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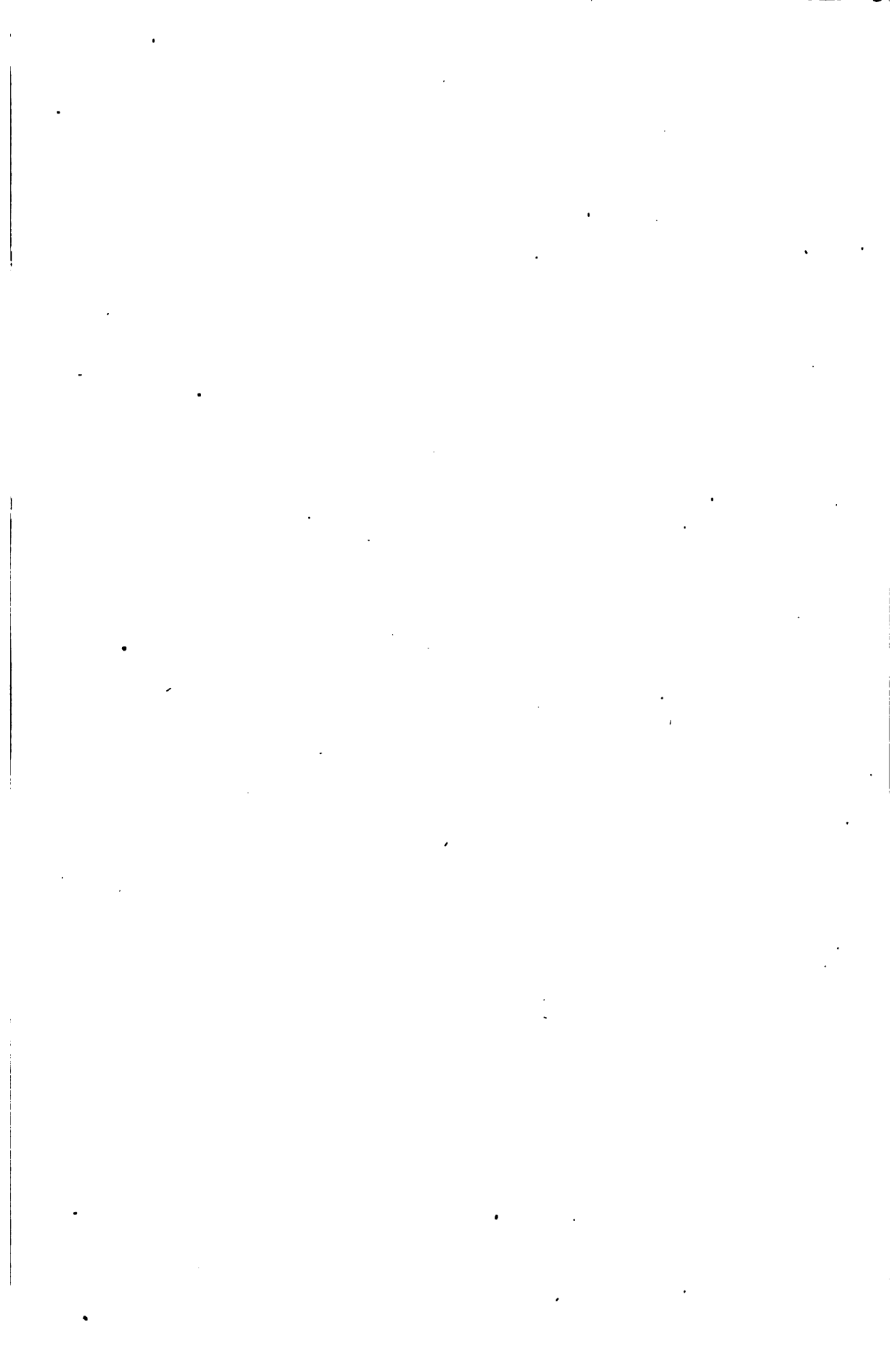












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# THE SOUTHEASTERN REPORTER

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CONTAINING ALL THE DECISIONS OF THE

SUPREME COURTS OF APPEALS OF VIRGINIA AND WEST VIRGINIA  
THE SUPREME COURTS OF NORTH CAROLINA AND SOUTH  
CAROLINA, AND THE SUPREME COURT AND  
COURT OF APPEALS OF GEORGIA

APRIL 6 — JUNE 29, 1912

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L. JUDSON WILLIAMS.<sup>6</sup>

<sup>1</sup> Resigned January 15, 1912.

<sup>2</sup> Qualified January 16, 1912.

<sup>3</sup> Resigned January 9, 1912.

<sup>4</sup> Elected Chief Justice January 10, 1912.

<sup>5</sup> Elected January 12, 1912.

<sup>6</sup> Ceased to be President January 9, 1912.

<sup>7</sup> Became President January 9, 1912.



# AMENDMENTS TO RULES

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## SUPREME COURT OF SOUTH CAROLINA

On Thursday, the 8th day of February, 1912, the following amendments were adopted as amendments to the rules of the Supreme Court:

That rule 8<sup>1</sup> of the rules of the Supreme Court be amended by striking out the word "eight" on the seventh line and inserting the word "ten," and by striking out the word "remaining" on the ninth line, so that the rule when amended shall read as follows:

"Three days previous to the commencement of the argument of any case, the counsel for the appellant shall deliver to the clerk of the court ten copies of the case or brief, which shall be disposed of as follows: One copy to each of the justices, one for the court, one for the reporter, and one for the

library of the Supreme Court; and at the same time each party shall deliver to the clerk ten copies of the points, as required by rule 9, six copies to be disposed of as above stated, and two copies to be delivered to the counsel of the other party on demand.

"Parties failing to furnish points will be confined to the discussion of questions that arise upon such points as shall be furnished by other parties to the cause, in accordance with this rule."

That rule 5<sup>2</sup> be amended by inserting the following as the 15th particular thereunder: "The name of the circuit judge before whom the case was tried."

EUGENE B. GARY, Chief Justice.

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<sup>1</sup> For rule as previously amended, see 33 S. E. vii.

<sup>2</sup> For rule as previously amended, see 35 S. E. v.



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# THE SOUTHEASTERN REPORTER

## VOLUME 74

(158 N. C. 341)

### DIXON v. HAAR.

(Supreme Court of North Carolina. March 13, 1912.)

#### 1. VENUE (§ 46\*)—ACTIONS AGAINST PUBLIC OFFICERS.

Under Revisal 1905, § 420, subd. 2, providing that actions against public officers for acts done by virtue of their office shall be tried in the county where the cause arose, and section 425, subd. 1, providing that the court may change the place of trial when the county designated in the summons and complaint is not the proper county, an action against a register of deeds for unlawfully issuing a marriage license, brought in a county other than that where the cause arose, but where defendant was found, should, on motion of the defendant, be removed to the proper county.

[Ed. Note.—For other cases, see Venue, Cent. Dig. § 68; Dec. Dig. § 46.\*]

#### 2. APPEAL AND ERROR (§ 106\*)—INTERLOCUTORY ORDERS.

An appeal from an order denying a motion to remove a cause to the proper county is not premature.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 430-434; Dec. Dig. § 106.\*]

Appeal from Superior Court, Duplin County; Ward, Judge.

Action by Albert Dixon against John Haar. From orders denying motions to dismiss and to remove the action to another county, defendant appeals. Reversed.

Stevens, Beasley & Weeks, for appellant. Kerr & Gavin, for appellee.

CLARK, C. J. [1] This action was begun before a justice of the peace in Duplin county by the plaintiff, who lived in that county, against the defendant, register of deeds of New Hanover, to recover the penalty of \$200, under Revisal 1905, § 2090, for unlawfully issuing a marriage license. The summons was served upon the defendant, who happened to be in Duplin county.

The justice refused the motion to remove the action for trial from Duplin to New Hanover, and rendered judgment against defendant, from which he appealed to the superior court. On appeal, the defendant moved in the superior court to dismiss the action, and also to remove it to New Hanover.

Both motions being refused, the defendant appealed. Revisal 1905, § 420 (2), provides that an action against a public officer "for an act done by him by virtue of his office must be tried in the county in which the cause of action arose." Revisal 1905, § 425 (1), provides, "when the county designated for that purpose is not the proper county," the action should be removed, not dismissed.

The statute is explicit that such action should be "tried" in New Hanover, and, having been wrongly brought in Duplin, it should have been removed to New Hanover. It is true that, as held in *Fisher v. Bullard*, 109 N. C. 574, 13 S. E. 799, there is no defect of jurisdiction, since the magistrate had jurisdiction, both of the subject-matter (being a penalty for not more than \$200), and service had been made upon the defendant. The defect was one of venue. The justice of the peace having declined to remove it, when the action got into the superior court, that court having full jurisdiction to try it, the cause should not have been dismissed, nor remanded to the justice of the peace, but it should have been removed to the county of New Hanover; that being the proper order under Revisal 1905, § 425 (1).

In *Fisher v. Bullard*, supra, the action was brought in the county where the defendant resided; and, while the act for which the penalty in suit was incurred was the burning of the woods in another county, it would have been difficult to have enforced the penalty, since the act authorizing the indorsement of the warrant of a justice of the peace by a justice of another county, except under Revisal 1905, §§ 1449, 1450, applies only in criminal cases. The motion in that case that was presented before the justice, and on appeal was not a motion to remove, but a motion to dismiss, and the court held merely that the latter motion was properly refused. If the motion had been to remove, our conclusion should, and doubtless would, have been different.

In *Austin v. Lewis*, 156 N. C. 461, 72 S. E. 493, the action was begun in Union county before a justice of the peace against a non-resident of that county by warrant issued

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes  
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to another county, when there was no bona fide defendant living in the county of the justice. This was in violation of the act of 1876 and 1877, now Revisal 1905, § 1447, which was enacted to forbid such practice, which had led to serious abuses, and the court held that in such case there was a defect of jurisdiction, and hence dismissed the action. There was no valid warrant or service in that case. Here both were valid; but the action was triable, i. e., the venue was in New Hanover.

The present case, therefore, differs from both the above. *Wooten v. Maulsby*, 69 N. C. 462, was a case similar to *Austin v. Lewis*, supra, and it was held that the justice of the peace acquired no jurisdiction; the warrant having been served in another county without any law which authorized such service. In *Lilly v. Purcell*, 78 N. C. 82, the court held differently, under the act of 1870, but pointed out that, under the act of 1876-77, now Revisal 1905, § 1447, which restored the law as it was prior to 1870, the court would have no jurisdiction. This ruling was followed by us in *Austin v. Lewis*, supra. In this latter class of cases, in which the warrant is attempted to be served by issuing it to another county, the action is forbidden, when there is no bona fide defendant in the county where the justice resides, and a removal would not give the relief against abuse which was sought by the statute. In such cases, there is a defect of jurisdiction, and not merely of venue.

[2] The appeal from the refusal of the motion to remove the cause to the proper county was not premature. *Brown v. Cogdell*, 136 N. C. 32, 48 S. E. 515, and cases there cited.

Reversed.

(158 N. C. 354)

#### POCOMOKE GUANO CO. v. CITY OF NEW BERN.

(Supreme Court of North Carolina. March 13, 1912.)

##### 1. MUNICIPAL CORPORATIONS (§ 592\*) — LICENSES—CITY AND STATE REGULATIONS.

The statute imposing, for purposes of inspection, a tonnage tax on fertilizer, and forbidding the levying of any other tax thereon, merely forbids any other tonnage tax, and does not prevent a city from imposing a license tax on the business of dealing in fertilizer.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1311-1314; Dec. Dig. § 592.\*]

##### 2. LICENSES (§ 16\*)—OCCUPATIONS AND EMPLOYMENTS—LIABILITY.

A fertilizer company, maintaining a warehouse in the city of New Bern from which it ships fertilizer on orders received at its general offices outside of the state, no sales being made in New Bern, is subject to the tax imposed by that city on all fertilizer dealers.

[Ed. Note.—For other cases, see *Licenses*, Cent. Dig. §§ 36-40; Dec. Dig. § 16.\*]

Brown and Allen, JJ., dissenting.

Appeal from Superior Court, Craven County; Carter, Judge.

Action submitted without controversy by the Pocomoke Guano Company against the City of New Bern. From the judgment, plaintiff appeals. Affirmed.

Moore & Dunn, for appellant. R. A. Nunn, for appellee.

CLARK, C. J. This is an action submitted without controversy to determine whether the plaintiff, Guano Company, is liable for the license tax of \$50 prescribed by the board of aldermen of the city of New Bern for carrying on business as fertilizer agents or dealers, for 12 months succeeding the date of the levy. Rev. § 2924, authorizes any municipal corporation to "annually lay a tax on all trades, professions, and franchises carried on or enjoyed within the city unless otherwise provided by law."

[1] Such license tax upon a trade or profession is not forbidden because a tonnage tax for purposes of inspection has been levied by the state under a statute which forbids "any other tax to be levied by county, city, or town." That provision simply forbids any other tonnage tax. It does not forbid an ad valorem tax upon the goods stored in town, nor a license tax upon the calling or occupation of manufacturing or dealing in fertilizers. *Guano Co. v. Tarboro*, 126 N. C. 68, 35 S. E. 231; *Guano Co. v. Biddle*, 73 S. E. 996, at this term.

The power of the Legislature to authorize the levy of license taxes upon trades, professions, and franchises has been discussed and sustained, also, in *Wilmington v. Macks*, 86 N. C. 88, 41 Am. Rep. 443; *State v. Worth*, 116 N. C. 1007, 21 S. E. 204; *State v. Irvin*, 126 N. C. 989, 35 S. E. 430; *State v. Hunt*, 129 N. C. 686, 40 S. E. 216, 85 Am. St. Rep. 758. The only question that arises, therefore, is whether the occupation or calling exercised by the plaintiff comes within the terms of the ordinance which levies a tax of \$50 upon callings and professions naming, among others, "fertilizer manufacturers, agents or dealers."

[2] The facts agreed on are that the plaintiff is a company engaged in manufacturing and selling fertilizer and fertilizer material, that it has no factory in New Bern, and that the orders for the goods are received solely at Norfolk, Va., and from thence are sent to its agents, who maintain a warehouse in the city of New Bern, where its fertilizers and fertilizing material are stored, and thence are shipped out upon the orders thus sent to them from the general office in Norfolk, Va.; no sales being made in New Bern.

Upon these facts, it is clear that the plaintiff is a manufacturing company maintaining an agency in the city of New Bern through which it deals in fertilizers and fer-

fertilizing material, storing the same and shipping out and distributing the fertilizers and fertilizing material upon receipt of orders which are taken and accepted at Norfolk, Va. It is not material that no fertilizers are manufactured in New Bern and that no sales are made there. The dealing consists in storing and keeping the goods on hand and shipping them out from time to time to the parties who have bought the same. The tax is upon the occupation or calling or business, whatever it may be termed, from which it is reaping a profit. Like other businesses, professions, and callings that are taxed because carried on there, this plaintiff, being protected in the exercise of such occupation or calling by the city, is subject to this license tax as the pro rata which the city is authorized to levy upon it in return for such protection. *Holland v. Isler*, 77 N. C. 1.

We concur in the judgment below.  
Affirmed.

BROWN, J. (dissenting). I am unable to agree with the conclusions of the court that the tax levied by the city of New Bern upon the plaintiff is valid. The facts, as I gather them from the records, are that the plaintiff, a corporation doing business in the city of Norfolk, leases a warehouse in the city of New Bern for the storage of its own goods only, consisting of fertilizers and fertilizing material. None of these goods are sold in the city of New Bern, but the sales offices of the plaintiff are outside of the state of North Carolina, at which offices it receives orders from the purchasers of fertilizer through traveling salesmen, and in some instances by mail. The plaintiff is not engaged in the selling of fertilizer in New Bern, or in the business of a warehouseman. A "warehouseman" is one whose storage facilities are open to the public. Whereas, the warehouse of the plaintiff is used exclusively for the storage of its own property.

I do not gainsay the right of the General Assembly to tax trades, professions, and franchises; but, according to the facts of this case, the plaintiff is not engaged in the exercise of either within the city of New Bern. The case came before the superior court in the form of a controversy submitted without action, in which it appears affirmatively that the plaintiff is not engaged in the sale of fertilizer in North Carolina, but that the warehouse in question is used exclusively for the private storage of its own material, and that deliveries are made from that upon orders received from the company's offices in Norfolk.

We have at this term held that this company is liable for the ad valorem tax upon the value of its fertilizers stored in the city of New Bern, which tax the company will be compelled to pay, but upon the facts agreed I find no warrant whatever to tax it either

as trader or as warehouseman. In addition to the heavy ad valorem tax adjudged against this plaintiff at this term, it is well to remember that it also pays a tonnage tax of 20 cents per ton upon this very fertilizer. To permit the city to tax this plaintiff as dealer, or warehouseman, when in fact it is not engaged in either capacity in this state, is piling Pelion on Ossa in the matter of taxation.

ALLEN, J., concurs in dissent.

(158 N. C. 363)

TARAULT v. SEIP et al.

(Supreme Court of North Carolina. March 13, 1912.)

1. COVENANTS (§ 5\*)—WARRANTY OF TITLE—WHAT CONSTITUTES.

A covenant in a deed that the grantor will "warrant and defend said premises" constitutes a good warranty of title; the covenant being construed most strongly against the grantor, and the omission of the word "title" being immaterial.

[Ed. Note.—For other cases, see *Covenants*, Cent. Dig. §§ 3, 4; Dec. Dig. § 5.\*]

2. FRAUD (§§ 13, 20\*)—FALSE REPRESENTATIONS—INTENT.

A grantor sent a negro with parties negotiating for the purchase of land, stating that he did not know the boundaries, but that the negro was familiar with the lines. The negro made erroneous statements about the boundaries, but there was no evidence that he acted with fraudulent intent, or that the grantor's statement that the negro knew the boundaries was made with intent to deceive. *Held*, that the grantor was not liable for false representations, especially where the evidence did not show that the grantees relied on the statements of the negro in purchasing the land.

[Ed. Note.—For other cases, see *Fraud*, Cent. Dig. §§ 3-5, 17, 18; Dec. Dig. §§ 13, 20.\*]

3. FRAUD (§ 50\*)—BURDEN.

The burden is on the party setting up fraud to prove scienter.

[Ed. Note.—For other cases, see *Fraud*, Cent. Dig. §§ 46, 47; Dec. Dig. § 50.\*]

Allen, J., dissenting.

Appeal from Superior Court, Currituck County; Cline, Judge.

Action by Joseph Tarault against John Seip and another. From the judgment, plaintiff appeals. Reversed in part, with directions.

Civil action tried at September term, 1911, of the superior court of Currituck county; his honor Judge Cline presiding.

The plaintiff sued to recover on a note for \$10,000 given for the purchase money of certain lands. The defendant pleaded counterclaims which are embodied in these issues:

(1) Did the plaintiff covenant to warrant and defend the title to the lands described in the answer? Answer: Yes.

(2) Were the defendants ousted from the lands, or any part thereof, as alleged in an-

swer? Answer: Yes; 17/80 of the Cox lands.

(3) What damage are defendants entitled to recover for 17/80 of Cox land, named by M. B. Mott and others, for value of land and attorney's fees and cost of witnesses? Answer: \$2,055.35 and interest from January 1, 1908.

(4) What damage are defendants entitled to recover because of the time of their employers in defending the Mott suit? Answer: \$150.

(5) What damages are defendants entitled to recover for the 3/80 of the Maj. John Cox lands? Answer: \$900.

(6) Did plaintiff represent to defendants that the line of his lands ran to the ditch which is the southern boundary of the A. M. Willey land? Answer: Yes.

(7) Were those representations false and fraudulent? Answer: Yes.

(8) Were those representations relied upon by defendant, and were they calculated and did they deceive the defendant Seip? Answer: Yes.

(9) What damage are defendants entitled to recover of plaintiff by reason of said representations? Answer: \$10,000, with interest from August 23, 1902, at 6 per cent.

(10) What amount is due the plaintiff on the note of \$10,000? Answer: \$10,250, with interest at 6 per cent. from July 28, 1906, on \$10,000.

His honor allowed the counterclaims embodied in the third issue, \$2,055.35, with interest from January 1, 1908, and in the ninth issue, \$10,000 with interest from August 23, 1902, both aggregating \$17,925.56, and rendered judgment, after satisfying and discharging the purchase-money note against the plaintiff for \$4,508.89. For some reason not set out his honor set aside the fourth and fifth issues and declined to allow the amounts as a counterclaim to the defendants. From a judgment rendered, the plaintiff appealed.

Pruden & Pruden and S. Brown Shepherd, for appellant. J. C. B. Ehringhaus and E. F. Aydlett, for appellees.

BROWN, J. There are only two matters presented for our consideration upon this appeal, and they relate to the counterclaims passed upon in the third issue and in the sixth, seventh, eighth, and ninth issues.

[1] 1. It is contended that the clause in the deed from plaintiff to Seip is not sufficient to create a covenant of warranty of title to the lands described in the deed, and that therefore defendants cannot recover on the third issue. The language of warranty is as follows: "And we, Joseph Tarault and Richard E. Norton, the said grantors, do, for ourselves, and our heirs, executors and administrators, covenant with the said grantee, his heirs and assigns that at and until the en-sealing of these presents we were well seised of the above-described premises as a good and indefeasible estate in fee simple, and

have good right to bargain and sell the same in manner and form as above written; that the same are free and clear of all incumbrances whatsoever, except taxes thereon; and that we will warrant and defend said premises, with the appurtenances thereunto belonging, to the said grantee, his heirs and assigns, forever, against all lawful claims and demands whatsoever, except taxes."

The learned counsel for plaintiff evidently place but little reliance upon this contention, for they cite us no authority, and give no reason in support of it. They content themselves with simply calling our attention to it in their brief. We presume that the theory upon which the exception was taken is the words "title to" being omitted from the warranty clause renders it insufficient as a covenant of warranty of title. The position is untenable. Covenants are construed most strongly against the grantor, and any language evidencing such an intention is sufficient. 11 Cyc. 1076, 1077; 14 Century Digest, "Covenants," § 1.

[2] 2. The defendants further contend that they were induced to purchase the land by the willful and false representations of the plaintiff in respect to the boundary, whereby the plaintiff was cheated out of about 1,000 acres of land. This counterclaim is embodied in the sixth, seventh, eighth, and ninth issues. The evidence taken in its most favorable light for defendants tends to prove these facts.

H. C. Hostler, of Ohio, a stockholder of the defendant Carolina Land & Lumber Company, which company the defendant John Seip organized to take over the land purchased by him of the plaintiff Tarault, together with A. B. Lukens and E. S. Skilder of Norfolk, and O. D. Jackson, the real estate broker negotiating the sale, went to look over the land before the purchase. The plaintiff Tarault was at home sick, suffering from asthma, and showed the parties only the cultivated land, but was unable to show them the boundaries of all the land. He also stated to the purchasers that he did not know the boundaries of the land and had never been around it, which testimony is uncontradicted. He got a colored man to go with the party to show the lines. When they came to a ditch six feet wide, Jackson and the colored man both said, "We are now on the Tarault property," and that, "This ditch marks the line." The party remained in the vicinity for several days, investigating the land, and later Mr. Seip came from Ohio and closed the transaction. The lands sold to Seip covered some 9,192 acres in all, and the purchase price was \$71,000. Four or five years afterwards it was found that this ditch did not mark the boundary of the property, and that there was between the ditch and the true Tarault line something like 1,000 acres, which belonged to one Willey, and was later recovered by Willey in a suit. In surveying this boundary it was found that the ditch

was right at the boundary in one place, and it was further established that the line between Willey and Tarault was well defined and marked; Willey having cut it out every few years. This testimony is corroborated by A. B. Lukens and O. D. Jackson. Jackson was not sure whether he and the colored man stated the line was at the ditch or near it, but said that they all took it for granted that the ditch was the line. It is further in evidence that this Willey land was well timbered. Upon this testimony of defendants the plaintiff moved for a nonsuit on the defendant's counterclaim as to fraud, which motion was refused. The plaintiff then introduced one Sears, who testified that he was present when Tarault told Jackson, Hosier, and Lukens that he had been only a half a mile in the swamp and did not know where the lines were. Deposition of Tarault was introduced, further stating that he had told the defendants that he had not been over the property, and did not know where the lines were, and did not know anybody who did, and that he told them to take their time and look at the lines and the records, and if they did not want it it was all right; he had just as lieve keep it. Witness Lukens was recalled, and stated that he did not remember Tarault's saying that he did not know where the lines were. Upon the close of the testimony the plaintiff renewed his motion as to nonsuit, which motion was refused. The plaintiff then asked the court to charge that upon all the evidence they should answer the sixth, seventh, and eighth issues, "No," and the ninth issue, "Nothing."

It is admitted that the boundaries of the deed do not cover the Willey land, and therefore the defendants cannot recover upon the warranty as to that. The cause of action the defendants seek to establish is based upon the allegation that the plaintiff represented to defendants that the Willey land was included in his own boundaries, that such representation was knowingly false and was made by plaintiff with the false and fraudulent purpose of inducing defendants to purchase, and that they made the purchase in consequence of such representations, relying upon them.

Accepting the doctrine that the principle that false representations as to material facts knowingly and willfully made as an inducement to a contract applies to contracts and sales of land as well as personalty, we are unable to find in the record any evidence of those necessary elements which are essential to constitute actionable fraud.

In order to constitute such, there must be false representations as to material facts, knowingly and willfully made as an inducement to the contract. Such representations must be shown to have been the reason for making the contract, and that they were reasonably relied upon by the other party. May v. Loomis, 140 N. C. 352, 52 S. E. 728. In this often-cited case Mr. Justice Hoke lays

down these principles and quotes abundant authority sustaining them. Applying them in this case, we find no evidence at all sufficient to sustain the allegations of the answer or the findings of the jury.

The plaintiff told the purchasers that he did not know the boundaries. He told them that Sam Jones, the negro, was familiar with the lines. There is not a scintilla of evidence that this statement was made to deceive. All the evidence shows that plaintiff was sick, and in sending the negro with the purchasers he acted in good faith. The ditch did constitute a part of the boundary at one point, and there is no evidence that the negro Jones acted with any fraudulent purpose when he said, "This ditch marks the line." That he made a mistake is not sufficient. Erroneous statements made by the vendor in the sale of land as to the location of a boundary are not sufficient, standing alone, to impeach the transaction for fraud. We think that Gatlin v. Harrell, 108 N. C. 487, 13 S. E. 190, lays down the proper rule for cases of this kind. The facts in that case are practically the same as those in the case at bar. There the vendor pointed out the corners and lines on several occasions, and it turned out that these boundaries were not the correct ones, and the opinion, after referring to the fact that the court below had granted a nonsuit on the facts, said: "We think the suggestion of the court was well founded. The whole of the evidence, accepted as true, did not in any reasonable view of it prove the alleged fraud and deceit. The proof was that the defendants pointed out to the plaintiff certain corners and line trees of the tract so sold, and that these, or some of them, were not the true ones; but there is nothing to prove that the defendants knew that they were not the true ones, nor that they fraudulently intended to mislead, deceive, and get advantage of the feme plaintiff. The proof, further, was that the defendants said the tract had been surveyed and contained 115 acres. There was nothing to prove that it had not been surveyed, or that it did not contain that quantity. The mere fact that the defendants pointed out corners and lines not the true ones could not of itself prove fraud and deceit, especially in the total absence of proof that the tract conveyed did not contain the quantity of land specified in the deed as containing 115 acres, more or less. Indeed, there was no proof, so far as it appears, as to the quantity of land the defendants contracted to sell to the feme plaintiff, or what quantity they conveyed, otherwise than as shown by the deed put in evidence. There was no proof to sustain the material allegations of the complaint. In the absence of such proof, it is obvious the plaintiffs could not recover, and the court hence properly intimated that they could not. There must be probata as well as allegata."

In our case there was nothing said or done to willfully mislead the purchasers, nor was artifice used to prevent a full inquiry. The purchasers remained at the property several days and satisfied themselves. They were told by the vendor that he did not know the boundaries, and all the vendor did was to give them what means he had at hand to aid them. He sent a colored man to show the boundaries, and, so far as it appears, thought the colored man knew the boundaries. It turns out that the ditch was actually at the true boundary in one place, and it was not a great mistake for the colored man to have assumed that this large ditch, starting at the boundary and running a long distance, was the real boundary.

Being swamp land, with the necessity for boats to cruise in it, there was much less opportunity for any one to be familiar with the true lines. Again, the evidence discloses that the lines were well marked and cut, and a little investigation on the part of the purchasers would have acquainted them with the true boundaries. If purchasers make mistakes and suffer loss by reason of such a state of facts as is disclosed here, it must be attributed to their own lack of proper and diligent inquiry, and they should not be heard to say, years afterwards, that they were fraudulently induced to make the purchase. Moreover, the evidence here does not show sufficiently that the defendants purchased this large tract of land, relying upon the testimony of the agent Jackson and the negro in regard to this particular boundary.

[3] An essential element of actionable fraud is the scienter or knowledge of the wrong on the part of the vendor. Where the representation is made as a part of the warranty, the vendor is held liable for his statement, whether he knew it to be true or not; but, where the action is for fraud, the burden is upon the party setting it up to prove the scienter. This distinction is well made by Chief Justice Pearson in *Etheridge v. Palin*, 72 N. C. 216, and is well supported by numerous authorities in this and other states. This court said, in *Tilghman v. West*, 43 N. C. 183: "Nor can fraud exist where the intent to deceive does not exist, for it is emphatically the action of the mind that gives it existence." And in *Hamrick v. Hogg*, 12 N. C. 350, Judge Henderson says: "It is not sufficient that the representation be false in point of fact; the defendant must be guilty of a moral falsehood. The party making a representation must know or believe it to be false, or, what is the same thing, have no reason to believe it to be untrue." The action for fraud and deceit rests in the intention with which the representation is made, and not upon the representations alone.

This doctrine is generally held by all courts in this country and in England. *Ber-*

*ry v. Peak*, L. R. 14 App. Cas. 337; *Byard v. Holmes*, 34 N. J. Law, 296; 2 Kent, Com. 484; *Shackett v. Bickford*, 74 N. H. 57, 65 Atl. 252, 7 L. R. A. (N. S.) 646, 124 Am. St. Rep. 933.

The case of *Shell v. Roseman*, 155 N. C. 90, 71 S. E. 86, is a case in point in which the evidence of intentional deceit is clear and full as pointed out by Mr. Justice Allen in the opinion of the court.

The judgment of the superior court is reversed upon the sixth, seventh, eighth, and ninth issues, and the motion of plaintiff to nonsuit defendants upon that counterclaim is allowed. Let judgment be entered in the superior court for plaintiff in accordance with this opinion, to wit, for \$10,250, with 6 per cent. interest from July 26, 1906, on \$10,000, subject to a credit of \$2,055.35 bearing 6 per cent. interest from January 1, 1908. Reversed.

ALLEN, J. (dissenting). On the 23d of August, 1902, the plaintiff executed a deed to the defendant Seip, purporting to convey about 9,000 acres of land for \$71,000, in which the covenant of warranty warranted "the premises." The defendant paid all of the purchase price in cash, except \$38,500, for which he executed four notes, secured by a mortgage on the land; the last note falling due on the 25th of August, 1905, and being for \$10,000. The defendant paid all of said notes except the last, and this action is for the purpose of enforcing payment of it. The defendant resists payment because he contends that he was induced to buy the land upon the representation that 1,000 acres, which were pointed out, were embraced in the purchase, when they were, in fact, owned by another person. A jury has returned a verdict, under instructions to which there is no exception, finding that the plaintiff made the representation in the sale of the land; that it was false and fraudulent; that it was relied on by the defendant; that it was calculated to deceive him and did so; and that the defendant has been damaged thereby to the amount of \$10,000, with interest thereon from August 23, 1902, and this court sets the verdict aside upon the ground that there was no evidence to support the verdict.

I cannot concur in the conclusion reached, and think a careful reading of the evidence shows that every element entering into a fraudulent transaction was fully proven. It must be remembered that the plaintiff instituted this action, and that he is invoking the equitable jurisdiction of the court to enable him to foreclose a mortgage. If the verdict of the jury is supported by evidence, the plaintiff has falsely represented 1,000 acres of land, which he did not own, to be within the boundaries of the deed he made to the defendant; the defendant relied on the representation, which was calculated to deceive and did deceive, and the plaintiff is

now asking a court of equity to foreclose a mortgage given to secure a note, which is made up of the purchase price of the 1,000 acres. I say it is so made up because the rest of the purchase price has been paid, and the jury has, in effect, found that the 1,000 acres is worth \$10,000. If the law will permit the plaintiff to recover under such circumstances, we must reject the statement that "law is the manifestation of the conscience of the commonwealth." I think, tested by the rules of the common law, or by equitable principles, the plaintiff must make good his representation.

Suppose we consider the evidence in the strongest light against the defendant, and require him to furnish evidence of fraudulent conduct upon the part of the plaintiff and actual knowledge that the representation was false. If there is evidence of these facts, the verdict cannot be disturbed under the rules laid down in the opinion of the court.

(1) The plaintiff was the owner of the land and was selling it. The fair inference is that he investigated the boundaries before he bought.

(2) The land had been surveyed before he bought, and the line plainly marked. Is it not legitimate to argue that he knew these facts?

(3) The agent of the defendant, who was examining the land, was a nonresident and had never been on the land before. He was therefore easily misled as to the boundary.

(4) He asked the plaintiff to furnish some one who could point out the boundaries.

(5) The plaintiff sent for Sam Jones, a negro, who was his employé and lived on the land, and said he was *familiar with the lines*, and would go with them and point them out.

(6) Sam Jones and a Mr. Jackson, who was the agent of the plaintiff in making the sale, went with the agent of the defendant, and when they reached a certain ditch, both said, "We are now on the Tarault land."

(7) They were not on the Tarault land when they reached the ditch, and there were in fact 1,000 acres between the ditch and the line of the Tarault land, belonging to another person.

(8) The defendant's agent relied on the representation.

Mr. Jackson, the agent of the plaintiff to make the sale, testified, among other things: "I live in Norfolk, and am a dealer in timber and mineral lands, and in the sale of the property from Tarault to Seip I acted in the capacity of broker, and sold the same upon a percentage agreement, to be paid by Mr. Tarault. I accompanied Mr. Seip's representatives, Messrs. Hosier and Lukens, from Norfolk, about the 5th or 6th of August, 1902. Mr. Tarault furnished us a colored man as a guide to show us the timber land. In crossing a well-marked ditch, we

took it for granted that that was the line, as I so understood it. It was understood by all of us that we were on Mr. Tarault's land after we crossed a well-marked ditch. I do not remember who stated this ditch to be the line, whether the colored man or myself. I had been informed before that the ditch was the line. In discussing the land, we all talked of it as being Tarault's property. I think this was Lukens' and Hosier's first trip to North Carolina, and the first time on that property, and I should say that they had no knowledge of where the line was, and no other information, except such as they got from the colored man sent by Mr. Tarault and myself. The colored man stated that it was Mr. Tarault's land and timber after they got across the bridge and into the timber. I am unable to say whether the colored man or myself made the statement that the ditch was the line, or very near the line of the Tarault land; but I recall clearly that the property near the ditch or shortly beyond the ditch was represented as Mr. Tarault's land. My recollection is very clear as to this ditch being considered the line, and we all took for granted that it was."

(9) The agent reported to the defendant, and this was the basis of his purchase.

(10) Sam Jones was not produced as a witness by the plaintiff, and his absence was not accounted for.

(11) The plaintiff was examined as a witness and denied sending any one to point out the lines.

(12) He conveyed land inside the boundaries of the deed, which he did not own, and when sued on his warranty, tried to evade liability by saying he warranted the "premises" and not the title.

No statement I have made in this enumeration can be disputed, and I think I have seen men convicted of high crimes, involving guilty knowledge, on less. And why should a court be astute to find a way to relieve the plaintiff? No one questions the fact that the representation was made, and that it was false. The defendant's agents swear they relied on it in making the trade, and when the trade was consummated, the plaintiff received pay for 1,000 acres of land he did not own, by reason of the false representation.

In the opinion of the court it is suggested that the defendant was negligent in not having the land surveyed, and that he ought not to be permitted to say, after the lapse of four or five years, that he was deceived.

The first suggestion is met by what is said in *Walsh v. Hall*, 66 N. C. 241: "The transaction was like hundreds of others in the country, which are entirely fair and honest, and we do not regard the want of a survey as laches on the part of the defendant. A large majority of the sales of land in the state are completed by the delivery of a deed copied from some previous deed, and

surveys are not generally made unless there is some dispute about the boundaries. Where the grantor has been in the possession of land for a number of years, exercising acts of ownership, his positive assertion as to location may be reasonably relied upon without a survey." And the second by the evidence.

H. C. Hosler, an agent of the defendant and in charge of the land, testified: "I never knew Mr. Willey claimed the land until I got the skidder in there and began to cut the timber. Don't remember the date, but it was four or five years after we got the deed, and somewhere about the year 1906,"

Mr. Willey was the owner of the 1,000 acres, and this action was commenced in 1906.

Again, the court says the evidence does not show sufficiently that the representation was relied on.

H. C. Hosler testified: "When Mr. Jackson and the colored man pointed out to me the ditch as the Tarault line, I firmly believed it was the line, and did not know anything else until Mr. Willey told us to get off. I had no other information about the line, and Mr. Tarault knew that I had no other information, for this was my first trip to North Carolina. The value of the land we purchased, running to the Abbott line, was from \$10,000 to \$15,000 less than if we had gotten the land shown us."

A. B. Lukens, another agent of defendant, who was on the land when the representation was made, testified: "Mr. Jackson asked Mr. Tarault for some one to show us the southern boundary of the lands. Mr. Tarault sent for the negro, Sam Jones, who lived on his place. Tarault said he was familiar with those lines. We crossed a ditch from four to six feet in width. Mr. Jackson said, 'We are now on the Tarault property,' and the negro gave us to understand that the ditch was Mr. Tarault's line. We accepted that ditch as the southern boundary of that land. We reported to Mr. Seip our examination of the matter. Mr. Jackson knew that Mr. Seip would be associated with us if we found the proposition to interest us. It was understood that Mr. Seip should come down and close up the transaction, take deeds, etc. Mr. Seip took a deed on our report, and turned it over to us, and it was recorded. Mr. Tarault went with us on the cultivated land, but not on the timbered land. He was greatly troubled with asthma at the time. We reported to Mr. John Seip the investigation of the land as set out in his evidence, and Mr. Seip bought upon that report, and we made the report for him upon the representation of the lands as made to us."

The evidence of Jackson, agent of the plaintiff, which has been referred to, shows clearly that the agents of the defendant relied on the representation.

I do not question the ruling in Gatlin v.

Harrell, 108 N. C. 487, 13 S. E. 190, which is said in the opinion to lay down the proper rule for cases of this kind; but I respectfully insist that it has no bearing on the question before us. In the Gatlin Case, the representation was that the land had been surveyed, and contained 115 acres, and the action was dismissed because there was no evidence that the land had not been surveyed and did not contain 115 acres, while in our case it is not denied that the representation was false. If, therefore, the strict rules of the common law are to be applied, and the defendant is required to prove actual knowledge, I think he has come up to the full measure of the law.

The case is not, however, at law, but in equity, where the maxims prevail that, "He who seeks equity must do equity," and, "He who comes into equity must come with clean hands," which are illustrative of the principle that nothing can call forth a court of equity into activity but conscience and good faith.

Mr. Pomeroy, in his work on Equity Jurisprudence, after stating that no representation is fraudulent at law, unless it is made with actual knowledge of its falsity, or under such circumstances that the law must necessarily impute such knowledge to the party when he makes it, points out that the rule is different in equity. He says (section 885): "It is fully settled by the ablest courts, English and American, that there may be actual fraud—not merely constructive fraud—in equity, without any feature or incident of moral culpability; that the actual fraud consisting of misrepresentation is not necessarily immoral. A person making an untrue statement, without knowing or believing it to be untrue, and without any intent to deceive, may be chargeable with actual fraud in equity." And again, in section 886: "If a person makes an untrue statement, and has at the time no knowledge of its truth, and even has no *belief* in its truth, he is chargeable with fraud in equity as well as in law. Making a statement which the party does not believe to be true is only slightly removed in culpability from the making a statement which the party knows to be false." And in section 887: "It is settled in equity by an overwhelming array of authority that where a person makes a statement of fact, which is actually untrue, and he has at the time no knowledge whatever of the matter, he is chargeable with fraud, and his claim to have believed in the truth of his statement cannot be regarded as at all material. The definite assertion of something which is untrue, concerning which the party has no knowledge at all, is tantamount in its effect to the assertion of something which the party knows to be untrue." And in section 888: "Finally, if a statement of fact, actually untrue, is made by a person who honestly believes it to be true, but under such circumstances that the *duty* of knowing the truth rests upon him, which, if



fulfilled, would have prevented him from making the statement, such misrepresentation may be fraudulent in equity, and the person answerable as for fraud; forgetfulness, ignorance, mistake, cannot avail to overcome the pre-existing *duty* of knowing and telling the truth." And in section 880: "If, therefore, a representation made prior to the transaction, and directly relating to it, is of such a character that it would naturally and reasonably induce, or tend to induce, any ordinary person to act upon it, and enter into the contract or engage in the transaction, and is in fact followed by such action on the part of the other person, then it will be presumed that it was made for the purpose and with the design of inducing that person to do what he has done; that is, to enter into the agreement or engage in the transaction. The design will be inferred from the natural and necessary consequences."

Justice Hoke, speaking for the court, recognizes this doctrine in *Modlin v. Railroad*, 145 N. C. 226, 58 S. E. 1075, as to the effect upon the principal of the false representations of an agent, and says: "It is well established that one who intentionally and positively asserts a fact to be true of his own knowledge, when he does not know whether it is true or false, is as culpable, in case another is thereby misled or injured, as one who makes an assertion which he knows to be untrue." And again, in *Whitehurst v. Insurance Co.*, 149 N. C. 276, 62 S. E. 1068: "And it is not always required, for the establishment of actionable fraud, that a false representation should be knowingly made. It is well recognized with us that, under certain conditions and circumstances, if a party to a bargain avers the existence of a material fact recklessly, or affirms its existence positively, when he is consciously ignorant whether it is true or false, he may be held responsible for a falsehood; and this doctrine is especially applicable when the parties to a bargain are not upon equal terms with reference to the representation, the one, for instance, being under a duty to investigate, and in a position to know the truth, and the other relying and having reasonable ground to rely upon the statements as importing verity."

Applying these principles, I think it clear that there was some evidence to be submitted to the jury.

Under the principles announced by Mr. Pomeroy, the representations are presumed to have been made with the purpose of having them acted on, and it is not necessary to show actual knowledge of falsity. The representations are fraudulent if made recklessly and without knowledge as to whether they are true or false, and in our case 1,000 acres were represented to belong to the plaintiff which he did not own, and the representations were made by the plaintiff, whose duty it was to know, to a stranger. Fraud

in equity has a wider significance than it has at law, and if it cannot be proven by circumstances, the courts will be powerless to trace it or remedy its wrongs.

Mr. Bispham says (section 197): "From the earliest times down to the present day, the wrongs inflicted by *covin* (to use the ancient term) have appealed with peculiar force to the conscience of chancellors; and probably no field of remedial law has more extended boundaries, or has yielded more substantial fruits of justice, than that which, in equity jurisprudence, is embraced under the title of fraud. \* \* \* The courts of equity have always avoided circumscribing the area of their jurisdiction in such cases by precise boundaries, lest some new artifice, not thought of before, might enable a wrongdoer to escape from the power of equitable redress. 'The court,' said Lord Chancellor Hardwicke, in *Lawley v. Hooper*, decided in 1745, 'very wisely hath never laid down any general rule beyond which it will not go, lest other means for avoiding the equity of the court should be found out.'"

There is another principle, recognized many times in this court and in other jurisdictions, upon which I think the judgment ought to be affirmed, and that is "that where one of two persons must suffer loss by the fraud or misconduct of a third person, he who first reposes the confidence or by his negligent conduct made it possible for the loss to occur must bear the loss." *Railroad v. Kitchin*, 91 N. C. 44; *Railroad v. Barnes*, 104 N. C. 27, 10 S. E. 83; *Medlin v. Buford*, 115 N. C. 272, 20 S. E. 463; *Rollins v. Ebbs*, 138 N. C. 145, 50 S. E. 577; *Bank v. Oil Mills*, 150 N. C. 722, 64 S. E. 885; *Bowers v. L. Co.*, 152 N. C. 607, 68 S. E. 19.

In the *Medlin Case*, Shepherd, C. J., says: "It is a general and just rule that when a loss has happened which must fall on one of two innocent persons, it shall be borne by him who is the occasion of the loss, even without any positive fault committed by him, but more especially if there has been any carelessness on his part which caused or contributed to the misfortune."

In the *Rollins Case*, Justice Hoke applies the doctrine to the law of agency, and quotes with approval from 2 Cyc. 159, that: "This rule is founded not only upon that principle of general jurisprudence which casts the loss, when one of the two equally innocent persons must suffer, upon him who has put it in the power of another to do the injury, but also upon that rule of the law of agencies which makes the principal liable for the acts of his agent, notwithstanding the private instructions of the principal have been disregarded, when he has held that the agent had a position of more enlarged authority." This principle finds support in well-considered adjudications in this state and elsewhere. *Gwyn v. Patterson*, 72 N. C. 189; *Railroad v. Kitchin*, 91 N. C. 89; *Humphreys v. Finch*, 97 N. C. 303 [1 S. E. 870, 2 Am. St. Rep. 293]."

And in the Bowers Case, Justice Walker, after saying that whenever one of two innocent persons must suffer by the act of a third, he who has enabled such third person to occasion the loss must sustain it, quotes Lord Holt as follows: "For as somebody must be a loser by this deceit, it is more reasonable that he who employs and puts a trust and confidence in the deceiver should be the loser, than a stranger."

Apply this principle to the facts: The plaintiff lived on the land he was selling, and the defendant knew nothing of the boundaries. The defendant's agent asked the plaintiff to furnish some one who could point out the lines. The plaintiff selected Sam Jones and said he was familiar with the lines. Jones went with the defendant's agent and made a false representation as to the boundary, which was relied on, causing damage. Who ought to bear the loss? In my opinion, the law answers, the plaintiff, Tarault, who first reposed confidence in Jones, although he may have intended no wrong.

(158 N. C. 351)

#### LITTLE v. COLWELL.

(Supreme Court of North Carolina. March 13, 1912.)

INSURANCE (§ 776\*)—FRATERNAL INSURANCE—BENEFICIARIES—"LEGAL DEPENDENT."

A member of a fraternal insurance order, who dies leaving only brothers and sisters and nieces and nephews not living with him, dies without "legal dependents," within the certificate of membership, providing for payment to legal dependents, and his administrator is entitled to the fund for the payment of debts and distribution in due course of administration; the words "legal dependents" meaning those relying on the member for support (citing 2 Words & Phrases, pp. 1991, 1992).

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1942, 1943; Dec. Dig. § 776.\*]

Appeal from Superior Court, New Hanover County; Cline, Judge.

Action by Joseph W. Little, administrator of D. T. McCulloch, against H. W. Colwell. From a judgment for defendant, plaintiff appeals. Affirmed.

Rountree & Carr, for appellant.

BROWN, J. The only assignment of error relates to the correctness of the following ruling of the judge: Second. That the funds received from the Junior Order of United American Mechanics are hereby declared to be assets in the hands of the administrator for the payment of debts of D. T. McCulloch, and the court finds as a fact, on the admission of all parties, that the deceased was a bachelor and died without leaving children, or any relative living with him, but did have brothers, sisters, and nephews and nieces, whom the court holds not "legal dependents" under the terms of the certificate offered in

evidence. It appears that the membership certificate in the Junior Order of United American Mechanics provides that any benefit accruing thereunder shall be payable to the legal dependents of the deceased. The benefit for \$500 was paid over to the administrator by the Junior Order of United American Mechanics, with the understanding that it was to be distributed as provided by law, and the administrator desires to disburse it among creditors, or among the brothers and sisters and nephews and nieces of the deceased, as the court may hold is proper.

Upon the findings of fact, we agree with the court below that the deceased died leaving no "legal dependents" within the meaning of the certificate of membership. His brothers and sisters did not live with him, and, for aught that appears, were in no legal sense dependent upon him, any more than he was dependent upon them. While the meaning of the term "legal dependent" has not been defined in any case before this court, we have abundant authority from other courts, as well as text-writers, in support of our decision. Webster's Dictionary defines the word "dependent" primarily to mean "one who depends; one who is sustained by another, or who relies on another for support or favor." In *Keener v. Grand Lodge*, 38 Mo. App. 543, the "legal dependents" of a person were restricted to those whom he was legally bound to support. Upon this theory a mistress is held not to be a legal dependent, and the same as to servants and retainers. *Keener v. Grand Lodge*, supra; *West v. Lodge*, 14 Tex. Civ. App. 471, 37 S. W. 966. In a Wisconsin case the Supreme Court defined the word "dependent" as follows: "We think the true meaning of the word 'dependent,' in this connection, means some person, or persons, dependent for support in some way upon the deceased." *Balou v. Gile*, 50 Wis. 614, 7 N. W. 561. Mr. Bacon, in his work on Benefit Societies, after reviewing the cases, says: "We are forced to the conclusion that they limit the term 'dependents' to those who reasonably rely upon another for subsistence, nourishment, and support." In Massachusetts it is held a mother not living with her son, and not relying on him for support, is not a legal dependent. *McCarthy v. New England Order*, 153 Mass. 314, 26 N. E. 866, 11 L. R. A. 144, 25 Am. St. Rep. 637, and the same ruling as to a brother is made in *Supreme Council v. Smith*, 45 N. J. Eq. 466, 17 Atl. 770. In *Supreme Council v. Perry*, 140 Mass. 580, 5 N. E. 634, it is held that a sister (nothing else appearing) is not a legal dependent. In 3 Eng. & Am. Ency. 969, it is said: "In passing upon the designation of 'dependents,' the courts have generally construed it strictly, and held it to mean those relying upon the insured for support." In 2 Words & Phras-

es, 1991, 1992, many cases are cited, and quoted from at length, sustaining this definition of the term.

As there are no "legal dependents," it follows that the administrator is entitled to the fund to be applied to the debts of the deceased, if any, and otherwise distributed in due course of administration.

Affirmed.

(158 N. C. 334)

### BURRUS v. WITCOVER.

(Supreme Court of North Carolina. March 13, 1912.)

#### 1. GAMING (§ 2\*)—VALIDITY—WHAT LAW GOVERNS—GAMING CONTRACT.

A contract, if a gaming contract, condemned by the laws of the state, will not be enforced by its courts, even if valid in the state where it was made.

[Ed. Note.—For other cases, see Gaming, Cent. Dig. § 2; Dec. Dig. § 2.\*]

#### 2. GAMING (§ 19\*)—RECOVERY ON DRAFT—ILLEGALITY.

Recovery cannot be had on a draft drawn by G. in favor of plaintiff and accepted by defendant; it being drawn to enable G. to furnish margins for gambling contracts with plaintiff, and the only consideration for its acceptance being the enabling of G. to continue his illegal transactions with plaintiff.

[Ed. Note.—For other cases, see Gaming, Cent. Dig. §§ 39-44; Dec. Dig. § 19.\*]

Appeal from Superior Court, Craven County; Ferguson, Judge.

Action by W. P. Burrus against H. Witcover. Judgment for defendant, and plaintiff appeals. Affirmed.

This is an action to recover on a draft for \$800, drawn June 4, 1906, at Marion, S. C., by W. A. Godbold, in favor of Burrus & Strakley, and accepted by the defendant Witcover. The defendant set up as a defense that the consideration for his acceptance was a gambling contract between the said Godbold and the plaintiff for the purchase of cotton. The plaintiff offered evidence that he was the owner of the draft, and admitted that the firm of Burrus & Strakley had negotiated a number of contracts for Godbold for the purchase of cotton on margin, known as "future contracts," and that the draft, which is the basis of this action, was drawn to enable the said Godbold to furnish margins for other contracts, or to pay a debt for margins. The defendant introduced a certified copy of the law of South Carolina, from which it appears that contracts for the sale of cotton and other things are illegal, when it is not the intention of the parties to deliver the property, the subject of the contract, and for settlements to be made upon the basis of the difference in market values; and the plaintiff said, on his examination, that he did not commence his action in South Carolina, because he knew he could not collect a gambling debt

in the courts of that state. Upon these admissions by the plaintiff, his honor directed a judgment of nonsuit to be entered, and the plaintiff excepted and appealed.

Guion & Guion, for appellant. Abernethy & Davis, for appellee.

ALLEN, J. [1] The plaintiff objected to the introduction of the certified copy of the laws of South Carolina; and, while we think it was competent, it is not, in our opinion, material to the decision of this case, as our courts would not aid in the enforcement of the contract, if it is a gaming contract, although valid in South Carolina. *Gooch v. Faucett*, 122 N. C. 272, 29 S. E. 362, 39 L. R. A. 835; *Cannady v. Railroad*, 143 N. C. 443, 55 S. E. 836, 8 L. R. A. (N. S.) 939, 118 Am. St. Rep. 821.

In the latter case, after stating that ordinarily matters bearing upon the execution, interpretation, and validity of a contract are determined by the law of the place where it is made, Justice Connor says: "The exceptions to the general rule are thus stated by Mr. Lawson, the editor of the excellent and exhaustive article on Contracts, in 9 Cyc. 674: 'The general doctrine, that a contract, valid where it is made, is valid also in the courts of any other country or state, when it is sought to be enforced, even though, had it been in the latter country or state, it would be illegal, and hence unenforceable, is subject to several exceptions: (1) When the contract in question is contrary to good morals; (2) when the state of the forum, or its citizens, would be injured by the enforcement by its courts of contracts of the kind in question; (3) when the contract violates the positive legislation of the state of the forum—that is, is contrary to its Constitution or statutes; and (4) when the contract violates the public policy of the state of the forum. These exceptions are grounded on the principle that the rule of comity is not a right of any state or country, but is permitted and accepted by all civilized communities from mutual interest and convenience, and from a sense of the inconvenience which would otherwise result, and from moral necessity to do justice, in order that justice may be done in return.'"

That the contract between Godbold and the plaintiff, as described by the plaintiff, is one condemned by the laws of this state cannot be questioned (*Revisal* 1905, §§ 1689, 3823, and 3824), and one who is a party to such a contract is not only indictable, but the statute says, in language that cannot be misunderstood, that "no action shall be maintained in any court to enforce any such contract, whether the same was made in or out of the state, or partly in and partly out of this state, and whether made by the parties thereto by themselves, or by or through their agents, immediately or medi-

ately; nor shall any party to any such contract, or any agent of any such party, directly or remotely connected with any such contract in any way whatever have or maintain any action or cause of action on account of any money or other thing of value paid or advanced or hypothecated by him or them in connection with or on account of such contract and agency."

[2] It would seem to follow necessarily that the plaintiff cannot maintain his action in our courts, except upon the ground that the defendant was not a party to the illegal contract, and that he is bound by his acceptance. The difficulty with this position is that both the plaintiff and the defendant were parties to the contract, and the only consideration for the acceptance of the draft by the defendant was to enable Godbold to continue his illegal transactions.

The exact question seems to have been decided in England in 1794, in *Steers v. Lashley*, 6 T. R. 61, which was approved on this point in *Embrey v. Jemison*, 131 U. S. 347, 9 Sup. Ct. 776, 33 L. Ed. 172, and this last case was cited with approval by our court in *Garseed v. Sternberger*, 135 N. C. 502, 47 S. E. 603.

The case of *Steers v. Lashley*, supra, "was an action on a bill of exchange drawn by Wilson on the defendant, and indorsed over by the former to the plaintiff after it had been accepted by the defendant. At the trial at the sittings at Westminster before Lord Kenyon, it appeared that the defendant had engaged in several stockjobbing transactions with different persons, in which Wilson was employed as his broker, and had paid the differences for the defendant. That, a dispute arising between Wilson and the defendant respecting the amount of those differences, the matter was referred to the plaintiff and three others, who awarded £306, 12s. 6d. to be due from the defendant to Wilson; for £100 part of which Wilson drew the bill, on which the action was brought." Lord Kenyon consulted the plaintiff, being of opinion that, as the bill grew out of a stockjobbing transaction, which was known to the plaintiff, he could not recover upon it, and in delivering his opinion he said: "If the plaintiff had lent this money to the defendant to pay the differences, and had afterwards received the bill in question for that sum, then, according to the principle established in *Petrie v. Hannay*, he might have recovered. But here the bill on which the action is brought was given for these very differences; and therefore Wilson himself could not have enforced payment of it. Then the security was indorsed over to the plaintiff, he knowing of the illegality of the contract between Wilson and the defendant, for he was the arbitrator to settle their accounts; and, under such circumstances, he

cannot be permitted to recover on the bill in a court of law."

This language was quoted in *Embrey v. Jemison*, supra, and the court further says in that case: "While there are authorities that seem to support the position taken by the defendant in error, we are of opinion that, upon principle, the original payee cannot maintain an action on a note, the consideration of which is money advanced by him or in execution of a contract of wager; he being a party to that contract, or having directly participated in the making of it in the name of or on behalf of one of the parties."

The cases of *Williams v. Carr*, 80 N. C. 299, and *Ballard v. Green*, 118 N. C. 392, 24 S. E. 777, are not in conflict with these views, as they are interpreted in the latter case, where the court says, after referring to parts of the charge of the judge of the superior court: "This means, if the jury believed that Duke loaned the money and had no connection with the speculations, that it was a valid contract, and plaintiff would be entitled to recover. *Williams v. Carr*, 80 N. C. 294."

We are therefore of opinion that the consideration for the acceptance by the defendant was illegal, and that there is no error. Affirmed.

(158 N. C. 566)

**LITTLETON v. HARR**, Register of Deeds.  
(Supreme Court of North Carolina. March 13, 1912.)

**1. MARRIAGE (§ 25\*)—LICENSE—IMPROPER ISSUE—PENALTY.**

Revisal 1905, § 2088, provides that a register of deeds shall not issue a license where either party to a proposed marriage is under 18 years of age and resides with the father or mother, etc., unless the consent in writing of the relation with whom such infant resides, or under whose custody or control he or she is, shall be delivered to the register; and section 2090 provides that the issuance of a license where either of the persons is under the prescribed age, without the consent provided, shall subject him to a penalty of \$200. *Held*, the sections of the statute must be construed together, so that, where a daughter under the prescribed age was living with her father, the statute clearly calls for his consent, and, though a license was issued with the mother's consent, the father would not be precluded from suing for the statutory penalty.

[Ed. Note.—For other cases, see *Marriage*, Cent. Dig. §§ 81-86; Dec. Dig. § 25.\*]

**2. STATUTES (§ 241\*)—CONSTRUCTION—PENAL STATUTE—STRICT CONSTRUCTION.**

A penal statute will not be construed strictly, where to do so would defeat its intent, as ascertained from the words used and their reasonable meaning, in view of the ends intended to be subserved.

[Ed. Note.—For other cases, see *Statutes*, Cent. Dig. §§ 322, 323; Dec. Dig. § 241.\*]

Appeal from Superior Court, New Hanover County; Word, Judge.

Action by J. E. Littleton against John Harr. From a judgment for plaintiff, defendant appeals. No error.

This case was heard in the superior court upon a case agreed, which, is in substance, as follows: The defendant is register of deeds of New Hanover county, and on or about December 27, 1910, issued a license for the marriage of Ednia Littleton, daughter of plaintiff, and at the time under 18 years of age. Consent of the father to the marriage of his daughter was never given, but instead the written consent of her mother, Melia Littleton. At the time the mother's consent was given and the license was applied for and issued, the said Ednia Littleton was living in the home of her father and being supported by him. The court, being of opinion, upon the facts stated, that the plaintiff was entitled to recover the penalty given by Revisal, § 2090, adjudged that he recover of defendant the sum of \$200 and costs. Defendant excepted and appealed.

A. G. Ricaud, for appellant. Geo. F. Meares, for appellee.

WALKER, J. (after stating the facts as above). [1] The Revisal, § 2088, provides that where either party to a proposed marriage is under 18 years of age and resides with the father, or mother, or uncle, or aunt, or brother, or elder sister, the register of deeds shall not issue a license for such marriage until the consent, in writing, of the relation with whom such infant resides, or, if he or she resides at a school, of the person by whom the minor was placed at school, "and under whose custody or control he or she is," shall be delivered to him, and the written consent shall be filed and preserved by the register. Section 2090 provides that a register of deeds who shall knowingly, or without reasonable inquiry, personally or by deputy, issue a license for the marriage of any two persons to which there is any legal impediment, or where either of the persons is under the age of 18 years, without the consent required by law, shall forfeit and pay \$200 to any parent, guardian, or other person standing in loco parentis who shall sue for the same. These two sections are in pari materia, and must therefore be construed together. *Bowles v. Cochran*, 93 N. C. 398.

We do not understand that the question of reasonable inquiry by the register as to the age of the applicant for license, or other impediment to the marriage, is involved in this case. There is no suggestion in the record about it. The case agreed presents the single question whether, upon the admitted facts, the written consent of the mother was sufficient to justify the issuing of a license. There is no controversy as to the age of the applicant, and the written consent of the mother would indicate at once that she was under 18 years of age, as such consent is not

required when the parties are over 18 years of age. Our opinion is that the issuing of the license upon the written consent of the mother alone, and without the written consent of the father, was not a compliance with the statute. The consent of the persons named in the statute, and in the order named, should be obtained. If a child is not residing with its father, but is residing with its mother, then the written consent of the latter is sufficient, and so on with the others named. The father is considered in law as the head of the household, and is entitled preferentially to the custody of his child; his right being superior to that of the mother. He is the child's natural guardian. 29 Cyc. 1588; *Ely v. Gammel*, 52 Ala. 584; *Donk v. Leavitt*, 109 Ill. App. 385; *Gates v. Renfroe*, 7 La. Ann. 569; *Bosworth v. Beller*, 2 La. Ann. 293. In the case last cited, the court said: "In case of differences between the parents as to the marriage of a minor child, the father's authority prevails." This, though, is but a general rule, and in its application, when a controversy arises between the father and mother as to the child's custody, the courts are governed by the interests of the child. We stated this principle in *Newsome v. Bunch*, 144 N. C. 15, 56 S. E. 509: "The father is, in the first instance, entitled to the custody of his child. But this rule of the common law has more recently been relaxed, and it has been said that, where the custody of children is the subject of dispute between different claimants, the legal rights of parents and guardians will be respected by the courts as being founded in nature and wisdom, and essential to the virtue and happiness of society; still the welfare of the infants themselves is the polar star by which the courts are to be guided to a right conclusion, and therefore they may, within certain limits, exercise a sound discretion for the benefit of the child, and in some cases will order it into the custody of a third person for good and sufficient reasons. In *re Lewis*, 88 N. C. 31; *Hurd on Habeas Corpus*, 528 and 529; *Tyler on Infancy*, 276 and 277; *Schouler on Domestic Relations*, § 428; 2 *Kent's Com.* 205. But as a general rule, and at the common law, the father has the paramount right to the control and custody of his children as against the world; this right springing necessarily from and being incident to the father's duty to provide for their protection, maintenance, and education. 21 A. & E. Enc. 1036; 1 *Blackstone* (Sharswood), 452, and note 10, where the authorities are collected. This right of the father continues to exist until the child is enfranchised by arriving at years of discretion, 'when the empire of the father gives place to the empire of reason.' 1 *Blk.* 453." The case of *In re Turner*, 151 N. C. 474, 66 S. E. 431, is to the same effect, and in it we referred approvingly to the following language of Chancellor Kent: "The fa-

ther, and on his death the mother, is generally entitled to the custody of the infant children, inasmuch as they are their natural protectors for maintenance and education. But the courts of justice may, in their sound discretion and when the morals or safety or interests of the children strongly require it, withdraw the infants from the custody of the father or mother and place the care and custody of them elsewhere." See, also, *Latham v. Ellis*, 116 N. C. 30, 20 S. E. 1012; *In re Lewis*, 88 N. C. 31; *Ex parte Alderman*, 157 N. C. 507, 73 S. E. 126.

But it is not necessary that we should resort to the principle just considered in order to decide the question before us, except in so far as it may shed light upon the meaning of the statute. The case agreed shows, as we construe it, that the daughter was residing with her father; for it states that she was living in his home and was supported by him. The mother may also have been living in the same house and residing with her husband in his home; but, upon the facts stated, it cannot well be contended that her daughter was residing with her, within the meaning and intent of the law. The language of the statute is plain that if she is residing with her father his written consent must be produced and delivered to the register before the license is issued; otherwise the officer incurs the penalty. Construing a somewhat similar statute, it was said, in *Riley v. Bell*, 89 Ala. 597, 7 South. 153: "The minor was a female, under 18 years of age, and had never before been married. The statute, in such cases, provides, that 'the probate judge must require the consent of the parents, or guardians of such minors, to the marriage, to be given either personally or in writing.' Code [1886] § 2315. This obviously means the consent of the father, if he be living and is not rendered incapable of giving it by defect of understanding or other good cause; or, if there be no father, then of the mother. The basis of the statute is the common-law principle that the father, and on his death the mother, is generally entitled to the custody of the children, and that, as parents, they are the natural protectors for maintenance and education. 2 Kent's Com. 205, 85, 86. The father in this case was living, but at the time temporarily absent from the state. It is shown that the mother gave her written consent to the minor daughter's marriage. This was insufficient to meet the requirements of the statute, and did not exempt the defendant from liability to the penalty in question." If anything, the language of our statute more clearly and strongly calls for the same interpretation, and requires the written consent of the father, if living and not unable or disqualified in some way to give it.

[2] It was urged in the argument that this statute, being penal, should be construed strictly; but in *Coley v. Lewis*, 91 N. C. 21, with reference to a similar contention, the court said: "While penal statutes must, in case of doubt, be strictly construed in their operation against others, a primary rule is to ascertain from the words used the intent of the enactment, and give such reasonable meaning as will prevent the mischief intended to be remedied, and secure the ends the statute was intended to subserve." But even a strict construction leads us to the conclusion that there was no error in the judgment.

No error.

(158 N. C. 564)

UNITED AMERICAN FREE WILL BAPTIST CHURCH, NORTHEAST CONFERENCE, et al. v. UNITED AMERICAN FREE WILL BAPTIST CHURCH, NORTHWEST CONFERENCE, et al.

(Supreme Court of North Carolina. March 13, 1912.)

PLEADING (§ 85\*)—EXTENSION OF TIME TO ANSWER—DISCRETION OF COURT.

Where, the pleadings in a case having been lost, an order was made that plaintiff file a complaint within 40 days, and that defendant file an answer within 40 days from the filing of the complaint, and that, on its failure to do so, plaintiff was to take judgment by default, the refusal of the presiding judge at the next term to sign a judgment tendered by plaintiff after defendant's failure to answer and his extension of time for defendant to file its answer was within his discretion, under Revisal 1905, § 512, authorizing a judge, in his discretion, to allow an answer or reply after the time limited therefor.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 172-178; Dec. Dig. § 85.\*]

Appeal from Superior Court, Lenoir County; Ward, Judge.

Action by the United American Free Will Baptist Church, Northeast Conference, and others against the United American Free Will Baptist Church, Northwest Conference, and others. From an order allowing defendants an extension of time to file their answer, plaintiffs appeal. Dismissed.

This action was brought by the Free Will Baptist Church, Northeast Conference, against the Free Will Baptist Church, Northwest Conference, for the adjudication of certain rights of property as between them. When the case was called for trial, it was discovered that the pleadings had been lost, and the judge presiding thereupon made an order to the effect that the plaintiff should file a complaint within 40 days after the adjournment of court, or suffer a nonsuit, and that defendant should file an answer within a like time after the filing of the complaint, and, in the event of its failure to do so, the plaintiff was ordered to take judgment by

default. A complaint was filed in due time by the plaintiff, but defendant failed to file its answer within the time fixed by the order. At the next term of the court, plaintiff tendered a judgment against defendant for the relief demanded in the complaint. Judge Ward refused to sign the judgment, and allowed the defendant an extension of time to file its answer, which was afterwards filed within the extended time. Plaintiff accepted and appealed.

T. C. Wooten and E. R. Wooten, for appellants. H. E. Shaw, Harry Skinner, and Loftin & Dawson, for appellees.

WALKER, J. (after stating the facts as above). It is provided by Revisal 1905, § 512, that the judge may in his discretion, and upon such terms as may be just, allow an answer or reply to be filed, or other act done, after the time limited therefor, or by an order enlarge such time. The judge has a very broad discretion in such matters, and there is every reason why he should have it. No judgment by default had been entered, and, when the matter was brought to the attention of Judge Ward by the motion for judgment, he had the clear right, or discretion, to extend the time for answering. Pell's Revisal, § 512, and notes, where the cases upon the subject are noted. This case is governed directly and pointedly by Woodcock v. Merrimon, 122 N. C. 731, 30 S. E. 321, and Cook v. Bank, 131 N. C. 96, 42 S. E. 550, and they are strong authorities in support of the ruling below. In the first of the cases additional time was allowed to answer, with a stipulation that, if defendant failed to avail himself of the privilege within the time so extended, judgment by default should be entered against him. The judge, at the next term, ignored the latter part of the order, and gave more time to answer, and it was held that the order was a proper one and entirely within the discretion of the judge, the exercise of which is not reviewable by this court. It was there said that what order shall be made or judgment rendered in case of default in filing a pleading must be left entirely to the discretion of the succeeding judge, and the judge who ordered the extension of time could not control that discretion. Approving Gilchrist v. Kitchen, 86 N. C. 20, and quoting therefrom, the court said: "Independent of the Code, we hold that the right to amend pleadings in the cause and allow answers or other pleadings to be filed at any time is an inherent power of the superior courts, which they may exercise at their discretion. The judge presiding is best presumed to know what orders and what indulgence as to filing of pleadings will promote the ends of justice, as they arise in each particular case, and with the exercise of this discretion this court

cannot interfere, because it is not the subject of appeal. Austin v. Clarke, 70 N. C. 458."

In Cook v. Bank this court had held in a former appeal that plaintiff was entitled to a judgment by default for want of an answer, and, notwithstanding this decision, it was afterwards held that, when the case was transmitted to the superior court, the judge had the discretion to refuse to enter a judgment by default, according to the opinion of this court, and to extend the time for answering. It is too well settled to require or even justify discussion that the enlargement of the time for filing pleadings is a matter to be decided according to the court's discretion. Wilmington v. McDonald, 133 N. C. 548, 45 S. E. 864. A judge could not well decide in advance whether the defendant's failure to file an answer within the prescribed time will be due to laches or to such circumstances as will excuse the omission and entitle him to further time.

Appeal dismissed.

(158 N. C. 344)

#### PUCKETT v. MORGAN.

(Supreme Court of North Carolina. March 13, 1912.)

#### 1. WILLS (§ 608\*)—CONSTRUCTION—RULE IN SHELLEY'S CASE.

In order that the rule in Shelley's Case shall apply, the estate must be given to the heirs or heirs of the body as an entire class or denomination of persons, and not merely to individuals embraced within such class, and then only when the subsequent estate is limited to the heirs as heirs of the first taker.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1372-1378; Dec. Dig. § 608.\*]

#### 2. WILLS (§ 608\*)—CONSTRUCTION—RULE IN SHELLEY'S CASE—NATURE OF RULE.

The rule in Shelley's Case is a rule of law and not of construction; and before it can be applied it must first be determined whether the subsequent limitation is to the "technical heirs" of the person taking the prior freehold, or to a particular class of heirs.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1372-1378; Dec. Dig. § 608.\*]

#### 3. WILLS (§ 608\*)—CONSTRUCTION—RULE IN SHELLEY'S CASE—"HEIRS."

Testator devised land to M. "during her life, then to her bodily heirs, if any; but if she have none, back to her brothers and sisters." Held, that the word "heirs" in such devise was not limited to the devisee's "bodily heirs," but instead meant children, descriptive of a class; and therefore the devisee did not take the fee under the rule in Shelley's Case.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1372-1378; Dec. Dig. § 608.\*]

For other definitions, see Words and Phrases, vol. 4, pp. 3241-3265; vol. 8, pp. 7677, 7678.]

Appeal from Superior Court, Franklin County; Ferguson, Judge.

Action by F. A. Puckett against James Morgan to recover possession of land. From a judgment sustaining a demurrer to the

complaint, plaintiff appeals. Reversed and remanded.

W. H. Yarborough, Jr., for appellant. W. M. Person, for appellee.

BROWN, J. In 1890, William Pace, the maternal grandfather of the plaintiff, died, leaving a will containing the following clause: "Item. I leave Martha Morgan, the wife of James Morgan, 48½ acres of land, known as the Rachael tract, on the east side, during her life, then to her bodily heirs, if any; but if she have none, back to her brothers and sisters." Martha Morgan died in 1894, leaving two daughters, of whom the plaintiff is one, she having since intermarried with P. H. Puckett. James Morgan, the husband of Martha Morgan, is still living and in possession of the land aforesaid, to recover which this suit is brought, claiming that he is entitled to a life estate in it as tenant by the curtesy.

The judge below was of opinion that under the "rule in Shelley's Case" Mrs. Morgan took an estate in fee, and consequently her husband, the defendant, would be entitled, as tenant by the curtesy, to the possession of the land during his life. It is needless to quote this ancient rule of law, so familiar to every student. The original case was tried in the reign of Queen Elizabeth, and is reported in 1 Coke, Rep. 104a, and the statement of the rule there given is the one most generally adopted by text-writers.

[1] While this dogma of the common law has been expounded and applied in hundreds of cases and by as many judges and text-writers, it seems to be generally agreed that, in order to bring the rule into operation, the subsequent estate must be limited to the heirs, qua heirs, of the first taker. It must be given to the heirs or heirs of the body as an entire class or denomination of persons, and not merely to individuals embraced within such class. The rule applies only when the word "heirs," or "heirs of the body," are used in their technical sense. Where such terms are used as mere descriptio personarum, the rule has no application.

[2] It is conceded that the rule in Shelley's Case is a rule of law, and not of construction; yet whether the subsequent limitation is to the "technical heirs" of the person taking the prior freehold, or to a particular class of heirs, is necessarily a preliminary question of construction of the particular instrument under consideration. *Parkhurst v. Harrower*, 142 Pa. 432, 21 Atl. 826, 24 Am. St. Rep. 507.

[3] As said by the Supreme Court of Pennsylvania: "To bring a devise within the rule in Shelley's Case, the limitation must be to the heirs in fee or tail as nomen collectivum for the whole line of inheritable blood." *McCann v. McCann*, 197 Pa. 452, 47 Atl. 743, 80 Am. St. Rep. 846. While this rule seems

to be applied with greater strictness in England than in this country, even there, when it appears from the context of the instrument that the words are used, not in the technical sense, but as mere descriptio personarum, they are taken as words of purchase, and not of inheritance, and the rule does not apply. *Theobald on Wills*, 340-342, and cases there cited.

This principle is commented upon by Judge Gaston in these expressive words: "On the other hand, as the law will not entrap men by words incautiously used, if, in the limitation of a remainder by any instrument or conveyance, the phrase 'heirs' or 'heirs of the body' be expressed, but it is unequivocally seen that the limitation is not made to them in that character, but simply as a number or class of individuals thus attempted to be described, then the whole force of the phrase is restricted to this designation or description; it shall have the same operation as the words would have of which it is the representative; there is not in fact a limitation to 'heirs,' and, of course, there is no room for the application of the rule." *Allen v. Pass*, 20 N. C. 212.

This principle is recognized by Chief Justice Shepherd, in his often cited and learned opinion in *Starnes v. Hill*, 112 N. C. 18, 18 S. E. 1016 (22 L. R. A. 598), when he says: "As the courts are astute in discovering the intention from the context of the conveyance, and readily give effect to every word from which such intention can reasonably and legitimately be inferred, it does not often occur that the application of the rule has the effect of subverting the real intention of the grantor or testator."

This exception to the application of the rule is also clearly stated by Mr. Justice Hoke, in *Smith v. Procter*, 139 N. C. 322, 51 S. E. 889, 2 L. R. A. (N. S.) 172; and it has been recognized and given effect to in a number of cases in this court, in which it was held the rule in Shelley's Case did not apply. The citation of a few will suffice.

In *Rollins v. Keel*, 115 N. C. 68, 20 S. E. 209, the language was: "I give said lands to him, the said Joseph E. Rollins, him, his heirs, and assigns, forever: Provided, however, that if the said Joseph E. Rollins shall die without leaving any lawful heir then the same, after the expiration of the widowhood of my wife, shall enure to my brother, Reuben A. Rollins, his heirs and assigns forever."

In *Francks v. Whitaker*, 116 N. C. 518, 21 S. E. 175, the language is: "I give and devise [real estate] to my beloved son, E. S. Francks, during his natural life, and after his death to his lawful heir or heirs, should he have any surviving him, but should he not have any lawful heir or heirs surviving him, then I give and devise the same to the children of my beloved son, W. W. Francks." In the last case, the court says that the words



"lawful heir or heirs, should he have any surviving him," should be construed to mean "issue," and in all cases where the word "issue" is used, or it is clear that the words "heir or heirs of the body" were used in the sense of "issue," it has been held that the rule did not apply.

In *Bird v. Gilliam*, 121 N. C. 326, 28 S. E. 489, the language is: "I loan the land whereon I now live to my daughter, Mary, during her natural life, and give the same to the heirs of her body; but if she should have no lawful heirs of her body, the said land at her death shall go back to my son, William." This is another case in which "lawful heirs of the body" were construed to mean "issue."

In *May v. Lewis*, 132 N. C. 115, 43 S. E. 550, the language is: "I loan unto my son my entire interest in the tract of land, \* \* \* to be his during his natural life, and at his death I give said land to his heirs, if any, to be theirs in fee simple forever; and if he should die without heirs, said land to revert back to his next of kin." (Almost identical with the language in this case.)

In *Howell v. Knight*, 100 N. C. 254, 6 S. E. 721, the language is: "I lend to A., and if he hath a lawful heir, begotten of his body, at his death, I give it to said heir or heirs; and if he dies without an heir, as aforesaid, I lend it to B."

The case of *Walker v. Taylor*, 144 N. C. 176, 56 S. E. 877, is not in conflict with these views; for in that case the remainder over was to "the heirs at law of the testator's three daughters," and the context shows that the words were used in their technical sense, and not as descriptive personae.

In the will now under consideration, we think the testator, Pace, has so explained and qualified the use of the words "her bodily heirs" as to plainly indicate that he meant the children or issue of his daughter Martha, and that the words are not employed in their legal or technical sense as representing heirs in general, but only as descriptive of a certain class of heirs. The words "if any" would be quite appropriate to indicate the possibility of no issue, but not to indicate the contingency of no lawful heirs; for it is rarely possible for one to die without heirs, and not uncommon to die without children. Then, again, the reversion over is to a class of heirs at law who would certainly inherit in the event of a failure of issue.

It is also manifest that the testator did not intend that his daughter should take an estate in fee; for in express words he devised her an estate for life only, and the context shows that he intended that her children should take at her death, and, in the event of her death without children, then that her brothers and sisters should receive the property.

We are of opinion that his honor erred in

sustaining the demurrer. The cause is remanded, with direction that the demurrer be overruled, and the defendant answer over. Reversed.

(158 N. C. 571)

# WILLIAMS et al. v. LEWIS.

Appeal of PHILLIPS.

(Supreme Court of North Carolina. March 13, 1912.)

## 1. EVIDENCE (§ 423\*)—PRINCIPAL AND SURETY—RIGHTS OF SURETIES.

As between persons signing a note as makers, parol evidence that one is a maker and the other a surety is admissible to enforce exoneration, subrogation, or any other equitable right as between them, not injuriously affecting the payee taking the note without knowledge of such relation.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1957-1965; Dec. Dig. § 423.\* Bills and Notes, Cent. Dig. §§ 1719-1727, 1791-1797.]

## 2. MORTGAGES (§ 153\*)—SUBSEQUENT MORTGAGEE—BONA FIDE PURCHASER.

A second mortgagee does not acquire a legal title necessary to make him a purchaser for value without notice but he acquires only an equitable interest, since the mortgagor had only an equity of redemption under the first mortgage.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 344, 345, 354; Dec. Dig. § 153.\*]

## 3. MORTGAGES (§ 156\*)—SUBSEQUENT MORTGAGEE—BONA FIDE PURCHASER.

A note and mortgage executed by three persons did not show the fact that one was a principal, and that two were sureties only. The principal executed a second mortgage to a mortgagee, who did not know the facts. Held, that the interest of the principal at the time of the execution of the second mortgage was subject to the first mortgage, and liable by way of exoneration of the sureties to the application of his interest to the payment of the first mortgage, and the second mortgagee acquired no greater rights than the principal, since by inquiry the second mortgagee could have ascertained the rights of the sureties to equitable subrogation or exoneration.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 360-365; Dec. Dig. § 156.\*]

Appeal from Superior Court, Edgecombe County; Ferguson, Judge.

Action by W. A. Williams and another against P. A. Lewis. From a judgment for plaintiffs, H. H. Phillips, the receiver of defendant, appeals. Affirmed.

This case was tried below on the following case agreed:

(1) On December 27, 1905, Howard Carr, Maggie Carr (now Williams), and Mollie Carr (now Lewis), executed to J. M. Norfleet, trustee, a deed of trust to secure a note of \$500 to L. E. Norfleet, the said deed of trust conveying their three-fourths equal and undivided interest in certain lands therein described, which deed was registered on December 28, 1905; J. F. Carr owning the other fourth.

(2) Howard Carr was principal and Maggie Williams and Mollie Lewis were sure-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

ties to the said debt, though the note and deed did not show it.

(3) The note of \$500 was for full value assigned to P. A. Lewis on the 15th day of March, 1909. L. E. Norfleet had no knowledge as to who was principal in said note until after the maturity of the same and prior to its assignment to G. M. T. Fountain, which assignment was after maturity; that G. M. T. Fountain, the assignee of L. E. Norfleet, and P. A. Lewis, the assignee of G. M. T. Fountain, had no knowledge until after the sale of the land as to who was the principal in said note.

(4) On June 24, 1908, Howard Carr borrowed of L. H. Edmondson \$133.50 and at the same time executed a note, under seal, for the same, due and payable January 1, 1909, and mortgaged to him his one-fourth undivided interest in said land to secure the same, which mortgage was duly registered July 1, 1908, and the said Edmondson had no knowledge of the facts set out in item 2 hereof, except as appeared of record.

(5) On the 17th of March, 1909, the Edmondson note was assigned to P. A. Lewis for full value and without knowledge on the part of Lewis as to who was principal in the \$500 note of L. E. Norfleet, dated December 27, 1905. If Edmondson had known, at the time of taking said note and mortgage, that the interest of Howard Carr in said land was alone subject to the payment of the Norfleet note of \$500, he would not have loaned the money, and, had P. A. Lewis known at the time of the transfer to him that Carr's interest was alone subject to the payment of the Norfleet debt, he would not have purchased the Edmondson note.

(6) On January 22, 1910, default having been made in the payment of the L. E. Norfleet note, J. M. Norfleet, trustee, sold the three-fourths undivided interest of Howard Carr, Maggie Williams, and Mollie Lewis in the land described in the deed of trust at public auction, after due advertisement, for \$800, and, after paying the cost of sale, taxes, and the amount due on the L. E. Norfleet note, there was left the sum of \$373.72, of which amount \$124.57 has been paid to Maggie Williams, \$124.57 to Mollie Lewis, and he still has left \$124.57. There was due upon the note to Edmondson, owned by P. A. Lewis, the sum of \$142.25 as of the date of the sale, and the sum of \$124.57 in the hands of said trustee was claimed by P. A. Lewis under the Edmondson mortgage from Howard Carr, and is now claimed by Phillips, receiver.

(7) In July, 1911, P. A. Lewis was duly adjudged a bankrupt, and H. H. Phillips was appointed receiver in bankruptcy of his estate, and now claims that the said sum of \$124.57 should be paid on the Edmondson note and mortgage, and Maggie Williams and Mollie Lewis claim that it should be equally divided between them.

Upon the facts stated in the case, the court

decided in favor of Maggie Williams and Mollie Lewis, and adjudged that the trustee pay the amount held by him to them equally, whereupon the receiver of P. A. Lewis appealed.

G. M. T. Fountain & Son, for appellant.  
W. O. Howard and J. M. Norfleet, for appellees M. Williams and M. Lewis.

WALKER, J. (after stating the facts as above). [1] There has been difference of opinion among the courts as to whether parol evidence is admissible to show that a person, apparently a coprincipal in a note, is, in fact, a surety. Some courts have held that parol evidence in such a case is incompetent, because it contradicts or varies the terms of the instrument signed by the surety. Others hold that it does not tend to alter or vary either the terms or legal effect of the written instrument, but is simply proving a fact outside of such terms, collateral to the contract and no part of it, and that the evidence is perfectly competent in a court of law; while some others maintain that, though the evidence is incompetent in a court of law, it is competent in a court of equity. But in *Cole v. Fox*, 83 N. C. 463, it was said: "The weight of authority sustains the principle that the evidence is competent in a court of law, and more especially in our courts, having no separate jurisdiction of law and equity, where all the rights of the parties, both legal and equitable, must be adjudicated in any suit wherein they are litigated and drawn in question. So that, in referring to authorities, it is immaterial whether they are decisions of courts of law or equity." See, also, *Welfare v. Thompson*, 83 N. C. 276; *Goodman v. Litaker*, 84 N. C. 8, 37 Am. Rep. 602. The admissibility of such evidence was fully considered in *Williams v. Glenn*, 92 N. C. 253, 53 Am. Rep. 416, and it was held that, as between the makers and payee of a note, it is made for the purpose of being the proof of the contract, and cannot be contradicted by extrinsic proof. The only exception to this rule is in the class of cases like *Welfare v. Thompson* and the other cases of that character cited above. But, as between the signers, it was not made or intended to be exclusive proof of the agreement or relation between them. This may be shown by parol proof. "The makers, though all appearing to be joint principals, may be shown to be some principals and some sureties. An apparent principal may be shown to be a surety; an apparent surety, a principal." Numerous cases were cited to sustain the proposition. The question whether parol evidence will be admitted to show the true relation of the parties is not the one directly involved in this case, as the parties in their case agreed admit that, in fact, Howard Carr was the principal and the other two signers of the note were merely sureties, though they all appeared on the face of the papers to be

coprincipals. But the cases we have cited establish the proposition that as between the signers of a note the true relation may be shown; that is, that one who appears to be principal is a surety, or vice versa, for the purpose of enforcing exoneration, subrogation, or any other equitable right as between them, which will not injuriously affect the payee who loaned his money without knowledge of the relation.

[2] The defendant contends, though, that while the court would exonerate the interests of Maggie Williams and Mollie Lewis pro tanto by first applying the proceeds from the sale of Howard Carr's one-fourth interest in the land to the payment of the debt, and resorting to their interests only for the purpose of paying the balance due, if this were a suit between the said sureties and Howard Carr to enforce their equity, either of exoneration or subrogation, it will not do so in this case, as L. H. Edmondson loaned the money to Howard Carr and took a mortgage on his one-fourth interest in the land on the faith of the apparent relation of the parties as shown on the face of the deed of trust made by the parties to J. M. Norfleet, as trustee, to secure the debt due to L. E. Norfleet, and, that being so, the interest of Carr is liable only for one-third of the Norfleet debt, and, as Mrs. Williams and Mrs. Lewis have received each one-third of the balance of the proceeds in the hands of the trustee, J. M. Norfleet, for distribution, the money now in controversy should be paid to him as the receiver in bankruptcy of P. A. Lewis, who is the assignee of L. H. Edmondson. This contention is based upon the assumption that Edmondson was a purchaser for value and without notice of the equity of Mrs. Williams and Mrs. Lewis. Is that assumption correct? We think not. When Edmondson took the mortgage on Carr's interest to secure his debt, he did not acquire the legal title, which is necessary to make a purchaser for value and without notice, but only an equitable interest, for Carr had only an equity of redemption under the deed of trust he made to J. M. Norfleet for L. E. Norfleet. The case is not to be distinguished in principle from *Polk v. Gallant*, 22 N. C. 395, in which Chief Justice Ruffin said: "Upon the argument, the counsel for the defendants placed not much stress on the defenses brought forward in the answer; and we think very properly, as they are clearly insufficient. In the first place, the sheriff's sale is no bar, even if a legal title had been the subject of it, as the purchaser only succeeds to the defendant in the execution, and is affected by all the equities against him. *Freeman v. Hill*, 21 N. C. 389. Much more must this be so when the defendant in the execution has himself but an equity. If it be of that kind which is liable to be sold, the purchaser can only claim to stand in the shoes

of the debtor, and get a title only by doing those acts, on the performance of which the debtor himself would have been authorized to ask for a conveyance. Precisely on the same footing stands the purchase of the son from the father himself, which was of an equity only. It is only the honest purchaser of a legal title whom equity will not disturb. If the purchase be of the legal title, but with notice of an equity in another, or if it be only an assignment of an equity, with or without notice of a prior equity in another person, in either case the estate must, in the hands of the purchaser, answer all the claims to which it would have been subject in the hands of the vendor. Between mere equities, the elder is the better. Against the present defendant, then, the plaintiff is entitled to all the relief which this court would have given him against the original purchaser, for whom he was surety." *Green v. Crockett*, 22 N. C. 390. So in *Winborn v. Gorrell*, 38 N. C. 117, 40 Am. Dec. 456, the court says, referring to the same question: "This brings up for consideration the defense set up by the trustee and creditors claiming under Hanner's assignment as peculiar to themselves, and founded on merits independent of those of Hanner and himself. They claim to be just creditors, who have honestly obtained a security for their debts without a knowledge of the plaintiff's equity, and therefore entitled to hold it. But they were mistaken in supposing that they had obtained a conveyance of this land as a security. They say they relied on the decree as determining the rights of the parties and constituting a title. But we have seen that is not so. The deed is only an assignment of an equitable title, and then, were these persons purchasers instead of creditors, the estate itself must answer all claims to which it would have been subject in the hands of the assignor. It is only the purchaser of the legal title without notice of a prior equity who can hold against such equity. *Polk v. Gallant*, 22 N. C. 395 [34 Am. Dec. 410]." The case of *Wharton v. Moore*, 84 N. C. 479, 37 Am. Rep. 627, presented a state of facts substantially like those in this case, and the court thus ruled in regard to them: "The effect of these several conveyances was to convey the legal estate of Russ and wife to Jones (or Thompson, the trustee, for his use) and the equity of redemption to J. B. Batchelor, and imperfect equities, first to Carter, the plaintiff's intestate, and then to Moore and Adams, the defendants. The releases of Jones and Batchelor indorsed on the deeds from Russ and wife, not being under seal, did not convey the legal estate to Moore and Adams, but left it in Jones or his trustee. *Linker v. Long*, 64 N. C. 296. So that the deed of bargain and sale executed by Russ and wife to Moore and Adams passed only such an interest as the vendors had at the

time, which was a subsequent equity. The purchaser of an equitable title always takes it subject to prior equities. It is only the purchaser of the legal title, without notice of a prior equity, who can take it against such equity. *Winborn v. Gorrell*, 38 N. C. 117 [40 Am. Dec. 456]. Those cases, which have been frequently approved by this court, are decisively against the appellant's contention. In *Wharton v. Moore* the equitable estate acquired by the party claiming to be a bona fide purchaser was created by a deed of trust; and in *Polk v. Gallant and Winborn v. Gorrell* the court protected the rights of sureties to subrogation or exoneration, as against the purchaser of an equity of redemption.

[3] The equity of Mrs. Williams and Mrs. Lewis, who were really sureties of Carr, was that of subrogation. When Edmondson bought the interest of Carr, it was subject, with the interest of Mrs. Williams and Mrs. Lewis, to the Norfleet mortgage, not only for the payment of the debt of Carr, but also by way of exoneration to the application of his interest to the payment of the debt, so as to protect the rights of his sureties (*Winborn v. Gorrell*, supra), or, if these interests had already been taken for the payment of the debt, they were immediately subrogated to the right and lien of the creditor, L. E. Norfleet, in respect to the interest of Howard Carr, their principal. When Edmondson and Lewis purchased the equity of their vendor in the land, they should have inquired as to the nature and extent of the incumbrance, and they would have ascertained that the interest of Carr in the land was liable for the whole debt, in the first instance, by way of exonerating his sureties, and, if they had already been compelled to pay the debt, by their substitution to the rights of the creditor and the security he held. So that the deed of trust to J. M. Norfleet secured, not only the debt of L. E. Norfleet, but also the rights of the sureties of Carr by equitable subrogation or exoneration, and it can make no difference in the result which of the equities was available to them. The equitable rights of the sureties accrued to them when they signed the note with their principal and gave the mortgage or deed of trust to secure it (*Nelson v. Williams*, 22 N. C. 118; *Green v. Crockett*, 22 N. C. 392), and they existed, therefore, when Edmondson received his mortgage from Carr.

As the proceeds derived from the sale of the interest of Carr in the land were not sufficient to pay the debt, it follows that the amount now in the hands of the trustee belongs to Mrs. Williams and Mrs. Lewis, and the judge was right in so holding.

Affirmed.

HOKE, J., concurs in result.

(158 N. C. 395)

**BACHELOR v. OVERTON et al.**  
(Supreme Court of North Carolina. March 13, 1912.)

**1. EXECUTORS AND ADMINISTRATORS (§ 29\*)—APPOINTMENT—COLLATERAL ATTACK.**

Where a clerk of the superior court in the exercise of his probate powers has general jurisdiction of the subject-matter, as indicated by Revisal 1905, § 16, his decree appointing an executor cannot be attacked or questioned, except by direct proceedings for that purpose.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 177-182; Dec. Dig. § 29.\*]

**2. EXECUTORS AND ADMINISTRATORS (§ 29\*)—APPOINTMENT—FAILURE TO REQUIRE BONDS—COLLATERAL ATTACK.**

Where a decree appointing an executor has been entered by the clerk of the superior court having general jurisdiction of the subject-matter, the executor's failure to give a bond is only an irregularity not invalidating the appointment, so that it is not open to collateral attack.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 177-182; Dec. Dig. § 29.\*]

**3. EXECUTORS AND ADMINISTRATORS (§ 28\*)—APPOINTMENT OF EXECUTOR—INFERENCE AS TO RESIDENCE.**

Though it was admitted by plaintiff suing as executor that he had not given bond and was not then a resident of the state, where defendant admitted of record that plaintiff's qualifications at the time of his appointment were regular and proper, it may be inferred on collateral attack on the appointment that, when he originally qualified, he was a resident of the state, notwithstanding Revisal 1905, § 28, which provides that a nonresident executor shall give bond, and section 319, which requires that, before his letters issue, he shall give bond with specified conditions.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 1859, 1867, 1874; Dec. Dig. § 28.\*]

**4. CHATTEL MORTGAGES (§ 172\*)—RECOVERY OF GOODS ON DEFAULT—DEFENSES—FAILURE OF TITLE.**

Where the buyer in a seller's action in claim and delivery admitted the purchase from the seller and the execution of a mortgage to secure the price but denied plaintiff's title to the goods sold, the buyer cannot resist payment or a surrender of the property as required by his contract, in the absence of any proof that his possession has been disturbed or the title acquired by him in any way rightfully questioned.

[Ed. Note.—For other cases, see *Chattel Mortgages*, Cent. Dig. §§ 306-315; Dec. Dig. § 172.\*]

Appeal from Superior Court, Nash County; Ferguson, Judge.

Action by O. D. Batchelor, executor of V. B. Batchelor, deceased, against J. D. Overton and another. Judgment of nonsuit, on the ground that plaintiff was a nonresident and had not given bond, and plaintiff appeals. Reversed.

E. B. Grantham and Austin & Davenport, for appellant. Brooks & Taylor, for appellees.

HOKE, J. It was alleged in the complaint and admitted in the answer that in Decem-

ber, 1902, plaintiff, O. D. Batchelor, was duly qualified as executor of V. B. Batchelor, deceased. The letters of administration to O. D. Batchelor of said date in proper form were received in evidence, showing that said V. B. Batchelor had died resident in Nash county, leaving a last will and testament, and appointing plaintiff his said executor, and it was further admitted that the will provided that no bond should be required. It was further alleged in the complaint and admitted in the answer that in December, 1908, plaintiff, as executor, had sold and delivered to defendants the sawmill, engine, boiler, and other property, the subject of the controversy, for \$600, had received \$150 on the purchase price, and took a mortgage on said property to secure the amount remaining due, to wit, \$450, and the mortgage was made part of the complaint. It was further alleged in the complaint, and denied in the answer, that no other and further payment had been made on the purchase price, and that plaintiff was the owner of the property under and by virtue of said mortgage, and had instituted present suit after the defendants had failed to make the payments required by said mortgage, and after each and every of the payments therein mentioned had become due and payable.

On those facts and admissions, we are of opinion, and so hold, that plaintiff is entitled to proceed with his action, and that the order of nonsuit should be set aside, and this, although it was admitted, further, that at the time of trial the plaintiff was a nonresident, and had given no bond. On this subject our statute (chapter 1, § 5, subsec. 2) enacts that a nonresident may qualify as executor (section 28), that such executor shall give bond, etc., and in chapter 9, § 319, it is provided that every executor, etc., from whom a bond is required by law, before letters issued, must give a bond, etc.

[1] Notwithstanding these requirements of the statute, it is very generally held that when a clerk of our superior court, in the exercise of the probate powers conferred by statute, has general jurisdiction of the subject-matter of inquiry, as indicated in chapter 1, § 16, Revisal, and on application made has entered a decree appointing an executor or administrator and letters are accordingly issued, such decree is controlling, and may not be successfully attacked or in any way questioned, but by direct proceedings instituted for the purpose. *Fann v. Railroad*, 155 N. C. 136, 71 S. E. 81; *Jordan v. Railroad*, 125 Wis. 581, 104 N. W. 808, 1 L. R. A. (N. S.) 885, 110 Am. St. Rep. 865, 4 Ann. Cas. 1118; *Croswell on Executors*, pp. 19-127. In *Fann's Case*, speaking to the general question, the court said: "In this day and time, and under our present system, it seems to be generally conceded that the decrees of probate courts, when acting within the scope of their powers, should be considered and dealt with

as orders and decrees of courts of general jurisdiction, and, where jurisdiction over the subject-matter of inquiry has been properly acquired, that these orders and decrees are not as a rule subject to collateral attack. The facts very generally recognized as jurisdictional are stated, in section 16 of our Revisal, to be that there must be a decedent, that he died domiciled in the county of the clerk where application is made, or that, having his domicile out of this state, he died out of the state, leaving assets in such county or assets have thereafter come into such county. Having his domicile out of the state, he died in the county of such clerk, leaving assets anywhere in the state or assets have thereafter come into the state, and where, on application for letters of administration, these facts appear of record, the question of the qualifications of the court's appointee cannot be collaterally assailed. That is one of the very questions referred to him for decision. But, if a person has been selected contrary to the prevailing rules of law, the error must be corrected by proceedings instituted directly for the purpose"—citing *Hall v. Railroad*, 146 N. C. 345, 59 S. E. 879; *Springer v. Shavender*, 118 N. C. 33, 23 S. E. 976, 54 Am. St. Rep. 708; *Lyle v. Siler*, 103 N. C. 261, 9 S. E. 491; *Moore and Wife v. Eure*, 101 N. C. 11, 7 S. E. 471, 9 Am. St. Rep. 17; *London v. Railroad*, 88 N. C. 585. And generally on the subject see *Dobler v. Strobel*, 9 N. D. 104, 81 N. W. 37, with notes by the editor in 81 Am. St. Rep. pp. 530-535; *Croswell on Executors and Administrators*, p. 19 et seq.

[2] Applying the principle, authority here and elsewhere is to the effect that, when a decree has been entered under circumstances stated, the failure to give a bond or the giving of an insufficient bond is only an irregularity in no way affecting the validity of the appointment, and that such appointment may not be questioned collaterally. *Hewerton v. Sexton*, 104 N. C. 75, 10 S. E. 148; *Garrison v. Cox*, 95 N. C. 353; *Hughes v. Hodges*, 94 N. C. 56; *Granbery v. Mhoon*, 12 N. C. 456; *Dobler v. Strobel*, supra; *Leatherwood v. Sullivan, Executors*, 81 Ala. 458, 1 South. 718; *Ex parte Maxwell*, 37 Ala. 362, 79 Am. Dec. 62; *Harris, Appellant, v. Chipman*, 9 Utah, 101, 33 Pac. 242; *In re Craigle's Estate*, 24 Mont. 37, 60 Pac. 495; *Croswell on Executors*, p. 187.

[3] It would seem that the prohibitive terms of chapter 1, § 28, and chapter 9, § 319, do not apply to the present case, for, while it is admitted for defendant that plaintiff is not at present a resident of this state, the admission also appears of record that plaintiff's qualifications in 1902 were regular and proper, and we think it a fair inference that, when he originally qualified, he was a resident of the state. *Moore v. Eure, Adm'r*, 101 N. C. 11, 7 S. E. 471, 9 Am. St. Rep. 17. In such case, and in any event, the appoint-

ment should stand unless set aside and letters recalled by direct proceedings.

[4] Apart from this, it is admitted that defendants bought the property from plaintiff and executed the mortgage sued on to him as executor, and, in the absence of any proof or suggestion that defendants' possession had been disturbed or the title passed to him in any way rightfully questioned, it is not open to defendants to resist payment or the surrender of the property, as required by his contract. *Webster v. Laws*, 89 N. C. 225; 35 Cyc. p. 541. There is error, and this will be certified that the trial may proceed, and the rights of the parties finally determined.

Reversed.

(158 N. C. 393)

**HICKS v. SEABOARD AIR LINE RY. et al.**  
(Supreme Court of North Carolina. March 13, 1912.)

**EMINENT DOMAIN (§ 285\*) — RELOCATION — DAMAGES—LIABILITY.**

Where a railroad company laid its road in such close proximity to a highway in front of plaintiff's premises that the road trustees of the township relocated the road by taking a strip of land from the front of plaintiff's premises, as authorized by Laws 1909, c. 245, plaintiff's remedy to recover damages for the land so taken, etc., was against the township, and not against the railroad company.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. § 791; Dec. Dig. § 285.\*]

Appeal from Superior Court, Franklin County; Carter, Judge.

Action by R. M. Hicks against the Seaboard Air Line Railway and the Board of Road Trustees of Franklinton Township. From a judgment overruling the demurrer of the railway company, it appeals. Reversed.

This is an appeal from a judgment overruling a demurrer.

The complaint alleges: That the plaintiff is a resident of Franklin county, and the owner of land adjoining the right of way of the defendant company. That the board of trustees of Franklinton township is a corporation created by chapter 245, Laws 1909, and has complete control of the public roads in Franklinton township, and is empowered to construct, maintain, and improve the same. That, prior to the construction of said railroad, the public county road ran along the lands now owned by plaintiff, and had so run for many years, beyond the memory of this plaintiff, and the said railroad company about the year 1885, in the construction of its road at this point, laid its track along the side of and parallel to said public road, but within less than 40 feet thereof. The said public road, running within 40 feet of said railroad track and on its right of way, has been recognized and used as a

public road ever since, up to the time complained of was continuously so used, and the said railroad company has never obtained any grant or conveyance thereof from any authorized source, nor made any consideration therefor. That said public road was one of the most important public roads in said Franklinton township, and under said act of the General Assembly of 1909 it was under the control of said road trustees, and full power was vested in said trustees to improve same as might be desired for the best use of the public. That in June, 1910, the defendant road trustees began the work of improving said public road, but along the plaintiff's land, where said road was within 40 feet of said railroad track, as plaintiff is informed and believes, and so avers, said road trustees were forbidden by the said defendant railroad company to do any work in the way of drainage or grading said public roadbed or otherwise improving same at any place within 40 feet of the center of the railroad track. That after being forbidden, and in consequence thereof, said road trustees proceeded to construct a public road adjoining the lands of said railroad outside of its right of way and upon the lands of the plaintiff. That in the construction of the said public road there was taken from the plaintiff's land a strip 30 feet wide and ——— long, including a part of the yard in front of plaintiff's residence, to his great damage. That to his request to have his damages assessed as under the provisions of the said Franklinton township roads act fixed the road trustees reply that the said defendant railroad, having taken the public road in its right of way, should pay all the damages caused in securing a location for the road as now laid off on plaintiff's land. And the defendant railroad denies liability therefor, and plaintiff, by both defendants, is denied recompense for the injuries sustained by him. And the plaintiff is unable, therefore, to determine in what jurisdiction and in what manner to move for the remedy for the injury done to him.

The defendant railroad demurs to the complaint upon the ground that it does not state a cause of action against it, and further because it discloses that the remedy of the plaintiff is by mandamus against said board of trustees.

Judgment was entered overruling the demurrer, and the defendant excepted and appealed.

Murray Allen and F. S. Sprull, for appellant S. A. L. Railroad. Bickett, White & Malone, for appellee Board of Road Trustees. Wm. H. Ruffin, for appellee.

ALLEN, J. We are unable to see that any cause of action is stated against the defendant railroad.

The plaintiff does not allege that said defendant has entered upon his land, or has committed any act causing him injury, nor is any relationship shown which would make the defendant liable for the acts of the board of trustees. It would seem that the board of trustees had the right to enter upon the lands of the plaintiff for the purpose of locating, relocating, or changing a public road, and the act of the General Assembly (chapter 245, Laws 1909) which confers this power furnishes a remedy to the owner of the land thus taken for a public use.

The question debated here, as to the right of the trustees to proceed against the railroad, is not before us, and we refrain from expressing any opinion upon it.

There is error in overruling the demurrer, and the judgment is reversed.

Reversed.

(158 N. C. 597)

HOBBS et al. v. CASHWELL et al.

(Supreme Court of North Carolina. March 13, 1912.)

**1. APPEAL AND ERROR (§ 640\*)—RECORD—SETTING OUT PROCEEDINGS—RULES OF COURT.**

Where the transcript does not set forth the proceedings in the order of time in which they occur, as required by Supreme Court rule 19 (66 S. E. vii), and the record shows no error warranting an order for a new trial, the appeal will be dismissed on motion under Supreme Court rule 20 (66 S. E. vii).

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2788; Dec. Dig. § 640.\*]

**2. APPEAL AND ERROR (§ 640\*)—RECORD—EXCEPTIONS.**

Where the transcript on appeal does not set out the exceptions numbered, as required by Supreme Court rule 19 (66 S. E. vii), and state the exceptions briefly and clearly, as required by Supreme Court rule 27 (66 S. E. viii), and the record shows no error warranting an order for a new trial, the case will be dismissed on motion.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2788; Dec. Dig. § 640.\*]

Appeal from Superior Court, Sampson County; Peebles, Judge.

Action by E. L. Hobbs and others against George W. Cashwell and others. Judgment for plaintiffs, and defendants appeal. Appeal dismissed.

This case was before this court at a previous term, and is reported in 152 N. C. 183, 67 S. E. 495. The case was retried before his honor, Judge Peebles, at May term, 1911, of the superior court of Sampson county. There was a verdict upon the issues and a judgment for the plaintiffs, from which the defendants appealed.

C. M. Faircloth and John D. Kerr, Sr., for appellants. Falson & Wright, for appellees.

**PER CURIAM.** [1, 2] Plaintiffs move, under rule 20 of the Supreme Court (66 S. E. vii), to dismiss this appeal upon the grounds: That in the record the "proceedings are not set forth in the order of time in which they occurred, and so as to follow each other in the order in which same took place, as required by rule 19, § 1 [66 S. E. vii]." (2) For that the appellant has not set out in the case on appeal his exceptions, briefly and clearly stated and numbered, as prescribed by rules 27 and 19, § 2 (66 S. E. viii, vii). *Jones v. Railway*, 153 N. C. 419, 69 S. E. 427; *Davis v. Wall*, 142 N. C. 453, 55 S. E. 350. Upon examination of the record in this case, we are of opinion that under the rules of the Supreme Court the plaintiffs' motion must be allowed. We have, however, examined the record and assignments of error and find no error of sufficient importance to warrant the ordering of another trial.

Appeal dismissed.

(158 N. C. 388)

In re BATTLE'S ESTATE.

(Supreme Court of North Carolina. March 13, 1912.)

**1. EXECUTORS AND ADMINISTRATORS (§ 35\*)—REMOVAL OF ADMINISTRATOR—APPLICATION TO REMOVE—NATURE OF PROCEEDING—"SPECIAL PROCEEDING"—"CIVIL ACTION."**

An application to the clerk of the superior court to remove an administrator, as authorized by Code, § 1521, is neither a "civil action" nor a "special proceeding," within Code Civ. Proc., for the purpose of litigating rights and liabilities of adverse parties, but is a mere application for the exercise of a statutory power to protect the estate.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 227-262; Dec. Dig. § 35.\*]

For other definitions, see Words and Phrases, vol. 2, pp. 1183-1193; vol. 8, p. 7903; vol. 7, pp. 6586-6590; vol. 8, pp. 7802, 7803.]

**2. EXECUTORS AND ADMINISTRATORS (§ 35\*)—ISSUES—TRANSFER.**

On an application to the clerk of the superior court to remove an administrator for cause, the clerk is not required, on issues raised, to transfer the cause to the superior court for a jury trial, but may, and ordinarily should, take definite action in the premises, though the clerk has power, in the exercise of discretion, to direct issues of fact to be tried by a jury, and to transfer them to the superior court for trial, as authorized by Code, § 116.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 227-262; Dec. Dig. § 35.\*]

**3. EXECUTORS AND ADMINISTRATORS (§ 35\*)—REMOVAL BY CLERK—APPEAL.**

On an application to the clerk of the superior court to remove an executor or administrator for cause, the executor or administrator, or any person interested, is authorized by Code, § 116, to appeal from the clerk's finding of fact and judgment to the judge having jurisdiction in term time or in vacation; and he may review the findings and affirm, reverse, or modify the judgment of the clerk and remand the matter to the clerk for further proceedings, and from the judgment of such judge an

appeal lies to the Supreme Court for the determination of errors of law.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 227-262; Dec. Dig. § 35.\*]

**4. EXECUTORS AND ADMINISTRATORS (§ 35\*)—REMOVAL—REVIEW—ISSUES—TRIAL.**

On appeal from a clerk of the superior court, on an application to remove an executor or administrator for cause, the judge in reviewing the clerk's findings may, in his discretion, direct issues of fact to be tried to a jury.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 227-262; Dec. Dig. § 35.\*]

**5. EXECUTORS AND ADMINISTRATORS (§ 35\*)—REMOVAL—GROUNDS.**

Within two weeks after intestate's death, appellant, a well-informed and capable business man, went to the house of the widow, who could neither read nor write, and obtained from her and from six of her children a contract, by which he was to receive 25 per cent. of the estate over and above lawful fees for administering the estate, together with a writing, purporting to be the widow's renunciation of her right to administer the estate in favor of appellant; both papers being witnessed by another, with whom appellant had agreed to share equally the amount sought to be received from the estate. *Held*, that appellant thereby showed himself unfit to act as administrator, and was properly removed.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 227-262; Dec. Dig. § 35.\*]

**Appeal from Superior Court, Nash County; Ferguson, Judge.**

In the matter of the administration of the estate of Frank P. Battle, deceased. Application for removal of W. R. Mann, administrator. On appeal from an order of the clerk of the superior court of Nash county. Order of removal was affirmed, and the administrator excepted and appeals. *Affirmed*.

T. T. Thorne, for appellant. Brooks & Taylor, for appellees.

**HOKE, J.** It appears of record that Frank Battle died, domiciled in Nash county, on 29th of September, 1911, and within two or three weeks thereafter W. R. Mann was duly qualified as his administrator; that the proceedings were had before T. A. Sills, Esq., clerk of the superior court of Nash county, and on presentation of a paper writing, purporting to be a renunciation of Cora Battle, widow of deceased, in favor of W. R. Mann. This paper, bearing date October 13, 1911, appeared to be signed by Cora Battle having made her mark thereto, and same was witnessed by one R. L. Powell. Thereafter, to wit, on November 20, 1911, on petition filed and notice duly given, affidavits were submitted on part of Cora Battle tending to show that she had not signed the renunciation, nor authorized any one to sign it for her. At the same time, affidavit was made on the part of Robt. L. Powell, deceased, to the effect that Cora Battle made her mark to said paper

writing in the presence of affiant as subscribing witness, and that the contents were fully explained and understood by her. It was admitted on the hearing by W. R. Mann that on the same date that the renunciation purported to be signed, and in contemplation of his administering on the estate, he had procured from the widow a contract, by which he was to be allowed 25 per cent. of the entire estate, in addition to the fees allowed by law. It was also admitted by Robert Powell, the subscribing witness, that he (the witness) had a one-half interest in the contract obtained by Mann, to wit, 25 per cent. in addition to lawful fees, and that the contract and the renunciation were carried by him to Cora Battle and executed at one and the same time. The clerk found as facts that the renunciation had not been made or authorized by the widow, and found the facts also in accord with the admissions, and gave judgment of removal. On appeal, the judge affirmed the judgment of the clerk, on the ground that, under the circumstances of the parties, the obtaining of the contract in question from the widow and six of the nine children of Frank Battle, deceased, showed W. R. Mann to be an unfit person to administer on the estate; whereupon said Mann excepted and appealed, assigning for error chiefly that, the pleadings and affidavits before the clerk having raised an issue of fact, the proceeding should have been transferred to the civil issue docket for trial by jury; (2) that his honor held the obtaining of the contract showed W. R. Mann to be an unfit person, when said Mann had offered in the superior court to surrender his contract, and offered affidavits, further, of a number of citizens to the effect that he was a man of good character and good business standing in the community where he lived.

[1-4] It is well understood that our clerks of the superior court, on petition filed and notice duly served, in the exercise of powers conferred upon them in matters of probate, may remove an executor or administrator for good cause shown. They make such orders, in the exercise of a legal discretion, which may be reviewed upon appeal. An application of this character is not regarded as being in the nature of an adversary proceeding, but a power conferred with a view of protecting the estate, and, because prompt action may often be necessary to this end, a clerk is not required, on issues raised, to transfer the cause to superior court for a jury trial, but may, and ordinarily should, take definite action in the premises. The practice in such cases is very well stated in *Edwards v. Cobb*, 95 N. C. 4-9, in which Merrimon, J., delivering the opinion, said: "This proceeding is neither a civil action nor a special proceeding under the Code of Civil Procedure. Its purpose is, not to litigate the

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.



alleged rights and liabilities of adverse parties, settle the same, and give judgment against one party in favor of another, but it is to require one who is charged by the law with special duties and trusts, for whosever may be interested, to show cause why, in some cases, he shall not give such bond as may be required of him, conditioned for the faithful discharge of his duties, and in others why he shall not be removed from his place or office because of some disqualification, malfeasance, misfeasance, or nonfeasance that disqualifies or unfits him in that respect, and renders it necessary that he shall be promptly removed from it. While ordinarily some person or persons rightfully interested should make the application for such removal, suggest the grounds for it, and produce the appropriate and necessary proofs in that behalf, and become parties to a proceeding for the purpose and responsible for costs, the clerk, in the exercise of his jurisdictional powers, requires the executor or administrator, as the case may be, to answer before him and show cause, or be removed from his office, to the end that the interests of the estate may be subserved and the rights of parties interested protected by his removal, and the appointment of a suitable person in his stead. The clerk has power, as we have seen, for proper cause, to make such removal, and, pending any litigation in that respect, to make all necessary interlocutory orders for the protection and better securing of the estate. Code, § 1521; Taylor v. Biddle, 71 N. C. 1; In re Brinson, 73 N. C. 278. Ordinarily, in such matters, issues of fact do not arise; only questions of fact are presented, and the clerk hears the matter before him summarily; he finds the facts from affidavits and competent documentary evidence, and founds his orders and judgments on same. He may, in his discretion, in some case, direct issues of fact to be tried by a jury, and transfer them to the superior court to be tried, as directed by the Code, § 116, but regularly he will not. No doubt, in some cases, he ought to do so. And, also, by virtue of this section, the executor or administrator, or any person interested, may appeal from the finding of fact and the judgment of the clerk to the judge having jurisdiction in term time or in vacation, and the judge may review the findings of fact, if need be, and decide such questions of law as may be raised, affirm, reverse, or modify the order or judgment of the clerk, and remand the matter to him for such further action as ought to be taken. From the judgment of the judge, an appeal would lie to this court, and errors of law only should be assigned. The judge, in reviewing the findings of fact,

might, in his discretion, direct proper issues of fact to be tried by a jury for his better information, and in some cases, it may be, he ought to do so. The statute, conferring power on the clerk to remove executors and administrators, does not prescribe in terms how the facts in such matters shall be ascertained; but it plainly implies that he shall act promptly and summarily."

Authority with us is in general approval of the position as stated (*Murrill v. Sandlin*, 86 N. C. 54; *In re Brinson*, Adm'r, 73 N. C. 278; *Taylor v. Biddle*, 71 N. C. 1; *Lovinsier, Ex'r, v. Pearce*, Guardian, 70 N. C. 168; *Hunt v. Sneed*, 64 N. C. 180); and the statute (Revisal, c. 1, § 35), authorizing and directing that, in all cases of revocation, etc., "the clerk shall immediately appoint a successor \* \* \* and make such orders as may tend to the better ordering of the estate," is in express recognition of the principle. The clerk, therefore, was not required to transfer the cause to the civil issue docket and delay action till trial had.

[8] We concur, also, in the view taken by his honor that it sufficiently appeared from the admissions of record that the appellant was not a fit or suitable person to act as administrator of this estate, and that a determination of other questions presented was not necessarily required. It may be that the taking of a contract of this character might not always and as a matter of law justify the removal; but, under the circumstances presented here, showing that within two weeks of intestate's death the appellant, a well-informed and capable business man, by his own admission and through the agency of one R. L. Powell, the subscribing witness, went to the house of the widow, who could neither read nor write, and obtained from her and from six of her children a contract for 25 per cent. of the estate over and above lawful fees, the administrator and the witness to share equally in the amount, evinces such an erroneous concept of official duty as to demonstrate his unfitness and justify his removal. While the clerk, in such cases, is in the exercise of a legal discretion which may, as stated, be reviewed on appeal, he is necessarily allowed a large latitude in such matters, and in the present case, on authority and the facts admitted of record, we are of opinion, and so hold, that the order of removal was properly made. *Simpson v. Jones*, 82 N. C. 323; *N. C. R. R. v. Wilson*, 81 N. C. 223; *In re Pike's Estate*, 45 Wis. 391; 11 A. & E. p. 823; 1 Williams, Ex'r (9th Am. Ed.) p. 702.

There is no error, and the judgment of the superior court is affirmed.

Affirmed.

(90 S. C. 568)

STATE ex rel. LYON, Atty. Gen., v. COLUMBIA WATER POWER CO. et al.

(Supreme Court of South Carolina. March 11, 1912.)

**1. MOTIONS (§ 59\*)—SETTING ASIDE CONSENT ORDER—POWER OF COURT.**

An order of court entered on consent extending the time to comply with other orders, requiring the removal of certain obstructions to navigation, given under a misapprehension of the facts, will be opened on motion where no expense has been incurred on the faith of the order, and where the adverse party has not been placed in a worse condition by reason of anything done under it.

[Ed. Note.—For other cases, see *Motions*, Cent. Dig. §§ 73-81; Dec. Dig. § 59.\*]

**2. NAVIGABLE WATERS (§ 3\*)—JURISDICTION OF STATE.**

Under the Constitution, a navigable water of the state must remain a public highway free to the citizens of the state and of the United States.

[Ed. Note.—For other cases, see *Navigable Waters*, Cent. Dig. § 3; Dec. Dig. § 3.\*]

**3. STATUTES (§ 131\*) — MODIFICATION—CONCURRENT RESOLUTION.**

Where the Legislature by statute required that a navigable canal of the state should be opened for navigation, a mere concurrent resolution of the Legislature could not amend the statute, or modify its force by requiring the Attorney General to consent that the time for removal of obstructions be extended.

[Ed. Note.—For other cases, see *Statutes*, Dec. Dig. § 131.\*]

**4. CANALS (§ 16\*) — REMOVAL OF OBSTRUCTIONS—EQUITABLE RELIEF.**

The court which ordered the removal of obstructions in a navigable canal of the state has power to modify the order by extending the time for the removal of the obstruction, and, in extending the time, will give great weight to the fact that the removal involves an engineering problem of great difficulty.

[Ed. Note.—For other cases, see *Canals*, Dec. Dig. § 16.\*]

**5. CANALS (§ 16\*)—MAINTENANCE—REMOVAL OF OBSTRUCTIONS—LOCKS.**

Civ. Code 1902, § 1409, authorizing the county board of commissioners to keep water-courses and cuts in repair, and to clear and straighten and make navigable the same, etc., empowers the board to provide for attendance on the locks at a navigable canal, so as to justify the court to require the locks to be put in order for operation, as against the objection that no provision is made for attendance on them.

[Ed. Note.—For other cases, see *Canals*, Cent. Dig. §§ 16, 17; Dec. Dig. § 16.\*]

**6. CANALS (§ 16\*) — OBLIGATION TO KEEP OPEN LOCKS—STATUTES.**

Act Dec. 27, 1887 (19 St. at Large, p. 1090), authorizing a transfer of a canal to a board of trustees, and providing that the canal shall be opened for navigation free of charge, requires that the canal shall be opened and kept open for navigation, and an assignee of the board, required by the assignment to perform the conditions prescribed by the statute, must provide locks in the canal, and keep them in condition for use, and thereby make the canal open for navigation.

[Ed. Note.—For other cases, see *Canals*, Dec. Dig. § 16.\*]

"To be officially reported."

Original petition by the State, on the relation of J. Fraser Lyon, Attorney General, against the Columbia Water Power Company and others. Decree ordered.

J. Fraser Lyon, Atty. Gen., and B. P. McMaster, for petitioner. B. L. Abney, for Columbia Water Power Co. Christie Benet, for City of Columbia.

WOODS, J. The nature and scope of this proceeding is set out with sufficient fullness in the opinion rendered on March 4, 1909, and reported in 82 S. C. 181, 63 S. E. 884, 22 L. R. A. (N. S.) 435, 129 Am. St. Rep. 876, 17 Ann. Cas. 343. By the decree then rendered, the court adjudged that the Columbia Canal was navigable water, and that its obstruction by a bridge used to support the water pipes of the city of Columbia was a public nuisance, against which the state was entitled to an injunction. In view of the alleged difficulties in conducting the city's supply of water without the use of the bridge, the court made the following order of reference: "It is, therefore, referred to A. D. McFadden, Esq., master for Richland county, to take testimony and report his conclusions of fact on these issues: Would an order enjoining at once the construction of the bridge described in the petition so seriously interfere with the water supply of the city of Columbia as to endanger the health of the city? In issuing the order of injunction for the protection of the free navigation of the canal, what length of time should be allowed the city of Columbia to provide another method of conveying an adequate supply of water to the waterworks of the city?" The report of the master having been afterwards filed, the court on March 5, 1910, ordered "that the respondent, the city of Columbia, and the mayor and aldermen of the city of Columbia, and each of them, are hereby enjoined and required to remove within eight months from the date of this order the water mains and bridge constructed across the Columbia canal by the city of Columbia, and located near the city water pumping station, a fuller description of said bridge and water mains appearing in the petition." 85 S. C. 113, 68 S. E. 1119.

Thereafter the General Assembly passed the following concurrent resolution:

"A concurrent resolution providing for an extension of time for the city of Columbia to comply with the order in the case of State v. City of Columbia.

"Whereas, the Supreme Court of South Carolina has passed an order requiring the city of Columbia to remove from across the Columbia Canal the water mains and bridge there erected by it on 5th June, 1911; and

"Whereas, the removal of said bridge and

mains will be at great expense and the whole water supply of the city of Columbia is dependent thereon; and

"Whereas, the said city does not question the right of the state to require it to remove the said bridge and mains at any time it sees fit to do so, but it is desirous of being allowed to let the bridge and mains remain until such time as it is shown that they are an actual obstruction to real navigation; and

"Whereas, it appears that even if the city of Columbia now removed the said bridge and mains, there are other obstructions in the said canal which would prevent navigation, and against which no proceedings have been taken by the state of South Carolina or other parties: Therefore,

"Section 1. Be it resolved by the House of Representatives, the Senate concurring, that the Attorney General be, and he is hereby, authorized and directed to consent to an order of the Supreme Court of the state of South Carolina extending the time for the removal of said bridge and mains 'for a period of five years from the date hereof unless all other present obstructions to navigation on said canal be sooner removed.'"

On the written consent of the Attorney General and other counsel, the court on May 5, 1911, made an administrative order that "the time allowed for the removal of said water pipes and bridges is hereby extended to 15th February, 1916, unless prior to said date the present obstructions to navigation at the locks be removed; then upon notice of such removal, said respondent shall, within eight months, remove the said bridge and water mains as directed in the original decree herein, filed March 10, 1910." After this order was made, Mr. B. P. McMaster, who, as counsel, had main charge of the case on behalf of the state under the sanction of the Attorney General, filed his petition for a revocation of the order on the ground that he "was induced to consent to said order, with such a contingency, upon the understanding and belief based upon the statement of the attorney of the respondent the Columbia Electric Street Railway, Light & Power Company, and its former manager, who stated to petitioner that the respondent recognized that it was its duty to keep said gates in workable condition, and at any time it would put its gates in such condition for the passage of boats in and out of said canal." On this petition an order was made requiring the respondents to show cause why the consent order above recited "should not be reconsidered, and such time for the removal of said obstructions be fixed by the court as should be meet and just, and the respondent the Columbia Electric Street Railway, Light & Power Company do show cause, at the same time and place, why said order in this cause should not be reconsid-

ered, and said cause reopened for further enforcement of the rights of the public, and why it should not be required to put its locks at the head of said canal in a workable condition." Separate returns were made by the respondents, and the issues arising thereunder are now before the court.

[1] It is not necessary to consider in detail the affidavits as to the conversations between Mr. McMaster and the officers of the street railway company which formed the basis of the understanding alleged by Mr. McMaster. Assuming that the officers of the street railway company did not intend to recognize its duty to keep the gates of the locks in workable condition, nor to promise to put them in such condition, it cannot be doubted that the consent was signed under that impression. No expense has been incurred, and in no respect has either of the respondents been placed in a worse condition by reason of anything done under the order. Under these circumstances, refusal to open the order would be oppressive. The objection made in the return of the city of Columbia that the Attorney General has not joined in the request that the consent order be opened was made no doubt because the Attorney General was absent from the state when the return was filed, and his position had not been ascertained by the city attorney. The record shows that the Attorney General is actively applying to have the consent order opened by joining in the printed argument submitted in support of the petition. In considering whether the consent order should be revoked and the matter reconsidered, it is necessary, however, to determine the force of the concurrent resolution, because the resolution not only authorized, but directed, the Attorney General to consent to an order extending the time for the removal of the bridge and water mains "for a period of five years from the date hereof unless all other obstructions to navigation upon said canal be sooner removed."

[2] As was shown in the former decree, the canal is navigable water of the state, and as such, under the Constitution, must forever remain a public highway free to the citizens of the state and the United States, without tax, impost, or toll imposed. The extent to which this constitutional provision limits the power of the General Assembly to enact laws imposing burdens on navigation or authorizing the obstruction of navigable waters for public purposes presents a question of difficulty. The subject has been discussed, and language like that used in our Constitution has been construed, in several cases decided by the Supreme Court of the United States. In *Cardwell v. American Bridge Co.*, 113 U. S. 205, 5 Sup. Ct. 423, 28 L. Ed. 959, the court said with respect to a similar provision in the statute admitting the state of California: "If we

treat the clause as divisible into two divisions, they must be construed together as having but one object, namely, to insure a highway equally open to all without preference to any, and unobstructed by duties or tolls, and thus prevent the use of navigable streams by private parties to the exclusion of the public, and the exaction of any toll for their navigation; and that the clause contemplated no other restriction upon the power of the state in authorizing the construction of bridges over them, whenever such construction would promote the convenience of the public." *Hamilton v. Vicksburg, etc., Ry. Co.*, 119 U. S. 280, 7 Sup. Ct. 206, 30 L. Ed. 393; *Willamette I. B. Co. v. Hatch*, 125 U. S. 1, 8 Sup. Ct. 811, 31 L. Ed. 629; *Manigault v. Springs*, 199 U. S. 479, 26 Sup. Ct. 811, 50 L. Ed. 278; *Illinois Central Ry. Co. v. People*, 146 U. S. 387, 13 Sup. Ct. 110, 37 L. Ed. 1018.

[3] But, if the power of the General Assembly to authorize the obstruction of navigable water by a municipality be assumed, the assumption could not prevent the court from opening and reconsidering the order in question, for this reason: The General Assembly itself by the statutes referred to in the former decree required the canal to be opened for navigation, and it is obvious that a mere concurrent resolution could not have the effect of amending the statutes or modifying their force by requiring the Attorney General to consent that the canal be obstructed contrary to the statute, so that the court would be bound by that consent.

[4] But the court in passing its orders must give great weight to the fact convincingly shown by the return of the city of Columbia that the removal of the bridge by it over the canal without material interference with the water supply of the city and its inhabitants involves an engineering problem of great difficulty, and the court has no hesitation in modifying its administrative orders heretofore granted by extending the time for the removal of the bridge until the expiration of eight months from the filing of this decree.

[5] The remaining question is whether the Columbia Street Railway Company should be required to put the locks in workable condition so that they may be used for navigation. The original petition alleged on this subject: "That your petitioner is informed and believes that the respondents the Columbia Water Power Company and the Columbia Electric Street Railway, Light & Power Company, in violation of their obligations to the public, have further obstructed said canal by placing timber and logs, and permitting the same to be and remain at and across the entrance of the lock at the head of said canal, and have fastened and secured the gate of said locks so that the same cannot be opened, and have allowed mud, driftwood, and debris to accumulate in said locks

so that the said gates have become immovable and useless, so as to prevent the passage of boats and other crafts into and out of said canal. \* \* \* That in closing the gates of the said locks as aforesaid and in failing to keep the passageway into said canal open for the use of the public, and in the violation of the said acts as hereinbefore set forth, the said respondents the Columbia Water Power Company and the Columbia Electric Street Railway, Light & Power Company have violated the duties and obligations assumed by them upon the purchase of said canal; and, said canal being a public highway, the aforesaid obstructions constitute a public nuisance, for the abatement of which your petitioner has no adequate remedy at law."

To this allegation the Columbia Street Railway Company responded in part as follows: "That the gates to the lock at the head of the canal on Broad river are not, and as respondent is informed and believes have never been, fastened or secured, so that the same cannot be opened, although, since the construction of the said lock, a movable cofferdam has been placed in the lock above the upper gate for the purpose of cleaning away the mud, sand, and trash accumulated there, but said cofferdam can easily be removed in a very short time. That upon removal of the mud and trash accumulated in the upper part of said lock the gates to the lock can be easily and readily opened, but mud, sand, and trash will accumulate in a short period of time, perhaps after each freshet in the river, especially when the gates are not regularly opened. That within the past two years one of the gates to said lock has been repaired and made new, so that the boats can pass through said locks whenever occasion requires. That while timber and logs have been laced into a boom and fastened some distance above the lock for the purpose of preventing trash, logs, etc., from washing against and injuring the lock and flood gates to the canal, the same does not interfere with the use of said lock, nor navigation through it. But within the past 14 years no boat has been used on the canal for the purpose of transporting any freight, merchandise, or commercial commodity, nor has any such boat been put through the said lock." The court in its former decree decided nothing on this subject, except that it would not in the exercise of its discretion order the Columbia Street Railway to remove the obstructions to the use of the locks until the General Assembly should make provision for the attendance upon them. The following language of the decree shows that the matter was left open for further administrative orders upon a showing that provision had been made by law for attendance on the locks: "The court cannot order the respondent to put the lock in order, because section 15 of the act of 1887, by virtue of which the

state's interest in the canal was transferred to the trustees of the Columbia Canal, expressly provided that the trustees should not be required to attend on any locks that may be built, and the Columbia Electric Street Railway, Light & Power Company assumed only the obligations imposed by that act. Assuming, but not deciding, that the Columbia Street Railway, Light & Power Company is bound under its contract to keep the lock free from obstruction to navigation, it is manifest the lock would be of no use without some one to operate it. Until the state may see fit to provide such operation, it would be useless to require the lock to be cleared of obstruction. We do not consider the allegation made in the returns that the use of the lock for navigation of the canal from Broad river would greatly impair the value of large manufacturing and public service works run by the water of the canal. It is to be assumed that the General Assembly, when it provides for attendance and use of the lock, will have due regard for the interests involved in the operation of these plants."

Counsel for the petitioner, at the last hearing, has brought to the attention of the court section 1409 of the Civil Code as a statute requiring the county board of commissioners to provide for attendance on the locks at the canal. The section provides: "The county board of commissioners are authorized and empowered to keep the said water courses and cuts in repair, and to dig out, clear, cleanse, shorten, straighten and make navigable the same, either with the labor of such male inhabitants as shall be liable to work on the public highways, or by contract with one or more persons; and they shall also have all such work done as may from time to time be expedient and necessary for the preservation and use of said water courses and cuts, notwithstanding such work be not designated in this chapter." We think the statute broad enough to meet the case, and that, in view of this statute, the court cannot exercise discretion to withhold an order for the locks to be put in order for operation, on the ground that no provision has been made for attendance upon them.

[8] It remains to decide the question of substantive right expressly left open in the former decree, namely, does the statute law of the state, under which the Columbia Street Railway has charge of the canal, require that corporation to maintain and keep open locks for the purposes of navigation at the entrance from Broad river to the canal? The statute of 1887 (19 Stat. 1090) authorized and required the board of directors of the South Carolina penitentiary "to transfer, assign, and release to the board of trustees of the Columbia Canal \* \* \* the property known as the Columbia Canal together with the lands now held therewith

\* \* \* for the use and benefit of the city of Columbia, for the purposes hereinafter mentioned in this act, subject nevertheless to the performance of the conditions and limitations herein prescribed on the part of the said board of trustees and their assigns." The Columbia Street Railway Company is the assignee of the board of trustees of the Columbia Canal, and as such assumed all the obligations imposed on that board by the statute. One of the conditions and limitations to which all rights acquired by the Columbia Street Railway is subject and which was expressly imposed upon it by the act is laid down in section 5 of the statute, namely, "that the said canal shall be opened for navigation free of charges by the said board of trustees." This, of course, did not mean that the canal should be opened and then closed, but that it should be opened and kept open for navigation. It is undisputed that locks are absolutely necessary to the use of the canal for any purposes of navigation from the Broad river into the canal, and certainly such navigation was contemplated by the statutes. It is impossible to doubt, therefore, that the statute imposed on the street railway company the duty of providing locks and keeping them in condition for use, for not otherwise could the canal be made open for navigation. That this was understood by the parties holding the canal under the act of 1887 to be their duty appears from the fact that they provided for navigation by the construction of locks. We are not unmindful that there are great interests involved in the use for manufacturing purposes of the power generated by the canal. These interests must be regarded as far as may be consistent with the proper use of the canal as navigable water; for the right of the citizen to the use of the navigable water of the state is not a boundless right. Like other rights, it is to be exercised with due regard to other interests, in this instance with particular concern for the use of the water power which the course of legislation with respect to the canal shows the General Assembly intended to promote. When the Columbia Electric Street Railway, Light & Power Company has performed the duty, it voluntarily assumed by putting the locks in workable order and navigation from the river into the canal has actually begun, it will be time enough to consider what, if any, limitation may be and should be put by the court upon the use of the canal for navigation, and what other orders, if any, may be necessary to have the canal opened to navigation. There is nothing before the court warranting the inference that the canal may not be of some use for navigation through the locks to the bridge, even before its removal; but a reasonable time should nevertheless be allowed for placing the locks in workable condition.

In consonance with the views herein ex-

pressed, it is therefore ordered that the city of Columbia be allowed eight months from the filing of this decree for the removal of its bridge over the Columbia Canal; that the Columbia Street Railway, Light & Power Company within three months from the filing of this decree open the Columbia Canal by putting the locks in workable condition at the Broad river entrance to the canal; that any and all of the parties have leave to apply for such further orders as may be necessary to protect their rights as herein declared, as questions with respect thereto may hereafter arise under the pleadings.

GARY, C. J., and HYDRICK, J., concur.

(31 S. C. 41)

KELLY et al. v. TINER.

(Supreme Court of South Carolina. March 20, 1912.)

1. CEMETERIES (§ 20\*)—DESECRATION—INJUNCTION—RIGHT TO SUE.

Where a bill alleged that certain land had been dedicated to cemetery purposes for between 80 and 90 years, that plaintiffs' parents, grandparents, great-grandparents, and other kindred, as well as their children, were buried there, and that plaintiffs expected to be buried there themselves, and their descendants likewise, it sufficiently showed that plaintiffs would sustain special and peculiar damage by the desecration of the cemetery to entitle them to sue to restrain defendants from obliterating the cemetery and converting the same into arable land for agriculture.

[Ed. Note.—For other cases, see Cemeteries, Cent. Dig. § 22; Dec. Dig. § 20.\*]

2. CEMETERIES (§ 20\*)—DESECRATION—INJUNCTION—INDIVIDUALS.

Where a graveyard is set apart for use of the public, those who have kindred or friends buried there may maintain a suit for any unlawful interference therewith or trespass thereon.

[Ed. Note.—For other cases, see Cemeteries, Cent. Dig. § 22; Dec. Dig. § 20.\*]

3. PARTIES (§ 12\*)—PERSON SUING FOR BENEFIT OF ALL.

Two persons whose kindred were buried in land dedicated and used for cemetery purposes were entitled to sue in their own names for themselves and for all others similarly interested to restrain the desecration of the cemetery and the use thereof for agricultural purposes; it being impracticable to bring all the parties before the court by reason of numbers.

[Ed. Note.—For other cases, see Parties, Cent. Dig. § 12; Dec. Dig. § 12.\*]

4. CEMETERIES (§ 20\*)—BURIAL OF DEAD—GRAVE RIGHTS.

Where one has been permitted to bury his dead in a cemetery by the express or implied consent of those in proper control of it, he acquires such possession in the spot of ground in which the bodies are buried as will entitle him to maintain trespass quare clausum fregit against the owners of the fee or strangers who, without his consent, negligently or wantonly disturb it.

[Ed. Note.—For other cases, see Cemeteries, Cent. Dig. § 22; Dec. Dig. § 20.\*]

Appeal from Common Pleas Circuit Court of Darlington County; S. W. G. Shipp, Judge.

Suit by Elias Kelly and another against John Tiner. From a judgment sustaining a demurrer to the complaint. plaintiffs appeal. Reversed.

The following is the complaint, demurrer, order, and exceptions referred to in the opinion:

"Complaint.

"The plaintiffs, complaining of the defendant, allege:

"(1) That the old 'Kelly Cemetery' is a plot of land in Darlington county, situated on the public road leading from Hartsville to Timmons ville, containing two (2) acres of land, and is bounded on the east by the said public road leading from Hartsville to Timmons ville and fronting thereon one acre; and is bounded on all other sides by lands of the defendant John Tiner; and is now being used and has been used for many years as a public burying ground.

"(2) That from plaintiffs' best knowledge, information, and belief, said knowledge, information, and belief having been obtained from the oldest inhabitants in the neighborhood, about 80 or 90 years ago, one Jacob Kelly, a large landowner of that neighborhood, set apart and gave to the public the two acres of land hereinbefore described as a public burying ground, and from that time until now the said two acres of land thus set apart, given, and dedicated to the public by the said Jacob Kelly has been known as the 'Kelly Cemetery,' and has been used exclusively by the public all these years exclusively as a burying ground. That the said two acres, after having been given and dedicated to the public, as aforesaid, and for the purposes aforesaid, was cut off and separated from the rest of the tract of land by rows of trees, the public at large taking possession of the same, and has ever since kept peaceable, continuous, and uninterrupted possession of the same, caring for it, cleaning it off, keeping the graves in good condition, and putting a wire fence around the graves to keep the cattle from trampling upon and desecrating this sacred spot.

"(3) That these plaintiffs are grandsons of the said Jacob Kelly, who originally set apart and gave the said two acres of land aforesaid for the purposes hereinbefore stated, and that these plaintiffs can remember for 50 years that the said two acres, known, as aforesaid, as the 'Kelly Cemetery,' was then owned and possessed by the public as a place to bury the dead, and no member of the Kelly family, as heir at law of the said Jacob Kelly, or any other person, prior to the acts of the defendant hereinafter stated, ever dreamed of laying claim to any part or parcel of the said two acres, or did any of

them ever attempt for all these years to exercise any acts of ownership over the same, except to bury their dead and aid and assist the public at large in keeping clean and in good order the said cemetery.

"(4) That these plaintiffs are residents of that neighborhood, and have been throughout almost their entire lives, and from information received from the very oldest citizens of the community they are informed and believe that at the sale of the said lands of the said Jacob Kelly at the courthouse door in Darlington it was publicly stated that these two acres, known as the 'Kelly Cemetery,' were excepted, it being the property of the public, and these plaintiffs have personally known all of the owners for the past 50 years of the tract of land from which the said two acres was cut off nearly a hundred years ago, and at no time did either or any of them lay any claim to any part or parcel of the same, or exercise, either publicly or privately, any acts of ownership over the same, except to bury their dead and aid and assist the public in preserving and keeping intact the said two acres of land for the exclusive and sole purpose of burying the dead, and at all times did the owners of said original tract of land own and admit, publicly and privately, that they did not own or possess any part or parcel of the 'Kelly Cemetery,' but that the same belonged to the public for the purpose of burying the dead.

"(5) That these plaintiffs are the grandsons and heirs of the said Jacob Kelly, and are now and have been citizens of that community almost during their entire lives; that they, with the rest of the public, have had peaceable, open, notorious, hostile, continuous, and uninterrupted possession of the said two acres of land, known as the 'Kelly Cemetery,' as aforesaid, for more than 50 years; that their parents, grandparents, and great-grandparents and other kindred, for nearly a hundred years, have been buried in this cemetery; that each of these plaintiffs have children buried there; that they expect, if the ruthless hand of its desecrator and destroyer, should be stayed, that this sacred spot shall be the burial place of these plaintiffs, their children, grandchildren, etc., on down through the corridors of time.

"(6) That on the days of February, March, April, and May of 1909 the defendant John Tiner, unlawfully, willfully, and wantonly burnt down the posts, holding the wires around the graves, cut down and destroyed most of the large trees, planted by hands long since dead and buried in the same graveyard, cut down and destroyed some of the grass, shrubbery, etc., on the said two acres, ploughed up into large beds a part of the land, and threatens to continue to commit the aforesaid depredations, and if he is not prohibited these plaintiffs verily believe that he will continue to thus illegally and unlawfully trespass upon this property, cut down and

destroy the remainder of the old trees, the old landmarks, as aforesaid, and will continue to destroy the shrubbery, mutilate the posts, and make the said two acres, the old 'Kelly Cemetery,' unfit for the purposes of burying the dead—the only use it has been dedicated to for the past 80 or 90 years.

"(7) That if the defendant be allowed to continue his acts of trespass and depredations, as aforesaid, these plaintiffs will be irreparably injured, and these plaintiffs verily believe from the defendant's past conduct, his threats, etc., that he does intend to continue his illegal, willful, and wanton acts until the old graveyard is made a cotton patch or cornfield.

"(8) That these plaintiffs have no adequate remedy at law, and unless the court restrains and enjoins the defendant from any further illegal, willful, and wanton trespasses and depredations, as aforesaid, these plaintiffs will be irretrievably and permanently injured and damaged, and the aforesaid 'Kelly Cemetery' forever destroyed, so that these plaintiffs and the community at large be deprived from burying their dead in the old family graveyard, and these plaintiffs desire that an injunction be issued, restraining and enjoining any further acts of trespass upon the aforesaid land, known as the old 'Kelly Cemetery,' by the defendant, his agents and servants, or by any other party or parties, acting for him or by his authority.

"Wherefore the plaintiffs pray judgment against the defendant, that the said defendant, his agents and servants, and all persons acting under his authority and direction, be perpetually and permanently enjoined from entering upon or trespassing in any way upon the said two acres of land above described, and known as the old 'Kelly Cemetery,' and from mutilating, cutting down, and destroying any of the posts, trees, shrubbery, etc., standing upon the said two acres of land, known, as aforesaid, as the old 'Kelly Cemetery,' and for the costs and disbursements of this action, and for such other and further relief as to the court doth seem just and proper."

"Grounds of Demurrer.

"(1) Because there is no allegation that the alleged acts of the defendant constitute a nuisance.

"(2) Because there is no allegation that the legal remedy of indictment has been exercised and found unavailing; indictment, and not injunction, being the proper mode of redress.

"(3) Because there is no allegation of peculiar and special damage sustained by plaintiffs which would entitle them to injunctive relief.

"(4) Because there is no allegation that the defendant is insolvent.

"(5) Because there is utter failure to state facts constituting any equity."

### "Order Sustaining Demurrer.

"The issue of law arising upon the demurrer of the defendant to plaintiffs' complaint herein having come duly on for trial before me at the regular term of this court on the 7th day of April, 1911, now, after hearing F. A. Miller of counsel for defendant in support of the demurrer, and J. B. McLaughlin, plaintiffs' attorney, in opposition thereto, and due deliberation having been had thereon, I decide and find as follows:

"That said complaint does not state facts sufficient to constitute a cause of action, because it appears upon the face of said complaint that there is no allegation of peculiar and special damage sustained by the plaintiffs which would entitle them to injunctive relief.

"It is therefore ordered that the defendant have final judgment in his favor, sustaining the demurrer to the complaint and dismissing said complaint, with costs. It is further ordered that in the event of an appeal to the Supreme Court from this order the temporary injunction, heretofore granted by Judge Wilson, be continued pending said appeal, provided the plaintiffs execute a new injunction bond in the sum of \$200, in accordance with the usual form of injunction bonds, in favor of the defendant, and that the said bond be filed within 10 days, with sufficient surety, to be approved by the clerk of this court."

### "Exceptions.

"(1) Because his honor, Judge Shipp, erred in sustaining the demurrer, when he should have held that the complaint was sufficient and did state facts upon which injunctive relief should have been granted.

"(2) Because his honor, Judge Shipp, erred in holding 'that said complaint does not state facts sufficient to constitute a cause of action, because it appears upon the face of said complaint that there is no allegation of peculiar and special damage sustained by the plaintiffs which would entitle them to injunctive relief.' He should have held that the complaint did state a good cause of action, and that there was an allegation of such peculiar and special damages as would entitle the plaintiffs to the injunctive relief prayed for.

"(3) Because his honor, Judge Shipp, erred in holding, after the following amendment was proposed, 'Elias Kelly and Burrell J. Kelly, as individuals and as heirs at law of Jacob Kelly, deceased, and in behalf of the other heirs and Jacob Kelly, deceased, and in behalf of the public in general who have dead buried in the graveyard described in the complaint, plaintiffs': 'I do not think that the amendment will do any good; you get the benefit of that you made the motion to amend. I would grant the privilege of amending if it would keep this case in court. I do not think it would.' When

he should have held that if there were a defect of parties, that the amendment would have cured that defect, and that these plaintiffs, in their own behalf, and as heirs at law of Jacob Kelly, deceased, and in behalf of all those who have dead buried there, would be entitled to the injunctive relief asked for in the complaint."

J. B. McLaughlin, for appellants. Miller & Lawson, for respondent.

(WATTS, J. This is a suit for permanent injunction. His honor, Judge Shipp, sustained the demurrer to the complaint interposed by the defendant, and for a proper understanding of the case it will be necessary that the complaint, demurrer, and order of Judge Shipp and the exceptions be reported with the case. He allowed an amendment to the complaint on motion of plaintiffs. The exceptions allege error in his decision. He based his order sustaining the demurrer on the ground "the complaint did not state facts sufficient to constitute a cause of action, because it appears upon the face of the complaint that there is no allegation of peculiar and special damages sustained by the plaintiffs which would entitle them to injunctive relief."

[1] Did the complaint state a cause of action before the amendment and afterwards? We think so. The plaintiffs allege that they are grandsons and heirs at law of Jacob Kelly, and they allege that Jacob Kelly, during his lifetime, set apart and dedicated for the use of the public two acres of land as a graveyard for the burial of the dead, and that it has been used as such for 80 or 90 years, and during all that time known as the "Kelly Cemetery," and during that time parties having dead buried there have kept up the graves by cleaning off the same and by fencing the same; that the right to use this property as a graveyard has never been questioned for over 50 years; that the plaintiffs' parents, grandparents, great-grandparents, and other kindred are buried there, and each of the plaintiffs have children buried there, and expect to be buried there themselves, and their descendants expect to be buried there; that the defendant is trespassing upon and destroying the wire, shrubbery, trees, etc., and making it unfit for the purpose it was set apart and used for, and intends to continue his depredations until the graveyard is made a cotton patch. We think the plaintiffs allege sufficiently peculiar and special damages to entitle them to injunction. They allege that they have kindred buried there, children, parents, and other ancestors. The allegations show they are interested in the graveyard as a whole, and particularly in the plat where their dead lie. I do not know of anything that would disturb and arouse the feelings of a properly constituted person more than the intentional trespass and violation



of the graves of their dead. It shocks and outrages the feelings and arouses the indignation of every right-minded person in a Christian country that the resting place of the dead should be interfered with, and the place set apart for this purpose converted into arable land, plowed over and cultivated, and wiped out and obliterated as a cemetery.

[2] I not only think, when a graveyard is set apart for the use of the public, that those who have kindred buried there can maintain a suit for any unlawful interferences and trespass, but I think any one who has friends buried there can interfere and allege peculiar and special damages. These plaintiffs complain on behalf of themselves and on the behalf of the public in general, who have dead buried there.

[3] Where it is impracticable to bring all the parties before the court, by reason of numbers, one or more can complain on behalf of themselves and such others as may come in. Judge Shipp based his decision on the principles laid down in *Steamboat Co. v. Railroad Co.*, 46 S. C. 327, 24 S. E. 337, 33 L. R. A. 541, 57 Am. St. Rep. 688, *Threatt v. Mining Co.*, 49 S. C. 131, 26 S. E. 970, *Baltzger v. Railway Co.*, 54 S. C. 242, 32 S. E. 358, 71 Am. St. Rep. 789, and other cases affirming that principle. An examination of these authorities will show that, where the public generally sustains injury, the party complaining must show some special or peculiar damage to himself. In the case at bar, the plaintiffs show this. They complain that their dead, buried in a graveyard set apart for that purpose for over 80 years, are being disturbed and their rights invaded by an unlawful attempt on the part of the defendant to take possession of the land occupied by their dead, and to tear down and eradicate all evidence of their resting place, and to plant the land in crops. Not only to disturb their dead, but the dead of others buried in the same graveyard. The very thought of the unlawful intermeddling with the resting place of the dead is abhorrent to the feelings of any one, and this, in my opinion, is sufficient to show special and peculiar damages to the plaintiffs. The law and Christianity devolves upon persons the duty to put away their dead, and gives them the right to protect the resting place of their dead from the wanton and willful depredations of strangers.

[4] "If one has been permitted to bury his dead in a cemetery by the express or implied consent of those in proper control of it, he acquires such possession in the spot of ground in which the bodies are buried, as will entitle him to maintain an action of trespass 'quare clausum fregit' against the owners of the fee or strangers who, without his consent, negligently or wantonly disturb it." *Davidson v. Reed*, 111 Ill. 167, 53 Am. Rep.

613. In the same case, we find: "One who has dedicated land to the public for burial purposes, the dedication having been accepted, may be prohibited from defacing or meddling with the graves thereon at the suit of any one having relatives or friends buried there." In the case of *Davidson v. Reed*, 111 Ill. 167, 53 Am. Rep. 615, 616, we find: "That the public accepted and used the land for the purpose for which it was designated by the owner is also beyond dispute. It has been suggested that the bill cannot be maintained in the name of the two complainants. The complainants were residents of the neighborhood; they had friends buried in the burying ground, and were thus interested in preserving, for themselves and the public, the burying ground as it had been established, and we are of the opinion that they had the right to sue in behalf of themselves and others having a like interest. The bill was brought, and, in our judgment, properly, for the protection of the rights of the people in that particular locality, and we perceive no reason why it may not be maintained in the names of a part for the benefit of all, as well as if all directly interested had joined in the bill."

In the case at bar, the plaintiffs have a general interest as citizens of the community in which the cemetery is located, and have a special and peculiar interest because their parents, children, and grandparents are buried there. We think the circuit judge was clearly in error. The other point involved here is decided in *Ex parte McCall*, 68 S. C. 489, 47 S. E. 974.

The judgment of the circuit court is reversed.

GARY, C. J., and WOODS, HYDRICK, and FRASER, JJ., concur.

(90 S. C. 544)

FRINK v. NATIONAL MUT. FIRE INS. CO.  
et al.

(Supreme Court of South Carolina. March 11, 1912.)

1. INSURANCE (§ 26\*)—ANSWER TO THE MERITS—EFFECT.

A foreign insurance company admitted to do business in the state submits itself to the jurisdiction of the courts of the state by answering to the merits in an action on a fire policy issued in the state, though it has been previously dissolved in the state of its origin.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 33; Dec. Dig. § 26.\*]

2. CORPORATIONS (§ 636\*)—FOREIGN CORPORATIONS—RIGHT TO DO BUSINESS.

A corporation of one state may transact business in another state only with the consent of the latter state, and subject to conditions imposed by the Legislature for the protection of its citizens.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2505–2509, 2571; Dec. Dig. § 636.\*]

**3. EVIDENCE (§ 83\*)—FOREIGN INSURANCE COMPANIES—ADMISSION TO DO BUSINESS—PRESUMPTIONS.**

The court will presume that a foreign insurance company admitted to do business in the state was required to comply with Civ. Code 1902, § 1790 et seq., providing for the admission of foreign insurance corporations to do business in the state on the deposit of securities for the benefit of policy holders to satisfy judgments of citizens of the state procured in the courts of the state.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 105; Dec. Dig. § 83.\*]

**4. INSURANCE (§ 26\*)—FOREIGN INSURANCE COMPANIES—ACTIONS AGAINST AFTER DISSOLUTION.**

Under Civ. Code 1902, §§ 1790, 1866, subjecting foreign corporations doing business in the state to the laws of the state, and providing that corporations, though dissolved, shall continue to be bodies corporate to prosecute and defend suits by or against them, and to enable them to settle their affairs, a foreign insurance corporation admitted to do business in the state and issuing policies in the state may be sued on a policy issued to a citizen notwithstanding its dissolution in the state of its origin, and its liability may only be avoided in the manner prescribed by the policy.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 33; Dec. Dig. § 26.\*]

**5. CORPORATIONS (§ 560\*)—JURISDICTION.**

A receiver of a corporation has no extra-territorial authority.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2253-2260, 2262; Dec. Dig. § 560.\*]

**6. INSURANCE (§ 229\*)—TERMINATION OF POLICY—"NOTICE"—REQUISITES.**

A notice within a fire policy stipulating for its cancellation on notice and repayment of unearned premiums is a personal notice, and a notice by publication requiring the filing of claims against insurer, a foreign corporation, in the state of its origin in proceedings for its dissolution, is insufficient, and the policy holder in the state may sue the corporation in the courts of the state, and obtain a judgment to be satisfied out of the securities deposited by insurer, as required by Civ. Code 1902, § 1796.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 500-503; Dec. Dig. § 229.\*]

For other definitions, see Words and Phrases, vol. 5, pp. 4830-4844; vol. 8, p. 7733.]

Watts, J., dissenting.

Appeal from Common Pleas Circuit Court of Richland County; Robert E. Copes, Judge.

Action by L. J. Frink against the National Mutual Fire Insurance Company and Arthur C. Wakeley, its receiver. From a judgment for defendants, plaintiff appeals. Reversed and remanded.

Hunter A. Gibbes, for appellant. Weston & Aycock, for respondents.

FRASER, J. One W. J. Kyser insured a dwelling house belonging to him with the respondent company for the term of three years in the sum of \$350, and the loss was made payable to the appellant, L. J. Frink, as mortgagee. The insurance company was incorporated under the laws of the state of Nebraska. The policy was issued on the 23d

day of October, 1907. About the 18th day of February, 1908, the house was destroyed by fire. These facts are admitted by the defendant, but it alleged that it is not liable because that on the 4th day of December, 1907, under proper proceedings in the district court of Douglass county, Neb., the court having jurisdiction of the subject-matter, the said company was declared to be insolvent, the defendant, A. C. Wakeley, appointed receiver, and it was further adjudged and decreed that the said National Mutual Fire Insurance Company, be, and the same is hereby, dissolved; that Arthur C. Wakeley duly qualified as receiver, and took charge of the property. The defendant further alleges that by order of the court made on the 18th day of April, 1908, it was duly ordered and adjudged that all persons having any claims of any kind or nature against said National Mutual Fire Insurance Company should present the same to said receiver at Omaha, Neb., on or by the 1st day of August, 1908; that true copies of said order of court were published in the newspapers of all states in which the National Mutual Fire Insurance Company had transacted business; that a true copy of said notice was published once a week for four weeks in the News and Courier of Charleston, S. C., prior to August 1, 1908, and that no demand was ever made by the plaintiff on his behalf on account of said claim prior to or by August 1, 1908. The defendant further alleges that it has had no legal existence of any kind and for any purpose since December 4, 1907, when it was dissolved, as above stated.

[1] The defendant, by its answer, submitted itself to the jurisdiction of the court. To this answer the plaintiff demurred on the ground, first, that the allegations upon their face do not constitute a defense; second, that the facts stated in said allegation are irrelevant to the contract set forth in the complaint, and do not constitute a legal avoidance of liability thereunder. Upon this demurrer the cause was tried in the circuit court for Richland county, before his honor, Judge Robert E. Copes, at the spring term, 1911. His honor overruled the demurrer, dismissed the complaint, and gave judgment for the defendant. The contract provides: "This policy shall be canceled at any time at the request of the insured; or by the company by giving five days notice of such cancellation. If this policy shall be canceled as hereinbefore provided, or become void or cease, the premium having been actually paid, the unearned portion shall be returned on surrender of this policy or last renewal, this company retaining the customary short rate; except that when this policy is canceled by this company by giving notice it shall retain only the pro rata premium." The authorities in other states are conflicting, and

there are none in this state bearing directly on the question, and this case will have to be decided on the general principles of law, as we deem them most applicable.

[2] A corporation of one state has no right to transact business in another state without permission. The state of South Carolina has the right to impose such conditions upon foreign corporations that seek to do business here that its lawmaking department thinks wise and prudent for the protection of its citizens. In the case of *John Hancock Mutual Life Insurance Company v. Warren*, 181 U. S. 76, 21 Sup. Ct. 536, 45 L. Ed. 755, the Supreme Court of the United States said: "The state prescribed the purposes of a corporation and the means of executing those powers. Their purposes and means are within the state's control. This is true as to domestic corporations. It has even a broader application to foreign corporations, and the state court has held that the statute was a condition imposed on the company on doing business within the state. It was said of it that whatever its limitations were upon the power of contracting, whatever its discriminations were, they became conditions of the permit, and were accepted with it. [Authorities cited.] It was for the Legislature of Ohio to dispose of the public policy of that state in respect to life insurance, and to impose such conditions on the transactions of business by life insurance companies within the state as were deemed best."

[3] In the exercise of this right the Legislature provided (section 1790, Code of Laws S. C. 1902): "All and every such foreign corporation carrying on business or owning property in this state shall be subject to the laws of the same in like manner, as corporations chartered under the laws of this state." Section 1796 provides "for the deposit with the proper officer of this state of a certificate of the official of some state of the United States, under his hand and official seal, that he holds on deposit, or in trust, for the benefit of all policy holders or members of such company or association securities worth at least one hundred thousand dollars, or in the absence of such capital or deposit, then with the State Treasurer of South Carolina valid securities aggregating ten thousand dollars or a bond for said amount, made by a solvent surety company, said treasurer shall be the judge of the validity of such securities and bond, which bond shall be conditioned to pay any judgment entered up in any court of competent jurisdiction in this state, upon a policy of insurance issued to any citizen of this state by any such company, and said judgment shall be a lien upon such securities." We must assume that the officer has done his duty and has the means at hand to enable the plaintiff to get his money, if he can get his judgment. The securities are to be held to pay judgments of citizens of this state procured in the courts of this state. This

fund is not provided for the general creditors, and may or may not be available for them.

[4] Section 1866 provides: "All corporations, whether they expire by their own limitation or be annulled by the Legislature, or otherwise dissolved, shall be continued bodies corporate for the purpose of prosecuting and defending suits by or against them and of enabling them to settle and close their affairs, to dispose of and convey their property and to divide their capital, but not for the purpose of continuing the business for which they were established." That means they cannot make new contracts, and cannot mean that the corporation is discharged from all liability on existing contracts. "It can be sued" says the statute. The corporation itself has answered. Can it plead that it is dead? It can no more do so than a natural person. If the corporation can appear and answer, it must set up a valid defense. The contract of insurance provides a way in which its liabilities may have been avoided.

[5] That a receiver has no extraterritorial authority is too well settled to require the citation of authority. It would have been an easy matter to have procured the appointment of a receiver in this state.

[6] For cancellation, the contract required notice and repayment of unearned premiums. The defendant says notice was published in the News and Courier. This was an excellent way to give notice, if the proper steps had been taken to make it legal notice. 21 Am. & Eng. Ency. of Law, p. 586, says: "(5) Statements Published in Newspapers.—A notice, advertisement, or other statement published in a newspaper, if not made pursuant to some statute or judicial order so as to have the legal operation of notice regardless of want of actual knowledge by the person to be charged, does not of itself afford implied or constructive notice to a person who is a subscriber to or habitual reader of that newspaper. In order to charge such person with notice of the fact or statement published, it must be proved that he actually read it; in other words, actual notice must be shown." Unless some law can be found that makes such a publication notice, it is not notice. Notice must be personal unless otherwise provided by law. The defendant had or ought to have had knowledge of the residence of every policy holder, and could have tried, at least, to have given notice to every policy holder so that other insurance could have been secured. Here the order and notice required the claims to be filed in Omaha, Neb. It may be that, if legal notice had been given the policy holder of the dissolution of the corporation before the loss occurred, that would have operated to cancel the policy, and limit the claim of the insured to the unearned premium. But in this case the order of dissolution does not provide for notice to the policy holder, and there is no

allegation in the answer that any notice was actually received by him, or that constructive notice was given in accordance with any law of Nebraska or of this state. The laws of South Carolina provide the means of procuring payment of established claims of its citizens in this state, and, until that fund is exhausted, the citizen of this state is not required to go to a distant state. If this were not the law, then see the anomalous condition. The state of South Carolina has the right to make conditions upon which a foreign corporation may do business in this state. One of the conditions in abundant courtesy is that a foreign corporation may do business with our citizens upon filing a bond with surety for the protection of the citizens of this state. When the fund is most needed (the corporation insolvent), the whole matter is taken away, and the insolvency of the principal discharges the surety.

The judgment of this court is that the judgment of the circuit court be reversed and the demurrer sustained, and that the cause be remanded to the circuit court for such further proceedings as may be necessary.

GARY, C. J., and WOODS and HYDRICK, JJ., concur.

WATTS, J. (dissenting). I cannot concur in the opinion of the majority of the court. The only question before the court is whether the dissolution of the defendant corporation, and the appointment of a receiver therefor by a court of the state of Nebraska, the state which had created the corporation, terminated the outstanding policies of insurance, and rendered them nugatory. There is no question as to the facts. The insurance company had been dissolved and a receiver appointed at the time of the fire. The receiver was appointed on December 4, 1907, and the fire occurred on February 18, 1909. If the policy had been canceled from any cause, the company was not liable. My opinion is that when the insurance company was, by an order of the court of competent jurisdiction of the state creating it, dissolved and put it in the hands of a receiver, the policy was canceled. "It is well settled that an adjudication of insolvency or the appointment of a receiver for an insolvent company operates as a cancellation of all outstanding policies." *Commonwealth v. Mass. Fire Insurance Co.*, 119 Mass. 45; 3 Cooley's Briefs on the Law of Insurance, 2810; *Taylor v. North Star Mutual Insurance Co.*, 46 Minn. 198, 48 N. W. 772. "And the rule is not affected by the provisions in the policies requiring notice to be given to insured when cancellation is desired by the company." *Reliance Lumber Company v. Brown*, 4 Ind. App. 92, 30 N. E. 625. "The executory contracts of a corporation become nugatory after it is forced into an involuntary liquidation and dissolution."

*People v. Insurance Co.*, 91 N. Y. 174. "The effect of a valid cancellation is to relieve the insurer from all liability on the policy." *Albany City Fire Insurance v. Keating*, 46 Ill. 394. When receiver was appointed all policies were canceled, and policy holders became creditors for any accrued claims they then had against the company, and at the time of the dissolution of the corporation and appointment of receiver the only claim plaintiff had against the defendant was for his unearned premium, and he is not suing for that. His fire loss was over 14 months after the receiver was appointed, and in my opinion his policy had been canceled. I think the decree of dissolution by the court in Nebraska is effectual everywhere, and being dissolved there on December 4, 1907, was dissolved in this state. 9 Am. & Eng. Ency. 908; 10 Cyc. 1329.

I think the judgment of the circuit court should be affirmed.

(91 S. C. 55)

B. F. JOHNSON PUB. CO. v. BLEASE, Governor, et al.

(Supreme Court of South Carolina. March 21, 1912.)

# 1. APPEAL AND ERROR (§ 839\*)—QUESTIONS REVIEWABLE—EXCEPTIONS.

The judgment of the Supreme Court on appeal will be confined to a consideration of the exceptions.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2915, 3279-3300; Dec. Dig. § 839.\*]

# 2. SCHOOLS AND SCHOOL DISTRICTS (§ 80\*)—PUBLICATION OF SCHOOL BOOKS—CONTRACTS.

Where the board of education accepted a bid to supply school books, and the bidder signed the contract prepared by the board, but did not deliver it because of a disagreement as to its construction, the board could make a new contract under the advertisement for bids requiring the execution of a contract within a specified time.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. §§ 192-194; Dec. Dig. § 80.\*]

Appeal from Common Pleas Circuit Court of Richland County; John S. Wilson, Judge.

Action by the B. F. Johnson Publishing Company against Cole L. Blease, as Governor and ex officio chairman, and others, constituting the State Board of Education. From an order denying relief, plaintiff appeals. Affirmed, and proceedings dismissed.

R. H. Welch, for appellant. J. Fraser Lyon, Atty. Gen., and Shand & Shand, for respondents.

FRASER, J. The state board of education, in the performance of their duties, advertised for bids to supply the children of public schools with school books. The appellants submitted a bid, which was accepted by the

board. A contract was drawn, as provided for by the advertisement, for execution. The contract was signed by the appellants and delivered to their agent, Mr. F. F. Hough, who carried it to Columbia to be signed by the board of education. Finding that there was a difference in the construction of certain provisions of the contract between the appellants and the board of education, the agent of appellants did not deliver the contract to the board. The board, finding that the difference was causing delay, and after repeated efforts to procure the contract, made a contract with another concern for the books. The appellants applied to his honor Judge Wilson, by petition, the prayer of which is as follows, so far as it affects this case: "Wherefore the petitioner prays that the respondents be required and commanded to properly execute said contract \* \* \* and for such other and further relief as may be equitable and just." Judge Wilson granted a rule to show cause, and upon final hearing, made the following order: "On hearing the petition in this case, the rule to show cause, and the return thereto, and full argument of counsel for both parties, and on full consideration of the issues involved, it is ordered and decreed that the rule to show cause be discharged and the proceedings dismissed. It is manifest in this case there was a call for bids, a bid for readers and other books made by petitioner, and the bid accepted. But the call for bids stated as a condition that the publishers whose bids were accepted should execute and deliver to the board a stipulated written contract. Such a contract was soon thereafter prepared by the state superintendent of education and sent to the petitioner. But because of a difference between the parties as to the interpretation and construction of a clause in the contract, the petitioner, although it signed the submitted contract, would not deliver it, and made it plain that it would not do so, unless so modified verbally or otherwise as to make it clearly conformable to petitioner's interpretation of it. Thereupon the state board of education revoked the adoption of petitioner's readers and adopted others, which contracts were executed and delivered, and under which books are now being furnished to the pupils of the public schools in South Carolina. Thereafter the petitioner delivered to the state superintendent of education the proposed contract which had been sent to it, duly executed, but with the three readers plainly erased in ink; the other books remaining. The state board thereupon accepted this modified contract by executing it in its modified form. Therefore this petitioner has no right to seek the aid of the courts to command respondents to execute a contract which by the acts of the petitioners was never consummated as to the specified readers as required by the call

for bids and the bid made and accepted." From this order the appeal was taken.

The following are the exceptions:

"(1) The court erred in not ordering and requiring the respondents as the state board of education to properly execute a contract with the appellant covering the readers that had been previously adopted.

"(2) The court erred in holding that the respondents could revoke their acceptance of the appellant's bid under the facts as they appeared.

"(3) The court erred in holding that the reason the contract was never consummated was due to the acts of the appellant."

[1] The judgment of this court will be confined strictly to the consideration of the exceptions.

[2] Exceptions 1 and 3 are overruled.

Mr. F. F. Hough, the agent of the appellants, makes this condensed statement under oath: "That the contract was not signed by the state board of education, because the B. F. Johnson Publishing Company could not agree to the interpretation sought to be placed upon a certain section of the contract, relating to exchange allowances." This statement also fully justifies the board in making a new contract. Under the advertisement, a written contract, setting out all the terms, was to have been made within 15 days. The appellant had the contract and still has it. The bid was accepted June 20th. Appellant's telegram of July 21st shows no disposition to complete the execution of the contract. This exception is overruled.

The judgment of this court is that the order appealed from is affirmed, and the proceedings dismissed.

GARY, C. J., and WOODS, HYDRICK, and WATTS, JJ., concur.

(91 S. C. 17)

# CITY OF CHESTER v. NATIONAL SURETY CO.

(Supreme Court of South Carolina. March 13, 1912.)

## 1. PRINCIPAL AND SURETY (§ 105\*)—DISCHARGE OF SURETY—EXTENSION OF TIME—WHAT CONSTITUTES.

Where a surety's principal entered into a contract with the city to complete the installation of a filter plant within six weeks after notice that the filter building was ready, and in reply to the principal's inquiry the city's representative stated that the building would be ready on March 15th, and on the 17th telegraphed: "Filter building ready. When can you start installation?" to which the principal replied that it could not start before April 1st, and the city's representative acquiesced in that date, there was no extension of time discharging the surety; the telegram not being notification provided for in the contract.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. §§ 191, 192, 196, 201-210; Dec. Dig. § 105.\*]

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

## 2. MUNICIPAL CORPORATIONS (§ 352\*)—CONSTRUCTION—TIME.

Whether time is of the essence of a contract depends upon the intention of the parties, to be ascertained from the language they used, read in the light of the character and purpose of the contract, and the circumstances under which it was made, so that a contract to install a filter plant for municipal waterworks, which provided that it should be completed within six weeks after notification of the completion of the filter building, the performance being guaranteed by a bond with a surety, makes time of the essence of the contract to the extent of all damages occurring to the city by the failure of the principal to complete the installation within the time limited.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 883; Dec. Dig. § 352.\*]

## 3. MUNICIPAL CORPORATIONS (§ 362\*)—CONSTRUCTION—ADOPTION BY REFERENCE.

A contract to install a filter plant for municipal waterworks, providing that it should be built in accordance with the specifications attached and according to all the conditions set forth, though not fixing the time within which performance must be made, does not waive the time limit fixed by the specifications; those being adopted as part of the contract by reference.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 894, 895; Dec. Dig. § 362.\*]

## 4. PRINCIPAL AND SURETY (§ 123\*)—DISCHARGE OF SURETY—NOTIFICATION.

A surety's bond for the performance of a contract for the installation of a filter plant for municipal waterworks provided that, if the principal should default in performance of the contract or abandon the work, the obligee should immediately notify the sureties. *Held* that, unless the principal abandoned the work, the municipality was under no obligation to notify the surety of any default until the time limit for performance had expired, because until that time had elapsed there was no default.

[Ed. Note.—For other cases, see *Principal and Surety*, Cent. Dig. §§ 304-311; Dec. Dig. § 123.\*]

Appeal from Common Pleas Circuit Court of Chester County; Ernest Moore, Special Judge.

Action by the City of Chester against the National Surety Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Butler & Hall, for appellant. J. C. McLure, for respondent.

HYDRICK, J. This action was brought on the bond given by defendant as surety for the performance of a contract made by the Greer Filter Manufacturing Company with the plaintiff to install a filter plant in connection with the plaintiff's system of waterworks. The contract provides that the filter plant shall "be built in strict accordance with the city engineer's specifications hereto attached \* \* \* and according to all the conditions and guaranties as set forth in said specifications." The specifications provide that the successful bidder "must agree to complete the work within six weeks

after the date when he has been notified by the city that the filter building is complete and the foundations are ready." The bond provides that if the principal shall default in the performance of the contract according to its terms, or shall abandon the work, "the obligee shall immediately notify the company," and thereafter the company shall have the right to assume and sublet the contract. The contract and bond were executed in August, 1909. On March 1, 1910, the filter manufacturing company wrote the city engineer asking for some definite information as to when they could go to work, saying that it would take "about three weeks to complete the plant and get it ready to run." On March 3d the city engineer replied, "We will be ready for you to start the filter installation on March 15th." On March 17th he telegraphed the manufacturing company: "Filter building ready. When can you start installation? Answer mail." On March 18th the company answered: "We will not be ready to start work at the city of Chester before April 1st. We have been delayed so many times in the delivery of our material that we stopped all our orders, until we had definite information that you would be ready for us. It will probably take another week for the material to all be assembled in the shops, and a week for delivery. We trust this will not inconvenience you whatever, and assure you that we will be on hand at that time." On March 21st the city engineer wrote the company: "We note that you will commence the installation of the filters on April 1st, and beg to advise that same will be satisfactory to us." On April 5th the company wrote the city engineer that it had discovered that it would be nearly May 1st before the material for the work could be gotten ready. On April 7th the city engineer replied: "Filter plant must be completed according to contract, which is six weeks after notification that building is ready. April 1st is date set by you, and agreed to by this city, as date of notification." On April 13th the company replied: "We will endeavor to ship the remainder of the material necessary to complete your work promptly, and will try to have the work completed by May 15th." On April 28th the company wrote that it would be between May 15th and June 1st before the material could be assembled at Chester, and asked that the time for completion of the contract be extended 30 days from June 1st. On April 30th the mayor of Chester replied, declining to grant the extension, and saying that the city would expect the contract to be completed on May 15th. On the same day (April 30th) the city attorney notified defendant of the "impending default," stating the facts, and that the city would look to defendant for the completion of the con-

tract according to its terms, and hold defendant responsible for all damages resulting from the failure to so complete it. On May 14th the city attorney gave defendant formal notice that the manufacturing company had defaulted in the performance of the contract, that the time limit had expired, and the company had done no work at all on the filter plant, and asked whether defendant intended to assume the contract and carry it out. After some further correspondence, both sides reserving their rights, the defendant declined to assume the contract. The court directed a verdict for plaintiff for the damages proved, about which there was no dispute.

Appellant correctly states the issues raised by the appeal as follows: "(1) Whether the surety is discharged by extension of time of performance of the contract without its knowledge or consent; (2) whether time was of the essence of the contract, and, if so, was there a waiver of same; (3) whether immediate notice was given to the surety of the default of the principal obligor, as provided in the contract; and from these considerations (4) whether the circuit judge erred in refusing to grant a nonsuit and in directing a verdict, taking from the jury the questions of fact involved."

[1] In answering the first issue, the first question is: Was there any extension of time? For, obviously, if there was no extension of time, the question whether defendant was discharged thereby does not arise. We cannot accept appellant's contention that the telegram of March 17th definitely fixed the time from which the six weeks provided in the contract for the completion of the work should begin to run. The testimony shows that several letters had previously passed between the city engineer and the filter manufacturing company relative to the time when the filter building would be completed. The company was apparently seeking this information for its own benefit and convenience in determining when to order the materials for the plant to be shipped. By the terms of the contract, the time did not begin to run, until the city gave notice that the filter building was complete and the foundations were ready. The question asked in the telegram of March 17th, "When can you start installation?" shows clearly that that telegram was not intended, and the answer shows equally clearly that it was not accepted, as the notice required by the contract to fix the time from which the six weeks should begin to run. The letter of the company of March 18th, and the reply of the city of March 21st, definitely fixed that time as April 1st, and the correspondence shows that it was so understood and acted upon afterwards by both parties to the contract. There was no extension of that time by the city.

[2] Whether time is of the essence of a

contract is ordinarily to be determined by the construction of the contract in the light of the settled principles of law upon that subject. As in all other questions of construction, the intention of the parties should prevail, and it should be ascertained, if it can be, from the language which they have used, which may be read in the light of the character and purpose of the contract and the facts and circumstances under which it was made and the construction put upon it by the parties themselves. Applying these principles to the construction of this contract, it is clear that the parties intended that time should be of the essence of it—at least to the extent of making the principal and surety responsible for all damages occurring to the city by reason of the failure of the principal to perform the contract within the time limit agreed upon, and to that extent alone did the circuit judge hold that time was of the essence of it.

[3] The next question is: Was there a waiver by the city of the time limit provision of the contract? Appellant contends that such a waiver must be implied from the failure to insert the provision with regard to the time in the body of the contract, instead of adopting it by a mere reference to the specifications. The same might be said of any other provision of the specifications. The agreement to perform the contract according to the specifications adopted the several provisions of the specifications as effectually as if each had been written into the contract itself. In fact, the specifications were adopted as the contract—they specified it. So far from waiving the provisions as to time, the evidence shows that compliance with it was persistently insisted upon.

[4] The condition of the bond that "the obligee shall immediately so notify" the defendant of its principal's default was strictly and literally complied with. Appellant is mistaken in supposing that the city was under obligation to notify the surety of any default, until the time limit had expired, because the principal had every moment of that time to perform the contract, and until that time had elapsed, the contract being still unperformed, there was no default. Nevertheless, as soon as the city ascertained from its correspondence with the filter manufacturing company that it could not or would not complete the work within the time limit agreed upon, it notified the defendant of the "impending default," notwithstanding the principal still had two weeks to complete the job; and on the very day that the default actually occurred—that is, the day that the time limit expired—the contract being still unperformed, the defendant was notified of the default.

There was no issue as to any matter of fact—at least as to any fact about which more than one reasonable inference could

be drawn. Therefore, the court properly directed the verdict.

Judgment affirmed.

GARY, C. J., and WOODS, J., concur.

(91 S. C. 13)

**PEOPLE'S BANK OF GREENVILLE v. SPEEGLE et al.**

(Supreme Court of South Carolina. March 13, 1912.)

**COUNTIES (§ 167\*)—CLAIMS AGAINST COUNTIES—WARRANTS—INDORSEMENT.**

Where the holder of a fraudulent county warrant indorsed it over to a bona fide holder for value, the bona fide holder can recover on the indorsement though never properly presenting the warrant for payment, for the indorsement guaranteed that the instrument was valid and genuine and the right of action accrued on proof of its invalidity.

[Ed. Note.—For other cases, see Counties, Cent. Dig. § 249; Dec. Dig. § 167.\*]

Appeal from Common Pleas Circuit Court of Greenville County; George W. Gage, Judge.

Action by the People's Bank of Greenville against Hattie K. Speegle and others. From a judgment for plaintiff, defendant Speegle appeals. Affirmed.

B. M. Shuman, for appellant. Jas. A. McCullough, for respondent. B. A. Morgan, for Tanner and Wood.

WATTS, J. This was an action for damages upon an indorsement of a fraudulent claim against Greenville county. On March 31, 1904, the defendant, Hattie K. Speegle, sold to the plaintiff for \$404 what purported to be a valid claim for \$440 against Greenville county for three mules, the claim being in favor of Tanner and Wood. This claim was indorsed before delivery by Mrs. Speegle and by Tanner and Wood. Before the transfer and sale, the claim had been approved by the then county board of commissioners, of whom J. E. Speegle, supervisor (the husband of defendant Hattie K. Speegle), was chairman. Subsequently this claim was presented to J. N. Walker, supervisor, who refused to pay the same upon the ground that it was fraudulent. Bank v. Goodwin, 81 S. C. 420, 62 S. E. 1100. It was passed upon and rejected as fraudulent by the investigating committee appointed under Act of 1905, 24 Stat. 1109. Thereafter plaintiff applied in the original jurisdiction of this court for a writ of mandamus to compel J. P. Goodwin, supervisor, to pay this and other claims, which plaintiff held as assignee, or to include them in his estimate of expenses to the General Assembly. The court denied the writ so far as this claim was concerned, holding that as it was not dated it was not a valid judgment against Greenville county. People's Bank v. Goodwin, 81 S. C. 419, 62

S. E. 1100. This opinion was filed November 16, 1908. The claim, being for the year 1904, was barred unless presented in that year, and was then believed by plaintiff to be fraudulent. It elected to treat it as such and sued, alleging the claim was fraudulent and that the defendants, by their indorsement, had guaranteed its validity and hence were liable in damages for the breach of the warranty contained in their indorsement for an amount equal to that advanced upon the claim.

The case came on for trial before his honor Judge Gage and a jury, and at the close of the testimony both plaintiff and defendant moved the court to direct a verdict. The defendant, Mrs. Speegle, made her motion on the ground that the action being based on the allegation that the claim was fraudulent and in fact no claim against the county, and it not appearing that the plaintiff or any one else had ever presented the claim to the county board of commissioners for approval in such shape as to give said board jurisdiction to pass on the validity thereof, no action thereon could be maintained in the court of common pleas, and that, until such claim was presented and rejected by said board, plaintiff could not recover from the said Hattie K. Speegle anything, on the ground that the same was not a valid claim, the said board of county commissioners being the only court or tribunal having jurisdiction to pronounce said claim invalid and reject it, and, it not appearing this had been done, the plaintiff could not maintain this action. Judge Gage refused the motion of defendant. The jury found a verdict for plaintiff under direction of the court on the ground the claim sold by defendant to plaintiff was fraudulent, spurious, and void. Defendant, Mrs. Speegle, appeals, alleging error on part of the circuit judge in not directing verdict in her favor on grounds moved for. We do not think this position can be sustained. This action was not brought upon a claim against the county, but upon an indorsement upon what purported to be a valid, outstanding claim against the county, when in fact the pretensive claim against the county, indorsed by defendant, was spurious, fraudulent, and void. Here we have the defendant in possession of a claim against Greenville county for \$440 indorsed by Tanner and Wood. It purports to be a bona fide claim against the county. She sells it to the plaintiff and indorses it, thereby guaranteeing it to be what it purports to be, an honest, valid, bona fide claim against the county for the amount called for, when in fact it was spurious and fraudulent, and the county was liable for no such claim. The whole claim, as far as Greenville county was concerned, was repudiated and declared to be fraudulent. These



defendants by their indorsement guaranteed that the claim was genuine and valid, and warranted it by their indorsement to be genuine and valid, and, when it was declared to be invalid and fraudulent, became liable by their indorsement for the amount of the loss sustained by the plaintiff, by reason of its purchasing what was supposed and purported to be an honest, valid, bona fide claim which turned out to be an invalid, spurious, and void claim. Here plaintiff bought what it supposed was a valid claim, guaranteed by the indorsers thereon to be such, paid out \$404 for it, acting in good faith and paying full value. It turns out that the claim was spurious and fraudulent, in fact no claim at all. The plaintiff had paid out as it were good money for a "gold brick." It does not make any difference whether the defendant knew the claim was fraudulent or not. When defendant offered it for sale as a good claim and indorsed it, she guaranteed it to be what it purported to be, an honest, valid, bona fide claim and made herself liable for any breach in the warranty contained in the indorsement for the amount of loss sustained by plaintiff. In *Strange v. Ellison*, 2 Bailey, 385, quoted with approval by Chief Justice Pope in *Hall v. Latimer*, 81 S. C. 97, 61 S. B. 1069, the court held: "Every one who vends an article impliedly undertakes that it is what its appearance indicates, and that it is not disguised so as to make it what it is not. This principle applies to all sorts of commodities in whatever form they may exist." We find the same learned and lamented Chief Justice in the same case quoting with approval from 18 Enc. 1240, as follows: "It is a general rule that one making a sale or transfer of a chose in action warrants its genuineness, and this is so whether he warrants it in terms or is silent at the time when the sale or transfer is made." Also he quotes from *Watson v. Chesire*, 18 Iowa, 202, 87 Am. Dec. 382, "that a party who transfers a paper without recourse is held still to guarantee the validity of the paper."

The exceptions are overruled. Judgment affirmed.

GARY, C. J., and WOODS, HYDRICK, and FRASER, JJ., concur.

(91 S. C. 23)

BRIGGS et al. v. DONALDSON et al.

(Supreme Court of South Carolina. March 16, 1912.)

APPEAL AND ERROR (§ 1170\*)—HARMLESS ERROR—VARIANCE BETWEEN PLEADING AND PROOF.

A variance between the pleading and the proof, not misleading the defeated party to his prejudice, must be disregarded on appeal,

as required by Code Civ. Proc. 1902, §§ 88, 368.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4540-4545; Dec. Dig. § 1170.\*]

Appeal from Common Pleas Circuit Court of Greenville County; Geo. W. Gage, Judge. "Not to be officially reported."

Action by W. A. Briggs and another against M. L. Donaldson and another, partners trading under the firm name of Donaldson & Hoke. From a judgment for plaintiffs, defendants appeal. Affirmed.

McCullough & Blythe, for appellants. Adam C. Welborn, for respondents.

WOODS, J. This appeal is from a judgment of the circuit court, affirming the judgment of the magistrate. The decree of the circuit court demonstrates that the case has been rightly decided, and that there is no substantial merit in the exceptions. The technical points cannot avail. Section 88 of the Code of Procedure provides that in magistrates' courts "a variance between the proof on the trial and the allegations in the pleading shall be disregarded, as immaterial, unless the court shall be satisfied that the adverse party has been misled to his prejudice thereby." The record shows that the defendant was not misled to his prejudice. Section 868 requires that technical errors and defects be disregarded.

The judgment of this court is that the judgment of the circuit court be affirmed for the reasons therein stated.

GARY, C. J., and HYDRICK, J., concur.

(91 S. C. 51)

HOLLIDAY CO. v. RALEIGH & C. R. CO.  
(Supreme Court of South Carolina. March 21, 1912.)

1. PLEADING (§ 248\*)—COMPLAINT—AMENDMENT—ALLOWANCE.

A complaint in an action against a carrier for negligently transporting live stock may be amended under Code Civ. Proc. 1902, § 194, by eliminating the allegation that plaintiff filed with the carrier's agent a claim, and that it was responsible for the loss as limited by the bill of lading, and allow a new complaint setting out the same injury and negligence, but omitting such allegation.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 686-709; Dec. Dig. § 248.\*]

2. PLEADING (§ 248\*)—COMPLAINT—AMENDMENTS—WHEN AUTHORIZED.

The court may allow an amendment to the complaint alleging a new cause of action for the same injury and negligence alleged in the original complaint.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 686-709; Dec. Dig. § 248.\*]

Appeal from Common Pleas Circuit Court of Marion County; S. W. G. Shipp, Judge. "To be officially reported."

Action by the Holliday Company against the Raleigh & Charleston Railroad Company. From a judgment for plaintiff, defendant appeals. Affirmed.

M. C. Woods, for appellant. Jas. W. Johnson, for respondent.

FRASER, J. This is an action for damages to stock.

The plaintiff alleges "that on or about the 12th day of December, A. D. 1906, the plaintiff delivered, or caused to be delivered, to the defendant, through its agent and connecting line, the Atchison, Topeka & Santa Fe Railway Company, at Blackwell, in the now state of Oklahoma, and the defendant received, twenty-nine (29) horses and mules, the property of the plaintiff, which the defendant as a common carrier as aforesaid promised and agreed, in consideration of a reasonable compensation paid, or to be paid it, safely and promptly to carry to Marion, in the county of Marion, and state of South Carolina, and there to deliver the same to the plaintiff." By the fifth paragraph of the complaint the plaintiff alleges "that defendant did not safely and promptly carry and deliver said mules and horses pursuant to said agreement, but, on the contrary, kept said animals on the road for a much longer time than was necessary, and negligently exposed them to the cold and freezing weather, and otherwise neglected them, and as a direct result thereof all of said animals were made sick, and seven of them died almost immediately after they were delivered to plaintiff; that six of said animals died within less than twenty-four hours after the defendant delivered them, and one soon thereafter, and the remainder were greatly damaged from the causes aforesaid." In the seventh paragraph the plaintiff alleges: "That on the 8th day of March, 1907, plaintiff filed with the defendant's agent at Marion, S. C., a claim made out in detail showing said loss, but the defendant has never adjusted nor paid the same, nor any part thereof, nor has the defendant traced said shipment and informed plaintiff when, where, and by which carrier the said animals were damaged and destroyed, and plaintiff alleges that defendant is responsible for said loss and damage to the extent of \$100 on each animal, the bill of lading limiting defendant's liability on each animal to \$100," and claims judgment for \$1,413.

After the pleadings were made up, the plaintiff gave notice of motion to amend the complaint, and served with the notice a copy of the complaint as he would have it amended. This new complaint had two causes of action, setting out the same injury to the stock and negligence, but the seventh paragraph of the complaint was omitted in the first cause of action, and plaintiff sought to allege that defendant itself had damaged the stock.

Under the second cause of action, the plaintiff set up that in addition to the claim filed on the 8th day of March, 1907, the plaintiff had on the 25th day of April, 1907, filed with the defendant an additional statement, and that the defendant had not traced the damage, and was therefore responsible. The motion was heard by Judge Shipp, and an order granted allowing the complaint amended, as moved for. The defendant appealed on the following exceptions:

"(1) Because his honor erred, it is respectfully submitted, in allowing the plaintiff to amend its complaint by omitting therefrom the seventh paragraph of the complaint, in that, plaintiff, having elected to sue on a specific contract of limited liability, cannot eliminate by way of amendment the remedy upon which it elected to sue and base its action on an entirely different remedy, it being submitted that the Code authorizes amendments only which are material to a cause of action which has been defectively stated, and does not authorize a substantial change in the cause of action; it being further submitted that there was no defect in the cause of action as originally stated, and the amendment corrects no defect, but, on the contrary, substantially and entirely changes from one cause of action based on one remedy to another cause of action based on another remedy.

"(2) Because his honor erred, it is respectfully submitted, in allowing the plaintiff to amend its complaint by setting up a second cause of action; it being submitted that the original complaint, having been limited to one cause of action based on a specific remedy, is not amended by the insertion of a second cause of action based on an entirely different remedy, such second cause of action being in effect and in fact an entirely different and independent suit, containing all the elements necessary to a perfect cause of action, and it was error to allow such so-called amendment when the same was no amendment of a change of cause of action or the insertion of another cause of action in the original cause of action; it being further submitted that the Code does not authorize the insertion of a second cause of action, when such cause of action is necessarily independent, by way of amendment."

[1] The first exception is overruled. Authority for this will be found in *Taylor v. Railroad Company*, 81 S. C. 579, 62 S. E. 1114, where Mr. Justice Woods, delivering the opinion of the court, says: "The cases in this state are irreconcilable, and there is a great contrariety of opinion on the subject in other jurisdictions. \* \* \* The important matter is to state a fixed rule on which the courts and the Bar may rely. Section 194 provides: Under this section the power of the court to allow amendment 'by correcting a mistake in the name of a party or a mistake in any other respect' is unlimited, except by the obligation imposed by the

statute on the court to see that the amendment is in furtherance of justice, and that such terms are imposed as may be just. This power is conditioned on proof of a bona fide mistake in setting forth the plaintiff's rights and the defendant's invasion of them. Unless the amendment proposed relates to the same transaction or the same subject as the original complaint, then it is manifest the plaintiff cannot claim to have made a mistake in the matter to which his pleading relates. When, however, the plaintiff makes the mistake of supposing one of his rights has been invaded by the defendant in one transaction or a series of transactions relating to the same subject, and discovers another and different right was invaded, it is within the power of the court, when it appears to be in furtherance of justice, to grant the amendment, though in strictness the amendment amounts to a change of the cause of action, or the insertion of another cause of action." This is full authority for overruling this exception.

[2] The second exception is likewise overruled, and full authority for overruling this exception is found in *Insurance Company v. Southern Railway*, 82 S. C. 3, 62 S. E. 1116, where the opinion was likewise delivered by Mr. Justice Woods, in which the court says: "The point that the circuit court has no power to allow an amendment setting up a new cause of action has been decided against the contention of the defendant in the recent case of *Taylor v. A. C. L. R. R. Co.*, 81 S. C. 574 [62 S. E. 1113]."

The judgment of this court is that the order appealed from be, and the same is hereby, affirmed, and the case remanded to the circuit court for such further proceedings as may be proper.

GARY, C. J., and WOODS, HYDRICK, and WATTS, JJ., concur.

(91 S. C. 29)

#### STATE v. WELDON et al.

(Supreme Court of South Carolina. March 16, 1912.)

#### 1. CRIMINAL LAW (§§ 641, 662, 918\*)—TRIAL—RIGHT OF COUNSEL—PRODUCTION OF WITNESSES.

Where a large crowd of people intensely hostile to the accused assembled at the courthouse during their trial for murder, and crowded the space within the bar immediately around the judge, the jury, and the witnesses, so that counsel for the accused during the trial did not see the jury, until he addressed them, because of the crowd, and several times requested the court to clear away the crowd, so that he might see the witnesses whom he was examining, there was a substantial interference with the exercise of the right of the accused, under Cr. Code 1902, § 49, to be heard by counsel, to defend himself, and to have a right to produce witnesses and proofs in his favor, and to meet the witnesses produced against

him face to face, so as to entitle accused, upon conviction, to a new trial.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 1496-1506, 8, 1538-1548, 2163-2196, 2219-2224; Dec. Dig. §§ 641, 662, 918.\*]

#### 2. JURY (§ 31\*)—RIGHT TO TRIAL BY IMPARTIAL JURY—CONSTITUTIONAL PROVISIONS.

Where a large crowd of people intensely hostile to the accused crowded the courthouse during their trial for murder, and filled the space within the bar immediately around the judge, the jury, and the witnesses, so that counsel for accused did not see the jury, until he addressed them, because of the crowd, and the crowd's intrusion into that part of the courtroom was calculated to overawe the jury, and it was not so safeguarded against extraneous influences as to allow the defendants the right of trial by an impartial jury, guaranteed by Const. art. 1, § 18, the defendants, upon conviction, were entitled to a new trial.

[Ed. Note.—For other cases, see *Jury*, Cent. Dig. §§ 204-219; Dec. Dig. § 31.\*]

#### 3. CRIMINAL LAW (§ 916\*)—TRIAL—TIME FOR PREPARATION OF DEFENSE.

Where the counsel appointed by the court to defend defendants, charged with murder, on his way to court through the crowd, heard expressions in regard to lynching which convinced him that if he should ask for the three days for preparation allowed by Cr. Code 1902, § 40, the defendants would be lynched, and under the compulsion of this fear went into the trial without preparation, the deprivation of this right entitled the defendants to a new trial.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 2159, 2160; Dec. Dig. § 916.\*]

Appeal from General Sessions Circuit Court of Florence County; Geo. W. Brown, Special Judge.

"Not to be officially reported."

Alex. Weldon and William Burroughs were convicted of murder. Motion for new trial denied, and they appeal. Reversed and remanded for new trial.

W. F. Clayton and Willcox & Willcox, for appellants. Walter H. Wells, for the State.

WOODS, J. The appellants, Alexander Weldon and William Burroughs, were convicted of the murder of Elihu Moye, and are under sentence of death. By a former appeal, the defendants sought a new trial in this court, on the ground that they had not had a fair trial, without having made a motion in the court of general sessions on that ground; but the appeal was dismissed as premature, without prejudice to the right of the defendants to move for a new trial in the circuit court. The orders of this court and the disposition of the appeal appear in 88 S. C. 555, 71 S. E. 33, and 89 S. C. 308, 71 S. E. 828.

After the dismissal of the former appeal, a motion was made in the court of general sessions for a new trial, on the grounds, first, that the defendants had discovered evidence in their favor after their trial which they

should be allowed to offer; and, second, that the trial was not fair and impartial. The motion was refused, and this appeal brings up for review both questions made in the court below.

The affidavits as to the after-discovered evidence fall short of making out a defense so clear and convincing as to warrant this court in holding that the circuit judge abused his discretion in not granting a new trial on the first ground.

[1] The second ground of appeal—the averment that the defendants have been convicted and sentenced to death without a fair and impartial trial—brings up for decision an issue of vital concern to every citizen of the state. By our Constitution, the people have set the law above themselves, except as they choose to change it by the methods which they themselves have ordained; and they have laid upon the courts the duty of enforcing their promise that the weak, as well as the strong, shall be condemned only after a fair trial according to law before an impartial jury. In the faithful performance of their promise by the people, and in the discharge of their duty by the courts, is involved, not only the public honor, but public safety, prosperity, and happiness; for in the long run neither individual nor community success is possible, unless men feel that they will not lose life nor liberty nor property without a fair and impartial trial under the law of the land. Therefore the complaint of the defendants that a large and hostile crowd of persons so interfered with the trial that it was not a fair trial, concerns, not only the defendants, but all the people.

Ideal conditions, it is true, are not to be expected, and verdicts should not be set aside by an appellate court for misconduct in a trial, unless the evidence is clear and convincing that extraneous influences so interfered with the conduct of the trial, or so pressed upon the jury, as to become factors in the result. A vast number of cases might be cited to show that this court will refuse to heed unsubstantial charges that trials have not been fair. Yet in all the course of the development of the administration of law in England and America since that time, there has never been a doubt of the rule laid down in 1819, in the case of the *King v. Hunt et al.*, 2 Chitty, 130, when the court said it is of the greatest importance that the administration of justice should be free, not only from spot or blame, but that it should be, as far as human infirmity could allow it to become, as free from all suspicion.

The special judge, Hon. George W. Brown, who presided at the trial has certified that, according to the facts as they appeared to him, the rights of the defendant were safeguarded and the trial properly conducted. His opinion and that of Judge Prince, who denied the motion for a new trial, are en-

titled to great consideration, for their ability and their solicitude that the defendants should have a fair trial cannot be doubted. In passing upon the correctness of their conclusions of law, every statement of fact made by the trial judge will be taken as true; and the evidence offered on behalf of the defendants will be taken as true only in so far as it is consistent with the statement of fact found in the report of the trial judge.

Looking at the case in this way, we find these to be the material facts: An atrocious murder of a worthy citizen had properly aroused the interest and indignation of the entire community. One of the persons suspected had confessed, and implicated as active participants in the crime the two defendants. Very soon after the murder, a special term of court had been ordered to try both the confessed murderer and these defendants. An immense number of people assembled at the trial intensely hostile to the accused, and crowded the courthouse. The defendants being without counsel, the presiding judge sent for Mr. W. F. Clayton and requested him to undertake their defense. On his way to the court through the dense crowd, Mr. Clayton "heard expressions in regard to lynching" which convinced him that, if he should ask for the three days of preparation allowed by law, the prisoners would be lynched, and under the compulsion of this fear he gave up that most vital right, and went immediately into the trial without preparation. That the danger of mob violence was present and imminent is made further manifest by the statements of Mr. Lucien W. McLemore and the stenographer of the court, Mr. F. F. Covington, both witnesses of high character. Not a particle of evidence was offered by the state to controvert this showing. The presiding judge, it is true, says that the crowd was quiet, and that it manifested no mob spirit to his eye nor in his hearing; but this statement does not impair the force of the testimony of those who mingled with the people, and thus had better opportunity to observe. Thus it appears, beyond all doubt, that the circumstances of the trial were such that counsel of experience and courage gave up, under the most urgent compulsion, the right to three days of preparation guaranteed to the accused by the law; and that, too, when he had been called into the case by the court without previous notice. Compulsion is sufficient to annul a will or a contract for the sale of property. How, then, can it be held that a trial involving life or death was fair and impartial, according to the law of the land, when the accused, under the compulsion of a reasonable apprehension of lawless violence, surrenders a right vital to his defense?

In an opinion delivered by the distinguished Judge Elliott, the Supreme Court of Indiana, under circumstances very similar to those appearing here, set aside for compul-

sion a plea of guilty, which defendant's counsel showed to the court had been entered, by their advice, on the reasonable apprehension that if their client should be acquitted he would be lynched. *Sanders v. State*, 85 Ind. 318, 44 Am. Rep. 29.

It is argued, however, that counsel should have sought the protection of the court. No doubt, that course would have been the most judicious; but, in view of the surroundings, and especially in view of the fact that the judge's seat was itself pressed upon by the crowd, it would be an unjust judgment to hold that the accused lost a vital right by the failure of their counsel to do the most judicious thing in the sudden emergency which he was called on by the court to meet.

Consideration of the further proceedings deepens the conviction that the trial was not fair. With respect to the charge that the space within the bar immediately around the judge, the jury, and the witnesses was so taken by the great crowd that the trial could not proceed with decorum and fairness, the presiding judge says that it was the best behaved crowd he ever saw, and that there was nothing to indicate to him a sign of a riotous spirit; that it did crowd within the bar, but that it was not in possession of the courthouse. He says further: "In every instance when I observed that it was becoming too much crowded within the bar, or my attention was called to such conditions, my admonitions received the most respectful consideration and obedience, and there was never any crowding within the bar that in any way interfered with the orderly dispatch of the business of the court, or with the rights of the counsel of the accused." The affidavit of Mr. Clayton contains the following statement: "That during the trial of the case deponent did not see the jury until he addressed them from the crowd intervening; that on several occasions deponent requested the judge to compel the sheriff to clear away the crowd that he might see the witness whom he was examining." There is no statement of fact made by the presiding judge inconsistent with the statement of Mr. Clayton. It thus appears that a large number of persons hostile to defendants were allowed to so press upon the court that counsel for the defense had to ask several times that they be cleared away, so that he could see the witness under examination, and to so press around the jury that counsel could not see them until he stood before them to argue the case. We are unable to assent to the opinion of the presiding judge that such a state of affairs did not interfere with the orderly conduct of the business of the court, or with the rights of the accused. Trials must be public; but the right of the accused to a fair trial is superior to the right of the public to witness the trial. In all trials, not only the dignity and decorum which should char-

acterize the administration of justice, but the preservation of the rights of the people and of the parties to the cause, require that the public should be kept away from the witnesses and the jury and the counsel, to the end that the issue may be tried and decided without interference or extraneous influence. In this case, the public was not so kept away. On the contrary, a large number of persons justly indignant at an atrocious murder, and undeniably hostile to the accused, pressed upon the court, the jury, and the witnesses.

Clearing away the hostile crowd from time to time did not meet the case. Fairness required that at least the space between the accused and their counsel, the jury, and the witnesses should have been kept free from intrusion. Courts cannot control public sentiment; but their commission from the people is to keep the inviolable precincts of the prisoner's dock, the counsel's place, the witness chair, the jury's seats, and the intervening space free from either hostile or friendly invasion or intrusion, lest the accused be terrified or his counsel confused in making his defense, lest the witness testify falsely under fear of inducement, lest the jury be overawed, or their minds influenced by an atmosphere surcharged with hostility or partiality. The intrusion into these inviolable precincts of a large number of persons, part of a vast assemblage hostile to the prisoners, was calculated to terrify the defendants, to confuse their counsel, to intimidate the witnesses, and to overawe the jury. This, with the fact that counsel gave up the right of the accused to have three days to prepare for their trial under the compulsion of a reasonable apprehension that the assertion of the right would result in their death by lynching, compels the conclusion that the defendants did not have a fair and impartial trial.

Applying the law more specifically, we reach these conclusions: The conditions under which counsel conducted the defendants' cause, and under which their witnesses were examined, substantially interfered with the due exercise of the right granted by section 49 of the Criminal Code 1902, "that the accused shall, at his trial, be allowed to be heard by counsel, may defend himself, and shall have a right to produce witnesses and proofs in his favor, and to meet the witnesses produced against him face to face."

[2, 3] The jury was not so safeguarded against extraneous influences as to allow the defendants the right of trial by an impartial jury, guaranteed by section 18, art. 1, of the Constitution; and the defendants were, by the compulsion of the fear of death by lynching, deprived of the right to have three days to prepare for their trial, conferred on them by section 40 of the Criminal Code.

Under varying facts, other courts have, with practical unanimity, held that verdicts

should not be allowed to stand, where action by those in attendance on a trial was calculated to overawe or influence the jury, or substantially interfere with the rights vital to the parties. *Hamilton v. State*, 36 Tex. Cr. R. 372, 37 S. W. 431; *Woolfolk v. State*, 81 Ga. 551, 8 S. E. 724; *Raines v. State*, 81 Miss. 489, 33 South. 19; *Sanders v. State*, 85 Ind. 318, 44 Am. Rep. 29; *People v. McMahon*, 244 Ill. 45, 91 N. E. 104; *Doyle v. Commonwealth*, 100 Va. 808, 40 S. E. 925; *State v. Wilcox*, 131 N. C. 707, 42 S. E. 536; *Robinson v. State*, 6 Ga. App. 696, 65 S. E. 792.

The judgment of this court is that the judgment of the Circuit Court be reversed, and the cause remanded for a new trial.

GARY, C. J., and HYDRICK, J., concur.

(91 S. C. 7)

### FOLK v. BROOKS et al.

(Supreme Court of South Carolina. March 12, 1912.)

#### 1. SPECIFIC PERFORMANCE (§ 121\*)—EVIDENCE—SUFFICIENCY.

In partition, where defendant claimed title to the land under a parol agreement, and by virtue of possession, evidence held insufficient to award him specific performance of the alleged agreement.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 387-395; Dec. Dig. § 121.\*]

#### 2. VENDOR AND PURCHASER (§ 232\*) — BONA FIDE PURCHASER—RECORDING.

Civ. Code 1902, § 2457, providing that no possession of real property described in any instrument of writing required by law to be recorded shall operate as notice of such instrument, and actual notice shall be sufficient only when of the instrument itself, does not apply to possession under a parol contract for the sale of land, and such possession is notice of the equity of the party in possession.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 540-562; Dec. Dig. § 232.\*]

#### 3. FRAUDS, STATUTE OF (§§ 56, 129\*)—LAND CONTRACT—PART PERFORMANCE.

Where defendant took possession of land under an agreement providing that, in consideration of his payment of the professional services of a conveyancer, he should have a lien on the land, and that if the owners failed to repay him within a year he was to take possession and have the land as his own, he had no title to it, legal or equitable; for the contract was in direct violation of the statute of frauds, not being an agreement to execute a lien in the future, and plaintiff's possession not being an act of the parties partially performing the contract.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. §§ 83-89, 136-138, 287-292; Dec. Dig. §§ 56, 129.\*]

#### 4. PARTITION (§ 85\*)—IMPROVEMENTS.

Where one in the possession of land, bona fide believing it to be his own, made improvements in good faith, he is, upon partition, entitled to compensation for the increased value of the land; his possession being notice of his claims.

[Ed. Note.—For other cases, see Partition, Cent. Dig. §§ 236-245; Dec. Dig. § 85.\*]

Appeal from Common Pleas Circuit Court of Sumter County; R. W. Memminger, Judge. "To be officially reported."

Action by Richard C. Folk against James Brooks, Benjamin Jasper, and others. From a judgment for plaintiff, defendants appeal. Modified and affirmed.

L. D. Jennings, for appellants. J. H. Clifton, for respondent.

WOODS, J. In this action for partition, the main question is whether on the trial the defendant Benjamin Jasper established an equitable title to the land described in the complaint, or an equitable lien thereon which should prevail over the plaintiff's legal title to a three-fourths interest.

[1] In 1897 the tract of land in dispute, containing about 25 acres, was conveyed by W. Eugene Lenoir to Eunice Brooks, Willoughby Sanders, Jane Brown, and Advil Hicks. Mr. H. Frank Wilson rendered to the grantees professional services in procuring the conveyance to them, for which he made a charge of \$25. Benjamin Jasper's claim to the land is based on an alleged contract with the owners of the land, which he testified was that he should pay the debt to Mr. Wilson and hold the title deed made by Lenoir, and that if the owners failed to repay him within a year he was to take possession and have the land as his own. The evidence is convincing that Jasper paid the debt; that the owners did not repay him; that he has been in possession of the land since 1900; and that he built a house on the land and made other improvements. The evidence also leads to the indubitable conclusion that Jasper paid the money and subsequently went into possession, relying on some agreement or understanding with the owners that he was to be protected by being allowed, either to go into possession and become the owner of the land, or to have a lien on it. But it is impossible to say with confidence what his relation to the land was to be. His testimony and his action indicates that he understood the contract to be that he was to have full ownership in case the owners failed to refund, within a year, the money paid by him to Mr. Wilson; and there was other testimony to the same effect. But Jane Brown, one of the parties, testified that she offered to pay Jasper her share of the money, and he refused to receive it; and the testimony of Pinckney Dinkins was to the effect that the contract was that the land was to stand as security for the money advanced. In view of this uncertainty as to the nature of the agreement, even if Jasper were asserting an equitable title against the owners of the land with whom he dealt, the court would be obliged to hold the evidence of a contract for the transfer of ownership to be not clear and convincing, and

would therefore refuse to decree specific performance. *McMillan v. McMillan*, 77 S. C. 511, 58 S. E. 431.

But the case of Jasper against the plaintiff is still weaker. In May, 1901, after Jasper had taken possession of the land, Willoughby Sanders, Jane Brown, and Advil Hicks executed a mortgage to the plaintiff, covering the land in dispute, to secure the payment of \$51. This mortgage was foreclosed, and at the master's sale the plaintiff became the purchaser and received a conveyance of the interests of the mortgagors. He testified that he took the mortgage without notice of the possession of Jasper, or of his alleged contract with the mortgagors; and there was nothing on record charging him with constructive notice of Jasper's claim.

[2] Section 2457 of the Civil Code provides: "No possession of real property described in any instrument of writing required by law to be recorded shall operate as notice of such instrument; and actual notice shall be deemed and held sufficient to supply the place of registration only when such notice is of the instrument itself or of its nature and purport." When the contract for the purchase of the land is not written, and therefore not an instrument required by law to be recorded, this section has no application; and so we have the somewhat anomalous state of the law that possession of one who pays the purchase money and takes a formal deed conveying the land is no notice to subsequent purchasers or creditors of the claim of the person in possession, while the possession of one who pays the purchase money and enters under a mere parol contract for conveyance to him is notice of the equity of the party in possession. While the authority of *Sheorn v. Robinson*, 22 S. C. 32, *Sweatman v. Edmunds*, 28 S. C. 58, 5 S. E. 165, and other like cases, holding possession to be notice to the world of the equities of the person in possession under a parol contract, must be recognized, it is obvious that the reason for requiring the facts out of which the equities arise to be clear and convincing are stronger, when the rights of persons claiming as innocent purchasers or creditors are involved, than where the controversy is between the contracting parties.

[3] We have sought without avail some ground for holding that Jasper should have a lien on the land for the \$25 advanced by him to the owners. There was no evidence of any kind of a contract to make a mortgage in the future, and no written agreement that Jasper should have a lien or claim on the land; on the contrary, the only evidence relating to a lien on the land to secure the advancement was the parol evidence to the effect that the agreement should itself constitute a lien. The courts of equity have never gone to the extent of holding that the loan of money, with the parol agreement

that the debt should be a lien on the land, constitutes a lien. To so hold would be to disregard the statute of frauds. It is true that Jasper took possession of the land about a year after the agreement was made; but this cannot avail to impress the loan of the money on the land as a lien for two reasons. The first is that the owners did not put him in possession as a part of the same transaction with the making of the loan; on the contrary, the taking of possession was his own act, done under the claim that it was originally agreed that he should take possession at the maturity of the loan, if it was not repaid. Hence the facts do not bring this case within the principle of those cases where there was a contract relating to the sale of land and a delivery of possession by one party and a taking of possession by the other as part performance of the contract of sale. The other reason is that mere change of possession cannot be regarded as part performance of a parol agreement that a creditor shall have a lien on land for the repayment of money loaned. We are unable to find any case where it has been so held. Change of possession is not in this state an incident or concomitant of the creation of a mortgage or lien. The apparent hardship of the enforcement of the statute of frauds according to its terms has led the courts into refinements which have been the fruitful source of litigation and of carelessness in the making of contracts as to land. We are not inclined to add another refinement by holding that, notwithstanding the statute, an equitable mortgage is created in favor of a creditor who lends money on a mere parol agreement that the loan shall constitute a lien, and that he shall take possession if the loan is not paid at maturity, and who in enforcement of the alleged agreement, after default, enters into possession.

We think, therefore, that the conclusion of the referee and the circuit court was correct, and that the defendant Benjamin Jasper has failed to establish his equity against the legal title of the plaintiff to three-fourths interest in the land conveyed by the master to the plaintiff, or to a lien thereunder. The result is a hardship on Jasper greatly to be regretted. But such hardships are inevitable to those who will not take the trouble to express in writing and record their contracts relating to the title of property which they intend to claim against the world.

[4] The claim of Jasper to be allowed the increment of value due to his improvements has a more substantial foundation. However vague the contract between Jasper and the owners of the land may have been, the preponderance of evidence supports the allegation that Jasper supposed, at the time he made the improvements, that he was the owner of the land, and made the improvements relying on that bona fide belief. The

building and clearing has added to the value of the property, and the plaintiff and the defendant Eunice Brooks will thus receive the benefit of Jasper's labor and money. Under the cases last cited, Jasper's possession was notice to the plaintiff of any equitable claim which Jasper had against the owners at the time the plaintiff took the mortgage, and also of such equity to the plaintiff, as purchaser, at the foreclosure sale. There can be no doubt that, if an action to recover the land had been brought against Jasper by the owners who gave the mortgage to the plaintiff, Jasper would have been entitled to the benefit of his improvements. He has the same right against the plaintiff, who occupies the position of a purchaser with notice of his equity. It is true that in *Annely v. De Saussure*, 12 S. C. 488, this court refused to allow improvements made on land by a purchaser who was assured by the executor of the mortgagor that the land was unincumbered, on the ground that improvements put upon mortgaged land are not refunded in equity as benefits conferred on the mortgagee. But that principle does not apply in this case; for there the improvements were put on the land after the execution and record of the mortgage, while here possession was taken and the improvements were made before the mortgage was executed.

The evidence of the increased value imparted to the land by the improvements is not entirely satisfactory; but the property is of small value, and it should not be consumed by further litigation. We think it safe to say that the value of the land has been increased \$150 by Jasper's improvements, and that he should be allowed that sum as a charge on the land, with interest from January 1, 1907, the date when the first item of rent was charged against him, less the rents charged against him by the referee.

The judgment of this court is that the judgment of the circuit court be modified according to the conclusions herein stated.

GARY, C. J., and HYDRICK, J., concur in the result.

(70 W. Va. 394)

MARSHALL v. STALNAKER et al.

(Supreme Court of Appeals of West Virginia. Feb. 20, 1912.)

(Syllabus by the Court.)

1. APPEAL AND ERROR (§ 536\*)—RECORD—SCOPE AND CONTENTS—BILL OF EXCEPTIONS.

No particular form of identification of a bill of exceptions in an order, designed to make it a part of the record, nor, in the bill, of a paper intended to be made a part of it, is necessary. Any terms of description indicating, with reasonable certainty, intention

to make a paper part of a judicial record, is sufficient.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2402, 2403; Dec. Dig. § 536.\*]

2. EXCEPTIONS, BILL OF (§ 22\*)—SCOPE AND CONTENTS—INCORPORATION BY REFERENCE.

A reference, in a bill of exceptions, to a paper as containing the evidence adduced on the trial, suffices to incorporate in it two batches of transcribed evidence, bearing the same marks of identification and obviously heard in the same trial.

[Ed. Note.—For other cases, see Exceptions, Bill of, Cent. Dig. § 29; Dec. Dig. § 22.\*]

3. EJECTMENT (§ 9\*)—RIGHT OF ACTION—TITLE OF PLAINTIFF—PRIOR POSSESSION.

Recovery in ejectment on the strength of prior possession, without more, is allowable only against mere trespassers or intruders without bona fide claims of title and forcible entrants. The doctrine has no application in cases in which the defendant has acquired the possession peaceably and in good faith, under claim of title.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. §§ 16-29; Dec. Dig. § 9.\*]

4. EJECTMENT (§ 19\*)—RIGHT OF ACTION—POSSESSION OF DEFENDANT.

In the case of a dispute between adjacent owners as to the location of a boundary line, left in a state of uncertainty by the evidence, the defendant may have a bona fide claim of title to the extent of the location he contends for, sustaining his possession during the pendency of the litigation to determine the controversy.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. §§ 65-78; Dec. Dig. § 19.\*]

5. ADVERSE POSSESSION (§ 100\*)—OPERATION AND EFFECT—EXTENT OF RIGHTS ACQUIRED.

Title by adverse possession under color of title is limited to the boundaries as finally fixed and determined. Outside thereof, adverse possession may be established by inclosure and occupancy, but not otherwise.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 547-574; Dec. Dig. § 100.\*]

Error to Circuit Court, Braxton County.

Action by T. Marcellus Marshall against Ahab Stalnaker and others. Judgment for defendants, and plaintiff brings error. Affirmed.

Linn, Byrne & Hines and Alex Dulin, for plaintiff in error. Hall Bros. and C. F. Greene, for defendants in error.

POFFENBARGER, J. [1] The sufficiency of the record on which this writ of error was allowed has been challenged on grounds pertaining to the bill of exceptions. The order intended to make it part of the record is skeleton in form, saying the plaintiff tendered "his bill of exceptions in the words and figures following, to wit (here copy the same), which is signed, sealed, and ordered to be made a part of the record." The bill itself is likewise in skeleton form, certifying, among other things, "that upon the said trial evidence was given as shown in the paper marked 'Evidence' and having the name of the presiding judge thereon, including the



deposition of Peter Bosley, except certain questions and answers marked 'Objection sustained.' As we find a paper, designated "Bill of Exceptions," and bearing the style of the case, and another paper, purporting to be evidence and so marked, also bearing the style of the case and the name of the presiding judge, we may reasonably say these papers are those referred to in the order and bill. Nothing more than reasonable certainty is required, as we have often held. *Jackson v. Railroad Co.*, 65 W. Va. 415, 64 S. E. 450; *De Board v. Camden, etc., Co.*, 62 W. Va. 41, 57 S. E. 279; *McKendree v. Shelton*, 51 W. Va. 516, 41 S. E. 909.

[2] The evidence, so marked, is in two batches, each marked the same way and apparently containing a portion of the evidence in the same case. Although the bill speaks of only one paper, marked "Evidence," this misdescription is obviously a trifling inaccuracy, and cannot reasonably be regarded as introducing an element of uncertainty. If we could say there are two such papers in substance and effect, as well as in mere form, the bill would be fatally defective, of course; but we are unable to do so. The recital in the bill of the omission of parts of the deposition of Bosley is the basis of a charge of incompleteness of the evidence; but, as the omitted portions were offered by the plaintiff and excluded at the instance of the defendant, they constitute no part of the evidence introduced, and the latter is not affected by its omission. An order entered in the case shows the regular stenographer of the court was excused on account of sickness before the evidence was all in and another substituted. The latter certifies a lot of evidence taken by her which is not included in the paper signed by the judge as evidence nor in the bill of exceptions. Hence, in point of fact, the bill does not contain all the evidence; but the certificate of the judge, saying it does, is conclusive and unimpeachable, and the omitted evidence can neither be added nor used to condemn the bill of exceptions. Being part of the record, the bill is a verity, unalterable and unimpeachable. *Tracy v. Carver Coal Co.*, 57 W. Va. 587, 50 S. E. 825.

Practically all of the rulings of the court to which exceptions were taken involve principles governing the disposition of the case on its merits. Though most of them are founded upon the action of the court in overruling objections to instructions requested by the defendant, their correctness depends rather upon the character of the evidence as a whole than upon portions thereof or conflicting theories arising out of it. The basis of the objections to them is alleged lack of evidence to justify the court in giving them or to sustain the verdict rendered in accordance with the law they apply. Hence the entire case here practically turns upon the sufficiency of the evidence to sustain the verdict.

The titles of the parties do not emanate from a common source, nor is either of them

traced to the commonwealth of Virginia or the state. The land in controversy is a narrow strip, and the right to it depends upon the location of the broken or angular boundary line between the plaintiff's tract of 128 acres and that of defendants containing 37 acres. Both are irregular in form, and that of the defendants adjoins the plaintiff's on the west. On the western side of the plaintiff's tract, there is a corner at the apex of an obtuse angle from which the lines run northeast and southeast. The land in controversy lies along these two lines, being a narrow strip something over 100 poles long. Some years before the institution of this action, the defendants cleared some of the land within the controverted territory; but, upon remonstrance from the plaintiff and his insistence upon the location of the boundary in accordance with his present claim, the defendants abandoned the strip, or permitted plaintiff to take possession of it, or so far relaxed their efforts to hold it as to enable him to obtain possession thereof. He had a tenant on it for one year. After that, his adversaries again peaceably entered upon it and have ever since been in possession. This subsequent action of theirs seems to have been taken after thorough investigation as to their rights and under a sincere conviction of the correctness of their theory as to the line and validity of their claim to the land. As to the true location of the line, the evidence is highly contradictory, uncertain, and inconclusive in character. The corners and lines directly in question are not conclusively identified or fixed as located by either of the parties. The monuments called for in the deeds at these points have been destroyed, and the evidence as to the true location consists, for the most part, of surveys starting from other points and governed by the calls for courses and distances. These surveys are conflicting and inconclusive also. The surveyors say it is necessary to vary from the courses and distances called for in the title papers in order to make them accord with the claims of either of the parties. There is some testimony tending to establish certain objects as monuments on each of the contested lines, but not at all conclusive. The location of the line was therefore clearly a jury question.

[3] Though the plaintiff does not trace title to the commonwealth or the state, 10 years of open, notorious, exclusive, and hostile possession would give title to the land in controversy, provided it is within the boundaries of his deeds; but, as the boundary line is the very matter in controversy, his possession of other portions of his land for that period would not conclusively establish his title to the portion dependent, as to the title, upon the location thereof. Assuming, therefore, the sufficiency of the evidence to prove title by adverse possession, the burden is nevertheless upon him to establish the boundary line so as to include the land in controversy, and since the evidence relating to the bound-

ary line in controversy is inconclusive, so as to raise a question for the jury and not for the court, such possession does not incontestably prove title to the strip in controversy. "Adverse possession under and by virtue of a deed is limited to the premises actually covered thereby." 1 Cyc. 1134, sustained by numerous authorities.

[3] But, invoking the rule enunciated in *Tapscott v. Cobb*, 52 Va. 172, and adverted to in *McDermitt v. Forbes*, 71 S. E. 193, *Taylor v. Russell*, 65 W. Va. 632, 64 S. E. 923, and *Witten v. St. Clair*, 27 W. Va. 762, the plaintiff insists upon his right to recover in this action without proof of title of the kind we have been discussing, perfect paper title or title by adverse possession, on the ground that the defendants are mere intruders or trespassers upon land of which he had had possession at the time of their entry. This principle, however, does not sustain his position, since the defendants entered peaceably and under a bona fide claim of title, believing the land in controversy to be within the boundaries prescribed by their deed. Of this doctrine, Judge Brannon said, in *Taylor v. Russell*: "The principle just stated applies only where there is one in actual possession intruded upon wrongfully by one having no shadow of title. It does not apply to parties having competitive rights or title, where the question is which is the better title." Such is the view expressed by Judge Snyder in *Witten v. St. Clair*, and the doctrine is so stated in *McDermitt v. Forbes*, "This rule is founded upon the presumption that every possession peaceably acquired is lawful, and is sustained by the policy of protecting the public peace against violence and disorder. But, as it is intended to prevent and redress trespasses and wrongs, it is limited to cases where the defendants are trespassers and wrongdoers. It is therefore qualified in its application by the circumstances which constitute the origin of the adverse possession, and the character of the claim on which it is defended. It does not extend to cases where the defendant has acquired the possession peaceably and in good faith, under color of title." *Sabariego v. Maverick*, 124 U. S. 261-297, 8 Sup. Ct. 461, 31 L. Ed. 430. See, also, *Haws v. Victoria Copper Mining Co.*, 160 U. S. 303, 16 Sup. Ct. 282, 40 L. Ed. 436; *Christy v. Scott*, 14 How. 282, 14 L. Ed. 422; *Fowke v. Darnall*, 5 Litt. (Ky.) 817; 15 Cyc. 30.

[4] Here the possession of the defendant was taken peaceably and under the bona fide belief that the lands lie within their boundaries, and so the case does not fall within the rule. Had the entry been forcible, the plaintiff could recover without regard to title or prior possession; but it was not. Moreover, in point of fact, the defendants themselves had had prior possession, for they had entered upon and improved the land before the plaintiff took possession of it at all. The plaintiff's entry was a mere inter-

ruption of their prior possession, and, when they re-entered, the possession vested in them as it had previously been. By re-entry, they regained all of their prior right. *Bacon v. Sheppard*, 11 N. J. Law, 232, 20 Am. Dec. 583. "If a disseisee re-enters, he shall have trespass against a stranger for a trespass done during the disseisin; for by re-entry he vests the possession in himself ab initio. So against a lessee, donee, or feoffee of the disseisor. 2 Rolle, Abr. 554." Id. "If one disseises me, after my regress, the law, as to the disseisor and his servants, supposes the freehold always continued in me." Chief Justice in *Liford's Case*, 12 Jac. 1. The evidence tending to show abandonment of their prior possession by the defendants, or withdrawal from the premises and acquiescence in the claim of the plaintiff, does not preclude the application of this principle. An error on their part as to the location of the boundary line, superinduced by the representations and claims of the plaintiff, wholly destroys the effect of such withdrawal or acquiescence. An informal agreement upon the location of a boundary line, made under mistake, is not binding, in the absence of long acquiescence or circumstances constituting an estoppel. 4 A. & E. Enc. L. 862. However, we need not invoke this doctrine, since there is no evidence of any express agreement. No line was marked or agreed to nor possession taken in such manner as to carry an agreement into execution. The elements requisite to bring this phase of the case within the principles declared in *Gwynn v. Schwartz*, 32 W. Va. 487, 9 S. E. 880, our leading case on the subject of agreed boundary lines, are not found in the evidence.

Failure of this alleged right of recovery on the ground of mere prior possession, under the application of the principles just stated, disposes of the exceptions to the action of the court in giving the instructions requested by the defendants, all of which were intended to do no more than cast upon the plaintiff the burden of proving title to the land in controversy, agreeably to the general rule that a plaintiff in ejectment must recover upon the strength of his own title. These instructions properly ignored the numerous exceptions to that rule, since there is no evidence tending to bring the plaintiff's case within any of them. They are unsupported by argument, and nothing in the petition suggests any ground of exception other than that here indicated.

Seeing no error in the judgment, we affirm it.

NOTE BY BRANNON, J. Is the broad statement in point 3 clearly sound? Is it true that one in actual possession, ousted by one who has color, but not legal or good title, cannot sustain ejectment to recover his possession? It is admitted that he can against a trespasser or intruder. Is not any one, though he has color of title and bona

side claim, but not good title, a trespasser or intruder in law? Since I wrote the case of *Taylor v. Russell*, 65 W. Va. 632, 64 S. E. 923, I have been led to question its soundness, not in decision, but in the statement that one having merely possession cannot recover except against a trespasser or intruder, and that the principle that one may recover on mere possession does not apply where there are competitive titles. My doubt is expressed in the later case of *Rifle v. Skinner*, 67 W. Va., at close of page 87, 67 S. E. 1080. See law there cited. As stated there, possession is prima facie evidence of title, good until the true title comes. Newell on Ejectment, p. 434, c. 13, § 14, says: "It is well settled, upon common-law authority and by the decisions of American courts, that in an action of ejectment, proof of prior possession by the plaintiff, claiming to be the owner in fee, is prima facie evidence of ownership and seisin, and although the lowest kind of evidence, it is sufficient to authorize a recovery, unless the defendant shows a better title." I find in 15 Cyc. 30: "Ejectment may be maintained upon the prior possession of plaintiff, or of parties through whom he claims; such possession being a sufficient prima facie title. Accordingly, where no legal title is shown in either party, the party showing prior possession in himself or those through whom he claims will be held to have a better right. Thus it has been held that the plaintiff upon such a showing may recover in ejectment against a defendant who shows no better right or title." *Mitchell v. Carder*, 21 W. Va. 277, holds that "a party, who is in possession of lands under claim of title, makes it his against the world, except as to the true owner, and it remains his as against all persons entering without his consent." See *Suttle v. Richmond*, 76 Va. 289, citing *Lee v. Tapscott*, 2 Va. 276. I note specially *Bass v. Ramos*, 58 Fla. 161, 50 South. 945, 138 Am. St. Rep. 105. Why should not one in possession, deprived of it by one who has not good title, be restored to it? *McMurray v. Dixon*, 105 Va. 605, 54 S. E. 481, is decided authority on the point.

(137 Ga. 681)

## JONES v. COONER.

(Supreme Court of Georgia. Dec. 13, 1911.  
Rehearing Denied Feb. 29, 1912.)

(Syllabus by the Court.)

## 1. INFANTS (§ 29\*)—RIGHTS OF HEIRS—YEAR'S SUPPORT—ESTOPPEL.

A conveyance by the heirs of a decedent at the instance of a widow will not estop the minor children of the decedent from having assigned to them a year's support from the estate of their deceased father.

[Ed. Note.—For other cases, see *Infants*, Cent. Dig. §§ 37-40; Dec. Dig. § 29.\*]

## 2. EXECUTORS AND ADMINISTRATORS (§ 184\*)—RIGHTS OF HEIRS—YEAR'S SUPPORT—ESTOPPEL.

Though a widow may be estopped from asserting her claim to a year's support, such estoppel will not debar her minor children from applying for and having assigned to them a year's support in their deceased father's estate.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 694, 702, 704; Dec. Dig. § 184.\*]

## 3. EXECUTORS AND ADMINISTRATORS (§ 194\*)—RIGHTS OF HEIRS—APPLICATION FOR YEAR'S SUPPORT.

The caveat, which urged the minors' deed as an estoppel, being insufficient for that purpose, was likewise insufficient as an assertion of an adverse title, because a caveator cannot assert, in opposition to the grant of a year's support, a title antagonistic to that of the estate.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 713-723; Dec. Dig. § 194.\*]

Error from Superior Court, Camden County; C. B. Conyers, Judge.

Application by M. E. Jones for year's support, and caveat thereto by J. F. Cooner. From a judgment refusing to strike caveat, the applicant brings error. Reversed.

S. C. Townsend, for plaintiff in error.  
David S. Atkinson, for defendant in error.

EVANS, P. J. The judgment complained of is the refusal of the court to strike a caveat to an application for year's support. The applicant for year's support was the widow of J. A. Peeples, Jr., who applied in behalf of herself and minor children; and the appraisers set apart a described tract of land, as being all of the estate of her deceased husband, and of a value less than \$500. The caveator denied her right to a year's support in half of the land, because he had purchased it from certain named persons, who were the heirs of her deceased husband, after his death, with the consent and at the instance of the widow, and had entered into possession of the land under his purchase. Applicant for year's support moved to strike the caveat, on the ground that it was in effect a claim to realty, which the court of ordinary was without jurisdiction to determine. The motion was overruled.

[1, 2] It is well settled that the court of ordinary has no jurisdiction to try and determine conflicting claims of ownership of property, arising between a widow applying for the setting aside of a year's support and a person asserting title adversely to the estate of her deceased husband. *Dix v. Dix*, 132 Ga. 630, 64 S. E. 790, and cases cited. However, it is contended that the caveat in this case is not an assertion of an adverse title by a stranger, but sets up an estoppel by a privy in estate of the heirs at law of the decedent against the right of the widow and minor children to have a year's support in land purchased by him from the

heirs at law at the instance of the widow. The caveat names the persons from whom the caveator claims to have purchased the land, and declares them to be heirs at law of J. A. Peeples, Jr., but does not say they are all of the heirs at law. The application for a year's support is not in the record; but both the return of the appraisers and the caveat describe it as having been made in behalf of the minor children, though neither discloses their names. The only conclusion deducible from the record is that either the caveator claims to have bought from adult heirs, excluding the minor children, or purchased from the minors themselves. If he did not buy from the minors, of course, they are not estopped, unless they are bound by the conduct of their mother. After a year's support in land has been assigned to a widow and minor children, she may bind the beneficiaries by her conveyance of the land pursuant to a sale made for the support of the minors. *Bridges v. Barbree*, 127 Ga. 679, 56 S. E. 1025. But she cannot divest her children of their right to a year's support from the estate of their father, or their interest as heirs at law, by a disposition of the estate of their father. If the caveator purchased from the minors, they could repudiate their deed. Estoppels do not apply to or affect infants, except in cases where an infant's fraudulent act or representation is made with a view to deceive or defraud. *Herman on Estoppel and Res Adjudicata*, § 584. There is no allegation in the caveat effective to bring the case within the exception to the general rule.

[3] The statute gives the right to a year's support to the minor children, as well as the widow; and if she estops herself from afterwards applying for a year's support, that estoppel will not operate against her children. The statute also requires that, if the estate be less than \$500, all of it shall be set aside as a year's support; and it would be immaterial whether the beneficiaries embraced the widow and minor children, or the minor children alone. So that, even if we consider the facts alleged in the caveat sufficient to estop the widow from applying for a year's support, certainly they are insufficient to bar the minor children of their right to a 12 months' support from the estate of their deceased father. *Gibbs v. Land*, 136 Ga. 261, 71 S. E. 136. We think the objection to the caveat sufficiently comprehensive to include the point that the caveator is attempting to set up his title in antagonism to the right of the minors to a year's support; for, if the conveyance by the heirs be not good as an estoppel, the only effect of the allegation of such deed would be to assert a claim of title, which cannot be done in a caveat to a year's support. The court erred in refusing to strike the caveat.

The caveat also set up that the estate

exceeded \$500 in value, and that the minors had received an equivalent of a year's support from the sale of certain personalty, and from the use of the remainder of the property belonging to the decedent. Only heirs, their privies, and creditors may contest with a widow and minor children their right to a year's support out of the estate of the deceased husband and father. The application for a year's support is in behalf of the widow and her nine minor children, without disclosing their names. The caveat asserts that the caveator is a purchaser from certain named persons, as heirs of the decedent. Inasmuch as the widow and children would be the only heirs of the decedent, and the caveator does not claim to have purchased from the widow, but claims to have purchased one-half of the land from certain persons alleged to be heirs, the burden is on the caveator to allege all the facts to show that those from whom he claims to have bought the land were the adult children of the decedent, before he could contest the minor's application for a year's support. If his vendors were the minor children, their conveyance would not operate to give the purchaser a right to caveat their application, for the reasons already pointed out. If the purchaser's vendors are not the applicants for year's support, the caveat may be amended to disclose that fact, so as to authorize an inquiry into the grounds of caveat contesting the minors' right to a year's support.

Judgment reversed. All the Justices concur.

(137 Ga. 640)

CARSON v. J. E. HURST & CO.

(Supreme Court of Georgia. Feb. 27, 1912.)

(Syllabus by the Court.)

**GUARANTY (§ 86\*)—CONSTRUCTION.**

The instrument sued on, when construed as a whole, did not limit the amount of credit which was to be extended by the obligees to the person for whose benefit it was executed, but only limited the extent of the obligor's liability.

[Ed. Note.—For other cases, see *Guaranty*, Cent. Dig. §§ 38-45; Dec. Dig. § 36.\*]

Error from Superior Court, Tift County; J. H. Merrill, Judge.

Action by J. E. Hurst & Co. against Briggs Carson. Judgment for plaintiffs, and defendant brings error. Affirmed.

Hurst & Co. brought suit against Briggs Carson for \$2,000 and interest thereon, for goods sold and delivered to Keith Carson in pursuance of the following instrument: "Tifton, Ga., March 4, 1907. To Messrs. John E. Hurst & Co.: In consideration of your delivering to Keith Carson all the goods which he, personally or by his agent or agents, may purchase or order of your firm from time to

time, to the extent of the sum hereinafter stipulated, I do hereby guarantee and bind myself to the punctual payment of the debt or debts thereby created, as fully as if purchased on my own personal account: Provided, however, that the amount of the indebtedness for goods so bought shall not exceed the sum of two thousand (\$2,000.00) dollars. It is understood, however, that, as he may make payment and reduce the amount of his indebtedness, he may from time to time purchase again, so that my liability shall at no time exceed the sum of two thousand (\$2,000.00) dollars; and the acceptance of notes or drafts from him shall in no way impair or weaken the validity of this guaranty, which is to be in full force and virtue until revoked in writing. And should the amount or amounts purchased as above stipulated be not paid by him at maturity, you shall have the right to proceed against me for its recovery, without any further proceeding or action against him; and I waive homestead and all other exemptions on both real and personal property as to the guaranty above mentioned. [Signed] Briggs Carson. Witness: Keith Carson." It appeared from the petition that the plaintiffs, after the execution of this instrument, sold to Keith Carson goods to the amount of \$3,879, and that Keith Carson was unable to pay the debt for which the action was brought. The defendant by answer set up that he was not liable on the guaranty contained in the instrument, for the reason that by the terms thereof the amount of goods to be sold by the plaintiffs to Keith Carson was limited to \$2,000, and that plaintiff had violated this term of the guaranty by selling goods to Keith Carson in excess of that amount. At the trial the defendant admitted the execution of the instrument sued on, and assumed the burden of proof. The only evidence introduced was that of the defendant, who testified: "The goods sold by John E. Hurst & Co. to Keith Carson, after the execution of the instrument sued on, were largely in excess of the amount named in the contract, and such credit was extended without my knowledge or consent." The court directed a verdict for the plaintiffs for \$2,000, besides interest at 7 per cent., and the defendant excepted.

Fulwood & Murray and Cobb & Erwin, for plaintiff in error. W. A. Thompson and Jno. R. L. Smith, for defendants in error.

FISH, C. J. (after stating the facts as above). This case must be decided upon the construction of the instrument sued on, and the facts, which appear from the petition and the evidence of the defendant, that the amount of goods sold under the guaranty was in excess of \$2,000, and that this was done without the knowledge or consent of the defendant. What is the proper construction of the guaranty? The contention of the plaintiffs below was that, under the

terms of the instrument, \$2,000 was the limit of the liability of the guarantor, and that the right of the plaintiffs to extend credit to Keith Carson was unlimited; while the contention of the defendant below was that, in accordance with the language of the instrument, \$2,000 was the limit of the credit to be extended by the plaintiffs to Keith Carson, as well as the limit of the defendant's liability. There being no evidence of the circumstances leading up to the execution of the instrument, or attendant thereon, the issue between the plaintiffs and the defendant as to the meaning of the instrument must be determined by reference to it alone, without aid from any extrinsic source. A guaranty is like all other contracts, in that the intent of the parties thereto is to govern; but, as was said in *Hargroves v. Cooke*, 15 Ga. 321, 325, "the courts will not be strict in the construction of such instruments (per *Tindal, C. J.*, in *Newberry v. Armstrong*, 4 Bingham, 201, 19 E. C. L. R. 55), but they are 'to be taken as strongly against the party giving the guarantee as the sense of them will admit.' *Mason v. Pritchard*, 12 East, 227." To the same effect, see *Drummond v. Prestman*, 12 Wheat. 515, 6 L. Ed. 712; *Rapelye v. Bailey*, 5 Conn. 149, 13 Am. Dec. 49; *Bright v. McKnight*, 1 Sneed (Tenn.) 158. In 20 Cyc. 1424, it is said: "If, after the application of the general rules governing the interpretation of contracts, there still remains an ambiguity, and the contract admits of two fair interpretations, one for and one against the guarantor, the authorities differ as to which of such interpretations shall be chosen. It has been affirmed in the strongest terms that if there is room to doubt what the intention of the guarantor was, or if uncertainty is to be found on the face of the instrument of guaranty, words used are to be accepted in the strongest sense against the guarantor; and this position is supported by the weight of authority [citing a number of American and English cases which sustain the text]. But some authorities take a contrary view. It would seem, however, that the difference between those courts that support the doctrine of liberal construction of the contract in favor of the creditor, and those courts which favor a strict interpretation in favor of the guarantor, is generally with reference to the point at which the rule of *strictissimi juris* is to be applied. It is settled that when the intent of the guarantor has been ascertained, or the terms of the guaranty are clearly defined, the liability of the guarantor is absolutely controlled by such intent, and is never to be extended beyond the precise terms."

In support of the rule of strict construction against the guarantor, some of the courts holding to that view have said that "no injury can result from this doctrine, as it is in the powers of guarantors to make their obligation dependent upon notice, de-

mand, or any other condition they see proper for their own protection and safety." In 14 Am. & Eng. Enc. Law (2d Ed.) 1143, it is said: "The great weight of authority, however, is against the two conflicting views herein mentioned. A very large majority of the decisions hold that guaranties are governed by the same rules of construction that control in the case of contracts generally. The contract of guaranty is not to be construed most favorably for the guarantor, nor most strongly against him. In guaranties the terms used and the language employed are to have a reasonable interpretation, according to the intent of the parties as disclosed by the instrument, read in the light of the surrounding circumstances and the purposes for which it was made; and the words used in the guaranty are to be construed in their ordinary and popular sense, unless by the known usage of trade they have acquired a peculiar meaning." In *Small Co. v. Claxton*, 1 Ga. App. 83 (3), 57 S. E. 977, it was held: "Where the terms of a written contract of guaranty, or suretyship, are ambiguous, they will be construed most strongly against the maker of the contract." After an examination of many authorities, we are of the opinion that the general rule deducible therefrom is that words of limitation in a guaranty, in the absence of clear intention in the instrument to the contrary, are to be construed as intending to limit the liability of the guarantor, and not to limit the extent of credit to be given, thereby creating a condition the breach of which relieves the guarantor. *Rindge v. Judson*, 24 N. Y. 64; *Tootle v. Elgutter*, 14 Neb. 158, 15 N. W. 228, 45 Am. Rep. 103; *Curtiss v. Hubbard*, 6 Metc. (Mass.) 186; *Laurie v. Scholefield*, L. R. 4 C. P. 622; *Claggett v. Salmon*, 5 Gill & J. (Md.) 314; *Pratt v. Matthews*, 24 Hun (N. Y.) 386; *Parker v. Wise*, 6 M. & S. 239; *Schnasi v. Lane*, 118 App. Div. 76, 103 N. Y. Supp. 127, affirmed by the Court of Appeals (191 N. Y. 545, 85 N. E. 1116). As we have seen, the doctrine of strict construction of a guaranty as against the guarantor was early adopted by this court. *Hargroves v. Cooke*, 15 Ga. 321. And that such construction will be adopted when the contract of guaranty is ambiguous was held by the Court of Appeals in *Small Co. v. Claxton*, supra.

As to the contract in the present case, the most that can be said in behalf of the guarantor is that it is ambiguous. The varying phraseology used in instruments of the character of the one now under consideration differentiates each in a greater or less degree from most others, and therefore each must, to a large extent, stand upon its own language. However, cases dealing with instruments closely similar are helpful in reaching a conclusion in a given case. We will therefore call special attention to some of the decisions construing instruments quite

similar to the one in hand. In *Merle v. Wells*, 2 Camp. 413, the defendant gave to the plaintiff the following instrument: "I have been applied to by my brother, William Wells, jeweler, to be bound to you for any debts he may contract, not to exceed one hundred pounds (with you) for goods necessary in his business as a jeweler. I have wrote to say by this declaration I consider myself bound to you for any debt he may contract for his business as a jeweler, not exceeding one hundred pounds, after this date." Lord Ellenborough said: "I think the defendant was answerable for any debt, not exceeding £100., which William Wells might from time to time contract with the plaintiffs in the way of his business. The guaranty is not confined to one instance, but applies to debts successively renewed. If a party means to be surety only for a single dealing, he should take care to say so. By such an instrument as this, a continuing suretyship is created to the specified amount." In *Parker v. Wise*, 6 M. & S. 239, a bond was given by defendant as surety for W. & W., with a condition reciting that obligees were bankers, and W. & W. paper manufacturers, and had overdrawn their account with obligees £4,822., and, in order to enable them to carry on their business, had applied to obligees to allow them for a time to overdraw such further sums as they should require, so as that the same, together with the £4,822., should not exceed in the whole at any one time £5,000., which obligees had agreed to do; and the condition was for the payment by W. & W. and defendant, or any of them, of the sum of £4,822., and also such further sums as obligees should or might thereafter advance to W. & W. in the course of their business, not exceeding in the whole £5,000. It was held that the bond was not avoided by the obligees having allowed W. & W. to overdraw to an amount, together with the £4,822., exceeding £5,000., and therefore defendant's plea to that effect was ill pleaded, for the restrictive words in the the recital were not to be construed as conditional that if obligees exceeded the amount the bond should be void. Lord Ellenborough, C. J., said: "Had the surety, as it has been urged, intended to impose a condition on his part that the bankers should not advance beyond £5,000., in order to make sure that the manufacturers should not, by an indefinite supply of funds, be led into a more extensive course of dealing than he contemplated, it would have been easy to have provided for such a condition, by stipulating that the obligation should be void if any further advance were made." In *Laurie v. Scholefield*, L. R. 4 C. P. 622, the facts were: R. & Co. being about to open an account with the Union Bank, the defendant and one Black signed the following guaranty: "In consideration of the Union Bank agreeing to advance and advancing to R. & Co. any sum or sums of money they

may require during the next 18 months, not exceeding in the whole £1,000., we hereby jointly and severally guarantee the payment of any of such sum as may be owing to the bank at the expiration of the said period of 18 months." £1,000. was placed by the bank to the credit of R. & Co.'s drawing account, and R. & Co. were debited with £1,000. in a loan account. R. & Co. from time to time drew checks against, and paid money to the credit of, their drawing account. Over £1,000. was thus paid in by R. & Co., and they were not debtors on the drawing account when it was finally closed. The loan account remained unaltered. The bank sued the defendant for £1,000. on the guaranty, and after the commencement of the action Black paid the bank £500. in discharge of his liability. The defendant did not plead this payment. It was held that the guaranty was a continuing one and that the defendant's liability was not discharged by the payments made by R. & Co. In his concurring opinion, Smith, J., said: "The words, 'not exceeding in the whole £1,000.,' do not amount to a condition. They were intended to express the limit of the defendant's liability, and not to prohibit the bank from making any further advances to Russell & Co. If it had been intended that no advances beyond the £1,000. should have been made during the currency of the suretyship, I should have expected more precise words. That is the view which the court took of a similar document in *Parker v. Wise*, 6 M. & S. 239."

In *Curtiss v. Hubbard*, 6 Metc. (Mass.) 186, the guaranty was as follows: "Whereas, Messrs. Curtiss & Merriam have at my request consented to sell goods to my son, William Hubbard, on a credit of six months: Now, in consideration thereof, and of one dollar to me paid by them, I guarantee the payment of a bill of merchandise purchased of them by said William under date of the 10th of July inst., and of all further sums which he may owe them for goods which they may sell him as aforesaid, provided that the whole amount which he may owe them at any one time shall not exceed eleven hundred dollars; it being the understanding that I am in no event to be liable for more than that sum." It was held that the \$1,100 was not limitation of the amount of credit which could be extended to William, but was only a limit of the liability of the guarantor. In *Pratt v. Matthews*, 24 Hun (N. Y.) 386, the statement is as follows: "On or about 10th January, 1877, the defendants executed to McKenny & Albright the writing sued on, in which they agreed to and with said firm that Pope, 'who has purchased, or is about to purchase, anthracite coal of said firm, shall and will pay said firm at such time or times, and at such prices as may be agreed upon between said firm and said Pope, for all coal that may be delivered to him, up to the 1st

day of January, 1878, and in default of his so doing we agree to pay for the same, provided the amount so in default shall not at any time exceed the sum of \$1,000.'" It was held that there was no limitation upon the amount of credit to be extended to Pope, but that the limitation was as to the amount of the liability of the guarantor. In *Taussig v. Reid*, 145 Ill. 488, 32 N. E. 918, 36 Am. St. Rep. 504, the instrument sued on was as follows: "For value received, I hereby guarantee the prompt payment at maturity of any indebtedness owing to Reid, Murdock & Fisher by Mrs. Mathilda Zuckerman \* \* \* for goods purchased or which may be purchased hereafter of them, to the amount of fifteen hundred dollars." It was held that the amount stated in the guaranty was a limitation upon the liability of the guarantors, and not a limitation upon the credit to be extended to Mrs. Zuckerman. In *Schinasi v. Lane*, 118 App. Div. 76, 103 N. Y. Supp. 127, the guaranty was as follows: "I hereby guarantee any bills the Retail Cigar & Tobacco Dealers' Association of New York may contract with you from this date until January 1, 1906, unless I notify you to the contrary, providing the amount of credit shall not exceed \$5,000 at any one time." It was held that the \$5,000 was the limit of the liability of the guarantor, and not of the amount of credit to be extended to the principal, and that the guarantor was not discharged by the extension of credit of more than \$5,000. The court said: "The defendant did not intend by his contract to deprive the company of obtaining credit. He merely intended that his liability should not exceed \$5,000. The language in which the guaranty was made was general, and, but for the clause with respect to the \$5,000, would have rendered the defendant's liability unlimited. \* \* \* The contract, having been drawn by the defendant, should, if necessary to protect the plaintiffs and accomplish the object of the guaranty, be interpreted most strongly against him, if it be ambiguous. The interpretation for which he now contends would make the contract misleading, and it is not the understanding that an ordinary person would glean from reading it." Four of the judges of the Supreme Court concurred in the opinion; one dissented. The case was affirmed in the Court of Appeals (191 N. Y. 545, 85 N. E. 1116) by four of the Justices; the other three dissenting. In *Tolerton v. Barck*, 81 Minn. 470, 84 N. W. 380, the defendant promised and guaranteed the payment of any sum of balance which then existed or might thereafter be contracted on account of goods and merchandise sold and delivered by plaintiff to a named firm of merchants, "provided such balance does not exceed one thousand dollars." The sum or balance due when the firm failed in business was something over \$1,300, and, because it exceeded the amount mentioned in the guar-

anty, it was contended by the defendant that he was released from liability. It was held that the amount named in the instrument was a limitation upon the liability of the guarantor, and not upon the amount of credit to be extended to the firm. In *Flak v. Stone*, 6 Dak. 35, 50 N. W. 125, the guaranty from the defendant to the plaintiff was as follows: "If you will send her [Mrs. Hollenbeck] such goods as she may order, not exceeding \$300 due you at any one time, I will guaranty that you are paid in full." It was held that it was not a breach of the terms of a guaranty, so as to relieve defendant from his liability for \$300, that plaintiff gave Mrs. Hollenbeck credit for more than that amount. In *Tootle v. Elgutter*, 14 Neb. 158,† the action was upon the following guaranty: "Please let Mr. John Newman have credit for goods to the amount of one hundred dollars, and for the payment of which I hold myself responsible." It was held to be a continuing guaranty, and the limitation therein was as to the amount for which the guarantor would hold himself liable, and not as to the credit to be given.

Considering the entire contract upon which this action is founded, and the fact that the defendant did not insert therein a stipulation that he should be relieved from all liability in the event that the plaintiffs should extend credit to Keith Carson to an amount exceeding \$2,000, and in view of the rulings to which we have referred, made by courts of the highest respectability in construing contracts very similar to the one now before us, we have confidently reached the conclusion that the judge of the trial court properly construed the contract in question as limiting the liability of the guarantor, and not the amount of credit to be extended. Accordingly, the verdict against the defendant was properly directed.

Judgment affirmed. All the Justices concur, except HILL, J., not presiding.

(137 Ga. 698)

#### OWENBY v. GEORGIA BAPTIST ASSEMBLY.

(Supreme Court of Georgia. Feb. 16, 1912.  
Rehearing Denied Feb. 29, 1912.)

(Syllabus by the Court.)

#### 1. SUBSCRIPTIONS (§§ 2, 5\*)—CONSIDERATION—ACCEPTANCE—MUTUALITY.

In mutual subscriptions for a given object, the promise of the others is a good consideration for the promise of each.

(a) It is not necessary that the payee should be named in a subscription paper. It is sufficient if there is an acceptance by the party intended.

(b) The test of mutuality of a promise is to be applied, not as of the time it was made, but as of the time when it is to be enforced. Therefore a promise in a subscription paper for a given object may be unilateral when made; but, if the party intended accomplishes

the object as contemplated, then the promise is rendered valid and binding.

(c) The ground of demurrer to the declaration, not controlled by the rulings above announced, if error at all, was not hurtful to the defendant.

[Ed. Note.—For other cases, see Subscriptions, Cent. Dig. §§ 3, 6, 7; Dec. Dig. §§ 2, 5.\*]

#### 2. APPEAL AND ERROR (§ 724\*)—ASSIGNMENTS OF ERROR—SUFFICIENCY.

There was no sufficient assignment of error to the ruling of the judge in holding that he was not disqualified to preside in the trial of the case.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2997-3001, 3022; Dec. Dig. § 724.\*]

#### 3. ADMISSION AND REJECTION OF EVIDENCE—NO ERROR.

There was no error in the admission or rejection of evidence.

#### 4. REFUSAL OF NONSUIT—DIRECTION OF VERDICT.

A nonsuit was properly refused, and the verdict directed was demanded under the law and the evidence.

Error from Superior Court, Fannin County; N. A. Morris, Judge.

Action by the Georgia Baptist Assembly against W. G. Owenby. Judgment for plaintiff, and defendant brings error. Affirmed.

A. S. J. Hall and Gober & Griffin, for plaintiff in error. Thos. A. Brown, O. R. Dupree, Wm. Butt, and J. Z. Foster, for defendant in error.

FISH, C. J. The Georgia Baptist Assembly sued out an attachment against Owenby as a nonresident of the state. A levy was made on certain personalty and realty. The defendant replevied the personalty, and, upon the filing of a declaration on the attachment against him, appeared and pleaded to the merits. The substance of the declaration as amended, after portions thereof had been stricken on demurrer, is as follows: The defendant is indebted to the plaintiff \$500 on a subscription paper signed by the defendant and numerous other cosubscribers, a copy of which is: "Blue Ridge, Fannin County, Georgia, March 5, 1908. We, the undersigned citizens of Blue Ridge and vicinity, promise and agree to give the amounts set opposite our names for the purpose of inducing the Baptists to locate their Chautauqua or assembly grounds at Blue Ridge, Georgia." The amount opposite the defendant's name is \$500. Subsequently to the date of the subscription paper, the subscribers, or nearly all of them, including the defendant (who owned a large amount of real estate in the city of Blue Ridge, where he resided at the time he signed the paper), in order to more successfully accomplish the purposes for which the subscriptions were made, namely, to secure the location of the assembly grounds of the Georgia Baptists in the city of Blue Ridge, had themselves incorporated in this state under the name of the Business

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

† 15 N. W. 228, 45 Am. Rep. 103.



Men's League of Blue Ridge, and soon thereafter organized the corporation; the defendant being one of the original incorporators, and not having since severed his connection with the corporation. Thereafter the plaintiff, having been incorporated as the Georgia Baptist Assembly, and acting upon the inducements offered by the signers of the subscription paper, accepted the offer made therein, and located its assembly grounds in the city of Blue Ridge. Upon such acceptance, the Business Men's League of Blue Ridge, in pursuance of a written resolution adopted by it, authorizing its president and secretary so to do, transferred in writing all of its interests in and to such subscription list, which transfer was signed by the president and secretary of the league, the corporate seal being thereto attached. Some of the subscribers have paid their subscriptions in full, others have paid half of the amounts they subscribed, and the money so paid has been invested in certain described lands in or near the city of Blue Ridge, which have been conveyed to the plaintiff to be used in connection with its assembly grounds; and the plaintiff, relying upon the agreement set forth in the subscription, has expended large sums of money in locating its assembly grounds in the city of Blue Ridge.

The amendment to the declaration alleged: "The defendant assented to every act of the Business Men's League of Blue Ridge, and of the plaintiff, looking to the location of said assembly grounds at Blue Ridge, and was a party to it; and he is now estopped from dissenting from such actions taken by said corporations. The plaintiff has acted upon the faith of the said acts of defendant and said Business Men's League of Blue Ridge, and has invested and spent large sums of money in establishing its assembly grounds at Blue Ridge, Georgia." The defendant refused to pay any part of his subscription, and has removed from the state. When the demurrers came on to be heard, the judge held himself disqualified to preside. By consent of counsel for the respective parties the case was "referred" to an attorney of the court as judge pro hac vice; and it was further ordered, by agreement, that the demurrers be heard in vacation, with the right of exception preserved. They were so heard. Some of them were overruled, while others were sustained. The defendant filed exceptions pendente lite to the refusal to sustain all of the demurrers. When the case subsequently came on for trial during term, the presiding judge held himself not to be disqualified to try the case, and entered an order revoking the former order, in which he had held himself disqualified. To this the defendant objected, contending that the judge was disqualified to preside. Upon the trial the defendant, at the conclusion of the evidence for the plaintiff, moved for a nonsuit, which was denied. Finally a verdict was directed by the court in favor of

the plaintiff against the defendant for the amount of his subscription, with interest thereon at 7 per cent. from the date of the subscription paper. The defendant filed a direct bill of exceptions, assigning error upon his exceptions, pendente lite, upon the ruling of the judge holding himself not disqualified to try the case, upon the admission and rejection of certain evidence, upon the overruling of the motion for nonsuit, and upon the direction of the verdict.

[1] 1. The grounds of demurrer to the declaration are, in effect, as follows: (a) No consideration is expressed in the subscription paper. (b) No payee is named therein. (c) The agreement it contains is unilateral. (d) There is no promise in it to the Business Men's League of Blue Ridge, nor is it alleged that the league had any connection with or interest in such paper, so as to give it the right to transfer the same, or that the defendant ever agreed that it be transferred by the league, to the plaintiff. In our opinion, there is no merit in any of these grounds of demurrer.

(a) "In mutual subscriptions for a given object, the promise of the others is a good consideration for the promise of each." Civil Code, § 4246. "If there be a valid consideration for the promise, it matters not from whom it is moved. The promisee may sustain his action, though a stranger to the consideration." *Id.* § 4249.

(b) It is not necessary that the payee should be named in the subscription paper. It is sufficient if there is an acceptance by the party intended. 37 Cyc. 488; 27 Am. & Eng. Enc. Law, 276; 1 Page on Contracts, § 51. See cases sustaining the text cited in each of these authorities. In *Wilson v. First Pres. Church*, 56 Ga. 554, it was held: "A subscription, signed by defendant and others, in these words, 'We the undersigned, promise to pay the amount set opposite to our several names, to be applied to the completion of the house of worship of the First Presbyterian Church in Savannah,' \* \* \* is a promise to pay the church, it being a corporation, and is valid, being supported by the consideration of mutual promises, and by the fact that the church, on the faith of the subscription, entered upon the work of completing the building."

(c) While the promise contained in the subscription paper may have been unilateral at the time it was signed by the defendant, the test of mutuality is to be applied, not as of that time, but as of the time when the agreement is to be enforced; and if the defendant signed the subscription paper for the purpose of inducing the Baptists to locate their assembly grounds in the city of Blue Ridge, and the plaintiff, for whose benefit it was substantially alleged the subscription was made, relying upon the agreement in the subscription, located its assembly grounds at Blue Ridge, and in doing so expended large amounts of money, then the plaintiff did ex-

actly what it was expected to do, thereby furnishing the contemplated consideration, and changing what was at first a unilateral promise into a valid and binding contract. *Wilson v. First Presbyterian Church*, 56 Ga. 554 (2); *Brown v. Bowman*, 119 Ga. 153, 46 S. E. 410; *Hardin v. Case*, 134 Ga. 813, 68 S. E. 648.

(d) The specifically expressed purpose of the subscription paper was to induce the Baptists to locate their assembly grounds at Blue Ridge, where it is alleged the defendant resided when he signed the paper, and where he then owned considerable real estate. It is further alleged that the defendant and nearly all of the other subscribers, in order to more successfully accomplish the purpose for which the subscriptions were made—that is, to secure the location of the assembly grounds of the Georgia Baptists at Blue Ridge—had themselves incorporated under the name of the Business Men's League of Blue Ridge; that the defendant had ever since remained a member of such league; that the corporation adopted a resolution authorizing and directing its president and secretary to transfer the subscription paper to the plaintiff, which was accordingly done; and that the plaintiff, relying upon the inducement offered by the signers of the subscription paper, accepted the same, located its assembly grounds at Blue Ridge, and expended large sums of money in so doing. The declaration, as amended, also alleges that the defendant assented to every act of the league and of the plaintiff looking to the location of the plaintiff's assembly grounds at Blue Ridge, and that the plaintiff, in locating such grounds there and in expending large sums of money in so doing, acted upon the faith of the acts of the defendant and the league. Even if, under all the allegations of the declaration, it does not appear that the league had such an interest in the subscription paper as authorized it to transfer the same to the plaintiff, we are nevertheless of the opinion that the declaration set out a cause of action in favor of the plaintiff against the defendant, as it sufficiently appears therefrom that the defendant signed the subscription paper for the purpose of securing the location of the assembly grounds of the Baptists at his home city, where he owned valuable real estate; that, acting upon the promise contained in such paper, and induced thereby, the plaintiff established the assembly grounds of the Georgia Baptist Assembly at Blue Ridge, and expended large sums of money in so doing; that some of the subscribers have paid in full, and others have paid half of their subscriptions; and that the defendant, although he has presumably received his proportion of whatever benefits might be derived from the location of the assembly grounds in the city of his residence, has refused to pay what he and the other subscribers offered or promised in order to secure that which they desired, and

which they have obtained from the plaintiff. *Wilson v. First Presbyterian Church*, 56 Ga. 564; 37 Cyc. 484; 27 Am. & Eng. Enc. Law, 380; 1 Page on Contracts, §§ 51, 298.

[2] 2. Error is assigned upon the ruling of the trial judge in holding himself not disqualified to preside in the case. It is recited in the bill of exceptions that at the May term, 1910, of the court where the case was pending, the presiding judge passed an order in which it is stated that, "it appearing" that he "is disqualified to hear and determine" the case, it is, by consent of parties, "referred" to a named attorney of the court as judge pro hac vice, and that the demurrers to the declaration be heard by him in vacation. Another recital of the bill of exceptions is that at the subsequent term of the court, during which the case was tried, the presiding judge, "over the objection of counsel for defendant, \* \* \* took jurisdiction of said case, and held himself qualified to try, and ordered said case to trial before a jury." The only other reference to the alleged disqualification of the judge in the bill of exceptions is the following: "The contract or acceptance, dated January 5, 1909, between the plaintiffs and the Business Men's League of Blue Ridge, shows that upon certain contingencies, or a failure of the plaintiffs to do certain things within a certain time, the property conveyed was to revert to the Business Men's League or the subscribers. This being true, it was error upon the part of the court to take jurisdiction of said case after having disqualified, and after no notice was served to vacate the order of the court disqualifying and referring the case to a judge pro hac vice, when it appeared that said court, under the terms of the agreement, was interested in this suit. Defendant assigns error upon the court's taking jurisdiction over objection, and says that the court was disqualified to hear and determine said case, and the taking of jurisdiction and the hearing of said case over his objection without notice was error, and is contrary to law." As will be observed, it does not appear from the above recitals in the bill of exceptions upon what grounds the judge held himself to be disqualified, nor why he subsequently held himself to be qualified, nor does it appear what the objection was (if any specific objection was made) which the defendant urged before the judge as a ground for his disqualification at the time he held himself to be qualified, although the plaintiff in error undertakes in the bill of exceptions to set forth the reasons why the court erred in holding himself qualified. Even if such reasons are apparently sound, the assignment of error is not sufficient, because we are not informed anywhere in the bill of exceptions that the judge passed on them, or what facts he did pass on in deciding that he was qualified to preside in the case. The principle applies here of the fa-

miliar rule that an assignment of error upon the admission of evidence, over objection, is not sufficient where the objection urged to the evidence at the time it was admitted is not disclosed.

[3] 3. We have carefully examined and considered every assignment of error upon the admission and rejection of evidence, and are confident that no error was committed in these respects. Indeed, it might be said that, in our opinion, if all the evidence which was admitted over the objection of the defendant had been rejected, and if all the evidence offered by him, and which was rejected, had been admitted, the plaintiff, nevertheless, would have been entitled to recover.

[4] 4. A nonsuit was properly refused; and, applying the legal principles to which we have referred, in ruling upon the demurrers to the facts of the case as disclosed by the evidence, the verdict for the plaintiff was demanded, and the court did not err in directing it.

Judgment affirmed. All the Justices concur, except HILL, J., not presiding.

(137 Ga. 638)

JONES v. KIMBROUGH, BICKERS & CO.  
(Supreme Court of Georgia. Feb. 27, 1912.)

(Syllabus by the Court.)

1. TROVER AND CONVERSION (§ 67\*)—ACTIONS—INSTRUCTIONS.

The court erred in charging the jury as follows: "To authorize a recovery by the plaintiff in this case, it must appear that the bond was the property of Mary Madison Jones, and it must further appear that Kimbrough, Bickers & Co. got possession of the same and converted the same to their use, sold the same, and have never paid for the same to Mrs. Jones, or any one else for Mary Madison Jones." Such instructions were calculated to lead the jury to believe that if the defendants received the bond from Mrs. Jones, and converted the same, and afterwards paid for it by making payment to Mrs. Jones for Mary Madison Jones, the plaintiff, they would not be liable to the plaintiff, without regard to the question as to whether Mrs. Jones had authority to receive such payment or not. Such is not the law, because, if the defendants received this bond from the mother of the plaintiff, knowing that it was the property of the plaintiff, and converted it to their own use, they would not be relieved of liability, although they afterwards paid the value of the bond to Mrs. Jones, the mother of the plaintiff; it not appearing that Mrs. Jones had authority, as trustee or in any other capacity, to consent to the conversion of the bond or to receive payment therefor.

[Ed. Note.—For other cases, see Trover and Conversion, Cent. Dig. §§ 295-303; Dec. Dig. § 67.\*]

2. EVIDENCE (§ 471\*)—OPINION EVIDENCE—ADMISSIBILITY.

The court should not have permitted a witness to testify that he was "satisfied since then that the \$500 and \$550 notes were paid" (the payment of these notes being a material subject of inquiry), over the objection that the opinion and conclusion of the witness were irrelevant and inadmissible. The expression,

"I am satisfied," while it may be one method of stating the witness' recollection, apparently states an opinion or belief of the witness, based upon hearsay or his own deduction or inference from facts. The witness should state the facts, and allow the jury to make the deductions. *Marshall v. Pierce*, 136 Ga. 543, 71 S. E. 893.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2149-2185; Dec. Dig. § 471.\*]

3. TROVER AND CONVERSION (§ 36\*)—ACTIONS—ADMISSIBILITY OF EVIDENCE.

The court erred in admitting the following writing in evidence: "This is to certify that all claims held by me against M. P. Kimbrough & Co. have been settled in full, Greensboro, Ga., Sept. 6, '98. E. D. Jones or Mrs. E. D. Jones;" it not appearing who actually signed the same. For, if the bond was turned over to defendants, as alleged, by the mother of the plaintiff, and they had knowledge at the time that it was the property of Mary Madison Jones, and they converted it, mere payment of money to Mrs. Jones, or to E. D. Jones, could not relieve them of liability to Mary Madison Jones for the value of the bond, in the absence of proof that one of the two parties last named had authority to accept payment for the bond; and the jury might have erroneously inferred from the allowance of this evidence that, even if the defendants had been in possession of the bond as charged and had converted the same, payment of money equal in amount to the value of the bond to Mrs. Jones, or to E. D. Jones, would be a discharge of their liability for such conversion.

[Ed. Note.—For other cases, see Trover and Conversion, Cent. Dig. §§ 217-224; Dec. Dig. § 36.\*]

4. PLEADING (§ 17\*)—ALLEGATIONS IN GENERAL—POSITIVENESS.

Where it was charged in the petition of the plaintiff that her mother had, without authority, delivered a bond, which was the property of the plaintiff, to the defendants, and that they had converted the same to their own use, and the defendants pleaded: "If defendants used said bond, the same was duly accounted for to Mrs. Minnie K. Jones [the mother of petitioner], and she was paid full value for the same. If the same was used by them, it was a purchase of said bond from Mrs. Jones without notice to defendants that this plaintiff, or any one else, had any title or interest in the same, and primarily it is the duty of this petitioner to proceed against said Mrs. Minnie K. Jones"—such plea was demurrable on the ground that "said paragraph is not positive but hypothetical in its averments."

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 38, 41, 350; Dec. Dig. § 17.\*]

5. TROVER AND CONVERSION (§ 22\*)—DEFENSES—POSSESSION OF DEFENDANT.

Nor was it a valid defense, under the facts recited in the foregoing headnote, that the defendants, at the time of the pleading, were not in possession of the bond, if they had previously committed acts which amounted to a conversion of the bond (*Seago v. Pomeroy*, 46 Ga. 227); and the paragraph of the amendment to the answer setting up this defense should have been stricken on demurrer.

[Ed. Note.—For other cases, see Trover and Conversion, Cent. Dig. §§ 152-162, 167-169; Dec. Dig. § 22.\*]

6. NO OTHER ERROR.

Except as indicated in the foregoing headnotes, no error appears.

Error from Superior Court, Greene County; H. G. Lewis, Judge.

Action by M. M. Jones, by next friend, against Kimbrough, Bickers & Co. Judgment for defendants, and plaintiff brings error. Reversed.

Park & Park and Samuel H. Sibley, for plaintiff in error. Jas. Davison and Jos. E. Pottle, for defendants in error.

BECK, J. Judgment reversed. All the Justices concur, except HILL, J., not presiding.

(10 Ga. App. 675)

**PATAPSCO SHOE CO. v. BANKSTON.**  
(No. 3,736.)

(Court of Appeals of Georgia. March 6, 1912.)

*(Syllabus by the Court.)*

**1. SALES (§ 38\*)—VALIDITY OF CONTRACT—FRAUD.**

Where a seller of goods, by fraudulent misrepresentations as to the contents of the written contract of sale, induces the purchaser to sign it without reading it, by creating an emergency on account of which the purchaser did not have time or opportunity to inform himself of the contents of the writing, the contract is not enforceable against him.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 65-77, 85; Dec. Dig. § 38.\*]

**2. SALES (§ 36\*)—VALIDITY OF CONTRACT—FRAUD.**

The mere fact, however, that the purchaser signed the contract under such an emergency without ascertaining its contents will not authorize him thereafter to repudiate it, in the absence of fraudulent misrepresentations or conduct on the part of the seller, which misled the purchaser as to the contents of the writing.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 63, 64; Dec. Dig. § 36.\*]

**3. AMENDMENT TO PLEADING—GRANT OF NEW TRIAL—ERROR.**

Applying to the facts of the present case the principles laid down in the preceding headnotes, the court erred in allowing the amendment to the defendant's answer and in granting a new trial.

*(Additional Syllabus by Editorial Staff.)*

**4. NEW TRIAL (§ 18\*)—DEMURRER TO ANSWER.**

Assignments of error complaining of the sustaining of a demurrer to portions of the answer have no place in a motion for new trial.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 24-29; Dec. Dig. § 18.\*]

Error from City Court of Ocilla; H. E. Oxford, Judge.

Action by the Patapsco Shoe Company against R. E. Bankston. From a judgment granting a new trial after verdict for plaintiff, it brings error. Reversed.

Newbern & Meeks, for plaintiff in error. R. M. Bryson, for defendant in error.

POTTLE, J. This was a suit brought by a seller of goods upon a contract signed by

both parties, to recover the purchase price. The contract stipulated that the price should be due within 10 days. Over objection of the plaintiff, the court allowed a plea setting up that there was a custom in the locality in which the defendant did business to allow 60 days on purchases of this character; that the agent for the seller knew of this custom, and that he presented the contract to be signed, containing a stipulation that the price should be due in 10 days, stating at the time that he had to catch a train which was about to leave; and that the defendant, on account of this emergency, signed the contract, supposing that it contained the stipulation allowing him 60 days credit. At the trial, defendant testified that, when the plaintiff's agent came to him to take the order for the shoes, he was waiting on a customer and the agent said that he had only a few minutes in which to catch a train. He told the defendant to sign the order quickly, as he was in a hurry to catch the train, and the defendant took it for granted that the shoes were sold to him on the same terms as everybody sold them, and signed the contract. The defendant never bought any shoes in his life, so he testified, unless on 60 days time, and sometimes 6 months, except on one occasion when he bought on 30 days credit. When the goods arrived the defendant declined to receive them, paid the freight on them, and shipped them back to the plaintiff. There was other testimony, of a witness for the defendant, to the effect that, so far as the witness knew, shoes were always sold in the locality in question upon a credit of from 60 days to 6 months; but the witness could not testify that all buyers got the same terms. At the conclusion of the evidence the court directed a verdict in favor of the plaintiff, for the full amount sued for. The defendant filed a motion for a new trial, containing the general grounds and some special assignments of error. The judge granted the motion for a new trial and set aside the verdict which he had previously directed. The plaintiff excepted to this judgment, and also to the judgment allowing the amendments to the defendant's pleas.

[1] The first conclusion of the trial judge was correct. The evidence demanded a verdict in favor of the plaintiff. One who can read must read, or take the consequences for his failure to do so. A purchaser of goods has no right to rely upon the representation of the seller as to the contents of the contract of sale, and cannot be relieved of the consequences of his own neglect in failing to ascertain the contents of the writing, unless the seller creates an emergency, or does some act which prevents the purchaser from reading the contract. *Walton Guano Co. v. Cope-land*, 112 Ga. 319, 37 S. E. 411, 52 L. R. A. 268. But if the seller fraudulently misrepre-

sents the contents of the writing, and at the same time creates an emergency, or does some act which prevents the purchaser from reading the contract, the purchaser is not bound. *Wood v. Safe Co.*, 96 Ga. 120, 22 S. E. 909; *McEride v. Telegraph Co.*, 102 Ga. 422, 80 S. E. 999.

[2] But, in order for the purchaser to be relieved, two things must concur: (1) There must be a fraudulent misrepresentation by the seller, acted on by the purchaser; and (2) the seller must do something which would relieve the purchaser of the duty resting upon him to read the contract himself and ascertain its terms. *Chandler v. Price*, 73 S. E. 413. In the present case it is not alleged that the seller made any misrepresentation of any character. The defendant relies solely upon the fact that he signed the contract hurriedly, because of the agent's statement that he had to catch a train, and that it was a custom in the community, known to the agent, under which shoes were sold upon a credit of not less than 60 days. Neither the defendant's plea nor his proof comes up to the rules laid down in former decisions. No such fraud on the part of the agent was shown as would entitle the defendant to relief from the contract. The mere fact that a custom existed in the community under which the plaintiff had been permitted by other sellers to have 60 days or more within which to pay for goods which he had bought would not be sufficient to avoid the contract. In the first place, it is not shown that this was such a universal custom as to have become, by implication, a part of the contract; and, in the second place, in order to entitle the purchaser to relief, he must plead and prove some actual fraud on the part of the seller, some actual misrepresentation by which he was misled, as to the contents of the writing, and, in addition to this, some legal excuse for his failure to read it.

[3] The amendments to the plea in this case should have been disallowed. The evidence for the defendant was wholly insufficient to establish any defense, and the court properly directed a verdict in favor of the plaintiff. This being so, it was error to grant a new trial.

[4] There are some special assignments of error in the amended motion, complaining of the sustaining of a demurrer to portions of the defendant's answer. Such an assignment of error has no proper place in a motion for a new trial, and cannot be considered.

The court properly excluded the testimony of a witness offered by the defendant to the effect that he had never bought any shoes but once that he did not have from 60 days to 6 months within which to pay for them, and that once he had 30 days. This evidence was wholly irrelevant and immaterial.

There was no sufficient reason alleged in the amended motion for granting a new trial.

Judgment reversed.

(10 Ga. App. 593)

MURPHEY v. CREAMER. (No. 3,841.)

(Court of Appeals of Georgia. Feb. 29, 1912.)

(Syllabus by the Court.)

1. NEW TRIAL (§ 26\*)—PROCEEDINGS TO PROCURE—ASSIGNMENTS OF ERROR—MATTERS CONSIDERED.

Several assignments of error in the motion for new trial are withdrawn from consideration by the ruling of the court below upon the demurrer, to which no exceptions were filed. The points presented by the demurrer are res judicata. Even though ordinarily the same points could properly be presented by motion for a new trial, the ruling thereon, unexcepted to, is the law of the case, and by this law the validity of the assignment of error is to be tested.

[Ed. Note.—For other cases, see *New Trial*, Cent. Dig. §§ 37-39; Dec. Dig. § 26.\*]

2. NEW TRIAL (§ 40\*)—PRESENTATION OF QUESTION IN TRIAL COURT—ADMISSION OF EVIDENCE.

A ground of a motion for a new trial, which purports to assign error upon the admission of testimony alleged to be objectionable, presents nothing for the consideration of this court upon review, unless it affirmatively appears that the same objection was made upon the trial. "A ground of a motion for a new trial, assigning error upon the admission of certain quoted testimony over the objection of the movant, without stating what the objection was upon which the trial judge ruled, is so incomplete that this court cannot pass upon it." *McCray v. State*, 134 Ga. 416, 68 S. E. 62, 20 Ann. Cas. 101.

[Ed. Note.—For other cases, see *New Trial*, Cent. Dig. §§ 62-66; Dec. Dig. § 40.\*]

3. LANDLORD AND TENANT (§ 79\*)—RIGHTS OF PARTIES—PRIORITIES.

The court did not err in refusing to charge the jury that the rights of the lessee and his assigns under a lease for five years would prevail over and be superior to any subsequent rental from Parks (the landlord) to Creamer.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Dec. Dig. § 79.\*]

4. CONTRACTS (§ 214\*)—CONSIDERATION—DEFINITENESS.

The consideration of a parol contract is not necessarily invalid because it is not payable on a definite day, for it may be mutually understood that such consideration is to be paid at a time or within a period which can be definitely ascertained.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 980-995; Dec. Dig. § 214.\*]

5. CONTRACTS (§ 10\*)—VALIDITY—MUTUALITY OF CONTRACT.

A contract is not void for want of mutuality merely for the reason that it is agreed the purchase price is to be paid from the proceeds or profits of a going business.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 21-40; Dec. Dig. § 10.\*]

6. NEW TRIAL (§ 26\*)—PROCEEDINGS TO PROCURE—QUESTIONS CONSIDERED.

The failure to except to the ruling upon the demurrer pointing out that there was a misjoinder of distinct causes of action precludes any question of the correctness of the

ruling, when it is sought to test its correctness by motion for a new trial. Even if the ruling is error, it may become the law of the case by failure to except in time, or by waiving the right to except. The excerpt from the charge to which exception is taken, however, is in the identical language used by the Supreme Court in *Porter v. Johnson*, 98 Ga. 143, 147, 23 S. E. 123, and, in view of the defendant's waiver of the right of exception, was not error.

[Ed. Note.—For other cases, see *New Trial*, Cent. Dig. §§ 37-39; Dec. Dig. § 26.\*]

#### 7. REMAINING ASSIGNMENTS CONSIDERED — NEW TRIAL REFUSED.

The remaining assignments of error not specifically dealt with in the opinion are none of them of sufficient merit to warrant the grant of a new trial.

Error from City Court of Richmond County; W. F. Eve, Judge.

Action by H. R. Creamer against George S. Murphey. Judgment for plaintiff, and defendant brings error. Affirmed.

Creamer filed a petition in the city court of Richmond county, in which he alleged that on January 10, 1908, he went into possession as the owner of a certain wood and coal yard in the city of Augusta formerly known as the wood and coal yard of S. M. McKendree & Co.; that prior to the date first mentioned it had been owned by the defendant Murphey, either in his own right or in connection with one Zachry; that the business, with all equipment and appurtenances, was sold to him by verbal contract for \$2,400, payment to be made as the sales of the business would warrant, the defendant expressly agreeing not to press payments during the summer months; that the balance of the purchase money was to become due within a reasonable time after the summer months were past, and that delivery of the property was made to the plaintiff in accordance with these stipulations; that the plaintiff paid \$1,465 on the purchase price, leaving only an unpaid balance of \$935 of the purchase price; that on July 29, 1908, the defendant came to the plaintiff's place of business and forcibly took possession of the wood yard and all of the equipment and appurtenances, and the stock of wood and coal, over the protest of the plaintiff's agent and without any authority of law; that the property thus seized by the defendant was worth \$2,400, and that by reason of its appropriation the plaintiff claims damages in the sum of \$1,500. The petition alleged, also, that the premises were rented by the plaintiff from one Parks, and that the invasion of the premises in violation of the plaintiff's right to the same was a willful and malicious trespass, by reason of which the plaintiff was damaged in the sum of \$250.

Another paragraph of the petition alleged the issuance of a possessory warrant by the plaintiff for the recovery of certain personal property, including the door key and a bunch of keys which had been seized by the

defendant, and the award of the property under the possessory warrant to the plaintiff, whereupon the defendant sued out a writ of certiorari, which he thereafter allowed to be dismissed. It was also alleged that, after the decision of the magistrate in favor of the plaintiff, the defendant swore out a possessory warrant against the plaintiff before one Bennett, a justice of the peace, alleging that the property which was in his (the defendant's) own possession was at that time in the possession of the plaintiff, and that this possessory warrant was sworn out solely for the purpose of affording the basis for a plea that the property described in the possessory warrant issued at the instance of the plaintiff was in the possession of a constable of Bennett's court. The plaintiff charged that the certiorari proceeding was a malicious use of legal process, without probable cause, made for the purpose of delaying the plaintiff in the assertion of his legal rights, and to retain possession of the keys and books, so as to fortify the defendant in the seizure of the defendant's business.

The plaintiff also claimed damages in the sum of \$500, for malicious prosecution instituted by the defendant against him upon an accusation for trespass, and damages of \$1,000, for profits which he would have received in the natural course of trade, of which he was deprived by reason of the trespass, seizure, and dispossession at the hands of the defendant.

A demurrer to the plaintiff's petition, to which reference will be made hereafter, was overruled, but no exceptions were filed. The defendant's plea denied each and all of the several paragraphs of the petition, and was amended so as to allege that what the defendant claimed was a sale was merely a proposition to sell, that no completed contract of sale was ever made, and that the plaintiff's possession of the property in question was merely as agent for the defendant. The plea also alleged that there was probable cause for the issuance of the warrant, and that all the acts of the defendant were in good faith, and not actuated by malice, and, moreover, that the alleged contract was violative of the statute of frauds. Upon the trial the jury rendered a verdict in favor of the plaintiff, for \$1,000 actual damages and \$250 punitive damages.

E. H. Callaway, for plaintiff in error. Wm. H. Fleming, for defendant in error.

RUSSELL, J. (after stating the facts as above). [1] By the demurrer to the petition, which was overruled, the defendant asserted: (1) That the petition sets out no cause of action. (2) That the petition is multifarious, joining in one suit more than one cause of action, and joining separate and distinct causes of action arising out of

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

the separate and distinct transactions occurring at different times and at different places. (3) That there is a misjoinder of causes of action in this: That the alleged cause of action set out in paragraphs 1, 2, and 3 is *ex contractu*, and the alleged cause of action set out in paragraphs 4 to 6 is *ex delicto*, and the cause of action in paragraph 7 is *ex contractu*. (4) That it affirmatively appears that the personal property referred to in paragraph 1 was not the property of the plaintiff, and that the alleged contract of sale was void. (5) That the separate cause of action set out in paragraph 4 is vague and indefinite, and the statement of fact therein sets out no cause of action. (6) That the allegations in paragraphs 5 and 6 set forth no cause of action against defendant. (7) That the petition and the allegations in paragraph 5 do not set out a cause of action, or state facts entitling the plaintiff to damages, because the defendant sued out the *certiorari* therein referred to. (8) That the facts set out in paragraph 6 do not set out a cause of action. (9) That the allegations in paragraph 7 do not set out a cause of action against the defendant. The allegations are vague, indefinite, and insufficient in law to constitute a cause of action. (10) That there is a misjoinder of causes of action, actions *ex contractu* and *ex delicto* being joined in one petition.

It is not necessary to rule upon the merits of any of these grounds of the demurrer, for no exception was taken to the judgment overruling it, and thereby the ruling upon the demurrer, whether right or wrong, became the law of the case. *Missouri State Life Ins. Co. v. Lovelace*, 1 Ga. App. 446, 58 S. E. 93. The disposition of the demurrer only rendered it obligatory upon the plaintiff to prove the statements of his petition, in order to make out a *prima facie* case. Applying the doctrine of *res judicata*, as laid down in the *Lovelace Case*, *supra*, as well as in *Georgia Northern Ry. Co. v. Hutchins*, 119 Ga. 510, 46 S. E. 659, *Ray v. Anderson*, 117 Ga. 136, 43 S. E. 408, *Savannah, Florida & Western Ry. Co. v. Renfro*, 115 Ga. 774, 42 S. E. 88, and *Roberts v. Ivey*, 63 Ga. 623, to the 10 grounds of the demurrer in the case at bar, it will be seen that several of the grounds of the motion for a new trial were practically eliminated and present nothing for our consideration. This process of elimination applies to numbers 2, 18, and 19, alleging that the verdict is contrary to law and the principles of equity and justice, No. 5, as to what constitutes a valid consideration, No. 6, as to the definiteness of the terms of the contract, No. 7, as to payments being made out of proceeds of the property conveyed by defendant to plaintiff, and No. 8, as to the time when payments were to be made and the source from which the money was to be derived.

[2] 2. Several of the grounds of the motion for new trial complain of the admission

of testimony, and state the reasons why the testimony objected to should not have been admitted. None of these assignments of error present anything for the consideration of this court, nor did they present anything for the consideration of the trial court at the hearing of the motion for new trial, for the reason that it does not appear that any objection now presented was made before the court at the time of the ruling complained of. The statement in an assignment of error that certain testimony is objectionable, and is now objected to for reasons therein stated, cannot be considered, unless it affirmatively appears that the trial court ruled upon precisely the same objections, and that his judgment upon these objections was error. Nothing is better settled than that the distinct ground of objection to testimony must be clearly presented, and that, in default of an explicit statement of the ground of objection at the time the objection is interposed, the incorrectness of the court's ruling is immaterial, because no ruling has been properly invoked or required. *Soell v. State*, 4 Ga. App. 340, 61 S. E. 514. Where the point upon which a ruling is invoked in this court does not affirmatively appear to have been properly before the trial judge for his consideration, it is not error of the judge, when passing upon a motion for a new trial, to disregard this ground of the motion entirely, because defective. "A ground of a motion for a new trial, assigning error upon the admission of certain quoted testimony over the objection of the movant, without stating what the objection was upon which the trial judge ruled, is so incomplete that this court cannot pass upon it." *McCray v. State*, 134 Ga. 416, 68 S. E. 62, 20 Ann. Cas. 101. This ruling disposes of the objections here urged to the admission of the possessory warrant proceedings sued out by Murphey against Creamer, and to the possessory warrant sworn out by Creamer against Murphey, and the statement of Billings which Creamer was permitted to testify to.

[3] 3. In the third ground of the motion for a new trial the complaint is made that the court erred in refusing to charge the jury (on the issue as to whether Murphey or Creamer had the right of possession as the tenant of Parks as landlord) that "the rights of the lessor and his assigns under the original lease from Parks, dated in January, 1906, to S. M. McKendree & Co., for a period of five years, would prevail over and be superior to any subsequent rental from Parks to Creamer, unless said written lease had been cancelled or surrendered." It is insisted by the learned counsel for plaintiff in error that, Parks having made a five-year lease to McKendree & Co. in January, 1906, which had never been abrogated, surrendered, or forfeited, he was prevented from making any oral lease or contract with Creamer for the same premises in January,

1908, and that, for this reason, the instruction which was requested should have been given. Inasmuch as it appears that this contract was not transferred to Murphey until several months after Creamer took possession, and after he had been recognized by Parks as his tenant, we fail to see any error in the refusal to charge as requested. The evidence was not undisputed that, at the time Creamer claimed to have rented the premises from Parks, Murphey was entitled to possession as tenant of Parks, and, unless it had been undisputed, the judge would have erred in charging as requested; for one of the vital points in the case was, who was Parks' tenant, Murphey or Creamer, and it would not be true, as a matter of law, that the rights of the assignee of the contract of rental, acquired subsequently to Creamer's possession, would necessarily have been superior before the transfer, although they might have been so after the contract was formally assigned in writing.

[4] 4. The statement by the court that a promise or agreement to pay a certain price would be a consideration was not erroneous, or calculated to mislead the jury, when considered in the light of the fact that it immediately followed an instruction upon the subject of consideration, which had been requested, in which the jury were told that "the consideration of a contract must be definite as to the amount or amounts, and the time or times of payment, so that the seller can enforce his rights and collect the same by suit, if not paid when due. A consideration which does not become due at some time definite, or that can be made definite, is not a valid consideration, and will not support a contract of sale." It is true that the sentence to which exception is taken does not refer to the definiteness of time which is essential in order to create a contract, but that essential had been referred to so amply before that the jury could not have been misled.

[5] 5. One of the main grounds of objection urged in several assignments of error is that the contract which Creamer attempted to prove is a nudum pactum because there is a total absence of mutuality. It is especially insisted that the contract is void, because the only provision for the payment of the purchase price is that it is to be paid from the proceeds of the business, and that this would be the payment to Murphey of his own property, and consequently no payment. We are cited to the cases of Beall v. Clark, 71 Ga. 818, and Dorsey v. Packwood, 12 How. 126, 13 L. Ed. 921, as authority for this proposition. We think the trial judge in this case went to the extreme limit in favor of the plaintiff in error when he charged that "a contract for the payment of the purchase price of property from the proceeds of the property itself would be inoperative and void." He certainly did not commit an er-

ror when he later instructed the jury that a contract of purchase might be good which contemplated the payment of the purchase price from the profits of the property purchased. The Cases of Beall and Dorsey, supra, in our opinion, are not in point in this case. In the Beall Case a minor son, to whose services a father was entitled, was told by his father that he would give him a certain plantation as soon as he made the money to pay the cost of it. The attempt to assert title in behalf of the son was based upon the Code section which relates to the parol gift of real estate to a child, and the whole decision in the Beall Case rests upon the proposition that the circumstances were not sufficient to raise the inference required by law in such cases. Our Supreme Court draws a distinction between the Beall Case and the Dorsey Case, which clearly shows that our court was considering only the question of a parol gift of land by a father to his child. In the Beall Case, supra, Judge Hall says (71 Ga. 852): "In that case, the bargainor had no right to the services of the bargainee; *in this he had*, yet the Supreme Court of the United States held, without dissent upon the part of any of its members, that 'an agreement whereby the purchaser of a plantation bound himself,' by writing, as appears from the record, 'to transfer to his son-in-law one-half of the plantation, slaves, cattle, and stock, as soon as the son-in-law should pay for one-half of the cost of said property, either with his own private means or with one-half of the profits of the plantation, was deficient in mutuality.' The son-in-law was not bound to render any services nor pay any money." An examination of the Dorsey Case, supra, shows that several legal considerations influenced the decision, besides the lack of mutuality in the contract between Dorsey and Packwood. While the portion of the headnote quoted by Justice Hall might lead to the conclusion that lack of mutuality alone controlled the decision, it must be borne in mind that there was absolutely no time fixed for the stipulated payment of one-half of the purchase price, even if it was paid, and that in summing up the reasons controlling the decision of the Supreme Court the decree for specific performance was refused, because the plaintiff, if bound at all, had shown no performance or offer of performance after an interval of 27 years, and also because of a release by Packwood on the part of Dorsey.

However, the plaintiff in error in the present case cannot complain of the charge of the court upon this point because the judge did instruct the jury in one portion of his charge that, if they found Creamer's payments were to be confined exclusively to the proceeds of the property transferred, that would be no consideration, and there would be a lack of mutuality. Of course, in charging the converse of this proposition, the court was correct in telling the jury that if the



contract was for a specific amount, and was not limited to the property transferred, then there would be mutuality, and the contract would be binding. It is evident that the use of the word "definite" did not mislead or confuse the jury because, from the context, it is quite apparent that the judge was referring to the oral argument in behalf of the defendant, rather than to the pleadings filed in his defense. There can be no mistaking that it was argued there, as it has been ably insisted here, on the part of the then defendant, that the contract as to the property which Creamer claimed to have bought was void for lack of mutuality, because the judge proceeded to tell the jury that, if payment under the proposed contract "was limited to the proceeds of the property sold, the seller would be paying himself exclusively out of his own property, and there would be nothing assumed by the party on the other side." The judge, in our opinion, did not err in adding, in response to a direct question propounded by the foreman of the jury in asking for instructions, that the lack of mutuality would be confined to the property actually transferred, and not the proceeds from other sources in the furtherance of the business. In other words, the test is: Was there liability for the amount specified in the contract? According to Creamer's testimony he was bound in any event to pay \$2,400. He agreed for Murphey to sell a certain portion of the assets, some of which he distinctly testified were of no use to him in the business, for \$1,465, and, while there is no direct evidence that he would not have been able to procure from some outside source, by pledging his assets, and by borrowing on personal security, or otherwise, the remainder due upon the purchase price of \$2,400, still, granting for the sake of the argument that the remainder of the purchase price was to be paid by the close of the next season from the profits of the business, the sale is not for that reason void for want of mutuality. Conceding that the fact that there will be profits is uncertain, still, if the purchase price is not paid when the limit fixed for payment has arrived, the purchaser becomes liable for the unpaid purchase price, and judgment can be recovered against him. The mere stipulation that the payment is to be made from profits would not of itself necessarily evidence that the purchase price would not be paid, or even that it would not be paid from the profits; nor would it necessarily evidence that payment from the profits of the property sold would be only payment to the seller of his own. A sale may be perfectly valid, and yet contemplate that the payments are to be made exclusively from profits in the articles sold, where it is understood and agreed that the services and skill of the purchaser are necessary to carry on a going business.

According to the testimony of Creamer, the

profits of the successor's business, and the consequent payments, were dependent, not only upon his business judgment and efficient management, but were made possible by his actual physical participation in the labor necessary to carry on the wood and coal business. The jury had the right to take this view of the matter. A case could be imagined where a splendid salesman, whose services were actually worth a large monthly salary, might take a small stock of merchandise, and with sufficient financial support, and by furnishing his services at much less than their market value, earn such profits in the business as to more than pay the purchase price of the original stock of goods, with the difference between the actual monetary value of his services in drawing trade and making profitable sales and the much smaller amount actually drawn out by himself for living expenses. In such a case it could not be said, if the purchaser built up the business and paid the former owner all he contracted to pay, that he should pay him more, or that the business still belonged to the former owner, because the stipulated purchase price had been paid from profits on a stock of goods which was, at the time of the contract, his exclusive property. In our opinion, the purchase price may be paid out of the proceeds of a resale of specific property, even though the property be realty, and a valid contract of sale may be made and pass title when the three following essential ingredients are shown: (a) Intention to pass title; (b) delivery in pursuance to the agreement; (c) the undertaking of the vendee to bestow his time and skill in making advantageous sales, such as making retail sales of goods bought by him in bulk, in case personal property is the subject-matter of the contract, or the making of advantageous sales by proper advertisement, settlement, promotion, and subdivision, in case of a contract for the sale of land.

[8] 6. Under the evidence in this case one of the issues was whether Murphey's motive in having Creamer arrested under the warrant for trespass was to have him punished for a violation of the law, or whether it was his object, by means of the criminal prosecution, to compel Creamer to surrender to him the property in dispute. This issue was to be determined by the jury, and the excerpt from the judge's charge upon the subject of malicious abuse and malicious use of legal process was not prejudicial to the plaintiff in error. Even if the judge did not distinctly classify the pending action, he properly distinguished the malicious abuse of legal process from malicious use of legal process, in the identical language employed by Chief Justice Simmons in *Porter v. Johnson*, 96 Ga. 146, 147, 23 S. E. 123. Otherwise than as pointed out in the opinion in that case, an action for malicious use of legal process seems to differ from one for malicious abuse

of like process mainly in the fact that, where a malicious use of legal process is alleged, it must also be alleged that the suit upon which the action is based has been terminated, while in the case of malicious abuse of legal process an averment to that effect is unnecessary. *Mullins v. Matthews*, 122 Ga. 286, 50 S. E. 101; *King v. Yarbray*, 136 Ga. 212, 71 S. E. 131 (3). Even if there was a misjoinder, the overruling of the demurrer presenting that objection not being excepted to, the judgment upon that point became the law of the case; and, for this reason, though the allegations of the plaintiff's petition should set forth a case of malicious use of legal process, as well as declare upon a malicious abuse of legal process, the actions could be properly joined.

[7] 7. Without entering upon a discussion of the remaining grounds of the motion for a new trial (each of which we have carefully weighed), it suffices to say that none of the errors assigned would authorize the grant of a new trial. It is plain that the modification or qualification of the judge's instruction (as to the necessity that the alleged contract of sale should fix a definite time for payment), to the effect that, where no definite time is fixed, payment shall be made in a reasonable time, was not error. An abundance of authorities sustain the proposition that it is not essential that a definite day of payment shall be fixed by the contract; and where payment is to be made within a specific period of time, it is only necessary that payment shall be actually made before the expiration of that period, and such a stipulation does not invalidate the contract of purchase. The jury appears to have taken a view of the evidence which fully authorized their finding, though an inference directly to the contrary was authorized. The charge of the court fully presented the contentions of the parties, and, upon the controlling principles of law involved, was as fair to the plaintiff in error as he had any right to expect. The major portion of the instructions requested were fully covered by the general charge, and where the instruction embodied in the request was wholly refused, it is apparent that the refusal was properly based upon the fact that the request, while embodying a correct principle of law, was not applicable to the evidence adduced upon the trial. The assignment of error which complains of the judge's refusal to instruct the jury, as requested, that the rights of McKendree & Co., and their assigns, under Parks' written lease, would prevail over Parks' rental to Creamer, affords an example, typifying more than one of these assignments of error. The request in that instance would not have been authorized by the evidence. It was undisputed that the lease had not been assigned to Murphey at the time that the

present cause of action arose. It may also be said, as to the qualification placed by the presiding judge upon the instructions requested, that they appear to be authorized in every instance.

Judgment affirmed.

POTTLE, J., not presiding.

(10 Ga. App. 700)

McGHEE COTTON CO. v. HERRINE.  
(No. 3,773.)

(Court of Appeals of Georgia. March 6, 1912.)

(Syllabus by the Court.)

SALES (§§ 82, 411\*)—CONTRACTS (§ 10\*)—FRAUDS, STATUTE OF (§ 106\*)—REMEDIES OF BUYER—ACTION FOR BREACH OF CONTRACT—SUFFICIENCY OF WRITING.

Suit was brought for damages for the alleged failure to deliver cotton according to the terms of a writing of which the following is a copy: "I have this day sold to McGhee Cotton Co., Rome, Ga. four (4) B/C average r's & 6's at 12 c per #, same to be delivered at McGhee Cotton Co. Warehouse, Rome, Ga., on or before November 10th, 1909, weight of cotton to be 450 to 500 # per bale." This writing was signed by Herrine. At the bottom of the writing appeared the word "Accepted," followed by the signature of the McGhee Cotton Company. The petition alleged the market value of the cotton at the time and place of delivery, the failure of the seller to deliver, and the willingness and ability of the buyer to take and pay for the cotton at the agreed price. Held: (1) The petition was not subject to general demurrer. (2) The writing was, in legal effect, an offer to sell upon the terms and at the time therein stipulated. *Luke v. Livingston*, 9 Ga. App. 116, 70 S. E. 596. (3) The writing showed on its face that the offer had been accepted in writing by the buyer. It thus became a mutually binding contract, valid under the statute of frauds, was not unilateral, and no tender of the agreed price prior to the date fixed for delivery was necessary. *Terry v. Cotton Co.*, 136 Ga. 187, 70 S. E. 1100. (4) In *Mallett v. Watkins*, 132 Ga. 700, 64 S. E. 999, 131 Am. St. Rep. 226, there was no written acceptance, nor was anything done by the buyer prior to the date fixed for delivery to take the transaction out of the statute of frauds.

[Ed. Note.—For other cases, see *Sales*, Cent. Dig. §§ 229-233, 1161-1164; *Dec. Dig.* §§ 82, 411; \* *Contracts*, Cent. Dig. §§ 21-40; *Dec. Dig.* § 10; \* *Frauds, Statute of*, Cent. Dig. §§ 210, 211; *Dec. Dig.* § 106.\*]

Error from City Court of Cartersville; A. M. Fonte, Judge.

Action by the McGhee Cotton Company against A. S. Herrine. Judgment for defendant, and plaintiff brings error. Reversed.

Finley & Henson and W. A. Milner, for plaintiff in error. Eubanks & Mebane, for defendant in error.

POTTLE, J. Judgment reversed.

(10 Ga. App. 709)

**HOLLIDAY v. MAYOR, ETC., OF CITY OF ATHENS.** (No. 3,805.)

(Court of Appeals of Georgia. March 6, 1912.)

*(Syllabus by the Court.)***1. MUNICIPAL CORPORATIONS (§ 755\*)—HIGHWAYS—MAINTENANCE.**

It is the duty of a municipal corporation, having control over its highways, to keep them in a reasonably safe condition for travel.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1587-1590; Dec. Dig. § 755.\*]

**2. MUNICIPAL CORPORATIONS (§ 794\*)—STREETS—REPAIRS.**

Where municipal authorities undertake the repair or improvement of a public street, they are bound to take such precautionary measures for the protection of persons having a right to the use of the street as ordinary care and diligence would require.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1653; Dec. Dig. § 794.\*]

**3. MUNICIPAL CORPORATIONS (§ 775\*)—REPAIRS ON STREETS—PROTECTION OF PUBLIC.**

An obstruction placed in a public street for the purpose of closing it to travel while repairs are under way must be of such a character and be maintained in such a way as to protect from danger persons who attempt to travel along the street in an ordinarily prudent manner.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1630; Dec. Dig. § 775.\*]

**4. MUNICIPAL CORPORATIONS (§ 806\*)—REPAIRS TO STREETS—INJURIES TO TRAVELER.**

If a person attempting to travel along a public street is injured by coming in contact with a rope stretched across the street by the municipal authorities in order to close the street for repairs, he cannot recover damages from the municipality, if by the exercise of ordinary care he could have discovered the rope in time to have avoided striking it, or if, after discovering the obstruction, he failed to exercise a like degree of diligence to avoid injury to himself.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1678, 1682; Dec. Dig. § 806.\*]

**5. MUNICIPAL CORPORATIONS (§ 800\*)—OBSTRUCTION IN STREET—EVIDENCE—ACCIDENT.**

If both the city and the traveler are free from fault, the injury will be attributed to accident, and no recovery can be had.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1666-1671; Dec. Dig. § 800.\*]

**6. NEGLIGENCE (§ 140\*)—INSTRUCTIONS—ACIDENTAL INJURIES.**

Where, in the trial of an action for damages growing out of a tort alleged to have been committed by the defendant, the plaintiff alleges his own freedom from fault and the defendant's negligence, and the defendant pleads its freedom from fault and negligence on the part of the plaintiff, and there is evidence authorizing a finding that neither party was at fault, it is not error to instruct the jury upon the law applicable to accidental injury.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 378-384; Dec. Dig. § 140.\*]

**7. NEW TRIAL (§ 105\*)—NEWLY DISCOVERED EVIDENCE.**

Alleged newly discovered evidence, which is merely cumulative and impeaching in its character, is not cause for a new trial.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 221-223, 229; Dec. Dig. § 105.\*]

**8. MUNICIPAL CORPORATIONS (§ 822\*)—OBSTRUCTIONS IN STREET—DUTY OF TRAVELER.**

The following charge of the court was not erroneous: "You will then determine from the evidence whether or not the plaintiff, at the time of discovering the obstructions, did all acts and used such precaution that a prudent man would have done and used for his own safety under similar circumstances and surroundings."

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1758-1762; Dec. Dig. § 822.\*]

**9. MUNICIPAL CORPORATIONS (§ 822\*)—INJURIES TO TRAVELER—REPAIRS IN STREET—INSTRUCTIONS.**

It was not, under the facts of the present case, error requiring the grant of a new trial to charge the jury as follows: "I charge you, as a proposition of law, that if there was anything present at the time and place of injury which would cause an ordinarily prudent person to reasonably apprehend the probability of danger to him in doing an act which he is about to perform, then he must take such steps as an ordinarily prudent person would take to ascertain whether such danger exists, as well as to avoid the consequences of the same after its existence is ascertained, and if he fails to do this and is injured, he will not be allowed to recover, if, by taking proper precaution, he could have avoided the consequences of the negligence of the defendant, if there was any negligence."

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1758-1762; Dec. Dig. § 822.\*]

**10. MUNICIPAL CORPORATIONS (§ 822\*)—INJURY TO TRAVELER—OBSTRUCTIONS IN STREET.**

There was no prejudicial error in this instruction: "If, upon the other hand, the plaintiff, at the time of passing along Hancock avenue in the direction of the rope in question, was not in the exercise of that observance and lookout for defects or obstructions in the street that a prudent man would have exercised under similar circumstances or surroundings, then he was not in the exercise of that care which the law required him to exercise for the discovery of danger, and, if injured, his injury would be attributable to his own negligence, or if, after discovering the obstruction, he failed to do those acts and use that precaution that a prudent man would have done and used to prevent the accident and for his own safety under similar circumstances or surroundings, and if injured, his injury would be attributable to his own negligence, and in either event he would not be authorized to recover." The charge is not subject to the criticism that it instructed the jury what facts would constitute negligence.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1758-1762; Dec. Dig. § 822.\*]

**11. MUNICIPAL CORPORATIONS (§ 822\*)—OBSTRUCTION IN STREETS—INSTRUCTIONS.**

There was no error of which the plaintiff could complain in the following charge: "In a nutshell: If the mayor and council placed or had placed the obstruction in the street, and the obstruction was not such as a prudent

municipality would have placed, under like circumstances or surroundings, and Dr. Holliday was injured by reason thereof, he can recover, provided he was in the exercise of ordinary care in discovering the obstruction and preventing his injuries, or that he could not have avoided the injury by the exercise of ordinary care on his part. If he was not in the exercise of such care, then he cannot recover."

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1758-1762; Dec. Dig. § 822.\*]

**12. MUNICIPAL CORPORATIONS (§ 822\*)—OBSTRUCTIONS IN STREETS—CARE OF TRAVELER.**

The following charge was free from substantial error: "I charge you, whatever the law required positively the defendant to do, a failure to do so is negligence, and in this case the law required the city to keep the streets in safe condition for travel in the ordinary modes, and, if you are satisfied from the evidence that it failed to do so, then I charge you that the defendant was guilty of negligence. The law also required the plaintiff to exercise ordinary care in using the street, and if you are satisfied from the evidence that he failed to do so, then I charge you that the plaintiff was also guilty of negligence. Therefore, if you are satisfied, from the evidence, that the defendant was negligent, and such negligence resulted in injury to the plaintiff, and you are also satisfied, from the evidence, that the plaintiff was also negligent at the same time, and his negligence concurred with the negligence of the defendant, and, concurring with the negligence of the defendant, contributed to this injury of the plaintiff, so that plaintiff's negligence would become a proximate cause of the injuries, and that the plaintiff would not have been injured if he had not been negligent, even though the defendant was also negligent, the plaintiff, under such circumstances, could not recover for his injuries."

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1758-1762; Dec. Dig. § 822.\*]

**13. MUNICIPAL CORPORATIONS (§§ 805, 806\*)—OBSTRUCTIONS IN STREET—INJURY TO TRAVELEER.**

The following instruction stated correctly the rule of law applicable to the theory of the case presented by the evidence for the defendant: "If, upon the other hand, the plaintiff, in driving his car along the street in question, by the exercise of ordinary care on his part could have discovered the existence of the obstruction in the street, and, failing to do so, ran his car into the obstruction and was injured, his injuries would be attributable to want of care, and he would not be authorized to recover; or if, in the exercise of ordinary care, he discovered the obstruction in the street, and, after making such discovery, he could have prevented the accident and injury to himself by the exercise of ordinary care for his own protection, and failed to do so, and was thereby injured, he could not recover for such injuries, and you should so find."

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1677-1682; Dec. Dig. §§ 805, 806.\*]

**14. APPEAL AND ERROR (§ 1064\*)—HARMLESS ERROR—INSTRUCTIONS—WITNESSES—IMPEACHMENT.**

In view of the entire charge, the following instruction, while inaccurate, will not require the granting of a new trial: "Where a party puts a witness on the stand, he is bound by his testimony, unless he has been entrap-

ped by the witness, and will not be allowed to impeach his testimony."

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4219-4224; Dec. Dig. § 1064.\*]

**15. MUNICIPAL CORPORATIONS (§ 807\*)—OBSTRUCTIONS IN STREET—VOLUNTARY USE—CONTRIBUTORY NEGLIGENCE.**

As applied to the facts of this case, the following charge will not be held to be erroneous: "I charge you, further, as a rule of law, that when one, knowing of the dangerous obstructions in a street, voluntarily undertakes to use such street, when there is another street free from obstruction, he is guilty of such negligence on his part as will preclude his right to recover damages for injuries sustained while using such obstructed street."

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1679-1681; Dec. Dig. § 807.\*]

Error from City Court of Athens; H. S. West, Judge.

Action by A. C. Holliday against the Mayor, etc., of City of Athens. Judgment for defendant, and plaintiff brings error. Affirmed.

W. M. Smith and E. K. Lumpkin, for plaintiff in error. F. C. Shackelford, for defendant in error.

**POTTLER, J. [1-4] 1-4.** The plaintiff, Dr. Holliday, received certain injuries to his person by being thrown from an automobile which came in contact with a rope stretched across Hancock avenue, in the city of Athens. The rope had been placed across the street by the municipal authorities, for the purpose of closing the thoroughfare to travel while certain repairs to the street were in progress. The plaintiff predicates his right to recover damages upon a claim that the city was negligent, both in the character of obstruction used and in failing to give sufficient warning and take sufficient precautionary measures for his protection. The city denied that it was negligent at all. It averred that the rope was nearly two inches in diameter and such as was customarily used for the purpose; that it could have been seen by the plaintiff for 150 yards to 200 yards before he reached it; that the plaintiff was driving his automobile at a negligent rate of speed, in excess of that authorized by the city ordinance; and that the plaintiff was injured, not on account of any negligence of the defendant, but on account of his own negligence and failure to exercise ordinary care. It would not be profitable to discuss the evidence in detail. The jury settled the issues of fact in favor of the defendant. There was ample evidence to support this finding. The jury were warranted in finding that the plaintiff was guilty of negligence, both in reference to the speed at which he was driving his machine and in reference to his failure to observe ordinary care for his own protection. There is no new law involved in the case. The city, of course, had a right to close the street for

travel while the repairs were under way. It was its duty to take such precautionary measures for the protection of the plaintiff and others having a right to use the street as ordinary prudence would dictate. Just what these precautions should have been, and just what warnings should have been given, and what character of obstruction should have been adopted to close the street, were all questions of fact for the jury. The plaintiff was under a corresponding duty to exercise ordinary care for his own protection. Generally speaking, the question as to what acts he should have performed to avoid injury to himself were also questions of fact for the jury. But it was certainly incumbent on the plaintiff, as a matter of law, to use his eyesight for the purpose of discovering any obstruction which might have been placed in the street. For instance, it would be gross negligence for a municipal corporation to leave exposed and unprotected a hole in one of its streets; but if one using the street deliberately and intentionally closed his eyes and failed to see such an obvious danger, when if he had looked he could have seen it, it would be said as a matter of law that he had failed to exercise ordinary care for his own protection. These principles are well settled by decisions of the Supreme Court. See *Mayor, etc., of Savannah v. Waldner*, 49 Ga. 316; *Wilson v. Atlanta*, 63 Ga. 291; *Massey v. Columbus*, 75 Ga. 658; *Sheats v. Rome*, 92 Ga. 535, 17 S. E. 922; *City Council of Augusta v. Tharpe*, 113 Ga. 153, 38 S. E. 389; *Idlett v. Atlanta*, 123 Ga. 821, 51 S. E. 709.

[5, 6] 5, 6. The plaintiff alleged that he was free from fault and that the defendant was negligent in failing to take proper precautions for his safety. The defendant pleaded that it had taken all of the precautions which ordinary care required, and that the plaintiff's injuries were the result of his own failure to exercise ordinary diligence. The plaintiff testified that he did not know the rope was across the street; that the rope was of about the same color as the street, and for this reason he could not see it; that he was driving his machine at from 5 to 6 miles an hour; that he did not see the rope until he approached within 10 or 12 feet of it; and that after he saw it he did everything to stop his machine before striking the rope. If these facts were to be believed, the plaintiff was free from fault. There was evidence for the defendant that the rope could have been easily seen by the plaintiff from 150 to 200 yards before he reached it; that it was a large rope, such as was customarily used for the purpose of closing the street for repairs; and that the city was not negligent in reference to the matter of taking proper precautions for the plaintiff's protection. There was no specific plea averring that the plaintiff's injuries were due to an accident. After the jury had retired, they were recalled and instructed that, if they should find both

the plaintiff and the defendant free from fault, he could not recover. It is contended that this instruction was erroneous, because there was no plea of accidental injury; and it is urged that the charge was particularly harmful, because given disassociated from any other instructions, and after the jury were recalled from their room. It is very clear that there was ample evidence to sustain a finding by the jury that neither the plaintiff nor the city was lacking in ordinary care. This being so, the theory of accident was involved in the case, and it was not error to give an instruction thereon. Inasmuch as there was no specific defense of accidental injury, the judge would not have been compelled to give an instruction upon this theory, certainly not in the absence of a written request; but he had a right to do so, and the fact that he recalled the jury to give an additional instruction omitted from his general charge will not be held to be prejudicial error.

[7] 7. During the trial a piece of rope was introduced in evidence by the city. One of its witnesses testified positively and unequivocally that he had cut this piece from the rope which was stretched across the street and with which the plaintiff came in contact when he was injured. There was testimony in behalf of the plaintiff that the fragment of the rope introduced in evidence was cut from another rope, and that the one actually stretched across the street was smaller and of a darker color than was indicated by the piece introduced in evidence. One of the grounds of the motion for new trial is based upon the alleged newly discovered testimony of several witnesses corroborating the plaintiff's theory in reference to the piece of rope introduced in evidence on the trial. Opposed to the affidavits of this witness is an affidavit of the witness who had testified for the city, reiterating his statement that he had cut this piece of rope from the rope by which the plaintiff claimed he was injured. There were affidavits of two other witnesses for the city, tending to corroborate the affidavit of this witness. The alleged newly discovered evidence was manifestly cumulative and impeaching in its character, and for this reason was not cause for a new trial.

[8-14] 8-14. Complaint is made of numerous extracts from the judge's charge which are set forth in the headnotes. The criticism of the charge contained in the ninth headnote is directed mainly at the use of the language in the concluding portion of the extract, to the effect that the plaintiff would not be allowed to recover if, "by taking proper precautions," he could have avoided the consequences of the defendant's alleged negligence. This was not an accurate statement of the rule; but, when the charge is considered all together, it is manifest that the court did not intend in this instruction, and the jury could not have understood him to intend, to hold the plaintiff to a

higher degree of care than that of ordinary diligence. The language used by the trial judge was an exact quotation from *W. & A. R. Co. v. Ferguson*, 113 Ga. 713, 39 S. E. 306, 54 L. R. A. 802. Having instructed the jury that the plaintiff must take such steps as an ordinarily prudent person would have taken, it is manifest that the judge meant to say that the failure to use proper precautions would be equivalent to a failure to exercise ordinary diligence. It may be that the extract from the charge quoted in the fifteenth headnote stated the rule too broadly; but it was not erroneous, when applied to the facts of the present case. Certainly, if the plaintiff knew the rope was stretched across the street, he had no right to drive his automobile into the rope at any rate of speed, and, if he did so, he was guilty of such negligence as would preclude a recovery. Where a street is wholly and entirely obstructed to travel, one knowing of the presence of such an obstruction would not have a right to use the street, and would be guilty of negligence if he attempted to do so. In reference to the instruction set forth in the eighth, tenth, and eleventh headnotes, the complaint is that the court should not have instructed the jury that it was necessary for the plaintiff to do any acts for his own protection, but should have left the jury to decide, first, whether or not the plaintiff should have done anything under the circumstances for his own protection, and, secondly, whether the things he did do were such as would have been done by an ordinarily prudent person similarly situated. We think the court properly instructed the jury as a matter of law that it was necessary for the plaintiff to do everything that an ordinarily prudent person would have done under the same circumstances to protect himself from injury, and leave to their decision solely the question whether or not the plaintiff had done those things which ordinary diligence required him to do. The extract from the charge set forth in the fourteenth headnote contained an inaccurate expression. It is not a correct statement of the law to say that, when a party puts a witness on the stand, he is bound by his testimony. The trial judge evidently did not intend his language to have the meaning which it seems to carry with it. Doubtless the judge intended simply to state the general rule that a party cannot impeach his own witness, unless he has been entrapped by the witness. Of course, a party litigant has a right to offer a witness who will testify to a different state of facts from those disclosed by other witnesses offered by the same party. We have, however, carefully read the entire charge of the trial judge in this case. The rules of law applicable to the issues made by the pleadings and the evidence are, in the main, correctly stated,

and afford the plaintiff no just cause of complaint. In view of the fact that the verdict was abundantly supported by the evidence, and taking into consideration the entire charge, which was eminently fair to both sides, it will not be held that this inaccurate verbiage in the extract referred to requires a reversal.

We find no substantial error in the record, and the judgment overruling the motion for a new trial will be affirmed.

Judgment affirmed.

(10 Ga. App. 754)

**MAYOR, ETC., OF CITY OF AMERICUS  
v. GARTNER.** (No. 3,838.)

(Court of Appeals of Georgia. March 6, 1912.)

(Syllabus by the Court.)

**1. MUNICIPAL CORPORATIONS (§ 763\*)—CARE OF STREETS.**

It is the duty of a municipal corporation to use ordinary care to keep the streets over which it has control in a safe condition for travel both by day and by night. *Holliday v. Athens*, 74 S. E. 67, this day decided.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1612-1615; Dec. Dig. § 763.\*]

**2. APPEAL AND ERROR (§ 1001\*)—DEFECTIVE STREETS—EVIDENCE—REVIEW.**

Under the evidence, the proximate cause of the plaintiff's injury was an elevation which had been negligently permitted by the city to remain in one of its public streets. The jury were warranted in finding that the plaintiff could not, by the exercise of ordinary care, have avoided the consequences of the defendant's negligence, and, no error of law being complained of, the verdict in the plaintiff's favor will not be disturbed.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3922, 3928-3934; Dec. Dig. § 1001.\*]

Error from City Court of Americus; Z. A. Littlejohn, Judge.

Action by L. P. Gartner against the Mayor, etc., of the City of Americus. Judgment for plaintiff, and defendant brings error. Affirmed.

R. L. Maynard and Ellis, Webb & Ellis, for plaintiff in error. W. P. Wallis, Jones & Childers, and E. A. Nisbet, for defendant in error.

POTTLE, J. Judgment affirmed.

(10 Ga. App. 606)

**WESTERN UNION TELEGRAPH CO. v.  
FORD.** (No. 3,411.)

(Court of Appeals of Georgia. Feb. 24, 1912.)

(Syllabus by the Court.)

**1, 2. DEMURRER OVERRULED—SUFFICIENCY OF PROOF.**

This court held, when the case was here on exception to the judgment overruling the demurrer to the petition, that the allegations of

the petition made a cause of action. On the trial these allegations were substantially proved.

### 3. EVIDENCE (§ 509\*)—EXPERT TESTIMONY—ADMISSIBILITY.

Where the issue is the reasonable probability of saving an eye affected with corneal ulcer, and this issue is provable only by expert evidence, the opinion of an expert, based on his own experience and knowledge acquired from statistics, that 70 per cent. of eyes affected like the plaintiff's eye are saved by treatment applied in 10 or 12 hours after the premonitory symptoms first occur, is competent evidence.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2312, 2313; Dec. Dig. § 509.\*]

### 4. CONTRACTS (§ 327\*)—CONDITIONS PRECEDENT—NOTICE OF CLAIM.

Where a contract requires written presentation of a claim within 60 days, the filing of a suit, and service thereon within 60 days, will suffice as a written presentation of the claim, provided the allegations of the petition sufficiently inform the defendant of the identity, nature, and extent of the claim; and this is true, although the suit may have been withdrawn or dismissed after filing and service, and another suit for the same cause of action renewed within the statutory limitation. Sufficient notice of the claim having been once given, the effect of the notice is not destroyed by the subsequent exigencies of pleading.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1563-1570; Dec. Dig. § 327.\*]

### 5. TRIAL (§ 256\*)—INSTRUCTIONS—REQUESTS—NECESSITY.

The excerpts from the charge, taken in connection with the general instructions, contain no material error. The charge, as a whole, clearly presented, as the true standard of diligence, ordinary care in the transmission and delivery of the telegram after its reception by an agent of the defendant charged with that duty. The words "ordinary care" are self-explanatory, and the failure to define their meaning, in the absence of a timely written request, is not reversible error.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 628-641; Dec. Dig. § 256.\*]

### 6. TRIAL (§ 219\*)—RIGHTS AS TO THIRD PERSONS—INSTRUCTIONS.

Where the evidence demands the finding that a named person was the agent of the defendant, the trial judge is not required to define the legal meaning of the term "agency," or to submit to the jury the question of agency as an issue under the evidence.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 489; Dec. Dig. § 219.\*]

### 7. TELEGRAPHS AND TELEPHONES (§ 36\*)—OPERATION—FAILURE TO TRANSMIT MESSAGE.

Under the evidence it was wholly immaterial whether the day on which the telegram was received for transmission was a legal holiday. Irrespective of that question, the jury were authorized to infer that the message could have been transmitted and delivered to the addressee. Besides, the defendant company, having received the message on a legal holiday, was under the duty of using ordinary care in transmitting and delivering it promptly.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Cent. Dig. §§ 26, 31; Dec. Dig. § 36.\*]

### 8. TELEGRAPHS AND TELEPHONES (§ 66\*)—OPERATION—ACTIONS—SUFFICIENCY OF EVIDENCE.

No material error of law appears; and while the evidence in support of the verdict is not free from doubt, and is not entirely satisfactory, yet this court cannot say there was no

evidence from which the jury, the exclusive arbiters of the facts, could not reasonably have concluded that the defendant was liable in damages.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Cent. Dig. §§ 61-63; Dec. Dig. § 66.\*]

### (Additional Syllabus by Editorial Staff.)

### 9. PRINCIPAL AND AGENT (§ 14\*)—EXISTENCE OF RELATION.

Where the agent of a telegraph company directed a patron to send a message through the agent of a railroad company by way of its telephone wire to the office of the telegraph company, and to pay the railroad agent the toll for the message, the railroad agent acted as the agent for the telegraph company in receiving the message.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 26-33; Dec. Dig. § 14.\*]

Error from City Court of Moultrie; J. D. McKenzie, Judge.

Action by A. M. Ford against the Western Union Telegraph Company. Judgment for plaintiff, and defendant brings error. Affirmed.

When this case was previously before this court, the judgment of the lower court, dismissing the petition on general demurrer, was reversed; it being the opinion of this court that the allegations of the petition set forth a cause of action. Following this decision a trial was had, and a verdict was rendered for the plaintiff for \$5,000. The defendant's motion for a new trial was overruled, and the case is here for review. The allegations of the petition are fully set out in the opinion of the court on the demurrer. Western Union Telegraph Co. v. Ford, 8 Ga. App. 514, 70 S. E. 65. It is necessary, however, to give a brief statement of the allegations, as well as a substantial statement of the evidence, in order that the questions raised may be clearly understood, and that it may be seen whether the allegations as made were proved.

The plaintiff alleges that she was suffering from an affection of the eye known as "purulent conjunctivitis, there being symptoms of iritis." She was under treatment for this affection by a specialist, who resided at Moultrie, Ga. This specialist informed plaintiff and her husband that, should iritis set in, a corneal ulcer would form on the eye, and, unless promptly stopped, it would spread to the vision and cause the loss of the eye, and he described to them the premonitory symptoms of corneal ulcer, so that they would recognize it and know when to send for him promptly. About 5 o'clock on the morning of July 5, 1909, plaintiff felt these premonitory symptoms. She thereupon immediately caused her husband to send a message by hand through the country to Dr. Odum, who was treating her, in connection with the specialist, for this eye trouble, and who lived at Barney, Ga., with a request that he

send a message to the specialist, asking him to come to her residence. There is no telegraph office at Barney, so this message was telephoned by Dr. Odum from Barney to Quitman, Ga., and there delivered to the defendant company; this being the usual way that messages intended to be telegraphed from Quitman were transmitted from Barney to Quitman. Between 8 and 9 o'clock on the same morning the message was delivered by Dr. Odum to the defendant at Quitman, and was as follows: "Barney, Ga., July 5. Dr. Jerkins, Moultrie, Ga. Come out to J. M. Ford's place. [Signed] Dr. Odum." It is alleged that this telegram could have been delivered by ordinary diligence within 15 minutes after the receipt thereof to Dr. Jerkins, the addressee, as Moultrie was within 50 miles of Quitman by wire; that the defendant company negligently failed to deliver this message to the addressee until 10:30 o'clock on the morning of July 6th, a delay of more than 25 hours; that, if the message had been delivered promptly, Dr. Jerkins "could and would have immediately gone to petitioner's house, and he would have at once stopped the spread of the ulcer before it reached the vision of the eye, and would have saved petitioner's said right eye." On receiving the telegram he did go to plaintiff's house, and, although he succeeded in arresting the progress of the ulcer, it had, in the last 24 hours immediately preceding his arrival, made such progress that the vision of the right eye was destroyed, making it necessary to have the eye removed to prevent the loss of the other eye. Dr. Jerkins lived in the city of Moultrie. His residence and office was within 400 yards of the defendant's office in Moultrie. He was at his office and residence all day on July 5th, and the message could, in the exercise of ordinary care, easily have been delivered to him early on the morning of July 5th in ample time for him to have gone to petitioner's home and arrested the progress of the disease, and, if he had received the message, he would have gone to her and have arrested the disease and saved her eye. Except for the fact that she was relying on the defendant to promptly transmit the message, she could and would have made other arrangements to secure the prompt attendance of the specialist, and she seeks to recover damages for the negligent failure of the telegraph company to transmit and deliver the message to the specialist, whereby he was prevented from earlier attendance and earlier treatment of her eye, claiming that this negligence was the proximate cause of the loss of her eye. She claims damages, not only for the loss of the eye, but for mental anguish and physical pain, which she suffered from the progress of the ulcer, and the mortification she will suffer from the loss of her eye during her entire life, from the resulting danger to the other eye, and from

the apprehension that she will become permanently blind. An amendment to the petition alleged that the message in question was delivered to the defendant company at Quitman, Ga., between 9 and 10 o'clock on the morning of July 5, 1909, and also that the ulcer reached the condition by and from which the vision of the eye was destroyed after 12 o'clock on the night of July 5th, and that, if the message had been delivered to Dr. Jerkins at any time prior to 8 o'clock on that night, he would have responded to the telegram, would have come to petitioner's home, would have stopped the spread of the ulcer before it reached the vision of the eye, and could and would have saved petitioner's eye.

It was not controverted that the plaintiff was suffering from an affection of the eye as described; that on Friday night, July 2d, Dr. Jerkins discovered the premonitory symptoms of corneal ulcer, and warned her and her husband at that time that, if same developed and was not promptly checked, it would destroy the vision of the eye; that she felt these premonitory symptoms on Monday, July 5th, about 5 o'clock a. m., and that her husband wrote a note to Dr. Odum and sent it to Barney, where Dr. Odum lived, six miles away, and Dr. Odum communicated this message to one Harrell, who was the representative of the South Georgia Railroad Company at Quitman, asking him to send the message to Dr. Jerkins. Here appears the first conflict in the evidence. Dr. Odum, for the plaintiff, testified that he communicated this message to Harrell between 7 and 8:30 o'clock, certainly not as late as 10 o'clock, on the morning of July 5th; that, while he did not advise Harrell of Mrs. Ford's condition and the danger that might result from delay, he nevertheless urged upon him the prompt sending of the message. Harrell testified, for the defendant, that he received this telephone communication from Dr. Odum at 10:20 o'clock Monday morning; that upon receipt of the message he noted the time of its reception by a pencil memorandum made upon a carbon copy of the telegram; that, when he received the message from Dr. Odum, he told him that the day was being observed as a legal holiday; and that it was doubtful if the message could be forwarded. Dr. Odum denied that Harrell stated to him at that time that it was a legal holiday, or that it was doubtful if the message could be sent, but that Harrell did make this statement to him when he called him the second time at 2 o'clock to ascertain if the message had been sent. Dr. Odum testified, however, that he knew that the day was a legal holiday.

There is no telegraph office at Barney. The South Georgia Railroad Company had a private telephone line operating between Barney and Quitman. If a person at Barney desired to send a telegram over the Western



Union Telegraph Company from Quitman, he could give it to the agent of the South Georgia Railroad Company at Barney, Ga., and this agent would collect from him the toll charged by the telephone line for communicating the message to the telegraph operator at Quitman, and would also collect the amount of the message that would have to be paid to the telegraph company at Quitman for forwarding the message over its line. The agent of the railroad company at Barney, upon receiving this message, would call up the agent of the South Georgia Railroad Company at Quitman, who in the present case was Harrell, communicate the message desired to be sent, and this agent of the railway company at Quitman would write out the message on a blank of the telegraph company and then send it to the telegraph office for transmission, or call up the telegraph office and have it send a messenger for the message. In the present instance Dr. Odum went to the depot of the South Georgia Railroad Company at Barney and tried to get the agent to call up Harrell at Quitman. The agent endeavored to do so, but could not get him over the telephone. Dr. Odum thereupon called up the Western Union at Quitman, and told the operator that he had a message. The party who answered the telephone at the Western Union office directed him to give it to the railroad agent at Barney, as they wanted pay for it, and Dr. Odum replied that he could not get up the agent. Subsequently Dr. Odum called Harrell up over the local line and gave him the message as stated. Harrell testified that the above method of sending messages from Barney to Quitman to be transmitted over the Western Union Company's lines, was the general custom, and that the agent of the railway company collected, not only the toll for the telephone company, but also the toll for the telegraph company and had monthly settlements with the telegraph company as to the tolls due it. Dr. Odum further testifies that in his telephone communication with the Western Union office at Quitman the operator told him that he could make an arrangement with the South Georgia Railroad Company by which the message would be transmitted to the Western Union Telegraph Company at Quitman, and that he thereupon communicated with Harrell over the long-distance line at Quitman, gave him the message, and told him that he would go down to the office of the Southern Railway Company at Barney and pay for the message, and to be sure to get the message off, and Harrell replied that he would. Harrell testified that he was acting in the matter for the sender of the telegram and for the telephone company; that he had no connection with the Western Union Telegraph Company, but that the Western Union Company got 25 cents, which was collected by the agent of the railroad company, for sending the message from

Quitman to Moultrie. The agent of the Western Union Company at Quitman testified that July 5th was a legal holiday; that on legal holidays the office hours of the company were from 8 to 10 in the morning and from 4 to 6 in the afternoon, and that the office at Moultrie observed the same hours; that the telegram in question was given to him at Quitman by the South Georgia Railroad Company; that he does not remember in this particular case how it reached the office, but that it was customary for his office to send messengers when they were called for to the railroad office to get the messages; that this telegram was received at his office at 10:33 o'clock on July 5th; that on receiving the message he put on it a memorandum of the time of its reception; that he immediately called the Moultrie office over the local wire; that the Moultrie office could not have been open at that time, according to the custom of observing legal holidays; that he received no answer at the Moultrie office; that he again called the Moultrie office at 11 o'clock, and again at 11:20 and next at 12 o'clock; that he called again at 12:50, but received no answer to any of the calls; that, according to the records of his office, he did not call the Moultrie office again until next day, July 6th, at 9:45 o'clock; that he remembers no effort to get the message to the Moultrie office between 12:50 on July 5th, until 9:45 on July 6th; that when he received the message he had no notice from Harrell that Mrs. Ford had any connection with the telegram, or that her eye was in a critical condition, nor any statement indicating urgency in transmitting the telegram to the addressee.

The evidence further shows that the office at Moultrie was open from 8 until 10 a. m. July 5th and again from 4 until 6 in the afternoon, but that no message was received from Quitman, and in fact no message could have been received direct from Moultrie over the local wire, because the wire was not in good order. The message may have been sent from Quitman to Moultrie by way of Savannah, Jacksonville, or Atlanta during the hours that the offices were open on that day. It was further shown that the Postal Telegraph Company had an office at Quitman, connecting with Moultrie, which was open on July 5th, and that there was telephone communication between these two places. Jones, the agent of the Western Union Company at Quitman, testified that, if the lines were working and in good order, it would take about a minute to send a message of seven words from Quitman to Moultrie, and that he and his brother were the agents of the Southern Bell Telephone Company at Quitman, he being the agent of the Western Union at Quitman also; that he did not try to send the message by telephone to Moultrie. He testified also as to his method of transmitting telegraph messages between

Barney and Quitman, intended to be sent beyond Quitman by way of the telegraph company's lines, stating that such messages are sent from Barney over long-distance telephone, "and the South Georgia Telephone Company collects for the message and turns it over to us, and we send it through, and at the end of the month we have a settlement between us for the toll on these messages"; and this arrangement between the Western Union Company and the South Georgia Telephone Company was similar in character to the arrangements the Western Union Company had with any "concerns in Quitman whose credit was good." Jones further testified that, after failing to get Moultrie directly, he made one effort to get it by way of Savannah, in order to send the message, but that the operator at Savannah declined to take the message, stating that he had the same wire as the office at Savannah had to Moultrie, and that he had as good a chance to get Moultrie as Savannah had. The foregoing is a statement, in substance, of the evidence tending to illustrate the question of negligent conduct on the part of the defendant telegraph company in receiving and transmitting the message in question.

Dr. Jerkins gave a description of the condition of the plaintiff's eye on the Friday before the Monday in question, and told of his discovery then of the premonitory symptoms and the probability of the formation of a corneal ulcer, and the information which he gave to the plaintiff and her husband as to the necessity for prompt action when she felt these symptoms. He testified that he was in his office at Moultrie all day July 5th; that, if he had received the message on July 5th, he would have gotten off as quickly as possible in response thereto, and could have reached the home of the plaintiff in one hour in his automobile; that he did not receive the telegram until July 6th; that he immediately left for plaintiff's home, reaching there about 12 o'clock; that he found that the corneal ulcer had developed, and he began treatment therefor, but that it did not yield to treatment, and that it finally progressed until the vision was lost and it became necessary to take out the eye in order to save the other one. "If I had been able to reach this lady by 12 o'clock noon on July 5th, it is impossible to say just what would have been the result of the treatment of this corneal ulcer, which I found developed when I got there. My opinion is that I could have healed the ulcer without leaving a very large scar. She would have had some vision, if I could have healed it before. If I could have seen her at 8 or 9 o'clock on the night of July 5, 1909, I would have had a better chance than later. I could not say that it could have been healed at that time. I do not know how fast it was developing. I could only say that I could have had a better chance at it earlier. This ulcer spread pretty fast. Had this ulcer first made its ap-

pearance at 5 o'clock July 5th, I could not say, I do not know, at what time it would advance to such a state as to be a hopeless case with reference to treating the eye, with reference to saving the sight. An ulcer of this nature spreads very fast. \* \* \* I do not know what condition it was in on Monday morning. If that purulent discharge was not under control on Monday morning, when the well-developed symptoms of the corneal ulcer appeared, so that Mrs. Ford could recognize it, the difference of either 10 or 12 hours in my getting there would have produced an effect in reference to stopping that ulcer, in all reasonable probability. I would have been able to have kept this discharge out of the ulcer, and have kept it under better control. If the purulent discharge was not in control at 6 or 7 o'clock on the morning of July 5th, with the symptoms of corneal ulcer so evident that Mrs. Ford herself could recognize them, and I could not have gotten there until 5 or 6 o'clock that night, it would have been pretty doubtful at that time that I could have stopped the spread of the corneal ulcer and saved the eye, if the discharge had still been going on. If the purulent discharge was not under control on the morning of July 5th, and I had not been able to get there until about 5 or 6 o'clock that night, the probability would have been against my being able to save the eye; but the discharge was under control the last time I saw it, on Friday or Saturday, and there was not any discharge the next time I saw it, Tuesday. \* \* \* It might have been I could not have stopped it from spreading in the beginning, but I believe I could right after it started. If I could have seen it right after it started, there would have been a reasonable probability that I could have saved the eye. If I could have seen it for 12 hours, what the probabilities were I, of course, could not say; but every hour would have helped. I believe I could, though. If I could not have seen it until 5 or 6 o'clock the evening before, the reasonable probabilities, the chances against my being able to save the eye, would be about equal. \* \* \* The percentage of eyes saved, affected like this eye was, provided you get to them within 10 or 12 hours after you feel the sharp pains that occur, taking everything into consideration, is probably about 70 per cent. There is probably not one in a hundred that would be affected just alike; but I should think, after this iritis had subsided, an ulcer in this condition ought to be controlled in that length of time, probably 70 per cent. of them. I could not swear to it; that is my opinion. \* \* \* When I got there something like half of the sight on the upper part had not been covered. It was a critical case for the sight from the very jump. If it extends with equal rapidity in all directions, every minute the sight is dying. I did not arrest the disintegration of the tissue. It kept right on until it passed

over the entire pupil. The cornea is bigger than the pupil. It covers the whole colored portion of the eye. With iritis on one side of the cornea and conjunctivitis on the other side, the sum total of the effects of these two diseases would be to put the vision out of commission, and into a weakened condition, where it would be more susceptible to the ravages of corneal ulcer than otherwise; and in order to arrest corneal ulcer under such circumstances, it is much more difficult than it would have been if it had occurred outside of any connection with conjunctivitis and iritis. I have been treating diseases of the eye for about 12 years. I have seen a few cases like this case in my practice. I do not recall how many cases. Of those cases similar to this I lost only one. \* \* \* I have known one to get well. Where iritis and conjunctivitis had set in, and when the first symptoms of corneal ulcer were seen, whether it would be possible to save the eye, if you neglected the treatment two days and nights, is hard to tell. I do not think so. When I saw this lady the last time before Tuesday, July 6th, she did not have a developed case of corneal ulcer."

Dr. Dunbar Roy, an oculist from Atlanta, who had been engaged in the practice of his specialty for 18 years, having studied both in this country and in Europe, testified, in substance, that if the plaintiff had been suffering from purulent conjunctivitis and iritis on Friday, and on that day symptoms of corneal ulcer were forming, and by the following Monday morning by 5 o'clock these symptoms had become so plain as to cause a roughness indicating breaking down of the cornea, the chances were very poor, if treatment was not begun until after that time, to save the sight, because of the fact that the cornea has very little vitality, and, if it once becomes affected, the chances are that it is going on to destruction; that under these conditions the chances for recovery would be extremely slim; and that if, on Monday morning at 5 o'clock, the patient herself recognized the breaking down of the cornea from this ulcer, if the physician could have gotten to her that afternoon at 5 o'clock, the chances would have been against saving the eye, although it would be impossible to say that the eye could not have been saved. "If the physician could have gotten to the patient at 8 o'clock Monday morning, three hours after she had noticed the symptoms, it is impossible to say what would have been the reasonable probability of saving the eye at that time. If the outcome is the loss of the eye within 30 hours after the patient begins to feel the roughness, I do not believe anything in the world would have saved the eye or the cornea, even had the physician reached her earlier."

W. A. Covington and Dorsey, Brewster, Howell & Heyman, for plaintiff in error.  
Shipp & Kline, for defendant in error.

RUSSELL, J. (after stating the facts as above). [1, 2] 1. The first question which arises for decision is whether, under the evidence, the telegraph company was guilty of culpable negligence in delaying the transmission and delivery of the message to the physician at Moultrie. The determination of this issue depends almost entirely upon the relationship which Harrell, the agent of the South Georgia Railroad Company at Quitman, occupied towards the parties. Was he the agent of the defendant telegraph company in receiving the message from Dr. Odum, or was he the agent of the sender of the message, or was he in a sense the agent of both the telegraph company and the sender? It is earnestly contended by learned counsel for plaintiff in error that Harrell was not the agent of the Western Union Telegraph Company in any sense; that the evidence demanded the finding that he was solely the agent of the sender in receiving and sending this message to Jones, the operator of the Western Union Company at Quitman. We have given the evidence bearing on this point careful consideration, and we have come to the conclusion that Harrell occupied the dual capacity of agent of both the sender and the Western Union Telegraph Company in receiving and sending the message; that, in so far as the transmission of the message to the operator at Quitman to be sent to Moultrie is concerned, he was acting as the agent of the Western Union Telegraph Company. The undisputed evidence shows that, in the absence of any telegraph station at Barney, Ga., it was the custom for the agent of the South Georgia Railroad Company at Barney to receive messages, and not only to collect a toll for the railroad company for sending the message to Quitman over its telephone wire, but also to collect for the telegraph company the toll due to it for the transmission of the message from Quitman to its destination. In this case, in addition to this custom, it appears that Dr. Odum was specially directed by the operator of the Western Union Company at Quitman to send this message through the agent of the railroad company, by way of its telephone wire from Barney to Quitman, and to pay to this agent the toll due for the message to be sent to Moultrie. The Western Union Telegraph Company having thus authorized the agent of the railroad company to receive messages intended for it, and also to receive in its behalf pay for such messages, constituted the railroad agent its agent for these purposes. We think that under these facts the question of Harrell's agency for the purpose of receiving the message for the telephone and telegraph companies was not issuable, and the court did not commit any error against the telegraph company in submitting this question of agency, in a general way, to be determined by the jury.

Harrell, therefore, being the agent of the telegraph company at Quitman, was under the duty to exercise reasonable and ordinary diligence in transmitting the message, when he received it, to the operator at the telegraph company's office in Quitman. The evidence as to when Harrell received the message from Dr. Odum is in conflict. Harrell testified positively, refreshing his recollection by a memorandum on the carbon copy of the message, that he did not receive the message from Dr. Odum until 10:20 o'clock Monday morning, and that he immediately called up the operator, and informed him that he had the message, and requested him to send a messenger for it. Dr. Odum testified that he had transmitted over the telephone wire from Barney to Quitman the message to Harrell between 7 and 8:30 o'clock a. m., certainly not later than 10 o'clock, Monday morning. This conflict in the evidence could only be determined by the jury. They had the right to accept as the truth the statement of Dr. Odum. Assuming, therefore, that Harrell received the message from Dr. Odum as late as 8:30 o'clock Monday morning, he was under a duty to use ordinary diligence in transmitting it to the operator at Quitman. The operator testified that he did not receive the message from Harrell until 10:30 o'clock. If Harrell received the message at 8:30 o'clock, and delayed transmitting it to the operator at Quitman until 10:30, it was for the jury to say whether this two hours' delay was unreasonable and negligent. It was also for the jury to determine whether the prompt performance of his duty by Harrell in transmitting the message to the operator at Quitman, and the proper exercise of diligence on the part of the operator in transmitting the telegram to the addressee, Dr. Jerkins, at Moultrie, would have enabled the latter to receive it in time to have gotten out to the plaintiff's home by 12 o'clock Monday, July 5th. Moultrie is only 36 miles from Quitman. Unquestionably, if the message had been received by Harrell at 8:30, and he had at once transmitted it to the operator at Quitman, and the operator had used due diligence in transmitting it to the addressee at Moultrie, it would have been received in all probability before the office at Moultrie had closed on account of the legal holiday. If Dr. Jerkins had received the dispatch at 10 o'clock, according to his evidence he would have gone immediately to the home of the plaintiff, and would have reached her in an hour or so, and if he had reached her before 12 o'clock on that day, according to his opinion as an expert, there was a reasonable probability that by treatment he could have saved the plaintiff's eye.

It is insisted that neither Harrell nor the operator at Quitman knew of the urgent character of the message, or of the critical situation of the plaintiff and the necessity

for prompt transmission and delivery; and this view is sustained, so far as the operator is concerned, although there is some evidence that Harrell had been urged by Dr. Odum to send the message promptly. We do not think, however, that this makes any material difference. Even without any knowledge of the urgent character of the message, it was a question for the jury to determine, under the evidence, whether the agent of the Western Union Telegraph Company at Quitman exercised ordinary diligence in sending the message which he had received, regardless of any knowledge of its urgency; and we are not prepared to hold that the jury would not be authorized to find that the delay of over two hours in transmitting the message from Quitman to Moultrie was an unreasonable and culpable delay. We therefore conclude that the jury were authorized, on this branch of the case, to find that the defendant telegraph company, through its agents, did not exercise ordinary diligence in transmitting and delivering the message to Dr. Jerkins, the physician at Moultrie, and that this delay prevented the physician from giving prompt medical treatment to the eye of the plaintiff. What is here said renders unnecessary any discussion of the sixth ground of the amended motion for a new trial.

[2] 2. The second question for determination is not free from doubt and difficulty. Was the negligent delay of the telegraph company in transmitting and delivering the telegram to the physician, whereby he was prevented from earlier attendance on the patient and medical treatment of the eye, the proximate cause of the loss of the plaintiff's eye? The general rule is that there must be some direct and proximate connection between the negligence or wrong done and the physical injury suffered to warrant a recovery in damages, and this causal connection must be proved by facts based upon direct testimony, or the opinion of experts, and must not depend upon conjecture or guesswork. In this case there could be no recovery under the law, unless the evidence shows that it was reasonably probable that the plaintiff would not have lost her eye, had the doctor reached her in time, after promptly receiving the telegram, and by proper treatment could then have saved the eye; and this evidence must have such probative value as to produce a reasonable conviction, without resorting to mere conjecture, inconclusive inferences, or bare possibilities. *Western Union Telegraph Co. v. Ford*, supra. It seems to us that sections 4509 and 4510 of the Civil Code of 1910, embody in a comprehensive statement the rule of law on this subject: "If the damages are only the imaginary or possible result of the tortious act, or other and contingent circumstances preponderate largely in causing the injurious effect, such damages are too remote to be the basis of recovery against

the wrongdoer." "Damages which are the legal and natural result of the act done, though contingent to some extent, are not too remote to be recovered. But damages traceable to the act, but not its legal or material consequence, are too remote and contingent." As pointed out by Judge Powell in discussing the question in *Glawson v. Southern Bell Tel. & Tel. Co.*, 9 Ga. App. 455, 71 S. E. 747, the courts of this country are in wide disagreement as to whether damages which result through the failure to get a physician, so that the progress of a malady can be checked or the effects of a wound can be allayed, and injurious results prevented, are speculative and remote within the meaning of the rules just quoted. Some courts go almost to the extent of holding that it is impossible from a human standpoint to say what would be the result of a physician's services in checking almost any known disease, or of relieving almost any imaginable physical hurt or injury. And in that case this court, following the rule laid down in the *Ford Case*, supra, accepts the doctrine that the question is to be determined by the jury, and that in determining this question they can accept the opinion of learned experts.

If the jury in the present case were authorized to believe, from the testimony of Dr. Jenkins, that he could have saved the plaintiff's eye if he had reached her Monday morning by 12 o'clock, or if there was a reasonable probability that he could have saved her eye at that time by proper treatment, the standard of proof laid down by both the *Ford* and *Glawson Cases*, supra, was reached. The evidence of Dr. Jenkins is not entirely satisfactory on this point; but, taking his evidence all together, we cannot say that the hypothesis that he would probably have saved her eye if he had reached her in time is not fairly deducible. He testified that, if he could have seen and treated the eye before 12 o'clock Monday, there would have been a reasonable probability that he could have saved it; and, from his opinion and experience as an expert, he states that 70 per cent. of eyes affected like this eye was, provided a physician could get to them and treat them within 10 or 12 hours after the occurrence of the first premonitory symptoms of corneal ulcer appear, could be saved. Of course, he was not positive that he could have saved this eye, even if he had reached it early Monday morning. In the very nature of things, he could not have been positive. This standard of proof is not possible to be reached in such cases, and we are compelled to make a decision within the limitations of human fallibility; and while, as stated, we are not entirely satisfied as to the character of the proof on this branch of the case, yet we do not feel that we would be justified in setting aside a verdict of the jury under this evidence, which was approved by the trial judge. In other words, we cannot

say, as a matter of law, that the question is one purely problematical and speculative; and, unless there is some prejudicial error in the conduct of the trial, we will leave the solution of this issue where the law places it, in the hands of a fair, impartial, and intelligent jury.

[3] 3. Error is assigned upon the ruling of the court in admitting in evidence the testimony of Dr. Jenkins as follows: "What percentage of eyes are saved, affected like this eye was, provided you get to them, say, within 10 or 12 hours after you feel the sharp pain that occurs?" The reply to this question was that the average would be 70 per cent. This evidence was objected to, on the ground that it was a matter of hearsay, and not relevant to the issues in the case. Certainly the question was relevant to one of the two controlling issues in the case, and we think it was within the province of expert testimony. If based upon the experience of the witness as an expert, it would be admissible for that reason. If it was based upon the consensus of opinion of specialists, we think it would be admissible for that reason. The evidence is similar in character to that presented by statistics gathered by learned and experienced men, such as the average of life contained in mortality tables, and other kindred subjects.

[4] 4. At the conclusion of the plaintiff's evidence a judgment of nonsuit was invoked, on the ground that the contract between the sender and the defendant company contained, as a condition precedent to a right of recovery, a stipulation that the claim should be filed by the plaintiff against the company within 60 days after the filing of the message, and there was no evidence that this claim had been filed as required by this condition of the contract. This objection was met by proof that the plaintiff had filed within 60 days a suit for damages against the defendant company, in which her case was fully set forth; that this suit was withdrawn, and subsequently, within the legal limitation, the present suit for the same cause of action was filed; and it is insisted by the plaintiff that this was equivalent to a compliance with this condition of the contract. In answer to this position it is contended by the plaintiff in error that the suit first filed was not a compliance with this condition, and that certainly, when the suit was withdrawn or dismissed, it became *functus officio*, and was as though no claim had ever been made. In our opinion, the filing of this suit was a substantial compliance with this condition of the contract. *Postal Telegraph Co. v. Morse*, 5 Ga. App. 504, 63 S. E. 590. Nor do we think that a subsequent temporary withdrawal of the suit destroyed the effect of the filing of the suit as a claim made against the company for damages. The first suit, filed within the 60 days from the time when the cause of action arose, had

been served upon the company. They then had notice of the claim for damages, and the subsequent temporary withdrawal of the suit could not have taken away from the company the notice previously acquired by the filing and service of the suit.

[§] 5. The excerpts from the charge of the court, taken in connection with the entire charge, contain no material error. We think the charge as a whole clearly and distinctly instructed the jury that the standard of diligence required of the defendant company with reference to the transmission and delivery of the message was that of ordinary care, and we do not think that the jury could possibly have inferred, from the excerpts set out and objected to, that any higher degree of diligence was required from the defendant than that of ordinary care. It was not necessary for the judge to define the words "ordinary care," in the absence of a timely written request. They are self-explanatory, and it will be presumed that the jury understood the ordinary and common significance of these terms.

[§] 6. The assignments of error on the failure of the court to charge that Harrell was the agent of the plaintiff, and not of the defendant telegraph company, are fully covered by the second division of the opinion. The failure of the court to define to the jury the legal meaning of the word "agency," even if erroneous, was not harmful, in view of the fact that, as heretofore expressed in the opinion, the undisputed evidence demanded the finding that Harrell was the agent of the defendant company in receiving and transmitting the message to the operator at Quitman.

[§] 7. The failure to charge the jury on the right to keep its office closed on legal holidays was immaterial, under the facts of this case. The jury were authorized to believe that the question of legal holiday was not relevant. The message was received by the agent, Harrell, and, in the exercise of ordinary diligence, could (at least the jury would have been authorized to so infer) have been transmitted and delivered during the hours when the offices both at Quitman and Moultrie were kept open, under the rules of the company, on legal holidays. Besides, the company accepted the telegram on a legal holiday, and was under the duty to exercise ordinary diligence, after having accepted it, to transmit and deliver it to the addressee on that day, notwithstanding the fact that the day was a legal holiday.

[§] 8. It is contended in the last ground of the amended motion for a new trial that the court erred in not restricting the right of recovery to damages for a partial failure of vision, since Dr. Jerkins' testimony, considered most favorably for the plaintiff, only bore the construction that, even if he had

reached the plaintiff in time, he could only have partially saved the vision of the eye. The evidence of Dr. Jerkins on this point is not entirely clear; but he does state that there was a reasonable probability that, if he had reached the plaintiff in time, her vision would have been preserved. He does not say whether this preservation would have been partial or complete, and the jury were authorized to draw the latter inference from his evidence, taken as a whole. This issue was not so clearly and distinctly made as to have demanded from the court a pertinent charge without a timely written request.

After giving the entire case a most careful consideration, we fail to discover any error of such a material character as would warrant the grant of another trial.

Judgment affirmed.

POTTLE, J., not presiding.

(10 Ga. App. 716)

**ORONHEIM v. POSTAL TELEGRAPH  
CABLE CO. (No. 3,808.)**

(Court of Appeals of Georgia. March 6, 1912.)

*(Syllabus by the Court.)*

**1. BANKS AND BANKING (§ 159\*)—FUNCTIONS AND DEALINGS—DEPOSITS FOR COLLECTION.**

Where a check is indorsed to a bank "for collection and credit for deposit" to the account of the payee, the bank is the agent of the payee to collect, and title to the check does not pass to the bank, in the absence of an agreement to that effect, evidenced otherwise than by the language of the indorsement.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 547-553; Dec. Dig. § 159.\*]

**2. BANKS AND BANKING (§ 156\*)—FUNCTIONS AND DEALINGS—DEPOSITS FOR COLLECTION.**

Such an agency may be revoked by the payee at any time before collection, and may be terminated by instructing the bank upon which the check is drawn to withhold payment.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 539-546; Dec. Dig. § 156.\*]

**3. BANKS AND BANKING (§ 166\*)—INSOLVENCY—PRIORITIES OF CLAIMS.**

Following the decision in Schofield Mfg. Co. v. Cochran, 119 Ga. 901, 47 S. E. 208, where the owner of a check delivers it to a bank for collection, and before the proceeds are remitted the bank fails and is placed in the hands of a receiver, the owner is not entitled to priority over the general creditors of the bank.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 574-578, 586; Dec. Dig. § 166.\*]

**4. TELEGRAPHS AND TELEPHONES (§ 37\*)—OPERATION—FAILURE TO DELIVER MESSAGE—PROXIMATE CAUSE OF INJURY.**

The probability that the drawer of a check given in settlement of a debt will request the drawee to withhold payment, when instructed so to do by the payee, and that the drawee will comply with such request, is so legally certain as to support an action for damages against a telegraph company for failing to deliver a mes-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

sage from the payee to the drawer, containing such an instruction.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. §§ 23, 24, 29, 30, 32; Dec. Dig. § 37.\*]

#### 5. SUFFICIENCY OF PETITION—DISMISSAL ON DEMURRE.

The petition set forth a cause of action, and should not have been dismissed on demurrer.

*(Additional Syllabus by Editorial Staff.)*

#### 6. TELEGRAPHS AND TELEPHONES (§ 37\*)—OPERATION—FAILURE TO TRANSMIT MESSAGE.

Plaintiff received a check from the general secretary of the supreme lodge, and deposited it for collection in a bank. On the failure of the bank, the payee of the check deposited with the defendant company for transmission a telegram to the drawer requesting him to stop payment of the check. Defendant failed to transmit the telegram, and the payee sued for the resulting loss of the amount of the check. *Held*, that the drawer was under legal obligation to comply with the request contained in the telegram, and the fact that it was addressed to him as an individual, and not in his official capacity, does not affect the liability of the defendant.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. §§ 23, 24, 29, 30, 32; Dec. Dig. § 37.\*]

#### 7. TELEGRAPHS AND TELEPHONES (§ 56\*)—OPERATION—FAILURE TO TRANSMIT MESSAGE.

Where the general superintendent of the insurance department of a fraternal order received a check and deposited it with a bank for collection and on the failure of the bank deposited with defendant telegraph company a telegram to the drawer to stop payment, and plaintiff was individually responsible to the fraternal order for the safe-keeping and proper distribution of the check, plaintiff, and not the fraternal order alone, was entitled to maintain an action against defendant for failure to transmit the telegram, resulting in the loss of the amount of the check.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. § 37; Dec. Dig. § 56.\*]

Error from City Court of Atlanta; H. M. Reid, Judge.

Action by H. Cronheim against the Postal Telegraph Cable Company. Judgment for plaintiff, and defendant brings error. Reversed.

H. Cronheim brought suit against the telegraph company, making in his petition substantially the following allegations:

Plaintiff was general superintendent of the insurance department of the Supreme Lodge of the Knights of Pythias for the State of Georgia, and had an office in the city of Atlanta, which was under the control of and maintained by the Supreme Lodge of the Knights of Pythias. On December 20, 1907, he received from Carlos S. Hardy, general secretary of the Supreme Lodge of the Knights of Pythias, in the city of Chicago, Ill., a certain voucher check in the following words and figures, to wit: "Supreme Lodge Knights of Pythias, Insurance Department. Voucher Check No. H. 1533. Chicago, Ill., 12/18, 1907. To H. Cronheim, Address, At-

lanta, Ga.: \$1,220. This voucher check is payable in current funds at the First National Bank of Chicago, when receipted in accordance with directions below. Advanced on a/c ..... Ne ..... \$1,220.00. Approved for payment: Carlos S. Hardy, General Secretary. Countersigned: Sam'l O. Smart, Auditor. Audit No. 1070. Received at Atlanta, Ga., (Date) Dec. 20, 1907, twelve hundred twenty and no/100 dollars (\$1,220.00), in full payment of the above account. Account No. 5. Drawn W. O. P. H. Cronheim. [Before signing please write place and date above.] Directions: This receipt must be dated and signed by the party in whose favor the voucher check is drawn and in exact form as given above." Indorsements on back of voucher check No. H. 1533: "Supreme Lodge Knights of Pythias, Insurance Department. \$1,220.00. Date 12/18—07." "Payable at the First National Bank, Chicago, Ill. No protest." "The Neal Bank, Atlanta, Ga." "Paid through Chicago Clearing House, 2—3, Dec. 23, '07, to Central Trust Company of Illinois." "Pay to any bank or bankers, or order. All other indorsements guaranteed. Dec. 20—07. The Neal Bank."

On December 20, 1907, the plaintiff deposited the voucher check in the office of the Neal Bank in the city of Atlanta, "for collection." In the usual and ordinary channels the check proceeded from the office of the Neal Bank to the Central Trust Company of Illinois, in Chicago, for presentation to the First National Bank of Chicago for payment. On December 21, 1907, which was Saturday, the Neal Bank failed and closed its doors for business. On December 23d, at 7:55 a. m., the plaintiff filed with the defendant company in Atlanta a telegram of which the following is a copy: "Atlanta, Ga., December 23, '07. To Carlos S. Hardy, 1220 Manhattan Building, Chicago, Ill. Stop payment check twelve hundred twenty-two dollars sent Dec. statement have written. [Signed] H. Cronheim." It is alleged that this telegram referred to the voucher check hereinbefore mentioned, and was designed to cause the addressee to instruct the First National Bank of Chicago to refuse payment of the check when presented, on account of the failure of the Neal Bank. At the time this message was left with the defendant's agent in Atlanta, attention was urged by the plaintiff to its importance, and to the consequences that would be suffered by him in the event of a failure to transmit it promptly, and the agent informed petitioner that it would reach its destination in about 30 minutes. The check in question was presented to the First National Bank at Chicago by the Central Trust Company of Illinois at 12 o'clock, noon, December 23, 1907, and was paid through the clearing house of Chicago, the check having been indorsed by the Neal Bank to the Central Trust Company. The

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

telegram was not delivered to Carlos S. Hardy until 2:05 p. m., December 23, 1907, having been negligently delayed in delivery by the defendant. Carlos S. Hardy, the general secretary aforesaid, was in his office at the address referred to in the telegram during the whole of December 23, 1907, and "would have stopped payment of this said voucher check by the First National Bank of Chicago if he had received said petitioner's message at any time prior to the receipt of same, to wit, December 23, 1907." It was further alleged that there was an error in transmission of the message, both as to the name of Carlos S. Hardy and as to the place for delivery of the message, as well as in the name of the sender, and it is averred that these errors in transmission contributed to the delay in delivery.

Plaintiff was individually responsible to the Supreme Lodge of the Knights of Pythias for the safe-keeping and distribution of all funds placed in his hands by the Supreme Lodge. He was responsible for the collection, safe-keeping, and proper distribution of the check, and no loss ensued to the Supreme Lodge by reason of the placing of the check in the Neal Bank for collection, and the failure of the defendant to promptly deliver the telegram; but the loss, as heretofore set forth, was sustained by the plaintiff individually. The Neal Bank having become insolvent, the check passed into the hands of the receivers of the bank, and, on account of the gross negligence in failing to deliver the message, the proceeds of the check were paid to the order of the Neal Bank, when, by ordinarily prompt and careful transmission and delivery of the message, payment could have been legally prevented; and plaintiff was forced to make the check good to the Supreme Lodge of the Knights of Pythias. Plaintiff has received from the receivers of the Neal Bank three payments on the check, as follows: March 20, 1908, \$244; October 20, 1908, \$244; November 20, 1909, \$188—making a total of \$671. He sues for the difference between this sum and the amount of the voucher, plus interest, claiming the right to recover the sum of \$862.32. On January 23, 1908, within 60 days from the date of the injury and damage complained of, the plaintiff filed his claim against the defendant for the sum of \$1,220, alleging the same to be due him as damages for the negligent transmission and delivery of his message, and caused said claim to be referred to the agency of the defendant in the city of Atlanta, the agency which had received the message for transmission and delivery, and the defendant refused to pay the amount claimed, or any part thereof.

The defendant interposed a demurrer to the petition upon the following grounds: (1) Because no cause of action is set forth; (2) because it does not appear how the plaintiff

became legally liable or responsible to the Supreme Lodge of the Knights of Pythias for the proceeds of the voucher; (3) because it appears that the plaintiff had a preferential claim against the receivers of the Neal Bank, and that sufficient funds went into the hands of the receivers of the Neal Bank to pay his claim in full; (4) because it appears from the petition that the right of action is not in the plaintiff. The defendant specially demurred to the averments that the plaintiff was general superintendent of the insurance department of the Supreme Lodge of the Knights of Pythias, and had an office in the city of Atlanta, which was maintained and controlled by the Supreme Lodge, and also to the allegation that the telegram had been negligently held by the defendant and not delivered to the addressee until 2:05 p. m., upon the ground that these allegations were impertinent. The defendant also specially demurred on the ground that the allegations of the petition did not show how and in what manner the plaintiff became legally responsible for the proceeds of the collection of the check; the averment in reference to this matter being alleged to be vague, indefinite, and uncertain. Special demurrer also raised the point that the nature, character, and details of the claim alleged to have been filed with the defendant were not set forth.

In response to the demurrer, the plaintiff amended his petition as follows: The check described in the petition was issued to the plaintiff "as an advance on account of the current expenses of his office" as general superintendent of the Supreme Lodge of the Knights of Pythias, and was issued for the purpose of paying "various commissions and compensations due to him and to various and divers secretaries of local branches of the insurance department of the Supreme Lodge, Knights of Pythias, in the state of Georgia, under his employment and supervision, for soliciting applications from members of the order of Knights of Pythias for insurance in said department, said voucher check having been so remitted and intrusted to him in his individual name and capacity by said insurance department, Supreme Lodge, Knights of Pythias, for the purposes aforesaid." Plaintiff sustained individual loss by reason of the negligence of the defendant, both on account of being a trustee and distributor of the voucher check for the purpose above mentioned, and because of his ownership thereof, by reason of which he was compelled to make the same good to the insurance department of the lodge. The original petition alleged that the voucher check was deposited in the Neal Bank for collection. By amendment it was alleged that the check was deposited "for collection and credit to his individual account with said Neal Bank for deposit."

The trial judge passed the following order: "The amendment makes it appear that



the check was deposited for credit to the plaintiff's private account, subject to his check, and it thus became the property of the bank, and he had no right to stop its payment. He sues only for actual damages. The general demurrer is sustained, and the plaintiff's petition dismissed, with judgment against the plaintiff for ——— dollars and ——— cents costs." The plaintiff excepted.

Leon C. Greer, for plaintiff in error. Anderson, Felder, Rountree & Wilson, for defendant in error.

POTTLE, J. (after stating the facts as above). [1, 2] 1. 2. When the receipt was signed by the plaintiff, the voucher became an order on the Chicago bank for the sum expressed in its face. The voucher recited upon its face that it was payable in current funds of the bank when the receipt was signed. When the receipt was signed, the voucher had all of the incidents of a check drawn in the usual form upon the order of the payee and indorsed by him. It was the right of the payee to divest himself of the title to the voucher by an absolute sale, or he could appoint an agent to collect and remit to him the proceeds. Ordinarily banks do not buy the checks of their customers drawn on other banks, but there is no legal objection to their doing so. Generally checks or drafts of this kind are accepted only for collection. The customer may be credited with the paper, or he may be credited with the amount of the check as cash. *Baillie v. Augusta Savings Bank*, 95 Ga. 277, 21 S. E. 717, 51 Am. St. Rep. 74. But even in the latter case it is well settled that the bank does not forfeit the right to charge the amount back to the customer if the check is dishonored. 1 *Morse, Banks and Banking* (4th Ed.) § 187. Sometimes, as a matter of accommodation to customers, banks do credit as cash the amount of foreign checks and permit the depositor to draw immediately against the credit; but this is a mere matter of custom or practice, which can, of course, be departed from at any time and in any case. Generally title to a particular check deposited in a bank does not pass out of the depositor until the proceeds are collected. The question, like all other questions of contract, depends upon the intention of the parties. If they intend title to pass, and by apt words enter into an agreement to this effect, such a contract will be given legal efficacy. But the courts will rather presume that simply the relation of principal and agent was created, in the absence of clear evidence that the parties intended that the relation of debtor and creditor should arise immediately upon the deposit of the check. Where a draft or check is deposited "for collection," it is clear that the title does not pass. *Central Railroad v. First National Bank*, 73 Ga. 383; *Neal v. Gray*, 124 Ga.

511 (3), 52 S. E. 622. Where it is deposited generally, upon an indorsement in blank, and nothing more appears, it will be presumed that the deposit was made in the usual course of business, and that the depositor intended to appoint the bank as his agent to collect the proceeds and deposit them to his credit. Here the voucher was left "for collection and credit to his individual account with said Neal Bank for deposit." There is no averment of any agreement or understanding other than that which may be implied from this language. There is no allegation that, at the time the voucher was left with the bank, plaintiff was credited with the amount of it as cash, or that there was any agreement that he was to be allowed to draw against the voucher, or any previous course of dealing by which he had the right to do this, or that he actually did so.

We are therefore confined to the language of the averment above quoted to ascertain the intention of the parties. So dealing with the case, we are very clear that title did not pass from the plaintiff. The evident meaning of the averment is that the plaintiff appointed the bank his agent to collect, and that *when collected* the proceeds should be deposited to his individual credit. This being so, the plaintiff had the right to control the check and stop its payment. The agency was revocable, and could be terminated at the plaintiff's pleasure. Indeed, the insolvency of the bank before the collection was actually made terminated the agency and the bank's right to proceed. 5 *Cyc.* 512. But, unless terminated, the agency continues until the collection is made, after which the relation of debtor and creditor arises. In *Freeman v. Exchange Bank*, 87 Ga. 45, 13 S. E. 160, a check was indorsed "for deposit to the credit of" the indorser. It was held that the proceeds of the check in the hands of a disinterested bank, through whose agency the collection was made, were subject to garnishment as assets of the indorser. We quote from the opinion of Mr. Chief Justice Bleckley: "There being in evidence no facts extrinsic to the bill itself and its indorsements to throw light upon the question of title, we are not to be understood as holding that such facts might not exert a controlling influence on the question. Indeed, there is authority for giving them such effect when duly proved. A deposit of paper in bank by a customer, he indorsing it 'for deposit,' may operate to clothe the bank with title under certain circumstances. *National Commercial Bank v. Miller*, 77 Ala. 168, 54 Am. Rep. 50; 2 *Morse on Bank*. § 577. But the general rule is that by a restrictive indorsement the depositor retains the title. *Bolles on Banks and Depositors*, § 220." In *Fourth National Bank v. Mayer*, 89 Ga. 108, 14 S. E. 891, it was held: "Where a regular customer of a bank deposits with the bank his draft payable to his own order and indorsed, 'For

deposit to the credit of the drawer, and the same is entered to his credit on the books of the bank, and forwarded by the bank to another bank for collection, the drawer, by the course of dealing, having the right to check against such deposit, and in fact checking against it, and his checks being honored, the title to the draft passes to the first bank, and, when collected by the second, the proceeds are not subject to garnishment at the instance of a creditor of the drawer; such proceeds being the property, not of the drawer, but of the first bank. The case is distinguishable from *C. R. R. v. First Nat. Bank*, 73 Ga. 383, and *Freeman v. Exchange Bank*, 87 Ga. 45 [13 S. E. 160].

We are of the opinion that the judgment of dismissal cannot be sustained upon the ground upon which the same was placed by the learned trial judge.

[3] 3. It is contended that the demurrer was rightly sustained because, under the facts alleged, the plaintiff was a preferred creditor of the Neal Bank, and could have avoided any loss by following the fund in the hands of the receiver, that the proceeds of the voucher which came into the hands of the receiver was a trust fund, and that a court of equity would have awarded it to him as such. We need not consider whether a wrongdoer, like the defendant is admitted by the demurrer to be in this case, can raise such a question. There is force in the suggestion that one who has wrongfully occasioned another damage ought not to be heard to say, after the damage is done, that the injured party should have sought relief in another proceeding and against another party. Whether the general rule that an injured party is bound to lessen his damage would make permissible a defense of this nature we need not inquire. In the celebrated English case of *Knatchbull v. Hallett*, 13 Ch. D. 696, the old equity rule, that either the property misappropriated by a faithless agent or its proceeds must be capable of identification before equity would impress it with a trust in favor of the party wronged, was enlarged and extended, so as to apply to a case where money held by a person in a fiduciary character was paid by him to his account at his bankers; it being held that in such a case the owner of the money could follow it and have a charge on the balance in the banker's hands. This modern doctrine has been followed by some of the American courts and applied to a fund collected by an insolvent bank as agent for another. See 5 Cyc. 512; 3 Am. & Eng. Enc. Law (2d Ed.) 805; 2 Morse, Banks & Banking (4th Ed.) § 590; *State v. Edwards*, 61 Neb. 181, 85 N. W. 43, 52 L. R. A. 858. But the rule is settled otherwise for us by the Supreme Court. In *Tiedeman v. Fertilizer Co.*, 109 Ga. 661, 34 S. E. 999, it was held: "Where the owner of notes placed the same in the hands of another for collection, and

the bailee, having made collections, failed to remit the proceeds, the claim of the owner of the money collected was, in a general sense, in the nature of a fiduciary debt, but not such an one as entitled him to a priority over the claims of general creditors in the distribution of the assets of the bailee who had become insolvent." *Ober v. Cochran*, 118 Ga. 396, 45 S. E. 382, 98 Am. St. Rep. 118, is to the same effect.

But it is said that the rule announced in these cases should not be applied where the bank became insolvent before the collection was made and the fund was paid over to the bank's receiver. In such a case it is urged that the fund is an asset of the depositor in the custody of the court, the depositor never having become a creditor of the bank, and the agency to collect having been terminated by the insolvency of the bank; that the receiver has no right to mingle the fund with the general assets of the insolvent bank, but should hold it as a trust fund, to be paid over to the depositor upon demand. There is much in this argument to commend it. The particular fund is in gremio legis, and collected by the receiver as a special fund, in consummation of the agency of the bank, which has been terminated by its insolvency. The receiver is not bound to accept the fund, and, if he does so, it would seem to be equitable and right for him to pay it over intact to the person who employed the bank to make the collection. But in *Schofield Mfg. Co. v. Cochran*, 119 Ga. 901, 47 S. E. 208, the bank failed and was placed in the hands of a receiver before the money was returned, and it was held that the owner of the draft which was thus collected was not entitled to priority over general creditors. This decision settles this question adversely to the contention of the defendant in error.

[4] 4. It is contended that the judgment dismissing the petition should be affirmed, because the plaintiff's claim for damages is dependent upon a speculative or contingent event, which is not so legally certain as to authorize a recovery against the defendant. In other words, it is said that the allegation in the petition that the addressee, Carlos S. Hardy, would have stopped payment of the check, had the message been promptly delivered, is an averment as to the happening of an event uncertain and speculative. The rule applicable in such cases is thus stated in the *Cyclopedia of Law and Procedure* (volume 37, p. 1758): "The loss is not, in the eye of the law, the proximate consequence of the telegraph company's negligence in a case where, even if the company had performed its duty, there can be no legal certainty that the loss would not still have occurred or the object of the message have been defeated. Thus, if the happening or preventing of the loss, even though the telegraph company had performed its duty, would still have been de-

pendent on a speculative or contingent future event, or on the voluntary action or inaction of the other party to the message, or of plaintiff himself, or of a third party, where there was no obligation on the part of such party to act or not to act, it cannot be said with legal certainty that the loss was the result of the telegraph company's negligence." This rule has been applied in a great variety of cases. For instance, where a suit was brought against a telegraph company for damages on account of the failure of the plaintiff to complete a contract referred to in the message, it was said that before the plaintiff could recover it must be said "with legal certainty that, if that telegram had been delivered, there would have been an actual contract; for, if a contract had not ensued, the company would clearly not be liable. We everywhere come across the rule that damages must not be contingent and conjectural. I do not here mean a conjectural process of fixing the mere amount of damages; but I mean that we cannot fix damages upon a party as guilty of wrong upon a cause or basis resting on a contingency, upon an event that might, or might not, have happened. We cannot say that the proposal of the lumber company would have been accepted." *Beatty v. Telegraph Co.*, 52 W. Va. 414, 44 S. E. 811. To the same effect, see *Tanning Co. v. Telegraph Co.*, 143 N. C. 376, 55 S. E. 777.

The rule was applied in favor of the telegraph company in a case where it was sued for damages for failing to deliver a message to a witness summoned to testify in a pending action. It was held that the claim of the plaintiff that, if the witness had been present, he would have won his case, was too speculative to be the basis of damages. *Martin v. Telegraph Co.*, 18 Wash. 260, 51 Pac. 376. Claim for damages was also denied in a case where the company failed to deliver a message to a son, announcing the illness of his father; the claim being predicated upon the theory that, if the message had been delivered, the son would have reached his father's bedside before his death and would have received from him a donation. The court held that such a loss as claimed by the plaintiff could not have been contemplated when the message was delivered. *Chapman v. Telegraph Co.*, 90 Ky. 285, 13 S. W. 880. In *Western Union v. Crall*, 39 Kan. 580, 18 Pac. 719, it was held that damages could not be recovered on account of loss of anticipated gain based upon the probability of the plaintiff's horse being able to win prize purses at a trotting race. In *Walser v. Telegraph Co.*, 114 N. C. 440, 19 S. E. 368, it appeared that the Comptroller of the Currency sent a telegram to the plaintiff, inquiring if he would accept the receivership of a certain bank at a compensation mentioned in the telegram. It was held that the plaintiff could not recover damages for the nondeliv-

ery of the message, inasmuch as, even if he had accepted the offer, the government was under no legal obligation to appoint him, and that for this reason the damages were too remote, and rested upon an event too uncertain. So, in a case where a telegram was sent requesting the shipment by express of four gallons of whisky, the plaintiff was not allowed to recover, because there was no evidence that the whisky would have been sent if the error in the transmission of the message had not been made. *Newsome v. Telegraph Co.*, 137 N. C. 513, 50 S. E. 279. See, also, *Smith v. Western Union*, 83 Ky. 104, 4 Am. St. Rep. 126; *McColl v. Western Union*, 44 N. Y. Super. Ct. 487.

In *Clay v. Western Union*, 81 Ga. 285, 6 S. E. 813, 12 Am. St. Rep. 316, the plaintiff alleged that by the negligence of the company a telegram sent to him was not delivered in time for him to make a trade, whereby he lost a certain sum which he would have made as profits if he had received the telegram at the proper time. Plaintiff was an undertaker, and the telegram was a direction for him to meet a certain train to arrange for the shipment of the remains of the person named in the telegram. The court held that by the failure of the company to deliver the message the plaintiff lost a mere opportunity or possibility to make something, and the judgment dismissing the petition on general demurrer was sustained. See, also, *Western Union Telegraph Co. v. Watson*, 94 Ga. 202, 21 S. E. 457, 47 Am. St. Rep. 151; *Bashinsky v. Western Union Telegraph Co.*, 1 Ga. App. 761, 58 S. E. 91. In the case last referred to, the plaintiffs alleged that by the failure of the defendant to deliver a message they lost a contract under which they would have made certain commissions. Judge Russell, speaking for the court, said: "It cannot be seen, from the allegations of the petition, how the plaintiffs were damaged. No right to recover damages is alleged. It is nowhere distinctly alleged that the plaintiffs had a contract with the sender of the message. On the contrary, from the distinct averment in the fourth paragraph of the petition that they 'would have been able to have made the contract,' etc., it can only be inferred that they did not have such a contract as would have bound the sender of the message. They lost nothing but a chance to make something. It was a case of lost opportunity; but the plaintiffs were in the same condition after receiving the telegram as they were before, except the expense of their reply, which was sent 'at a venture.' It is averred that, if the plaintiffs had received the telegram in time, they would have made \$1,999.99. They might have done this if they had been able to make the contract, or they might not. No contract is set out." See, also, *Richmond Mills v. Western Union Telegraph Co.*, 123 Ga. 216, 51 S. E. 290, where the telegram which the defendant

failed to deliver contained a mere proposal to sell goods. It was held that the claim of the plaintiff that if the message had been delivered the purchaser would have accepted, and they would have made certain profits, rested upon an event too uncertain to authorize a recovery. In *Capers v. Western Union Telegraph Co.*, 71 S. C. 29, 50 S. E. 537, the right to recover damages for the failure of the defendant to deliver a message in time to have money deposited in a bank to pay a check was denied, upon the ground that the plaintiff failed to allege "that the addressee would have delivered the money in time to the person designated to convey it to the bank, and that such person would have conveyed it in time."

We recognize the soundness of these decisions and the correctness of the general rule therein announced; but we do not think this rule is applicable to the facts of the present case. If one owes another money, it is his duty to seek him out and pay him in legal tender. If the creditor, for the mere accommodation of the debtor, accepts the latter's personal check drawn upon a foreign bank, the creditor has the right to appoint an agent to collect this check. The delivery of the check to the creditor does not satisfy the debt, unless expressly so accepted. The obligation of the debtor continues until the check is actually paid. The creditor has a right to revoke the agency to collect, and if he appoints a faithful agent, and undertakes to revoke the agency, it is the duty of the debtor to co-operate with the creditor in the revocation of the agency; and if the debtor received from the creditor a telegram requesting him to stop payment of the check, and he should fail to do so, and the money should be misappropriated by the agent appointed to collect, the debt would not be satisfied, and the debtor would still be liable to the creditor. This being true, the debtor would be under a legal obligation to stop the payment of the check. The court will not assume as a matter of law in such a case that the debtor would not comply with this obligation imposed upon him, but, on the contrary, will presume that he would have done what the law would require him to do in order to relieve himself from liability. The allegation in the petition is that the person to whom the message was addressed would have stopped payment of the check. If this person had been under no obligation to stop payment, but a mere outsider, the plaintiff would have stated no cause of action, because in that case the person to whom the message was sent might or might not have complied with the request, would have been under no obligation to do so, and the court would not presume that he would have done so. The possibility of his complying with the request in such a case would have been too uncertain and contingent to form the basis of a recovery. But we think

the case is altogether different where the person to whom the message is sent is the one who drew the check and who owed the money, and who was, therefore, under a legal obligation to take the necessary steps to save himself from loss. See, generally, on this subject, *Western Union Tel. Co. v. Ford*, 8 Ga. App. 514, 70 S. E. 65; *s. c.*, 10 Ga. App. —, 74 S. E. 70 (Feb. 24, 1912).

[6] 5. But it is contended that Hardy, the person to whom the telegram was addressed, was not such a debtor of the plaintiff as to place him under any legal obligation to comply with the request contained in the telegram. Under the allegations of the petition, the amount of money named in the voucher was due to the plaintiff, to be used by him for the purpose mentioned in the petition. Hardy was the custodian of the fund out of which this money was to be paid. He had a right to withdraw the fund by check. It was his duty, as an agent of the Supreme Lodge of the Knights of Pythias and as custodian of the fund, to pay over this amount of money to the plaintiff. Now, suppose the message had been promptly delivered to Hardy, and he had negligently failed to notify the Chicago bank to withhold payment of the check. Is it not clear that Hardy would have been personally responsible for the loss of this money? A corporation can act only through its agents, and if one of its agents by negligent inaction causes the corporation to sustain a loss, the agent would be liable to the corporation. It is also true that, if this agent by his negligence causes third persons to sustain loss, the agent would be individually responsible to the party injured. We think, therefore, that under the allegations of the petition the case stands just as though it were a transaction between an ordinary creditor and an ordinary debtor.

The fact that the telegram was addressed to Hardy as an individual can make no difference. It is said that as an individual Hardy had no right to stop payment on the check, but could have done so acting only in his capacity as an officer of the Supreme Lodge of the Knights of Pythias. We think it is entirely immaterial that the message was not addressed to him in his official capacity. Hardy as an officer and Hardy as an individual were one and the same man. If he had received the telegram as an individual, in all probability he would have taken whatever action was necessary and proper as an officer of the lodge to stop payment of the check. If the plaintiff had met Hardy on the street and requested him to stop payment of the check, it certainly would not have been necessary to expressly address him as general secretary of the Supreme Lodge of the Knights of Pythias, nor was it necessary to incorporate his official title in the telegram.

[7] It is further contended that, if there

is any right of action at all, it is in the Supreme Lodge of the Knights of Pythias, and not in the plaintiff; that it appears from the allegations of the petition that the money belonged to the Knights of Pythias, and not to the plaintiff, and that he was the mere agent of the lodge to disburse the fund. The petition alleges that the plaintiff was individually responsible to the Supreme Lodge of the Knights of Pythias for the safe-keeping and proper distribution of the voucher check deposited with the Neal bank, that no loss ensued to the Supreme Lodge by reason of the failure of the plaintiff to receive the proceeds of the check, that the plaintiff alone was responsible for its loss, and that he had in fact made the same good to the Supreme Lodge. We think these allegations were sufficient to show that the plaintiff was authorized to bring suit in his own name. He avers that he was responsible to the Supreme Lodge for the safe-keeping of the money, that the loss was occasioned by the act of the agent whom he appointed to collect the money, and that, recognizing his liability, he in fact paid to the Supreme Lodge the amount of the check.

[5] Under these allegations the plaintiff had a right to maintain the action. Our conclusion is that the demurrer was not well taken, and that the court erred in dismissing the petition.

Judgment reversed.

(10 Ga. App. 745)

**SOUTHERN RY. CO. v. FLANIGAN.**  
(No. 3,821.)

(Court of Appeals of Georgia. March 6, 1912.)

*(Syllabus by the Court.)*

**1. CARRIERS (§ 264\*)—PASSENGER TRAINS—REGULATION.**

In the absence of statutory prohibition or regulation, a railroad company may adopt a rule that certain passenger trains, running regularly on its road, will stop only at designated places.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1037-1039; Dec. Dig. § 264.\*]

**2. CARRIERS (§ 264\*)—PURCHASER OF TICKET—RIGHTS OF PARTIES.**

Where a common carrier, sells to a person a ticket between two points on its line of road, and the ticket contains no express restriction as to the train or trains on which it will be accepted for passage, the holder thereof has the right to assume, in the absence of any information, actual or constructive, to the contrary, that he may ride on the ticket to his destination, as indicated by the ticket, on any train of the company carrying passengers to that point.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1037-1039; Dec. Dig. § 264.\*]

**3. CARRIERS (§ 361\*)—EXPULSION OF PASSENGER—LIABILITY OF RAILROAD.**

Where a person, having bought his ticket to a particular station on the line of the railroad, boards a passenger train of the company in ignorance of the fact that the train makes no stop at that particular place, it is the duty of

the conductor, when he first discovers the passenger's mistake, to inform him of the fact, in order that the passenger may exercise his option to remain on the train to the point to which his ticket entitles him to ride, or to disembark at some station where the train does stop. The passenger cannot be treated as a trespasser before reaching the station called for by his ticket; and if, over his protest, he is compelled by the conductor to leave the train before reaching it, his wrongful expulsion is a tort for which the railroad company is responsible in damages.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1409-1501; Dec. Dig. § 361.\*]

Error from City Court of Atlanta; H. M. Reid, Judge.

Action by F. B. Flanigan against the Southern Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

McDaniel & Black and E. A. Neely, for plaintiff in error. J. T. Moore and Moore & Branch, for defendant in error.

HILL, C. J. The plaintiff's petition alleges that on March 26, 1910, she bought a ticket from the agent of the Southern Railway Company at Science Hill, Ky., entitling her to transportation to Jenkinsburg, Ga., and, after purchasing the ticket, boarded one of the regular passenger trains of the defendant company with her six children for the purpose of going to Jenkinsburg, to which place the train was going. When she arrived at Atlanta, Ga., she was for the first time informed by the conductor of the train that the train she was on was a through train, and did not stop at Jenkinsburg, and that she would have to leave the train in Atlanta and wait for another train, in order to complete her trip to Jenkinsburg. The train arrived in Atlanta about 11 o'clock at night, and when the conductor told her that she could not continue her trip to Jenkinsburg on that train, and would be compelled to leave it, she objected to being put off in Atlanta, and insisted upon continuing her trip to Jenkinsburg on that train. Nevertheless the conductor would not permit her to complete her trip to Jenkinsburg, and she was thus compelled to leave the train and to wait in Atlanta from 11 o'clock that night until 7:30 o'clock next morning. She was practically without money, was an entire stranger in Atlanta, and was in a delicate state of health at the time. In this situation she was compelled to sit up in the depot in Atlanta all night with her children. She was caused great anxiety and physical suffering, suffered much pain and discomfort by reason of having to stay over in Atlanta and sit up all night, and was rendered ill by the worry, anxiety, and discomfort thus suffered by her, and she continued to suffer for several weeks as a result of these facts. She alleges that the conduct of the conductor in compelling her to leave the train in

Atlanta under the circumstances stated amounted to an expulsion; that, having purchased a ticket to Jenkinsburg, she was entitled to be carried on that ticket to that point; that she was not informed, when she boarded the train at Science Hill, that the train was a through train and would not stop at Jenkinsburg, and that she would have to remain in Atlanta for another train, and she was for the first time informed of this fact by the conductor on reaching Atlanta. She sues to recover damages, both compensatory and punitive, for the tortious conduct of the conductor. The defendant filed a demurrer, on general and special grounds. Some of the special grounds were sustained, with leave to amend, and some were overruled. The general demurrer was overruled, and to the judgment overruling this general demurrer the defendant excepted.

Three questions are raised by the record:

(1) As to the right of the railroad company to promulgate rules regulating the running and stopping of its trains at stations, requiring some trains to run through without stopping, except at designated stations on its line, and others to stop at all stations; (2) as to the duty of one who buys a ticket to inform himself on what train the ticket would entitle him to transportation; and (3) as to the rights of the passenger who ignorantly boards a train which does not stop at the station to which he has bought a ticket, and the correlative duty of the conductor of the train when he discovers that such passenger is on the wrong train.

[1] 1. In the absence of statutory regulation or prohibition, a railroad company may adopt regulations that certain passenger trains, running regularly on its roads, shall stop only at designated stations. There can be no doubt that such rules and regulations are reasonable, and are necessary in the proper conduct of the business of the railroad company. Civil Code 1910, § 2729; Southern Ry. Co. v. Watson, 110 Ga. 681, 36 S. E. 209; Harp v. Southern Ry. Co., 119 Ga. 927, 47 S. E. 206, 100 Am. St. Rep. 212; Hutchinson on Carriers (3d Ed.) § 1060. But a rule, however reasonable, should be enforced with due regard to the obligation of extraordinary diligence which the law imposes upon carriers of passengers.

[2] 2. It is insisted by counsel for the plaintiff in error that a passenger is bound to inquire and ascertain whether the train which he proposes to take stops at the station to which his ticket entitles him to ride; that if, without inquiry, he boards a train which, by the regulations of the carrier, does not stop at his destination, he cannot require the train to be stopped at such destination, but that he may lawfully ride to the nearest point short of his destination where the train regularly stops; and it is said that there is no allegation in the petition that the plaintiff made any effort to have the train on

which she had taken passage stop at the nearest point short of Jenkinsburg, the particular station to which she had bought a ticket, nor, in fact, that Atlanta was not the nearest scheduled stop of that train to Jenkinsburg. The rule as claimed by the plaintiff in error is unquestionably supported by great weight of authorities, both text-writers and decisions of courts. Hutchinson on Carriers (3d Ed.) § 1060, and cases cited in the notes; 4 Elliott on Railroads, p. 1593; 3 Thompson's Commentaries on the Law of Negligence, § 2562. Discussing this subject, Thompson, in his Commentaries on Negligence, supra, declares that "it is the duty of a person before taking passage upon a railroad train to use reasonable diligence, by inquiring of the station agent or the conductor of the train, or by reading the published schedules of the train, or by other means, to ascertain whether or not the particular train stops at his particular place of destination," and he cites in support of this rule several decisions in the notes, which hold, in effect, that where an intended passenger purchases a ticket at the company's office when the train is about to depart in the direction in which he wishes to go, without making inquiry as to whether or not the train will stop at the particular station to which he has purchased the ticket, and after boarding the train he learns for the first time that the train will not stop at that station, he has no redress against the company, either for carrying him beyond his particular station, or for requiring him to get off at an intermediate station.

In the case of Texas & Pacific Railway Co. v. Ludlam, 57 Fed. 481, 6 C. C. A. 454, Judge Pardee, speaking for the Circuit Court of Appeals for the Fifth Circuit, announces the rule as follows: "It is the duty of the person about to take passage on a railroad train to inform himself when, where, and how he can go or stop, according to the regulations of the railroad company; and if he makes a mistake, not induced by the company, against which ordinary care in this respect would have protected him, he has no remedy against the company for the consequences." And he further holds that where a train not scheduled to stop at a certain station is boarded by a person holding a ticket for such station, without informing himself whether he can stop there or not, the failure of the conductor to inform him at the first opportunity that the train does not stop there, so that he can exercise the right of stopping at some intermediate station, is not a breach of the company's obligation, so as to render it liable for damages caused to a passenger by being put off at the last preceding station where he is subjected to great inconvenience and exposure. As to this latter point there was a dissenting opinion by Locke, District Judge. Thompson, in his Commentaries on the Law of Negligence (volume 3, § 2563), declares that the decision of the majority of

the United States Circuit Court of Appeals on this point, "though rendered by a federal Court of Appeals, cannot make a rule of law so palpably unreasonable, so unjust, and so opposed to public right."

We cannot fully subscribe to the soundness of the rule that one who proposes to become a passenger is bound to inquire, when he purchases his ticket and before he boards the train, to ascertain whether the train which he proposes to take according to its schedule stops at the particular place on the line of the railroad to which his ticket entitles him to ride. It seems to this court that the sounder rule on the subject is to impose upon the railroad company the duty of giving the information to the purchaser of the ticket over its railroad as to what train stops at the particular station to which it sells the ticket, and not to impose the duty of inquiry upon the proposed passenger. Agents who sell tickets know the schedules of the company's trains, and it would seem to be more reasonable to require that this information should be given to the passenger, when he proposes to buy his ticket to a particular station, than it would be to require the passenger, before or when he purchases the ticket, to make the inquiry. A ticket over a railroad is not only a receipt for the money paid for the ticket, but constitutes a contract between the passenger and the company for transportation according to its terms; and in the carrying out of the contract the law of this state imposes upon the carrier extraordinary diligence to protect the passenger, and certainly it would be unreasonable to hold that the full measure of the carrier's diligence has been reached unless he gives this information in his possession so important to the exercising by the passenger of the right to which he is entitled under his contract as evidenced by the ticket. When a passenger buys a ticket, he has a right to presume that all necessary information or instructions will be given him for the proper use of that ticket. And when one who proposes to become a passenger buys a ticket from an agent of the carrier to a particular station, he has a right to assume, in the absence of any information, actual or constructive, to the contrary, that he may ride on that ticket to his destination on any train of the company carrying passengers to that place.

Certainly this should be the rule, in the absence of any restriction in the ticket itself showing that it is not good for transportation to the particular station to which it had been purchased. When a person goes to a railroad station and buys a ticket from the agent of the company, the reasonable inference from that act is that he intends to become a passenger to his destination on the next train passing the initial point and going to the particular place designated by the ticket; and if the next train is a through

train, or one that does not stop at that station, the agent of the company, when he sells the ticket to the proposed passenger, should inform him of the fact. In *Atkinson v. Southern Ry. Co.*, 114 Ga. 146, 39 S. E. 888, 55 L. R. A. 223, it is held that, "when a railroad company places an agent in charge of its business at a place where passengers are expected to board its trains, and authorizes such agent to sell tickets to passengers to be used when taking passage upon its trains, one who purchases from such an agent a ticket upon which there is no statement as to what trains it will or will not be good for passage upon has a right to presume that the agent is authorized by the company to give him information on this subject."

Of course, if the proposed purchaser should ask for the information, it would be the duty of the agent to give it to him, and the company would be held responsible for the correctness of the information. *Atkinson v. Southern Ry. Co.*, supra. But we think the rule should go further, and make it the duty of the agent, having reason to believe that the purchaser proposes to take passage on a particular train, to inform him that that train will not stop at the station to which he proposes to purchase a ticket, so that he may regulate his conduct as a passenger accordingly. We frankly admit that this opinion is contrary to the views of many judges and text-writers, but we are nevertheless strong in the faith that it is more in consonance with reason and justice, and more in harmony with the rule of extraordinary diligence which the law imposes upon carriers of passengers. The point has not been expressly ruled by the Supreme Court of this state, but we think the principle herein announced is fairly deducible from several of its decisions. *Central of Georgia Ry. Co. v. Roberts*, 91 Ga. 513, 18 S. E. 315; *Head v. Georgia Pacific Ry. Co.*, 79 Ga. 358, 7 S. E. 217, 11 Am. St. Rep. 434; *Caldwell v. Richmond & Danville R. Co.*, 89 Ga. 550, 15 S. E. 678; *Pickens v. Georgia R. Co.*, 126 Ga. 517, 55 S. E. 171.

[3] 3. But, even if it be conceded that the rule is as claimed by the plaintiff in error, yet, under the allegations of the petition, or reasonable deductions therefrom, a cause of action was set out. If a passenger boards a train, which according to schedule does not stop at the station called for by his ticket, in ignorance of that fact and without making any inquiry with reference thereto, he does not thereby become a trespasser; but he has the right to remain on board the train and to exercise his election as to a station where the train does stop at which he will get off. As expressed by Judge Thompson in his *Commentaries on the Law of Negligence* (volume 3, § 2563): "If the conductor has no authority to vary the rules of the company in regard to stopping his train at a station where it is not permitted to stop by such

rules, then it is the plain duty of the conductor, when he discovers that the passenger has a ticket calling for a place at which the conductor cannot stop the train, to inform the passenger of that fact, so that he can exercise his option as to the intermediate place at which he will get off."

Applying this rule to the allegations of the petition, we hold that when the conductor of the defendant company first discovered that the plaintiff held a ticket which on its face entitled her to ride to Jenkinsburg, Ga., and that she had presumptively ignorantly gotten on a train which under the schedule did not stop at that place, it was his duty then and there to have informed her of that fact and have given her the opportunity of then getting off of the train and waiting for one that would stop at her place of destination, provided the conductor, under the rules, had no authority to stop the train at that place. If he had the authority, notwithstanding the rule, to stop the train at Jenkinsburg, having withheld from her information on the subject, and having taken up her ticket, or punched it, which is equivalent to the same thing, it became his duty to stop the train at Jenkinsburg and give her an opportunity of alighting therefrom. "A railroad conductor should not accept from a passenger a ticket to a particular station, knowing that she intends and desires to get off there, unless he intends to stop the train at that station and allow her to alight. If he accepts the ticket, a duty arises to stop the train at the point of destination fixed by the ticket." *Pickens v. Georgia R. Co.*, 126 Ga. 518, 55 S. E. 171; *Caldwell v. Railroad Co.*, 89 Ga. 550, 15 S. E. 678.

It is fair to assume, in the light of the general practice of conductors in taking up tickets or fares, that the conductor in the present case discovered, soon after the train left the initial point, that this passenger had a ticket which on its face entitled her to transportation to Jenkinsburg, Ga. He should then have told her that the train on which she was riding did not stop at that station, and have given her the opportunity of getting off at that point, or of making an election to get off at some other station where the train did stop. He could not, in the exercise of that extraordinary diligence which the law imposes upon carriers of passengers, take up the ticket, or any portion thereof, or punch it, thus indicating that the passenger was entitled to ride thereon, and withhold from her information as to the fact that she could not continue on that train to Jenkinsburg, and permit her to ride on the ticket all the way to Atlanta, which the court judicially knows is some distance from Science Hill, Ky., and, upon reaching Atlanta at night, inform her for the first time that she was on the wrong train, and then compel her to get off and remain in Atlanta all night, awaiting the arrival of a train on which she could

continue her trip to Jenkinsburg. Having brought her on his train this far on her route without objection, it became his duty, as an agent of the company with whom she had the contract of transportation, to permit her to continue on that train, and to stop and allow her to disembark therefrom at Jenkinsburg. "Where a person, having purchased his ticket for a certain station, gets on a train which makes no stop there, the conductor, by taking and punching his ticket, accepts him as a passenger, regardless of whether he was negligent in getting on the train." *Schurr v. Houston*, 10 N. Y. St. Rep. 262; 9 Am. Dig. (Century Edition) title "Carriers," p. 1037, § 1109. While probably this decision goes a little too far in the latter statement relating to negligence in boarding the train, yet where the passenger has been guilty of no negligence, the principle announced in it is pertinent and sound.

It is conceded by learned counsel for the plaintiff in error that the plaintiff might lawfully have ridden on her ticket to the nearest point short of her destination, and it is stated that there is nothing in the allegations of the petition to negative the assumption that she was entitled to do this, since it is not alleged that Atlanta was not in fact the nearest schedule stop of the train upon which she was riding; but we think that if a person purchases a ticket to a particular station, and ignorantly boards a train which does not stop there, he is entitled at his option to ride as far as that station, and cannot be treated as a trespasser and forced to leave the train until after the station is reached. The conductor must leave to the passenger the right to remain on the train until the place called for by his ticket is reached, if the passenger desires to do so; for the passenger would have that right, even if the train did not stop there. The conductor would only have the right to eject the passenger after the station was reached where the train did not stop and the passenger remained thereon without paying fare. 3 Thompson's Law of Negligence, § 2568. The view, however, that we have announced in this opinion, renders this point immaterial.

Having accepted her as a passenger, and permitted her to ride all the way to Atlanta on the ticket, the company had no right to arbitrarily break that relationship, or to temporarily suspend it. The conduct of the conductor in bringing her this far on her route, and in withholding from her the information that the train did not stop at Jenkinsburg, amounted to a waiver of the rule in the particular instance relating to the stopping of the train at Jenkinsburg. The enforcement of the rule, under the circumstances, was unreasonable and unwarranted, and was a breach of that extraordinary diligence which the statute imposed upon the carrier. In *Caldwell v. Richmond & Danville R. Co.*, supra, it is held that a railroad company which as



a common carrier receives a passenger and collects her ticket to a particular station, with knowledge on the part of the conductor that she intends and desires to leave the train at that station, is charged by law with the duty of stopping the train at that station and affording her an opportunity to get off, and failure to perform such duty is not only a breach of contract, but a tort for which an action is maintainable. See, also, *Williamson v. Central Railway Co.*, 127 Ga. 125, 56 S. E. 119.

Judgment affirmed.

(10 Ga. App. 786)

**MAPLES v. STATE.** (Nos. 3920-3924.)  
(Court of Appeals of Georgia. March 19, 1912.)

*(Syllabus by the Court.)*

**CRIMINAL LAW (§ 1023\*)—BILL OF EXCEPTIONS—DEMAND FOR TRIAL.**

This court is without jurisdiction of a bill of exceptions complaining solely of the refusal of the trial judge to permit a demand for trial in a criminal case to be entered upon the minutes. *Sharpe v. State*, 73 S. E. 33. Upon motion of the plaintiffs in error, direction is given that the copy bill of exceptions in each of the foregoing cases, which has been filed in the office of the clerk of the trial court, may operate as exceptions pendente lite.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 2583-2598; Dec. Dig. § 1023.\*]

Error from Superior Court, Miller County; W. C. Worrill, Judge.

Gurly Maples, Gary Maples, Chas. Cato, J. M. Tabb, and Johnnie Stanton were each convicted of crime, and bring separate writs of error. Dismissed, with directions.

W. I. Geer, for plaintiffs in error. J. A. Laing, Sol. Gen., and R. R. Arnold, for the State.

**POTTLE, J.** Writs of error dismissed, with direction.

(10 Ga. App. 794)

**WATSON v. STATE.** (No. 3,941.)  
(Court of Appeals of Georgia. March 19, 1912.)

*(Syllabus by the Court.)*

**DISORDERLY HOUSE (§ 17\*)—EVIDENCE—SUFFICIENCY.**

The evidence did not authorize the conviction of the defendant. Mere proof of general reputation to that effect will not authorize the conviction of one accused of the offense of keeping a lewd house. The decision in this case is controlled by the rulings of this court in *Jones v. State*, 2 Ga. App. 433, 58 S. E. 559, and *Coleman v. State*, 5 Ga. App. 366, 63 S. E. 244. The court erred in refusing a new trial.

[Ed. Note.—For other cases, see *Disorderly House*, Cent. Dig. §§ 26-29; Dec. Dig. § 17.\*]

Error from City Court of Savannah; Davis Freeman, Judge.

Sarah Watson was convicted of keeping a disorderly house, and brings error. Reversed.

Shelby Myrick and J. H. Kinckle, for plaintiff in error. W. O. Hartridge, Sol. Gen., and Morris H. Bernstein, for the State.

**RUSSELL, J.** Judgment reversed.

(10 Ga. App. 778)

**SHAW v. STATE.** (No. 3,781.)  
(Court of Appeals of Georgia. March 19, 1912.)

*(Syllabus by the Court.)*

**1. BURGLARY (§ 23\*)—INDICTMENT—DESCRIPTION OF STOLEN PROPERTY.**

In an indictment for burglary, embracing a larceny from the house, the description of the stolen property as being "thirty-five pounds of middling meat of the value of seven and 50/100 dollars, the property of said Len Porter," was sufficient, and there was no error in overruling the demurrer, based on the ground that the description was not sufficiently definite.

[Ed. Note.—For other cases, see *Burglary*, Cent. Dig. §§ 63-66; Dec. Dig. § 23.\*]

**2. CRIMINAL LAW (§ 824\*)—INSTRUCTIONS—ALIBI.**

The evidence introduced by the defendant did not render the defendant's presence at the scene of the larceny impossible, and, in the absence of a request to that effect, the judge did not err in omitting to instruct the jury upon the law of alibi.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 1996-2004; Dec. Dig. § 824.\*]

Error from Superior Court, Taliaferro County; B. F. Walker, Judge.

Robert Shaw was convicted of burglary, and brings error. Affirmed.

J. A. Benzley, for plaintiff in error. Thos. J. Brown, Sol., for the State.

**RUSSELL, J.** Judgment affirmed.

**POTTLE, J.**, not presiding.

(10 Ga. App. 829)

**CHILDS v. STATE.** (No. 4,013.)  
(Court of Appeals of Georgia. March 19, 1912.)

*(Syllabus by the Court.)*

**1. CRIMINAL LAW (§ 561\*)—EVIDENCE.**

In cases of alleged arson, in the absence of evidence as to the cause of the burning, the law presumes that the fire was accidental, and the state must prove beyond a reasonable doubt the perpetration of the criminal act. *Ragland v. State*, 2 Ga. App. 492, 58 S. E. 689; *West v. State*, 6 Ga. App. 105, 64 S. E. 130.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 1267; Dec. Dig. § 561.\*]

**2. CRIMINAL LAW (§ 409\*)—EVIDENCE—ADMISSIONS OF ACCUSED.**

It is well settled that the corpus delicti must be shown by evidence aliunde the confession or incriminatory admissions. *West v. State*, supra; *Boyd v. State*, 4 Ga. App. 58, 60 S. E. 801; *Allen v. State*, 4 Ga. App. 458, 61

S. E. 840; *Bines v. State*, 118 Ga. 320, 45 S. E. 376, 68 L. R. A. 33. In the present case there was no evidence whatever tending to prove the arson, except admissions slightly incriminatory, and these admissions were inconclusive, and at most raised only a bare suspicion of guilt. The verdict was therefore without any evidence to support it, and was contrary to law.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 918, 919; Dec. Dig. § 409.\*]

Error from Superior Court, Henry County; Robt. T. Daniel, Judge.

Dan Childs was convicted of arson, and brings error. Reversed.

Brown & Brown, for plaintiff in error. J. W. Wise, Sol. Gen., for the State.

HILL, C. J. Judgment reversed.

(10 Ga. App. 660)

LOYLESS v. HESSE ENVELOPE & LITHOGRAPHING CO. (No. 3,707.)

(Court of Appeals of Georgia. March 6, 1912.)

(*Syllabus by the Court.*)

1. EVIDENCE (§ 434\*)—PAROL EVIDENCE AFFECTING WRITING — INVALIDATING CONTRACT.

Misrepresentations made by an agent in procuring a contract, when they amount to a fraud, may be alleged and proved as a defense to a suit upon the contract. Testimony that such misrepresentations were made, and that, relying upon their truth, the defendant was induced to make the contract, does not alter the terms of the contract, but furnishes a reason why the contract is void and cannot be legally enforced.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2006-2020; Dec. Dig. § 434.\*]

2. WRIT OF ERROR—DISMISSAL.

The motion to dismiss the writ of error is without merit.

(*Additional Syllabus by Editorial Staff.*)

3. APPEAL AND ERROR (§ 639\*)—DISMISSAL—GROUNDS.

In an action for the price of envelopes ordered by defendant, a motion to dismiss defendant's writ of error, because the brief of evidence filed with the motion for new trial was not that which was agreed upon by counsel, in that it did not have attached to it a copy of defendant's written order for the envelopes and letters claimed to have been written by the defendant to the plaintiff confirmatory of the order, is without merit, where there is no dispute as to the contents of the order or of the letters, and the decision of the appellate court in granting a new trial does not depend upon a consideration thereof.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2787; Dec. Dig. § 639.\*]

Error from City Court of Atlanta; A. E. Calhoun, Judge.

Action by the Hesse Envelope & Lithographing Company against D. A. Loyless. Judgment for plaintiff, and defendant brings error. Reversed.

A. E. Ramsaur and A. E. Wilson, for plaintiff in error. Geo. B. Rush, for defendant in error.

HILL, C. J. The Hesse Envelope & Lithographing Company sued D. A. Loyless in the city court of Atlanta, alleging in substance as follows: On or about December 12, 1908, Loyless ordered of petitioner 50,000 envelopes at an agreed price of \$2.65 per 1,000, to be shipped to the Byrd Printing Company, Atlanta, Ga., f. o. b. St. Louis, Mo. The envelopes thus ordered had to be made up and stamped with certain printed matter especially for the defendant, and, being thus printed and stamped, they were useless to petitioner or to any one else, except the defendant. On or about January 6, 1909, as per instructions received from the defendant, plaintiff shipped to the Byrd Printing Company, for the defendant, 10,000 of the special size envelopes so ordered. Petitioner has fully complied with its contract, has manufactured and printed 50,000 envelopes in compliance with the order, and has delivered 10,000 of them, and holds the other 40,000 subject to the defendant's order. Defendant refuses to accept the balance of the order, and refuses to pay for the 10,000 delivered, as well as for the 40,000 held subject to his order; and the suit is filed to recover the agreed price to be paid for the entire 50,000 envelopes, with interest thereon.

The defendant by a plea admits that he ordered the quantity of envelopes alleged, and alleges that he refused to pay for them for the following reasons: He was induced to order the envelopes by an agent or salesman of the plaintiff, one A. A. Allen to whom he stated that he desired them for the purpose of sending out a trade paper or magazine known as "The Southern Carbonator and Bottler," which is a bulky publication averaging from 95 to 120 pages to the issue, and printed on thick, heavy paper; that never having used envelopes in the mailing of his magazines, and being wholly ignorant of the paper business, he did not know what particular grade or style of envelopes to order, and so stated to the said Allen at the time, but informed him that he wanted an envelope made of paper sufficiently strong and tough to permit of carrying his magazine through the mails without tearing, and that no other sort of envelope would answer his purposes; that Allen then exhibited to defendant a sample envelope, and represented to defendant that envelopes made according to this sample would be in every way sufficient for his needs, and expressly warranted that the envelopes would be made according to this sample, and would safely carry the defendant's magazine through the mail; a copy of which magazine was exhibited to Allen for the purpose of showing him its weight and size; that relying upon this warranty, and upon the express consideration that the envelopes to be furnished would be sufficiently strong and tough to carry his maga-

zines through the mails, defendant thereupon ordered the 50,000 envelopes; that early in the month of January, 1909, defendant received from plaintiff an advance shipment of 10,000 envelopes upon the order, and upon the occasion of the issuance of the next number of his magazine he used some 2,500 of the envelopes in sending out his magazines to his subscribers; that, instead of the envelopes being of the grade and quality ordered by him, they were made of flimsy, inferior paper, which was easily torn, and would not sustain the weight of the magazine, and defendant was compelled, as a measure of precaution, to wrap each copy of his magazine with twine outside of the envelope, in the hope of preventing the envelope from bursting and the magazine from being lost in the mails; that even with this precaution a large number of the magazines were returned to him by the postal authorities on account of being insufficiently wrapped, because of the inferiority of the envelopes, and because the envelopes had become torn and mutilated from the ordinary handling in the mails, to the extent that the addresses were torn therefrom, and that all of the magazines which were not returned to him by the postal authorities reached their destination with the envelopes in a torn and mutilated condition, by reason of the flimsiness and inferiority of the envelopes; that, on account of the very inferior quality of the envelopes shipped to him, they were utterly useless to him, and could not be used for any purpose whatever, and he was compelled immediately to order wrappers for the purpose of getting out the remaining copies of his magazines; that he at once notified plaintiff of the inferior quality of the envelopes which had been shipped to him, and countermanded the order for the remaining 40,000, but, inasmuch as he had endeavored to use some 2,500 of the envelopes, he offered to pay plaintiff for the 10,000 which he had accepted, though realizing that he was not bound to make such an offer; that the plaintiff declined to accept the payment offered in full settlement of the account against him, and demanded payment for the entire 50,000 envelopes. In brief, the defense set up was fraud in the procurement of the order, breach of express warranty, and failure of consideration. The jury returned a verdict in favor of the plaintiff for the full amount; and the defendant excepts to the refusal of a new trial.

[1] On the trial certain testimony offered by the defendant, to prove the allegations of his plea as to the misrepresentations which induced him to give the order for the envelopes, was excluded by the court, on the ground that, the order being in writing, this evidence was inadmissible, because it varied the terms of a written contract. The defendant offered to prove the representations made to him at the time that the order was given by the salesman of the plaintiff, and

the exhibition by the salesman to him of a sample copy, which he claimed to be suitable for the defendant's purpose, promising that the 50,000 envelopes to be furnished to the defendant by the plaintiff should be like the sample. The trial court erred in excluding this testimony. It is not within the rule that parol testimony is inadmissible to alter or vary the terms of a written contract. "A plea of breach of warranty and failure of consideration does not add to or vary a written contract between the parties, although the plea does not allege fraud, deceit, or mistake in the making of the contract." *Aultman v. Mason*, 83 Ga. 212, 9 S. E. 536. The plea in the present case, however, does allege fraud in the procurement of the order for the envelopes, by the untrue representations made to the defendant by the salesman of the plaintiff, which induced him to give the order. Misrepresentations of an agent in procuring a contract may amount to fraud upon the purchaser, and a plea setting up these facts would be a good defense to an action brought upon the contract, and evidence in support of such a plea would be admissible, notwithstanding that the contract stipulated that no other representations, except those contained therein, would be binding on the seller. While the written contract could not have been altered by parol, yet if its execution was the result of fraud, accident, or mistake, such fact could have been pleaded and proved by parol in avoidance thereof. *Ham v. Parkerson*, 68 Ga. 830; *State Historical Ass'n v. Silverman*, 6 Ga. App. 560, 65 S. E. 293. "Where a party has been induced to enter into a contract by the willful fraud on the part of the other party, calculated to deceive, and which does deceive, the defrauded party may set up the fraud in his defense to an action on the contract." *Turner v. Ware*, 2 Ga. App. 57, 58 S. E. 310. And Mr. Justice Lumpkin, in the case of *Epps v. Waring*, 93 Ga. 765, 20 S. E. 645, declares that "it is a universally recognized doctrine, supported by all respectable text-writers, and upheld in every well-considered case bearing upon this subject, that where a party has been induced to enter into a contract by a willful fraud on the part of the other party, calculated to deceive, and which does deceive, the defrauded party may set up the fraud in his defense to an action upon the contract." Under these authorities, we think it very clear that the trial judge erred in not allowing the defendant to prove by testimony which was offered the allegations of his plea, and especially the evidence of the representations made by the salesman of the plaintiff which induced the defendant to give the order for the envelopes, which representations were alleged to have been untrue. The attempt was, not to vary the terms of the written order, but to get rid of it because of fraud in its procurement.

[2, 3] When this case was called for argument in this court, a motion was made to dismiss the writ of error, because the brief of evidence filed with the motion for a new trial was not that which was agreed upon by counsel, in that it did not have attached to it a copy of the written order for the envelopes, and certain letters claimed to have been written by the defendant to the plaintiff confirmatory of this order. The motion is without merit. There was no dispute as to the contents of the order, or of the letters alluded to. They were referred to by both plaintiff and defendant in the oral evidence, and they are set out in the brief of counsel for the defendant in error, and their correctness is admitted by the brief filed in this case by the plaintiff in error. The decision of this court in granting a new trial does not depend upon a consideration of the written contract, or of the letters of the plaintiff confirmatory of that contract; but the reversal is ordered because of the error in excluding testimony offered by the defendant to prove the allegations of his plea relating to the false and fraudulent representations of the plaintiff's salesman, which induced him to give the order for the envelopes.

Judgment reversed.

(10 Ga. App. 791)

**ROBINSON v. STATE.** (No. 3,938.)

(Court of Appeals of Georgia. March 19, 1912.)

*(Syllabus by the Court.)*

**LANDLORD AND TENANT (§§ 328, 333\*)—LIEN FOR SUPPLIES — REMOVAL OF PROPERTY — CRIMINAL RESPONSIBILITY.**

The ruling in this case is controlled by the decisions in *Fountain v. Fountain*, 7 Ga. App. 361, 66 S. E. 1020, and *Parks v. Simpson*, 124 Ga. 523, 52 S. E. 616. A landlord has no lien for supplies furnished for a year prior to that in which the crop was raised. For that reason, where it appears that the tenant has paid his rent in full, and also that he has delivered to the landlord money and produce enough to pay for the supplies advanced to him in making the crop for the particular year in question, he is not subject to be convicted of a violation of sections 720 and 721 of the Penal Code of 1910.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 1388-1392, 1393; Dec. Dig. §§ 328, 333.\*]

Error from City Court of Wrightsville; J. L. Kent, Judge.

George Robinson was convicted of disposing of property subject to lien, and brings error. Reversed.

E. L. Stephens, for plaintiff in error. B. B. Blount, Alfred Herrington, Sol. Gen., and Hines & Jordan, for the State.

**RUSSELL, J.** Judgment reversed.

(10 Ga. App. 802)

**SLADE v. STATE.** (No. 3,958.)

(Court of Appeals of Georgia. March 19, 1912.)

*(Syllabus by the Court.)*

**INSTRUCTIONS.**

The excerpts in the charge of the court, when considered with the context of the charge as a whole, are not objectionable, as intimating or expressing an opinion upon the evidence. The evidence authorized the verdict, and there was no error in refusing a new trial.

Error from Superior Court, Crisp County; U. V. Whipple, Judge.

T. J. Slade, Jr., was convicted of crime and brings error. Affirmed.

Crum & Jones, for plaintiff in error. Max E. Land, Sol. Gen., J. T. Hill, and J. W. Dennard, for the State.

**RUSSELL, J.** Judgment affirmed.

(10 Ga. App. 786)

**LIVINGSTON v. MARTIN.** (No. 3,917.)

(Court of Appeals of Georgia. March 6, 1912.)

*(Syllabus by the Court.)*

**STIPULATIONS (§ 14\*)—CONSTRUCTION AND OPERATION.**

Under the ruling of this court in *Luke v. Livingston*, 9 Ga. App. 116, 70 S. E. 596, the court did not err in refusing to enter judgment in favor of the plaintiff and against the defendant in this case. The expressed intention of the defendant's agreement was to let the ruling of this court "on the unilateral feature of said case, if adverse to Luke, finally determine" the case at bar. The ruling of this court in that case was not necessarily or conclusively adverse to Luke, nor did it affect his right to show either that the contract was in fact unilateral, or that it was void because it was in fact a wagering contract. In affirming the judgment overruling the demurrer, our judgment was expressly placed upon the ground that jury questions were involved, and that the lower court could not, upon demurrer, determine as a matter of law that the contract was unilateral, or that it was void as a gaming contract.

[Ed. Note.—For other cases, see *Stipulations*, Cent. Dig. §§ 24-37; Dec. Dig. § 14.\*]

Error from City Court of Fitzgerald; E. Wall, Judge.

Action by J. K. Livingston against D. L. Martin. Judgment for defendant, and plaintiff brings error. Affirmed.

Elkins & Wall, for plaintiff in error. Griffin & Griffin, A. J. McDonald, and D. E. Griffin, for defendant in error.

**RUSSELL, J.** Livingston brought this suit against Martin upon a contract apparently substantially similar to that involved in *Luke v. Livingston*, 9 Ga. App. 116, 70 S. E. 596, seeking to recover damages in the sum of \$1,275 for a breach of the contract. At the May term, 1910, of the city court of Fitzgerald (about the time that

the writ of error from the city court of Ocilla in *Luke v. Livingston* was filed in this court), the defendant, Martin, individually and by his counsel entered into an agreement, which was entered on the minutes of the court, of which the following are the only material portions: "Whereas, the contract sued on in said *Luke Case* is substantially the same in form as the one sued on in the above-stated case, it is accordingly agreed by the said defendant and his counsel that if the said Court of Appeals decides that the contract in said *Luke Case* is not unilateral, and is on account of the terms of said contract not unenforceable, then the plaintiff in the above-stated case may at once enter judgment before the judge of this court (a jury trial being expressly waived) against the defendant for the amount sued for, except \$50. In the event that the Court of Appeals decides that said contract in said *Luke Case* is not unilateral, and is not void on account of the terms of said contract, all right to further objections, grounds of demurrer, pleas, answers, and the like, both those in record and those not in record, are expressly waived, and the recitals of facts admitted as to the above-stated amount; the intention being to let the Court of Appeals ruling on the unilateral feature of said case, if adverse to *Luke*, finally determine the above-stated case." Upon the strength of this agreement counsel for *Livingston*, during the November term, 1911, of the city court of Fitzgerald, presented to the court a motion asking the rendition of a judgment in his favor against the said *Martin*, without the intervention of a jury; the motion stating that the plaintiff in the pending cause, under provisions of the consent made and filed by the parties in the case, and by reason of the terms of the decision of the Court of Appeals in the case of *Luke v. Livingston*, was entitled to have judgment rendered in his favor. The judge issued a rule calling upon the defendant to show cause why the judgment should not be entered against him, and upon a hearing thereon overruled the motion and refused to enter judgment in behalf of the plaintiff. *Livingston* excepts to this judgment.

We think the court ruled correctly in denying the plaintiff's right to take a judgment. It is extremely questionable whether *Martin's* agreement, which we have quoted literally, is of any binding force. While every agreement between parties in court should be punctiliously observed and rigidly enforced by the courts, when it is possible to enforce it, it is difficult to discern how *Martin's* agreement escapes being a nudum pactum, if it escapes at all. As introductory of the material portions of the agreement which we have quoted, it is stated that it is agreed in open court "*by the defendant and his counsel*" that the instant case be not tried until the Court of

Appeals decides the case of *Livingston v. Luke*, a writ of error from the city court of Ocilla; and (giving other terms of the agreement the construction now claimed by counsel for the plaintiff in error) it was agreed by the defendant that this case should abide the result of the *Luke Case*. So much for the defendant's agreement. But what does the plaintiff upon his part agree to do as a consideration for the defendant's promise? There seems to be nothing, unless it is an implied agreement that the case will be delayed, and thus the defendant may gain some time. The plaintiff does not sign the agreement upon the minutes, nor is there any stipulation upon the part of the plaintiff that if the judgment of the lower court had been reversed, and this court had held that the contract upon its face was, as a matter of law, unilateral and void, he would dismiss the action and pay the costs. However, as stated above, the agreement was entered into in open court, and perhaps the implied assent of the plaintiff's counsel to the stipulation in regard to continuances might constitute such an acceptance on the plaintiff's part as would have bound him to dismiss the suit if the contract in *Luke's Case* had been declared unilateral upon its face. So we will waive this point and deal with the agreement as though it was binding upon the defendant *Martin*.

Even in this view of the matter, however, the decision of the trial judge was right, because it is expressly stated that the intention of the defendant's agreement is "to let the Court of Appeals ruling on the unilateral feature of said case, if adverse to *Luke*, finally determine the above-stated case." It is true that in the preceding portion of the agreement it is stated that "if the Court of Appeals decides that the contract in said *Luke Case* is not unilateral, and is on account of the terms of said contract not unenforceable, then the plaintiff [in this case] may at once enter judgment before the judge of this court." But this agreement, like every other agreement, must be considered as a whole. Construing the agreement as a whole, the language used in the concluding portion of the agreement, that the ruling on the unilateral feature is to finally determine the case, is controlling, and this means nothing more than that the question is to be decided by a jury, if the defendant, under proper pleadings, has evidence to show that the \$1 mentioned in the contract was not in fact paid to him. The reason why the agreement of the defendant in this case is not binding, and was properly so held to be by the trial judge, is that, while this court did not hold the contract in the *Luke Case* to be unilateral or unenforceable *per se*, we did not hold that it was not unilateral, and, on the contrary, expressly held that on a trial it might be shown to be both unilateral and void as contrary to public policy. According

to the holding in the Luke Case, *supra*, the contract is *prima facie* not unilateral, because of the alleged payment of the sum of \$1 upon the purchase price, and so we held that the judge could not, upon demurrer (which considers only the outward appearance of the instrument), say that it was unilateral; but this court did not hold that the contract was not unilateral, and, on the contrary, it was made the duty of the judge to declare the contract unilateral and void if it should appear to the jury, upon the trial, that the \$1 mentioned in the contract was in fact never paid, for in that event Luke's contract, considered as an offer to sell, would not have been legally accepted. We expressly held that Livingston's agreement to pay damages in case he did not accept would not prevent the contract from being unilateral, and we put our judgment sustaining the overruling of the demurrer to the petition upon the fact that the statement that a dollar has been paid was, "at least *prima facie*, a recital of part payment of the *purchase price*." We kept in mind that the mere fact that an offer is based on a consideration does not prevent its being unilateral; but we concluded, upon mature consideration, that the trial judge, in passing upon the contract on demurrer, did not err in treating the statement of the contract that "the sum of \$1 in cash has been paid on this contract by the said J. K. Livingston" as *prima facie* evidence of acceptance on Livingston's part; that is, as *prima facie* evidence that Livingston had paid Luke a portion of the purchase price of the cotton in order to bind the bargain.

The trial judge, in ruling upon the motion to enter up judgment against the defendant in this case, correctly apprehended the ruling of this court in the Luke Case, as well as the import of the agreement made by the defendant in this case. The agreement and the ruling of this court are not defined within the same boundaries, nor do they cover identically the same territory. If the agreement in regard to the pending cause is mutual, it evidences that both parties expected this court, in the Luke Case, to pass finally and conclusively upon the plaintiff's (Luke's)

right of action, and to adjudge that upon the contract alone he was either entitled or not entitled to recover. Perhaps it was Luke's purpose, in filing the demurrer, to thus test the sufficiency of the contract. The demurrer may have been Luke's only means of defense. Luke may have been unable to deny Livingston's acceptance of the contract by the payment of a part of the purchase price, or to have shown that it was mutually understood and agreed that the contract was a mere cover for a transaction in cotton futures. The ruling sustaining the judgment of the city court of Ocilla in Luke's Case might, for these reasons, be conclusive in his case. This court, however, without any knowledge of or concern with the real facts or the eventual conclusion of the litigation, took the view that the trial judge was right in holding that under the allegations of the contract the plaintiff had a *prima facie* right to recover, even though it could not be said that the right was absolutely beyond explanation. On the contrary, we expressly held that the plaintiff's entire right to recover would be destroyed, if it appeared either that the contract was unilateral, because there had in fact been no payment made upon the contract, or because the agreement, while valid on its face, was a mere mask designed to cover an unlawful transaction in cotton futures.

The assumption of the parties in this case, as evidenced by the agreement, was that the decision of this court upon the demurrer would finally dispose of the case. On the contrary, we concluded our ruling upon the contract in the Luke Case, *supra*, by saying: "Considering the contract as a whole, we are finally led to conclude that jury questions are presented, and" for that reason "the court did not err in overruling the general demurrer to the petition." Construing fairly the agreement of the defendant in this case as a whole, it amounts only to an agreement to abide the result in the Luke Case, and this means, as rightly held by the trial judge, that either of the defenses pointed out in the Luke Case is available to the defendant in the present case.

Judgment affirmed.

(10 Ga. App. 801)

**ADAMS v. STATE.** (No. 3,954.)

(Court of Appeals of Georgia. March 19, 1912.)

*(Syllabus by the Court.)***1. FALSE PRETENSES (§ 49\*)—SUFFICIENCY.**

No contract, "clear and definite in its terms," having been shown, the evidence was not sufficient to authorize a conviction of cheating and swindling, under the act approved August 15, 1903 (Acts 1903, p. 90). *Sanders v. State*, 7 Ga. App. 46, 65 S. E. 1071.

[Ed. Note.—For other cases, see *False Pretenses*, Cent. Dig. § 62; Dec. Dig. § 49.\*]

**2. INDEFINITE CONTRACT.**

Even if the evidence was sufficient in other respects, the contract was too indefinite as to the character of the work to be performed.

Error from City Court of Sparta; R. W. Moore, Judge.

Jack Adams was convicted of swindling, and brings error. Reversed.

T. M. Hunt, for plaintiff in error. R. L. Merritt, Sol., and T. F. Fleming, for the State.

POTTLE, J. Judgment reversed.

(10 Ga. App. 794)

**KENNEDY v. STATE.** (No. 3,942.)

(Court of Appeals of Georgia. March 19, 1912.)

*(Syllabus by the Court.)***ASSAULT AND BATTERY (§ 80\*)—EVIDENCE—SIMPLE ASSAULT.**

The accused having been indicted for the offense of assault and battery, and the evidence demanding a finding that, if any offense at all was committed, it was that of an unlawful battery, there could be no conviction of simple assault. Penal Code 1910, § 19. *Kelsey v. State*, 62 Ga. 558; *Harris v. State*, 101 Ga. 530, 29 S. E. 423; *Welborn v. State*, *Giles v. State*, 116 Ga. 522, 42 S. E. 773.

[Ed. Note.—For other cases, see *Assault and Battery*, Cent. Dig. § 126; Dec. Dig. § 80.\*]

Error from City Court of Reidsville; E. C. Collins, Judge.

Walter Kennedy was convicted of assault, and brings error. Reversed.

Way & Burkhalter, for plaintiff in error. Robt. E. De Loach, Sol., for the State.

POTTLE, J. Judgment reversed.

(10 Ga. App. 817)

**SPEER v. STATE.** (No. 3,965.)

(Court of Appeals of Georgia. March 19, 1912.)

*(Syllabus by the Court.)***CRIMINAL LAW (§ 938\*)—NEW TRIAL—NEWLY DISCOVERED EVIDENCE.**

The evidence authorized the conviction, and there was no error in refusing a new trial. Even if the newly discovered testimony

sought to be presented by affidavit is not merely cumulative. and impeaching, the judge did not err in overruling the ground of the motion for new trial based upon alleged newly discovered evidence, inasmuch as the character of the affidants was not vouched for, and there was no affidavit to show that the facts alleged to have been ascertained subsequently to the trial were unknown to the defendant and his counsel at the time of the trial, or that this evidence could not have been obtained in time for the trial by the exercise of ordinary diligence.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 2306-2317; Dec. Dig. § 938.\*]

Error from Superior Court, Spalding County; Robt. T. Daniel, Judge.

Joe Speer was convicted of crime, and brings error. Affirmed.

W. H. Connor, for plaintiff in error. J. W. Wise, Sol. Gen., for the State.

RUSSELL, J. Judgment affirmed.

(10 Ga. App. 790)

**CAMPBELL v. STATE.** (No. 3,937.)

(Court of Appeals of Georgia. March 19, 1912.)

*(Syllabus by the Court.)***CRIMINAL LAW (§§ 939, 945\*)—NEW TRIAL—NEWLY DISCOVERED EVIDENCE.**

The evidence strongly supports the verdict, and the alleged newly discovered testimony would not probably change the result on a second trial.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 2318-2323, 2324-2327, 2336; Dec. Dig. §§ 939, 945.\*]

Error from City Court of Houston County; C. E. Brunson, Judge.

Eliza Campbell was convicted of selling whisky, and brings error. Affirmed.

M. Kunz, for plaintiff in error. R. E. Brown, Sol., for the State.

HILL, C. J. The plaintiff in error was convicted of selling whisky in Houston county. The evidence for the state strongly supports the verdict. She asks for a new trial on the ground of newly discovered testimony, to wit, that her residence, where the state's witnesses testified that they bought whisky from her on divers occasions during the year 1911, was in Dooly county, and not in Houston county. On the trial three witnesses swore positively that her residence was in Houston county, and she made no question of jurisdiction. In support of this ground of her motion, she presented the affidavit of one witness, who swore that the accused lived in Dooly county at the time of the commission of the offense. She also offered to prove, by a deed to certain land in Dooly county, that the place where she lived was in Dooly county. She claimed that her home was on the land conveyed by this

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

deed; but in the description of the land conveyed there is nothing to show that it included her home. The state, in a counter-showing, presented the affidavits of three men, who swore that they were familiar with the location of the home of the accused, and had known it for 35 or 40 years, and that it was in Houston county. The alleged newly discovered evidence would not probably change the result on a second trial. It is unreasonable that one can live for many years in one place without knowing the county in which he or she has resided for so long a time. There was no error in refusing to grant a new trial on this ground. Certainly the slightest diligence, either by the accused or her counsel, would have discovered the fact.

Judgment affirmed.

(10 Ga. App. 795)

**CAMPBELL v. STATE.** (No. 3,947.)

(Court of Appeals of Georgia. March 19, 1912.)

*(Syllabus by the Court.)*

**1. SUFFICIENCY OF EVIDENCE.**

The evidence in behalf of the state authorized the jury to infer that the assault was made by the defendant, and that, while it was not his purpose to use force, or to have sexual intercourse with the female against her will, she did not consent to or encourage the advances made by him.

**2. REFUSAL OF NEW TRIAL.**

There is no merit in the other assignments of error, and it was not error to refuse a new trial.

Error from Superior Court, Colquitt County; W. E. Thomas, Judge.

J. A. Campbell was convicted of assault, and brings error. Affirmed.

W. A. Covington and T. H. Parker, for plaintiff in error. J. A. Wilkes, Sol. Gen., for the State.

**RUSSELL, J.** Judgment affirmed.

(10 Ga. App. 786)

**BENN v. STATE.** (No. 3,925.)

(Court of Appeals of Georgia. March 19, 1912.)

*(Syllabus by the Court.)*

**SUFFICIENCY OF EVIDENCE.**

The evidence fully supports the verdict, and no error of law is complained of.

Error from City Court of Madison; K. S. Anderson, Judge.

Jenkins Benn was convicted of crime, and brings error. Affirmed.

Percy Middlebrooks, for plaintiff in error. A. G. Foster, Sol., for the State.

**POTTLE, J.** Judgment affirmed.



(158 N. C. 428)

## HUDSON et al. v. AMAN et al.

(Supreme Court of North Carolina. March 20, 1912.)

**1. PRINCIPAL AND SURETY (§ 190\*)—REIMBURSEMENT BY SURETIES—ACTIONS.**

At common law, sureties who paid the debt of the principal could sue in assumpsit for reimbursement.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. §§ 568-577; Dec. Dig. § 190.\*]

**2. PRINCIPAL AND SURETY (§ 190\*)—ACTION BY SURETIES FOR REIMBURSEMENT—PARTIES.**

An action in assumpsit for exoneration by sureties who paid the debt of the principal was, at common law, ordinarily several and not joint; but where the payment was joint or was made out of a joint fund, the sureties could join in a suit for reimbursement.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. §§ 568-577; Dec. Dig. § 190.\*]

**3. PRINCIPAL AND SURETY (§ 200\*)—ACTION BY SURETY AGAINST COSURETIES FOR CONTRIBUTION—PARTIES.**

A surety suing in equity for contribution by cosureties must usually make the principal and the solvent sureties, resident in the state, parties plaintiff or defendant, so that a full determination of the interests involved may be had in one suit.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. §§ 568-577; Dec. Dig. § 200.\*]

**4. APPEAL AND ERROR (§ 877\*)—RIGHT TO REVERSAL—ACTION BY SURETIES AGAINST PRINCIPAL.**

Where sureties on the official bond of a tax collector jointly sued him for reimbursement for a payment by them of a judgment for his misappropriation of taxes, and the court ordered a severance, but properly refused to dismiss for misjoinder, the order of severance will not be reversed on the tax collector's appeal from the refusal to dismiss, though payments by the sureties were in unequal amounts; no claim for adjustment being demanded.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3560-3572; Dec. Dig. § 877.\*]

Appeal from Superior Court, Sampson County; Ward, Judge.

Action by J. H. Hudson and others against A. W. Aman and others. From a judgment refusing to dismiss an action for misjoinder, defendant Aman appeals. Affirmed.

H. A. Grady, for appellant. Faison & Wright, for appellees.

HOKE, J. The action was originally instituted by plaintiffs, sureties on the official bond of A. W. Aman, as sheriff and tax collector of Sampson county, against the defendants, county commissioners of said county. Pending the action, said A. W. Aman was duly made party defendant. The complaint in effect alleged that plaintiffs, with others, were sureties on the bond of A. W. Aman as tax collector of Sampson county in the sum of \$38,500, and that said Aman had failed to comply with the conditions of said bond, had misappropriated and squandered the taxes, and by reason of his said default

the plaintiffs, his sureties, had been compelled to pay to the county the sum of \$418.50 each, and one of them, J. H. Turlington, had to pay an additional \$94; that the commissioners of the county had turned over the current tax lists to said Aman, before requiring proper settlement of him on former lists and when they well knew, or had every reason to believe, he was already in default, and by reason of this breach of statutory duty had caused increased loss and damage to plaintiffs, his sureties. To this complaint, the county commissioners demurred. Their demurrer, having been overruled in the court below, on appeal to this court it was held that no cause of action had been stated against them in plaintiff's favor. See Hudson v. McArthur, 152 N. C. 445, 67 S. E. 995, 28 L. R. A. (N. S.) 115. This opinion having been certified down, the action was dismissed as to said commissioners, and thereupon defendant Aman demurred to the complaint, as stated, for misjoinder of parties plaintiff and causes of action.

[1-3] At common law, sureties who paid the debt of their principal could sustain an action in exoneration of the loss. The action lay in assumpsit and was ordinarily several and not joint. Boggs v. Curtin, 10 Serg. & R. (Pa.) 211; Peabody v. Chapman, 20 N. H. 418. Even at law, however, when the payment was joint or was made out of a joint fund, the sureties were permitted to join in a suit for reimbursements, and this very generally obtained when a judgment had been recovered and was paid by the sureties jointly. Weeks v. Parsons, 176 Mass. 570, 58 N. E. 157; Clapp v. Rice, 15 Gray (Mass.) 557, 77 Am. Dec. 387; Rizer v. Callen, 27 Kan. 339; Day et al. v. Swann, 13 Me. 165; Prescott v. Newell, 39 Vt. 82. And in courts of equity, when an adjustment of conflicting claims became necessary and a surety brought suit for contributions against cosureties, it was usually required to make the principal and all solvent sureties, resident within the state, parties plaintiff or defendant, that a full determination of interests involved could be had in one and the same suit. Rainey v. Yarborough, 37 N. C. 249, 38 Am. Dec. 681; Adams v. Hayes, 120 N. C. 383, 27 S. E. 47.

[4] The cause having been dismissed against the county commissioners, the action as it now stands presents a claim by sureties who have paid the debt of their principal and by fair inference have been compelled to pay it by suit, and, it further appearing that these payments have been in unequal amounts, it would seem that the cause might well have proceeded in a joint action, that the ultimate rights of the parties should be finally determined. Inasmuch, however, as no claim for adjustment is demanded, and parties plaintiff have not appealed, we see no good reason why the order of severance

should not stand and the parties allowed to proceed in separate actions for the amount each has paid, and in no event could the action have been properly dismissed.

Street v. Tuck, 84 N. C. 605; Hodges v. Railroad, 105 N. C. 170, 10 S. E. 917. We find no reversible error, and the judgment of the superior court ordering a severance of the actions is affirmed.

Affirmed.

(158 N. C. 594)

CAUDLE et al. v. MORRIS et al.

(Supreme Court of North Carolina. March 20, 1912.)

**1. APPEAL AND ERROR (§ 659\*)—RECORD—CERTIORARI TO PERFECT.**

Where appellant docketed the record proper in apt time, and it appeared that the trial judge failed to settle the case, there being no laches on part of the appellant, certiorari to settle and send up the case will be granted.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2834-2843; Dec. Dig. § 659.\*]

**2. APPEAL AND ERROR (§ 595\*)—RECORD—APPEAL BY BOTH PARTIES.**

Supreme Court rule No. 17 (66 S. E. vii) provides that, if the appellant shall fail to bring up and file the transcript of the record, the appellee may file with the clerk a certificate showing the names of the parties to the action and when the judgment and appeal were taken, and his motion to docket and dismiss shall be allowed at the first session of the court thereafter, with leave to appellant to apply for a redocketing. Held that, where both parties appeal, a transcript must be sent up for each party; and this requirement cannot be dispensed with by waiver.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2623; Dec. Dig. § 595.\*]

**3. APPEAL AND ERROR (§ 1\*)—RIGHT TO APPEAL.**

An appeal is not a matter of absolute right; but appellant must comply with the statutes and rules of court as to the time and manner of taking and perfecting it.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1-4; Dec. Dig. § 1.\*]

**4. APPEAL AND ERROR (§ 621\*)—DISMISSAL—FAILURE TO DOCKET.**

Under Supreme Court rule 5 (66 S. E. v) prescribing the time for docketing the transcript of the record, though the court, without appellant's fault, fails to settle the case, appellant must, within such time, docket all of the record proper, or so much thereof as he can obtain, and file an affidavit as to why the entire record cannot be docketed; otherwise the appeal will be dismissed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2724-2731; Dec. Dig. § 621.\*]

Action by W. H. T. Caudle and others against Mollie Morris and others. From the judgment, both parties appeal. On defendants' motion to reinstate their appeal. Motion denied.

R. C. Strong, for plaintiffs. Douglass, Lyon & Douglass and R. N. Simms, for defendants.

PER CURIAM. [1] In the plaintiffs' appeal, the appellant docketed the record prop-

er in apt time, and asked for a certiorari that the case on appeal may be settled and sent up. It appearing that the judge had failed to settle the case without any laches on the part of the appellant, the certiorari will issue.

[2, 3] In the defendants' appeal, the plaintiffs docketed in apt time the certificate required under rule 17 (66 S. E. vii), and moved to dismiss defendants' appeal. The motion was granted. The defendants thereupon moved to reinstate. It appears that the defendants had not docketed the record proper, but they ask for a certiorari, and seek to excuse their failure to comply with the rule by the fact that the plaintiffs had docketed their record proper; but they cannot excuse their own negligence by relying upon the diligence of the plaintiff. In Jones v. Hoggard, 107 N. C. 349, 12 S. E. 286, it is said: "When both parties appeal, a transcript of the record must be sent up for each. This rule cannot be waived by consent of counsel"—citing Perry v. Adams, 96 N. C. 347, 2 S. E. 659, which cites Devereux v. Burgwin, 33 N. C. 490; Morrison v. Cornelius, 63 N. C. 346. Jones v. Hoggard has been cited and approved in State v. Bost, 125 N. C. 711, 34 S. E. 650, Mills v. Guaranty Co., 136 N. C. 256, 48 S. E. 652, Bank v. Bobbitt, 108 N. C. 525, 13 S. E. 177, and in many other cases. If opposite counsel, by consent, cannot waive the record when both sides appeal, certainly the court cannot dispense with it when the opposite counsel are here relying upon the failure of the defendants to file their record. As this court has often held, an appeal is not a matter of absolute right; but the appellant must comply with the statutes and rules of court as to the time and manner of taking and perfecting his appeal. Just as the right of action is not an absolute one; but a plaintiff must comply with the regulations of orderly procedure by issuing his summons in the statutory time and having it served and filing his complaint in the time and manner prescribed, and observing in other respects the requirements as to procedure.

[4] The rule of procedure is well settled that, when the appeal is not docketed at or before the time prescribed in rule 5 (66 S. E. v), the appellant must docket all of the record proper, or so much thereof as he can obtain, with an affidavit as to why the entire record cannot be docketed, and move at that time for a certiorari for the "case on appeal," if, without his fault, the judge has failed to settle the case, or for such other parts of the record as are lacking. If he fails to do so, the appellee has the right to docket the certificate prescribed by rule 17 and have the appeal dismissed. Burrell v. Hughes, 120 N. C. 277, 26 S. E. 782, and cases there cited, and Pittman v. Kimberly, 92 N. C. 562, and the numerous cases citing those two cases, which are to be found in the Annotated Edition. In Burrell, supra,

the court says: "There are *some* matters, at least, which should be deemed settled, and this is one of them." Defendants' motion to reinstate is denied. *Walsh v. Burleson*, 154 N. C. 174, 69 S. E. 680.

Motion denied.

(158 N. C. 399)

**WILLIAMS v. DUNN et al.**

(Supreme Court of North Carolina. March 20, 1912.)

**1. EXECUTION (§ 161\*)—IRREGULARITIES—MOTION TO RECALL.**

A motion to recall an execution on notice, in the court out of which the execution issued, will not usually be allowed after a sale had, as against an innocent purchaser who was not a party to the proceeding; but, as against a party of record or a purchaser with notice, both the writ and the sale may be quashed.

[Ed. Note.—For other cases, see *Execution*, Cent. Dig. §§ 467-471; Dec. Dig. § 161.\*]

**2. EXECUTION (§ 162\*)—IRREGULARITIES—RECALL — PROCEEDINGS — INSTITUTION BEFORE CLERK.**

At any time before sale under an execution, proceedings may be instituted before the clerk of the superior court to recall the execution; but after return made, and especially if there are equitable claims for adjustment, the motion should be made before the judge in term.

[Ed. Note.—For other cases, see *Execution*, Cent. Dig. § 472; Dec. Dig. § 162.\*]

**3. EXECUTION (§ 163\*)—WITHDRAWAL—PROCEEDINGS—REVIEW.**

Revisal 1905, § 614, provides that whenever any civil action or special proceeding begun before the clerk of the superior court shall be sent to the superior court before the judge, he shall have jurisdiction to determine all matters in controversy, unless it appears to him that justice would be more speedily administered by remanding the proceeding to the clerk. *Held*, that where a motion to quash an execution and sale of real estate was submitted to the clerk of the superior court who granted the relief, and an appeal was taken to the judge of the court, it was improper for the judge to refuse to hear the controversy on the ground that the clerk was without jurisdiction to entertain the motion.

[Ed. Note.—For other cases, see *Execution*, Cent. Dig. §§ 473-483; Dec. Dig. § 163.\*]

Appeal from Superior Court, Lenoir County; Ferguson, Judge.

Action by J. W. Williams against C. F. Dunn and others. On motion to quash an execution and sale thereunder. Heard on appeal from the Supreme Court clerk before a judge of the court, and from an order dismissing the proceedings on the ground that the clerk had no jurisdiction to entertain or act on the motion, Williams excepted and appeals. Reversed and remanded.

Rouse & Land, for appellant. C. F. Dunn, for appellees.

**HOKE, J.** It appears of record that on February 13, 1909, one Jessie Williams, having obtained a judgment in a justice's court against Jno. Williams, the present appellant, for \$35.12 and interest, caused the same to be duly docketed in the superior court of

Lenoir county, and on October 21, 1910, the same was assigned and transferred of record to Chas. F. Dunn, cashier of Chas. F. Dunn & Sons; that on February 8, 1911, execution was issued returnable to March term of superior court, same being within 40 days from date of issue; that under said execution, on March 14, 1911, certain real estate of appellant, to wit, three lots in the city of Kinston, was sold by sheriff and the same bought by Chas. F. Dunn, cashier, at the price of \$125, and same was thereafter on April 13, 1911, conveyed by the sheriff to said Chas. F. Dunn, etc.; that on September 2d, pursuant to notice duly issued and served on Jessie Williams and C. F. Dunn, motion was made to quash said execution and sale, and there were affidavits submitted on part of appellant tending to show various irregularities in the proceedings by which appellant's land was sold, among others, that the execution had been issued within 40 days of the term to which the same was returnable and contrary to section 624, Revisal, that the sale was made without proper advertisement, and that by the action of Chas. F. Dunn competitive bidding was in a large measure suppressed or prevented, and such purchaser was enabled to bid off the entire property for \$125, when either of the three lots was worth over \$300, etc., and appellant professed a willingness and desire to pay to Chas. F. Dunn the amount of said judgments had against affiant and costs, etc. There was affidavit on part of C. F. Dunn in denial of appellant's affidavits and containing averment that the sale was in all respects regular and fair. On the hearing before the clerk, that officer entered judgment setting aside the execution and sale thereunder, declared same of no effect, and ordered that execution issue restoring the original owner to his property, that an account of rents be taken, etc., and on appeal, as heretofore stated, the judge below reversed the ruling of the clerk and dismissed the proceedings on the ground that the clerk was without jurisdiction to entertain the motion.

[1] The right to recall an execution by notice and motion in the court from which same was issued is usually the proper method of obtaining redress for irregularities affecting its validity. *Aldridge v. Loftin*, 104 N. C. 122, 10 S. E. 210; *Beckwith v. Mining Co.*, 87 N. C. 155; *Faison v. McIlwaine*, 72 N. C. 312; *Foard v. Alexander*, 64 N. C. 69. The remedy will not usually be entertained or allowed after a sale had as against an innocent purchaser who was not a party to the proceedings; but against a party of record or a purchaser who buys with full notice on motion made in apt time and in furtherance of right, both writ and sale may be quashed. *Saunders v. Ruddle*, 27 B. Mon. (17 Ky.) 139, 15 Am. Dec. 148; *Van Campen*

v. Snyder, 4 Miss. 66, 32 Am. Dec. 311. And by weight of authority even after writ returned. 8 Pl. & Fr. p. 470, citing Reinhard v. Baker, 13 W. Va. 805, and other cases.

[2] At any time prior to sale the proceedings may be instituted before the clerk, and under certain circumstances it is probable that this course could be pursued at any time prior to the return day of the writ. Aldridge v. Loftin, *supra*. After return made, however, and especially when there may be certain equitable claims for adjustment, it would seem the better practice that the motion should be made before the judge in term. Beckwith v. Mining Co., *supra*. Without final decision as to the power of the clerk after sale and return made, we all are of opinion that on the facts presented on this appeal the judge should have proceeded to hear and determine the question presented.

[3] By Revisal 1905, § 614, it is provided: "Whenever any civil action or special proceeding begun before the clerk of any superior court shall be for any ground whatever sent to the superior court before the judge, the judge shall have jurisdiction; and it shall be his duty, upon the request of either party, to proceed to hear and determine all matters in controversy, in such action, unless it shall appear to him that justice would be more cheaply and speedily administered by sending the action back to be proceeded in before the clerk, in which case he may do so." This well-considered statute, which has done so much to facilitate the efficient administration of justice, has always received the liberal interpretation that would best promote its beneficent purpose. Roseman v. Roseman, 127 N. C. 494, 37 S. E. 518; Faison v. Williams, 121 N. C. 152, 28 S. E. 188; Capps v. Capps, 85 N. C. 408. And whether the present case comes strictly within its terms or not, it is well understood that the clerk is but a part of our superior court, and when a motion of this character is brought before the judge in term, all parties having been duly notified, there is no good reason why the principle expressly established by this law in all civil actions and special proceedings should not prevail here and the court have full jurisdiction. Speaking to this subject in Roseman's Case, our present Chief Justice has well said: "The superior court undoubtedly had authority, under its general equity jurisdiction, to appoint a new trustee to prevent the failure of the trust, if the proceeding had begun by writ returnable to the superior court, and even if no writ whatever had been served, if the parties in interest appeared generally; and that is the case, in effect, here, since no appeal was taken. Even if an appeal had been taken from such judgments, it would be an anomaly if a party sued before the clerk, who is a part of the superior court, could, on appeal to the judge, have the ac-

tion dismissed, and thus require the plaintiffs to come right back into the identical court from which they have been dismissed, and in which the cause was originally brought before the clerk of the court."

There was error in dismissing the proceeding for want of jurisdiction, and this will be certified that the rights involved shall be determined.

Error.

(158 N. C. 334)

**MERCHANTS' NAT. BANK v. FLIPPEN et al.**

(Supreme Court of North Carolina. March 20, 1912.)

**RECEIVERS (§ 148\*)—DISTRIBUTION OF ASSETS—AMOUNT OF CLAIMS—SECURED CLAIMS.**

In the distribution by a receiver of assets of an insolvent company, dividends are to be declared upon the basis of the original indebtedness existing at the time of the receivership, and not on the basis of the amount remaining due after collections upon collateral; but when such dividends, added to collections realized upon collateral, are sufficient to pay the debt in full, dividends should cease, and the uncollected collateral be delivered to the receiver.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. § 200; Dec. Dig. § 148.\*]

Appeal from Superior Court, Wake County; Webb, Judge.

Action by the Merchants' National Bank against S. T. Flippen and O. E. Snow, receiver. Judgment for plaintiff and defendant Snow, receiver, appeals. Affirmed.

Watson, Buxton & Watson, for appellant Snow. Aycock & Winston, for appellee Merchants' Nat. Bank. T. W. Folger and Walter Clark, Jr., for appellee Flippen.

BROWN, J. The Pilot Bank & Trust Company failed in business, and defendant Snow was appointed receiver to settle up its affairs. At date of receivership, the insolvent corporation owed the Merchants' National Bank of Raleigh, N. C., \$4,227.51. That bank held certain notes as collateral, among others, that of the defendant Flippen. From this collateral the said bank had received certain sums since the date of the receivership.

The sole question presented is whether in cases of this nature distribution by the receiver should be on the basis of the entire indebtedness originally—I. e., \$4,227.51—or on the basis of the amount remaining unpaid at the time distribution is ordered. In other words, whether the receiver, being ordered to pay 50 per cent. of the indebtedness, should pay on the basis of the entire amount which originally was due, or only 50 per cent. of the amount still remaining due. It is useless to discuss the many cases in which this matter has been passed on by the courts of this country. Suffice it to say that the overwhelming weight of authority favors the position that dividends are declared upon the basis of the original indebtedness exist-

ing at the time of the receivership. When such dividends, added to any sums collected by the creditor from collateral, shall have paid the debt in full, then dividends of course must cease, and the uncollected collateral delivered to the receiver. By following this rule no injustice is done to the other creditors of the insolvent, and a certain and unchanging sum is given upon which dividends are to be declared. This is the view taken by this court heretofore, and directly decided in the cases of *Winston v. Biggs*, 117 N. C. 206, 23 S. E. 316; *Brown v. Bank*, 79 N. C. 244. In *Merrill v. Bank*, 173 U. S. 131, 19 Sup. Ct. 360, 43 L. Ed. 640, the Supreme Court of the United States holds that "a secured creditor of an insolvent bank may prove and receive dividends upon the face of his claim as it stood at the time of the declaration of insolvency, without crediting either his collaterals or collections made therefrom, after such declaration, subject always to the proviso that dividends must cease when, from them and from collaterals realized, the claim has been paid in full." The above, we think, is a succinct and correct synopsis of the great weight of authority. The following courts hold similar views: *England (Palmer v. Culverwell)*, 85 L. T. N. S. 758; *Colorado (Hendrie v. Graham)*, 14 Colo. App. 13, 59 Pac. 219; *Illinois (In re Bates)*, 118 Ill. 524, 9 N. E. 257, 59 Am. Rep. 383; *Furness v. Bank*, 147 Ill. 570, 35 N. E. 624; *Kentucky (Hibler v. Davis)*, 76 Ky. 20; *Massachusetts (Cabot v. Bodman)*, 11 Gray [Mass.] 134; *Michigan (Bank v. Byles)*, 67 Mich. 296, 34 N. W. 702; *Bank v. Haug*, 82 Mich. 607, 47 N. W. 33, 11 L. R. A. 327; *Minnesota (Mead v. Randall)*, 68 Minn. 233, 71 N. W. 31; *New Hampshire (Bank v. Trust Co.)*, 70 N. H. 542, 49 Atl. 113; *New York (In re Bicknell)*, 31 Misc. Rep. 302, 64 N. Y. Supp. 360; *People v. Remington*, 121 N. Y. 328, 24 N. E. 793, 8 L. R. A. 458; *Pennsylvania (Morris v. Olwine)*, 22 Pa. 441; *Miller's Appeal*, 35 Pa. 481; *Rhode Island (Greene v. Bank)*, 18 R. I. 779, 30 Atl. 963; *South Carolina (Atlantic Phos. Co. v. Law)*, 45 S. C. 606, 23 S. E. 955; *Texas (Kauffman v. Hudson)*, 65 Tex. 716; *West Virginia (Williams v. Overholt)*, 46 W. Va. 339, 33 S. E. 226; *Vermont (West v. Bank)*, 19 Vt. 403.

We find nothing in the case of *Chemical Co. v. Edwards*, 136 N. C. 74, 48 S. E. 568, which contravenes our decision.

The judgment is affirmed.

(158 N. C. 592)

HERRING et al. v. WARWICK et al.

(Supreme Court of North Carolina. March 20, 1912.)

APPEAL AND ERROR (§ 1099\*) — JUDGMENT — LAW OF THE CASE.

Where, on a former appeal, the court considered the evidence and inferentially denied a

motion for a nonsuit, but reversed a judgment for plaintiff because of an erroneous instruction, and the evidence on the second trial is stronger than that on the first trial, a judgment for plaintiff will not be disturbed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4370-4379; Dec. Dig. § 1099.\*]

Appeal from Superior Court, Sampson County; Ward, Judge.

Action by S. A. Herring and others against M. A. Warwick and others. From a judgment for plaintiffs, defendants appeal. Affirmed.

The following issues were submitted to the jury:

"(1) At the sale of the land in question, on February 15, 1898, at courthouse door in Clinton, was it agreed between John T. Gregory, the mortgagee, and the defendant Warwick that Warwick should bid off the said land, and did he bid off said lands as agent and trustee for said Gregory, as alleged?" Answer: "Yes."

"(2) Are the plaintiffs, other than Lonnie Herring, the owners in remainder of said lands, subject to the life estate of said S. A. Herring?" Answer: "Yes."

"(3) Is the said action barred by the statute of limitations?" Answer: "No."

"(4) What was the value of the short-straw timber sold off said land by defendant?" Answer: "\$50."

"(5) What was the value of the long-straw timber cut off said land by defendant?" Answer: "\$46."

"(6) Outside of the timber, has the defendant committed waste on said land; and, if so, what are the damages therefor?" Answer: "None."

"(7) What was the value of the tract of land at the time it was bid off by defendant?" Answer: "\$261."

It was admitted, as found by the jury on the former trial, that the defendant Warwick is the owner of the life estate for the life of S. A. Herring in the premises in controversy. His honor gave judgment for the plaintiff, and in the judgment declared that Warwick was the owner of the life estate aforesaid. The defendants appealed.

Faison & Wright and J. D. Kerr, for appellants. H. A. Grady and Murray Allen, for appellees.

PER CURIAM. This cause was before the court at spring term 1911 (155 N. C. 346, 71 S. E. 462). The facts are all fully stated, and the case fully discussed in the opinion of Mr. Justice Walker, rendered for the court. A new trial was granted because the verdict was rendered in one essential particular under the influence of one erroneous instruction.

In granting the new trial, and considering the case on the former appeal, we necessarily considered all the evidence then produced,

and a motion for a judgment of nonsuit was inferentially denied. The evidence in this regard is much stronger than that presented upon the former appeal, and we think his honor carefully followed the former decision of this court, and we find in his rulings upon the evidence and in his charge to the jury no substantial error which we think would warrant us in ordering another trial.

The judgment of the superior court is affirmed.

(158 N. C. 598)

**HARE et al. v. GRANTHAM.**

(Supreme Court of North Carolina. March 20, 1912.)

**1. APPEAL AND ERROR (§ 1135\*)—REVIEW—AFFIRMANCE.**

Where the case on appeal is not served within the time required by law, and hence is not sent up with the record, but the court finds that the complaint states a cause of action, and that there is no error apparent upon the face of the record, the judgment will be affirmed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4454, 4455; Dec. Dig. § 1135.\*]

**2. REPLEVIN (§ 57\*)—CLAIM AND DELIVERY—COMPLAINT—SUFFICIENCY.**

A complaint alleging that plaintiffs owned and were entitled to the immediate possession of certain personal property described in the affidavit, and made a part of the complaint, that defendant's possession was wrongful, that the property was of a stated value, and had been seized under the affidavit of claim, and then returned to defendant on his execution bond, and demanding judgment for the delivery of the goods or for their value with damages for detention, states a good cause of action.

[Ed. Note.—For other cases, see Replevin, Cent. Dig. § 109; Dec. Dig. § 57.\*]

Appeal from Superior Court, Harnett County; Peebles, Judge.

Action by S. T. Hare and others against W. H. Grantham. Judgment for plaintiffs, and defendant appeals. Affirmed.

The plaintiffs alleged:

"(2) That said plaintiffs are the owners of and entitled to the immediate possession of certain personal property described in the affidavit filed in the claim and delivery proceedings in this action, the same being the property which the defendant obtained from the plaintiffs, and the said claim and delivery including the affidavit is made a part of this complaint.

"(3) That the defendant is in possession of the said property.

"(4) That said possession of the defendant is wrongful and unlawful.

"(5) That the actual value of said property at the time of the seizure hereinafter mentioned, as plaintiffs are informed and believe, was \$1,500.

"(6) That the plaintiffs in this action caused claim and delivery to issue under which the sheriff of Harnett county seized

the property described in the affidavit of the claim and delivery proceedings.

"(7) That the defendant filed an undertaking pursuant to the statute in the sum of \$3,000 with G. T. Hodges and J. E. Wall as sureties, whereupon said property was delivered by the sheriff to the defendant, who still retains possession of the same; and demanded (1) that they recover of the defendant and his sureties said stock of goods and property described in said affidavit at its true value in money at the time of its seizure, such damages as the plaintiffs may have sustained by reason of its deterioration and detention since the commencement of this action; (2) that, if for any cause actual delivery cannot be had, then that they recover of the defendant and his sureties the value of said property, with damages for its detention; for general relief."

Doughlass & Lyon and J. C. Clifford, for appellant. R. L. Godwin and E. F. Young, for appellees.

**PER CURIAM.** [1, 2] It is admitted that the case on appeal was not served within the time required by law, and therefore has not been sent up to this court with the record. The plaintiffs move the court to affirm the judgment upon the face of the record. The defendant moves the court to dismiss the action because on the face of the complaint no cause of action is stated. The court, being of opinion that a cause of action is stated in the complaint, and that there is no error apparent upon the face of the record, allows the motion to affirm the judgment of the superior court.

Affirmed.

(158 N. C. 327)

**SOUTHERLAND v. ATLANTIC COAST LINE R. CO.**

(Supreme Court of North Carolina. March 20, 1912.)

**1. CARRIERS (§ 230\*)—TRANSPORTATION OF LIVE STOCK—NEGLIGENT DELAY—QUESTION FOR JURY.**

In an action for injuries to live stock caused by alleged negligent delay, evidence held to require submission of the issue of defendant's negligence to the jury.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 961, 962; Dec. Dig. § 230.\*]

**2. CARRIERS (§ 228\*)—TRANSPORTATION OF LIVE STOCK—DELAY—EVIDENCE.**

On April 25, 1905, at 9:20 a. m., plaintiff shipped a car of cattle from M. to Richmond, which did not reach their destination until 11 o'clock on April 27th in a much damaged condition. Held, that evidence that on the same day plaintiff shipped another car from C. to Richmond, both points being on defendant's road, though C. was on a branch line a few miles further from Richmond than M., and that the latter shipment arrived in good order on the morning of the 26th, was admissible as bearing on the issue of delay.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 957-960; Dec. Dig. § 228.\*]

### 3. CARRIERS (§ 218\*)—TRANSPORTATION OF CATTLE—NOTICE OF INJURY—CARRIER'S AGENT.

An employé in charge of defendant's stockyards at which plaintiff's cattle were unloaded, who superintended the unloading of and looked after cattle for the railroad companies on arrival, was the agent of the railroad company, so that notice of injuries to cattle given to him was notice to the carrier.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 674-696, 927, 928, 932-949; Dec. Dig. § 218.\*]

### 4. CARRIERS (§ 230\*)—TRANSPORTATION OF LIVE STOCK—DELAY—REASONABLE TIME—INSTRUCTIONS.

In an action for delay in transporting cattle, an instruction that the evidence tended to show the time when the cattle were loaded at the point of shipment and when they were delivered at destination, and that, if the jury found such evidence to be true, it was evidence of negligence to be weighed and considered on that issue, was proper.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 961, 962; Dec. Dig. § 230.\*]

### 5. TRIAL (§ 260\*)—INSTRUCTIONS—REQUEST TO CHARGE.

It was not error to refuse requests to charge substantially covered by instructions given.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 651-659; Dec. Dig. § 260.\*]

Appeal from Superior Court, Duplin County; Ward, Judge.

Action by R. B. Southerland against the Atlantic Coast Line Railroad Company. Judgment for plaintiff, and defendant appeals. Affirmed.

These issues were submitted to the jury:

"(1) Were the cattle of the plaintiff injured by the negligence of the defendant by defendant failing to carry said cattle in a reasonable time, as alleged?" Answer: "Yes."

"(2) What damages, if any, is the plaintiff entitled to recover?" Answer: "\$150, with interest at 6 per cent. from April 27, 1905, till paid."

H. L. Stevens and Murray Allen, for appellant. Fowler & Crumpler and C. M. Faircloth, for appellee.

BROWN, J. There are 15 assignments of error in the record, which have received our consideration, and we think that none of them can justly be sustained. We will not undertake to comment on all of them, but only such as we think necessary.

[1] 1. The motion to nonsuit was properly overruled. We think there was sufficient evidence to justify his honor in submitting the issue as to the negligent delay in the shipment of the cattle to the jury, and the consequent injury to the animals therefrom. The evidence tended to prove that on April 25, 1905, the plaintiff shipped a car load of cattle from Magnolia, N. C., to one Brauer, Richmond, Va., over the road of the defendant under a live stock contract. The car was loaded and delivered to the defendant at 9:20 a. m. April 25th, and reached its

destination at 11 o'clock April 27th, in a much damaged condition.

[2] There was evidence tending to prove that on the same day, April 25, 1905, the plaintiff shipped another car of cattle from Clinton, N. C., to Richmond, Va., over the defendant's road, which was delivered in Richmond in good order and condition on the morning of the 26th. This evidence was objected to by the defendant, but we think it perfectly competent upon the question as to what would constitute a reasonable time for transportation between Magnolia and Richmond, both points being on the defendant's road, and Clinton being on a branch line and a few miles further from Richmond than Magnolia. Upon this evidence, we think the motion to nonsuit was properly overruled.

[3] 2. It is contended by the defendant that the consignee of the cattle failed to give written notice to any agent of the defendant of the damaged condition of the cattle before they were removed from the jurisdiction of the railroad, as required by the terms of the bill of lading. This court has recognized such a stipulation in a bill of lading as valid. *Selby v. Railroad*, 113 N. C. 588, 18 S. E. 88, 37 Am. St. Rep. 635; *Austin v. Railroad*, 151 N. C. 137, 65 S. E. 757. But we think the terms of the bill of lading in this respect were substantially complied with. The evidence shows that it was the custom of the railroad company to send loaded cattle cars to the Union Stockyards in Richmond to be unloaded. The evidence shows that the consignee, Brauer, received the cattle under protest on account of the damage due to unnecessary delay while en route. It is true this notice was given to one Lambert, who was in charge of the stockyards, but there is testimony tending to prove that he superintended the unloading of cattle for the railroads, that he was always present at such unloadings, and worked for the railroad company in that way, and looked after all the cattle for the railroad when they came in. From the evidence we think the jury was fully warranted in inferring that Lambert was the agent of the railroad company in receiving and unloading the cattle, and, that being so, notice to him would be in all respects a compliance with the terms of the contract. It would be unreasonable to require the consignee to search for some other agent of the defendant than the one who was present, superintending the receipt and delivery of the cattle. Lambert was to all intents and purposes the agent of the railroad company, and notice to him was notice to it.

[4] 3. The defendant's eighth exception directed to the charge of the court upon the question of what constitutes reasonable time cannot be sustained. His honor in-

structed the jury that the evidence tends to show the time when the cattle were loaded at Magnolia, and when they were delivered at Richmond, but he did not undertake to declare that to be per se negligence; but he instructed the jury that such facts, if found to be true, were evidence of negligence to be weighed and considered by the jury upon the first issue.

[5] 4. The plaintiff requested instructions relative to a delay of the car of cattle at Rocky Mount, and contended that his honor failed to give the instructions. An examination of the record shows that the instructions were substantially given by the court certainly to the full extent to which the defendant was entitled.

Upon examination of the entire record, we are of opinion that no substantial error was committed.

No error.

(158 N. C. 625)

#### STATE v. HINTON.

(Supreme Court of North Carolina. March 20, 1912.)

#### 1. CRIMINAL LAW (§ 1149\*)—BILL OF PARTICULARS—DENIAL—DISCRETION.

The denial of an application by accused for a bill of particulars is not reviewable, unless there is an abuse of the discretion of the trial court.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3039-3043, 3058; Dec. Dig. § 1149.\*]

#### 2. CRIMINAL LAW (§ 252\*)—BILL OF PARTICULARS—ABUSE OF DISCRETION.

Where a warrant recited that the affiant, chief of police, stated that he was informed and believed that on or about December 4, 1911, in the city of Raleigh, etc., defendant did unlawfully and willfully resist, delay, and obstruct W. and D., two officers of the police for the city in discharging and attempting to discharge a duty of their office, contrary, etc., and it did not appear that defendant required any additional information to enable him to make his defense, the denial of an application for a bill of particulars was not an abuse of discretion.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 526-536; Dec. Dig. § 252.\*]

#### 3. CRIMINAL LAW (§ 252\*)—WARRANT—SUFFICIENCY—LANGUAGE OF STATUTE.

A warrant containing an affidavit of a police officer, and alleging that on a specified day and in a specified place within the court's jurisdiction accused did unlawfully and willfully resist, delay and obstruct two persons designated, who were police officers, and who were discharging and attempting to discharge their duty, etc., was substantially in the language of the statute prohibiting the obstruction of officers, and was therefore sufficient.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 526-536; Dec. Dig. § 252.\*]

Appeal from Superior Court, Wake County; Bragaw, Judge.

William Hinton, alias "Son" Hinton, was convicted of obstructing an officer, and appeals. Affirmed.

The defendant was tried before the police justice of the city of Raleigh on the follow-

ing warrant: "J. P. Stell, chief of police of the city of Raleigh, being duly sworn, says that he is informed and believes that on or about the 4th day of December, 1911, in the city of Raleigh, and in Raleigh township, Wake county, William Hinton, alias 'Son' Hinton, did unlawfully and willfully resist, delay, and obstruct J. H. Wyatt and G. C. Dillehay, duly constituted public officers of the police for the city of Raleigh, in discharging and attempting to discharge a duty of their office, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the state. \* \* \* You are hereby commanded to forthwith apprehend the said William Hinton, alias 'Son' Hinton, and bring him before his honor, the police justice of the city of Raleigh, to answer the charge set forth in the above affidavit, and to be further dealt with according to law," and upon conviction he appealed to the superior court of Wake county. When the case was called for trial in the superior court, the defendant moved for a bill of particulars, which the court denied, in the exercise of its direction, and he excepted. He also moved to quash the warrant, which was denied, and he excepted; also he moved in arrest of judgment, after a verdict of guilty was returned, and to the refusal of this motion excepted. Judgment was rendered upon the verdict, and the defendant appealed.

W. B. Snow, for appellant. Attorney General Bickett and T. H. Calvert, for the State.

ALLEN, J. [1] The motion for a bill of particulars is addressed to the discretion of the court, and is not reviewable, unless there is a gross abuse of discretion. *State v. Dewey*, 139 N. C. 556, 51 S. E. 937.

[2] In this case there is not only no evidence of the abuse of the discretion vested in the judge, but there is no statement in the record tending to show that the defendant required any information, outside of the indictment, to enable him to make his defense. There is nothing in *State v. Corbin*, 157 N. C. 619, 72 S. E. 1071, which interferes with the discretion of the judge, or is in conflict with the law declared in *State v. Dewey*, supra. The question under consideration in the *Corbin* Case was a motion in arrest of judgment, the indictment following the words of the statute, and it was said: "If the defendant did not know which stream he was charged with polluting, or the means alleged to have been used, he could have obtained specific information by asking for a bill of particulars under section 3244 of the Revisal," which is no intimation that, if the bill of particulars had been asked for, it would not have been discretionary with the judge to grant or refuse it.



[3] The motions to quash and in arrest of judgment rest on the same ground, the insufficiency of the warrant, and in determining them the affidavit and order of arrest must be considered together (State v. Yellowday, 152 N. C. 793, 67 S. E. 480), and, when so considered, the warrant follows substantially the words of the statute, which is sufficient (State v. Harrison, 145 N. C. 408, 59 S. E. 867; State v. Leeper, 146 N. C. 655, 61 S. E. 585; State v. Corbin, 157 N. C. 619, 72 S. E. 1071). There is no error.

No error.

(158 N. C. 596)

#### BYRD v. SEXTON.

(Supreme Court of North Carolina. March 20, 1912.)

#### APPEAL AND ERROR (§ 1161\*) — DETERMINATION—REVERSAL.

Where appellee's counsel admits that an assignment of error is well taken and consents to a new trial, the case must be reversed and remanded.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4520; Dec. Dig. § 1161.\*]

Appeal from Superior Court, Harnett County; Peebles, Judge.

Action by L. T. Byrd against J. A. Sexton. From a judgment for defendant, plaintiff appeals. Reversed and remanded.

R. L. Godwin, E. F. Young, and N. A. Townsend, for appellant. D. H. McLean & Son and J. C. Clifford, for appellee.

**PER CURIAM.** The third assignment of error of the appellant relates to remarks of the court criticising the counsel, and to language used by the court, which it is claimed is tantamount to an expression of opinion upon the facts in violation of the statute. Upon the call of this appeal, the counsel for the appellee admits to the court that the assignment of error is well taken, and that language was used tantamount to an expression of opinion, and consents to a new trial.

It is therefore ordered that a new trial be granted.

New trial.

(158 N. C. 597)

#### LENOIR COUNTY v. CRABTREE.

(Supreme Court of North Carolina. March 20, 1912.)

#### 1. NAVIGABLE WATERS (§ 20\*)—BRIDGES—DRAWS—COUNTY COMMISSIONERS—POWERS.

Under Revisal 1905, § 1318(8), requiring county commissioners to provide draws and bridges where the same may be necessary for the convenient passage of vessels, and section 2698, authorizing counties to erect bridges and the commissioners to provide and keep draws therein, county commissioners had discretionary power to establish a draw in a bridge that turned in either direction.

[Ed. Note.—For other cases, see Navigable Waters, Cent. Dig. §§ 73-99; Dec. Dig. § 20.\*]

#### 2. NAVIGABLE WATERS (§ 20\*)—DRAWBRIDGES—OBSTRUCTION—CONSENT OF COUNTY COMMISSIONERS.

Where the commissioners of a county, with the consent and approval of the War Department, constructed a bridge over a navigable stream with a draw operating in either direction, its usefulness could not be impaired by obstructing its operation in one direction without the consent of the county commissioners.

[Ed. Note.—For other cases, see Navigable Waters, Cent. Dig. §§ 73-99; Dec. Dig. § 20.\*]

#### 3. NAVIGABLE WATERS (§ 20\*)—DRAWBRIDGES—OBSTRUCTION OF BRIDGE—ESTOPPEL.

Where a drawbridge over a navigable stream was so constructed that the draw might be operated in either direction, until defendant constructed a building so near the bridge between high and low water mark that thereafter the bridge could not be operated except in one direction, the fact that the building was permitted to so remain for 14 months without objection from the county commissioners did not estop the county from thereafter requiring its removal.

[Ed. Note.—For other cases, see Navigable Waters, Cent. Dig. §§ 73-99; Dec. Dig. § 20.\*]

#### 4. NAVIGABLE WATERS (§ 36\*)—LAND BETWEEN HIGH AND LOW WATER MARK.

Land between high and low water mark on a navigable river belongs to the individual owner of the upland only sub modo and subject to the superior right of the public to use it for all purposes incident to navigation.

[Ed. Note.—For other cases, see Navigable Waters, Cent. Dig. §§ 180-200; Dec. Dig. § 36.\*]

#### 5. NAVIGABLE WATERS (§ 20\*)—DRAWBRIDGES—OBSTRUCTION.

The erection of a drawbridge across a navigable stream is an incident of navigation which cannot be defeated by the erection of a building or other obstruction on the land between high and low water mark, or so near the bridge as to interfere with the free operation of the draw.

[Ed. Note.—For other cases, see Navigable Waters, Cent. Dig. §§ 73-99; Dec. Dig. § 20.\*]

#### 6. NAVIGABLE WATERS (§ 36\*)—LAND BETWEEN HIGH AND LOW WATER MARK—ENTRY—EASEMENTS.

Land between high and low water mark on a stream is not subject to entry, as the occupant can only acquire an easement therein subject to the superior right of the public to use the stream for navigation.

[Ed. Note.—For other cases, see Navigable Waters, Cent. Dig. §§ 180-200; Dec. Dig. § 36.\*]

#### 7. ACTION (§ 7\*)—MOTIVE IN BRINGING ACTION.

Where a suit was brought on behalf of the county by its commissioners to compel the removal of a store building constructed between high and low water mark in such a manner as to impair the operation of a drawbridge over a navigable stream, it was not material that the action was inspired by the owner of a rival store and was not brought merely for the benefit of the county.

[Ed. Note.—For other cases, see Action, Cent. Dig. § 8; Dec. Dig. § 7.\*]

#### 8. NAVIGABLE WATERS (§ 26\*)—ABATEMENT—EXPENSE.

Where defendant had so constructed a storehouse between high and low water mark as to impair the operation of a drawbridge across a navigable stream, without authority of law and in derogation of public right, it was no objection to a proceeding to compel its re-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

moval that such a decree would entail great expense to him.

[Ed. Note.—For other cases, see *Navigable Waters*, Cent. Dig. §§ 133-166; Dec. Dig. § 26.\*]

## 9. COUNTIES (§ 217\*)—ACTION—NATURE AND FORM.

Under Revisal 1905, § 1809, constituting every county a body politic and corporate, and section 1310, authorizing a county to sue and be sued in the name of the county, a suit was properly brought in the name of the county and was not required to be brought in the name of the board of county commissioners.

[Ed. Note.—For other cases, see *Counties*, Cent. Dig. §§ 347-351; Dec. Dig. § 217.\*]

Appeal from Superior Court, Lenoir County; Peebles, Judge.

Suit by Lenoir County against C. W. Crabtree. Judgment for defendant, and complainant appeals. Reversed.

G. V. Cowper, for appellant. E. R. Wooten, for appellee.

CLARK, C. J. This is a proceeding for a mandatory injunction to prohibit the defendant from further maintaining or adding to a building which is built so near to a public bridge over the Neuse river as to prevent the draw therein from being operated except in one direction. For something over 100 years the county of Lenoir maintained a bridge across Neuse river, a navigable stream at that point. In 1884 the present bridge was built by the county about 15 feet from where the old bridge stood, and it was furnished with a modern draw-bridge, which was constructed for the purpose of turning up or down stream as necessity might arise. There was a draw in the former bridge, but it does not appear whether or not it could be operated in both directions, nor is it material.

[1] Revisal, § 1318(8), among other duties, imposed upon the county commissioners that of "providing draws in bridges where same may be necessary for the convenient passage of vessels," etc., and Revisal, § 2698, provides that the counties may erect bridges and "shall by their board of commissioners provide and keep draws in all such bridges."

It is a matter which rests in the discretion of the county commissioners should they establish draws that turn both ways, certainly unless it were a clear abuse of their powers. *Brodnax v. Groom*, 64 N. C. 244. On the contrary, it is common knowledge that a draw should open both up and down stream, as on high water an emergency may require such to be done in safety to the navigation. The bridge or vessels might at times be endangered, or navigation seriously interfered with, if the draw could not be freely turned in either direction, especially in high water.

Though it is not expressly found by the judge, it appears from the admission in the

defendant's brief, and is not denied in the evidence, that the building is partly at least, if not altogether, built on land between high and low water mark. The judge finds that it was put there within 14 months before this action begun and is so close to the bridge that the draw cannot be opened downstream. Indeed, the evidence shows, without contradiction, that the building extends within two feet of the bridge on the down side thereof.

[2, 3] By act of Congress the state can authorize bridges to be built over navigable streams wholly within the state, provided the plans are submitted to and approved by the War Department. As the plan of this bridge built in 1884 provided a draw which opened both ways, it must have been so approved, and an obstruction making it less convenient for navigation without the approval of the War Department is doubtless indictable in the federal court. Nor can its usefulness be impaired by obstructing its operation in any way without the consent also of the board of county commissioners. It might be inferred from his honor's judgment that he was of opinion that the fact that the building has stood at that point for 14 months without objection from the county commissioners was an estoppel upon the county. If so, this view is erroneous. In the recent case of *Shelby v. Power Co.*, 155 N. C. 196, 71 S. E. 218, Brown, J., says: "It is well settled that unless by legislative enactment no title can be acquired against the public by user alone, nor loss to the public by nonuser." *Commonwealth v. Morehead*, 118 Pa. 344, 12 Atl. 424, 4 Am. St. Rep. 599, and cases cited; 22 Am. & Eng. p. 1190. Public rights are never destroyed by long-continued encroachments or permissive trespasses."

The county commissioners, in many cases, might not have their attention called to an encroachment of this kind upon the public rights, or they might not be properly advised as to the injurious effect. Certainly the public cannot lose their rights by the want of vigilance in the temporary occupants of their office. There is no statute of limitations against the public from which a right can be presumed to have been granted by the county commissioners to the defendant to interfere with the use of the public property for his own use which is the basis of a statute of limitations. Indeed, the statute expressly prohibits the application of the statute of limitations against the public by reason of such encroachment. Revisal, § 389.

[4-6] The land between high and low water mark belongs to an individual only sub modo and subject to the superior right of the public to use it for all purposes incident to navigation. The erection of a bridge across a navigable stream with a draw, of the most

modern construction, opening both ways, is an incident of navigation which cannot be defeated by the erection of a building or other obstruction on such strip of land between high and low water mark, or so near to the bridge as to interfere with the free operation of the draw. *Gould on Waters*, § 151, and cases there cited. Land lying between low and high water mark is not subject to entry. *Ward v. Willis*, 51 N. C. 183, 72 Am. Dec. 570; *Land Co. v. Hotel*, 132 N. C. 522, 44 S. E. 39, 61 L. R. A. 937; *State v. Twiford*, 136 N. C. 609, 48 S. E. 588. At most, the occupant can have only an easement therein subject to the superior right of the public to the use of the stream for navigation and, as here, for the incidental purpose of a bridge so constructed as to interfere the least with navigation.

[7, 8] The judge below dismissed the action upon the ground, as we understand it, that he knew of no law which required that a draw over a navigable stream should open both ways, that the building had been there for 14 months without objection by the county commissioners, and because he was "firmly of the opinion that the owner of an opposition store inspired this action." The first two propositions we have discussed. As to the last, the action is brought in behalf of the county by its county commissioners, and it is immaterial whether an opposition storekeeper influenced the commissioners or not. They were discharging their duty in objecting to a longer interference with the free use of the bridge, which was provided with a double draw by their authority when the bridge was erected and which had been approved, and was probably required, by the War Department. Nor is it a matter for consideration that to require the defendant to remove his house so as to allow the draw to be operated freely would be an expense to him. He placed his building there without authority of law and in derogation of the public right and must suffer the consequences of an order to remove it.

[9] This action is brought by "Lenoir county, who sues through the commissioners for the county of Lenoir." His honor seems to have been of opinion that this was defective in that the action should have been brought by the "board of commissioners," and expresses a doubt whether the defect was cured because no objection was taken by demurrer. *Revisal*, § 1309, constitutes every county a "body politic and corporate," and *Revisal*, § 1310, authorizes a county "to sue and be sued in the name of the county." We see no reason, therefore, why the action might not be brought simply in the name of "Lenoir county," as other actions have been brought to this court without objection. It is true that there are decisions that a county should be sued through its commissioners,

but Judge Pell, in his notes to *Revisal*, § 1310, justly calls attention to the fact that the statute had since been amended. Even if it had not been, the designation of the plaintiff would have been sufficient in the absence of a demurrer raising objection thereto. The action was properly brought on behalf of the county. *Com'rs v. Lumber Co.*, 115 N. C. 590, 20 S. E. 707, 847.

The order dismissing the action is set aside, and upon the facts found judgment should be entered requiring the defendant to remove the building within such reasonable time and to such reasonable distance as may be found just, upon investigation by the court below.

Reversed.

(158 N. C. 617)

### STATE v. MILLICAN et al.

(Supreme Court of North Carolina. March 20, 1912.)

#### 1. CRIMINAL LAW (§ 1159\*)—APPEAL—VERDICT—CONCLUSIVENESS.

On appeal in a criminal case, the court cannot set aside the verdict on the ground that the weight of evidence is against conviction.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 3074-3083; Dec. Dig. § 1159.\*]

#### 2. CRIMINAL LAW (§ 1148\*)—APPEAL—DISCRETION OF TRIAL COURT—DENYING SEVERANCE.

A refusal to grant a severance is not reviewable except in case of gross abuse of discretion by the trial court.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 3050-3052; Dec. Dig. § 1148.\*]

#### 3. ARSON (§ 35\*)—ADMISSION OF EVIDENCE—OTHER FIRES.

In a prosecution for arson, evidence that there were other fires in the town after accused was imprisoned was not admissible, even though such other fires were shown to be incendiary, since such evidence would improperly introduce irrelevant issues.

[Ed. Note.—For other cases, see *Arson*, Cent. Dig. § 56; Dec. Dig. § 35.\*]

#### 4. ARSON (§ 29\*)—PROSECUTION—ADMISSION OF EVIDENCE.

In a prosecution for arson by burning a warehouse, evidence that accused had manifested ill will toward the inhabitants of the town was admissible.

[Ed. Note.—For other cases, see *Arson*, Cent. Dig. § 69; Dec. Dig. § 29.\*]

#### 5. ARSON (§ 35\*)—ADMISSION OF EVIDENCE.

Evidence as to length of time accused had been in prison was properly excluded in an arson case, where it was not claimed they were imprisoned when the building was burned.

[Ed. Note.—For other cases, see *Arson*, Cent. Dig. § 56; Dec. Dig. § 35.\*]

#### 6. CRIMINAL LAW (§ 1170\*)—APPEAL—HARMLESS ERROR—EXCLUSION OF EVIDENCE.

Any error in excluding evidence, in an arson case, that the state took a position at the present trial inconsistent with its position at a former trial, was harmless to accused, where the witness by whom the state's former position was attempted to be shown testified

that he did not remember hearing anything at the former trial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3145-3153; Dec. Dig. § 1170.\*]

**7. CRIMINAL LAW (§ 1169\*)—APPEAL—HARMLESS ERROR—ADMISSION OF EVIDENCE.**

In a prosecution for burning a warehouse, accused testified on cross-examination that he was talking to two colored men and told them that he would go up to a certain house if they waited awhile, and they asked then why he and others had them up concerning pistols, and he told them that there was a fire and accused helped carry out the stuff, and that it was afterwards claimed that some pistols were lost and were charged to have been taken by accused and another, and that he said that hereafter he would not help about fires, and that R. said something about snatching accused down, and that he would have him fixed tonight. R. testified for the state that accused said that he wanted to see another fire in the town as long as the white people were so smart. *Held*, that the evidence was not prejudicial to accused.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3088, 3137-3143; Dec. Dig. § 1169.\*]

**8. CRIMINAL LAW (§ 1172\*)—APPEAL—HARMLESS ERROR—FAILURE TO CHARGE—DEFINING STATUTORY TERMS.**

In a prosecution under Revisal 1905, § 3338, making one guilty of a felony who "wantonly and willfully" sets fire to a warehouse, the only disputed questions were whether the fire was accidental or of incendiary origin, and, if incendiary, whether accused set the fire, and there was no evidence tending to show that accused set the fire accidentally, and the instructions required the jury to find, in order to convict, that accused agreed with another to burn the warehouse, which they at once did by deliberately setting it on fire. *Held*, that failure to define the word "wantonly" as used in the statute could not have injured accused.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3128, 3154-3157, 3159-3163, 3169; Dec. Dig. § 1172.\*]

**9. CRIMINAL LAW (§ 893\*)—VERDICT.**

The verdict in a criminal case must be construed with reference to the proceedings at trial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2089, 2527; Dec. Dig. § 893.\*]

Appeal from Superior Court, Lenoir County; Ferguson, Judge.

Lonnie Millican and others were convicted of statutory arson, and they appeal. Affirmed.

The defendants were indicted at May term, 1911, of the superior court of Lenoir county, under section 3338 of the Revisal, for burning a warehouse in La Grange. They were tried on the indictment at October term of said court, and upon failure of the jury to agree a juror was withdrawn and a new trial ordered. They were tried a second time at January term, 1912, of said court, and convicted. The judge presiding sentenced each of the defendants to a term of 30 years at hard labor in the state's prison, and they appealed.

Y. T. Ormond, G. V. Cowper, and F. I. Sutton, for appellants. Attorney General Bickett and T. H. Calvert, for the State.

ALLEN, J. [1] If we were permitted to examine the evidence for the purpose of determining the guilt or innocence of the defendants, we would have grave doubts as to the propriety of sustaining the verdict of the jury. The state had to rely upon a witness, who claimed to be an accomplice, whose evidence is unsatisfactory and has very little corroboration. This witness gives the following account of the burning: "Sunday, before the fire, I came downtown, and when I got there, there was Lonnie Millican, Jim Britt, and Nick Joyner on the platform talking—the depot platform. I walked up there and asked them to let me get in what they were talking about, and Lonnie said, 'All right, if you can keep a secret.' He said the white folks didn't like them and he was going to get even. I asked how he was going to get even, and he said he was going to burn the town. I said I would watch. I cannot tell what time it was. I don't know exactly. Nobody but these three boys when I got there. When I said I would watch, Lonnie and Jim went on, and then Nick and I went on. Just went down to Wooten's alley; Lonnie and Jim first, and then me and Nick. Lonnie told me where to stand when we got there. Nick goes on between Mr. Barwick's and the bank. I stood at the alley towards Front street. Nick was between Barwick's and the hotel there. Lonnie and Jim went back behind Mr. McDonald's warehouse as far as I could see them. We went in the alleyway. They told me they were going to burn the town; that the white folks didn't like them. I told them I would watch. After they went, I saw Jim raking up trash. I could not see exactly on account of Lonnie's overcoat. I could not half see for his overcoat. Don't know, where he put the trash. They came back and then went behind Mr. Sim Wooten's stores. I went out on Front street then. I could not tell how close they were to warehouse. I don't know how close—pretty close to it. I heard people holler fire when I went on Front street. Nick and I went about the same time and heard them then. When I got back, Mr. McDonald's building was burning and Mr. Barwick's had caught. Had gone about a half of a block before alarm of fire. No, sir; it wasn't dark when I went back behind the warehouse and was watching. You could see anybody behind there." In addition to his confession that he was an accomplice, he was further discredited by his admission that he was indicted, and employed a lawyer to defend him, telling him that he was not connected with the fire, and the fact that he had been taken out of prison several times and examined by officers of the law, and was finally liberated with-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

out a trial. If his statement is true, the defendants, without previous conference with him, told him at once, upon his approaching them, of their purpose to burn the town, and he, without motive, agreed to watch, and all of them went immediately before it was dark and set fire to a warehouse, which was overlooked by a hotel and in a populous community. In addition to this, at least one of the defendants offered evidence of an alibi, which, if believed, was complete. We have given a brief statement of the evidence in order that the bearing of the exceptions relied on by the defendants may be understood, as our duty is limited to the consideration of the alleged errors in law, and, in cases like this, we have no power to review the verdict of the jury.

[2] The first exception is to the refusal of his honor to order a severance. As was said in *State v. Oxendine*, 107 N. C. 783, 12 S. E. 573, and in *State v. Carrawan*, 142 N. C. 576, 54 S. E. 1002: "The refusal of the court to grant a severance is not reviewable, except in case of gross abuse, and no such abuse appears in this case." And therefore the exception cannot be sustained.

[3] His honor excluded evidence to prove that, after the imprisonment of the defendants, there were other fires at La Grange, and this is the basis of the second, third, fifth, sixth, and fourteenth exceptions. The fact that there were other fires at La Grange, standing alone, could have no probative force, and, if there were such fires, there was no effort to prove that they were not accidental, and were incendiary. If, however, such evidence had been offered, it would have been incompetent, as it would introduce other and different issues and would have no tendency to prove the guilt or innocence of the defendants. If the defendants could offer evidence that, after their imprisonment, there were other fires at La Grange that were incendiary, the state must be permitted to contradict, and if the defendants establish their contention, it would prove nothing, except that there were others than the defendants who would commit crime, which would not exculpate them. The case of *State v. Smarr*, 121 N. C. 669, 28 S. E. 549, seems to be in point against the defendants, in which it was held that on the trial of one for burglary it is not competent for him to show that other burglaries were committed in the same neighborhood about the same time, and it has been held uniformly in this state that evidence much stronger than that offered by the defendants of a kindred nature, which would prove that another committed the crime charged, is not competent unless it is of such character as to exclude the guilt of the accused. *State v. Davis*, 77 N. C. 488; *State v. England*, 78 N. C. 554; *State v. Baxter*, 82 N. C. 604; *State v. Beverly*, 88 N. C. 633; *State v. Lambert*, 93 N. C. 623.

[4] The defendants further contend that, although his honor excluded evidence as to other fires, he called them to the attention of the jury, and told the jury to consider them, by stating that the contention of the state was that the defendant Millican had shown ill will toward the people there, "manifested after this fire and at other times when there had been a fire at La Grange," and that from all these facts and circumstances the state contended that the defendants were guilty. This is, in our opinion, a misconception of the charge. His honor did not instruct the jurors that they could consider evidence of other fires, but that the state contended that the defendant Millican had manifested ill will towards the people of La Grange, and that this conduct of the defendant, if found to exist, could be considered, which was not erroneous.

[5, 6] The exclusion of the evidence as to the length of time the defendants had been in prison, the subject of the fourth exception, was proper, there being no contention that they were confined at the time of the burning; and the twelfth exception is equally untenable, because, if competent to prove that the state took a position at the former trial inconsistent with that contended for in this, the witness, by whom it was attempted to be proven, said he did not remember hearing anything at the former trial, and, therefore, could not know what the contention of the state was.

[7] The seventh, eighth, ninth, tenth, and eleventh exceptions are to impeaching questions asked one of the defendants, Millican, which he answered in the negative, and to the following conversation detailed by him: "I was talking to two colored men from here, Will Phillips and Tom Mayor. They were asking about going up to a lady's house, and I said I didn't have time to go, but I would go later if they would wait. They said they couldn't and I said, well, I couldn't go then. They asked why they had we boys up concerning pistols. I told him that, when there was a fire, I helped carry out stuff, and, after everything was over, they were claiming that some pistols were lost and laid it on three or four of us around there. One of them said, 'When I am home, I don't go to any fires,' and I said, 'Hereafter nobody need say anything to me about helping.' Mr. Rouse said something about snatching me down. He said, 'I will have you fixed to-night.' One of the boys said, 'You had better go on,' and I went on off." We fail to see in this anything prejudicial to the defendant, and in view of the evidence of Rouse, a witness for the state, that the defendant said, on the occasion referred to by him, that he wanted to see another fire in La Grange as long as the white people were so smart, it was necessary and helpful for him to give his version of the occurrence.

[8] The other exceptions are to the refusal

to give certain prayers for instructions, and to parts of the charge as given, all of which we have carefully examined. The prayers were, in substance, incorporated in the charge, which was fair and comprehensive and in accordance with precedent. The one principally relied on is the failure to define the word "wantonly," used in the statute, under which the defendants are indicted, as a part of the description of the offense; the defendants contending, under the authority of *State v. Massey*, 97 N. C. 465, 2 S. E. 445, *State v. Morgan*, 98 N. C. 641, 3 S. E. 927, and other cases, that it was necessary to allege in the indictment that the burning was done "wantonly" and that this allegation would not be supplied by the use of the words "maliciously and feloniously," and if necessary to be alleged it must be proven, and that it was the duty of his honor to so instruct the jury. The objection is not to the indictment, which conforms to all the requirements of the law, but to the failure to charge. No request was made by the defendants for his honor to define "wantonly," and we refer to this, not for the purpose of putting our ruling on the ground of failure to make the request, but to show that it was not regarded as material, in view of the evidence.

There were only two facts in dispute before the jury: (1) Was the fire the work of an incendiary, or was it accidental? (2) If the work of an incendiary, did the defendants set out the fire? There was no suggestion in the evidence, nor do counsel contend here, that the fire may have been caused by the defendants accidentally, and under the charge of the court the jury had to find, in order to convict the defendants, that they agreed with Dempsey Wood, col., to burn the warehouse, and that they at once carried out the agreement, and deliberately set the building on fire, and, if so, the act was of necessity wanton and malicious, and it could do no good to so describe it. In other words, his honor would have been justified in charging the jury that, if they were satisfied that the defendants agreed to burn the warehouse, and that pursuant to that agreement they deliberately burned it, the act was wanton and malicious, and this is the only view presented to the jury, upon which they could convict, as appears from the charge to the jury: "When the state prefers a charge against its citizens, it devolves upon the state to satisfy the jury from the evidence, beyond a reasonable doubt, of the guilt of the defendants. \* \* \* It devolves upon the state to satisfy you fully that the property was wrongfully, willfully, and maliciously set afire by some person or persons, and, further, to satisfy you fully from the evidence that the parties now on trial, one, or all three, or two, were the parties who set the building on fire. If you should find from the

evidence beyond a reasonable doubt that the three defendants conspired and agreed together that they would set fire to and burn the house, and that the witness Dempsey Wood entered into the conspiracy and agreed to watch, and in furtherance of that agreement and conspiracy one or more of them set fire to the house, the others being present, encouraging and aiding him in doing so, and it makes no kind of difference which one did the act of setting fire to the house, all would be equally guilty. If you should find from the evidence beyond a reasonable doubt that either one set fire to the house, the others being present, aiding and assisting, either by actually doing something toward that end, or watching for the protection of those doing it, they would all be guilty. \* \* \* If any one shows that he was not there at the time of the fire, or shows such proof as shall cause you to have some doubt, return a verdict of not guilty as to such one. If all three show that, then return a verdict of not guilty as to all three. If upon all the evidence you are not satisfied beyond a reasonable doubt of the guilt of one, return a verdict of not guilty as to such one, or to two or to all three, if you are not satisfied beyond a reasonable doubt."

[8] The verdict, like the charge, must be construed with reference to the trial. *Cox v. Railroad*, 149 N. C. 86, 62 S. E. 761, 16 Ann. Cas. 474.

Upon a review of the record, confining ourselves to a consideration of the exceptions, we must say there is no error.

No error.

(158 N. C. 348)

#### BARBER et al. v. GRIFFIN et al.

(Supreme Court of North Carolina. March 13, 1912.)

#### 1. PRIVATE ROADS (§ 2\*)—ESTABLISHMENT—PETITION.

In proceedings under Revisal 1905, § 2686, to lay out a cartway, a petition stating that an old pathway running through the lands of the petitioners and of certain other parties, and open for more than 40 years, had been closed by the other parties greatly to the inconvenience of the petitioners, and that it was necessary to cross the lands of the other parties to get a convenient outlet to a public road, was not demurrable.

[Ed. Note.—For other cases, see *Private Roads*, Cent. Dig. §§ 3-21; Dec. Dig. § 2.\*]

#### 2. PRIVATE ROADS (§ 1\*)—WORDS AND PHRASES—"CARTWAY."

Cartways are quasi public roads in which the public has a direct personal interest.

[Ed. Note.—For other cases, see *Private Roads*, Cent. Dig. §§ 1, 2; Dec. Dig. § 1.\*]

For other definitions, see *Words and Phrases*, vol. 1, pp. 984, 985.]

#### 3. PRIVATE ROADS (§ 2\*)—ESTABLISHMENT—EVIDENCE—COMPETENCY.

In proceedings under Revisal 1905, § 2686, to lay out a cartway, evidence to show the utility of an old pathway which the defendants had closed up was competent upon the ques-

tion of the reasonableness, necessity, and convenience of the proposed cartway.

[Ed. Note.—For other cases, see *Private Roads*, Cent. Dig. §§ 3-21; Dec. Dig. § 2.\*]

#### 4. PRIVATE ROADS (§ 2\*)—ESTABLISHMENT—INSTRUCTIONS.

In such proceedings, it was proper to refuse a requested instruction which ignored distance, convenience, and reasonableness and advised the jury that if the petitioners, by acting together, could establish a cartway over their own lands to the public road, then they were not entitled to a cartway over the lands of the defendants.

[Ed. Note.—For other cases, see *Private Roads*, Cent. Dig. §§ 3-21; Dec. Dig. § 2.\*]

#### 5. PRIVATE ROADS (§ 2\*)—ESTABLISHMENT—INSTRUCTIONS.

In such proceedings, an instruction that the petitioners were not entitled to a cartway simply as a convenience or to give a more convenient route to a public road sufficiently presented the case upon the necessity, reasonableness, and justice of the cartway being laid out.

[Ed. Note.—For other cases, see *Private Roads*, Cent. Dig. §§ 3-21; Dec. Dig. § 2.\*]

Appeal from Superior Court, Martin County; Cooke, Judge.

Petition for a cartway under Revisal 1905, § 2686, by W. S. Barber and others against L. H. Griffin and others. From a judgment for plaintiffs, defendants appeal. No error.

This issue was submitted to the jury: Is the cartway proposed by the plaintiffs necessary, reasonable, and just? Answer. Yes.

Martin & Critcher and S. J. Everett, for appellants. A. R. Dunning, for appellees.

BROWN, J. The defendants moved to dismiss the petition upon the ground that the same did not state facts sufficient to constitute a cause of action, and to have the same considered as demurrer ore tenus.

We think his honor properly overruled the motion. The petition sets forth the fact that for over 40 years there was an old pathway running through the lands of the petitioners and the defendants L. H. and Caroline Griffin, which was closed up by the said Griffin, greatly to the detriment and inconvenience of the petitioners. The petitioners further set forth that in order to get a convenient pathway and outlet to the public road it is necessary to cross the lands of the said L. H. and Caroline Griffin.

The petitioners do not seem to rely upon any prescriptive right to the use of the old pathway, nor do they set up any easement over the Griffin lands. That would be inconsistent with the character of this proceeding.

[1] It is patent from a cursory reading of the Revisal, § 2686, that the facts set forth in this petition bring this proceeding clearly within the language and spirit of the statute.

[2] Cartways are regarded as quasi public roads, and the condemnation of private property for such a use has been frequently sustained upon that ground as a valid exercise

of the power of eminent domain. This question is fully considered by Mr. Justice Walker in the case of *Cook v. Vickers*, 141 N. C. 103, 53 S. E. 740. These cartways are public institutions in which the public have a direct, personal interest. 1 Lewis, *Eminent Domain*, § 167.

[3] The next exception is to the ruling of the court admitting evidence of the old pathway upon the ground that laying out the new pathway was a matter entirely within the discretion of the five freeholders. We see no force in the objection. The issue seems to have been submitted to the jury in almost the very language of the statute. In passing on the reasonableness and the necessity, as well as the convenience of the new cartway sought to be laid out, evidence as to the use of the old pathway, its convenience and directness, was competent as tending to prove its utility to the public. It would not be a violation of the statute, if the jurors saw fit to do so, to lay out the new pathway over the route of the old.

[4] The defendants requested his honor to instruct the jury that, if the petitioners by acting together can establish a cartway over their own lands to the public road, then they are not entitled to a cartway over the lands of the defendants. This instruction seems to ignore entirely the question of distance, convenience, and reasonableness.

[5] In that particular we think his honor gave all that the defendants were entitled to when he instructed the jury that the petitioners are not entitled to have this cartway simply as a convenience, or because it enables them to reach the public road from the lands upon which they may reside by a shorter or more convenient route, as there is no public outlet serving such a purpose. The case was put to the jury upon the necessity, reasonableness, and justice to the petitioners in permitting them to have the cartway as laid out.

Upon examination of all the evidence, together with the lucid charge of the court, we think no error has been committed of which the defendants can justly complain.

No error.

(158 N. C. 652)

#### STATE v. HARDY.

(Supreme Court of North Carolina. March 13, 1912.)

#### 1. PRIVATE ROADS (§ 2\*)—ESTABLISHMENT—JURISDICTION—PETITION.

A township board of supervisors had jurisdiction to lay out a private cartway, though the petition asked for a public cartway.

[Ed. Note.—For other cases, see *Private Roads*, Cent. Dig. §§ 3-21; Dec. Dig. § 2.\*]

#### 2. PRIVATE ROADS (§ 2\*)—COLLATERAL ATTACK ON PROCEEDINGS.

Where proceedings before a township board of supervisors to lay out a cartway were not wholly void on their face, they were

not subject to collateral attack so as to render defendant indictable for removing a fence to open the cartway in obedience to an order issued in such proceedings.

[Ed. Note.—For other cases, see Private Roads, Cent. Dig. §§ 3-21; Dec. Dig. § 2.\*]

Appeal from Superior Court, Duplin County; Ward, Judge.

John R. Hardy was adjudged not guilty of unlawfully and willfully removing a fence around a cultivated field, and the State appeals. Affirmed.

Defendant had removed a fence in obedience to an order issued by the board of supervisors of a township in proceedings upon a petition to lay out a "public cartway." The following is the special verdict: "We, the jury, having been duly impaneled, return into court the following special verdict: The defendant was indicted under the bill hereto attached, we find that the defendant tore away the fence of prosecutrix and prosecutor on the road and on the woods side of the field of the prosecutrix within two years before the finding of this bill; that said fence surrounded a cultivated field, and that the tearing away of said fence was an injury to said fence. We further find that the defendant proceeded to commit said acts and did commit said acts under and by virtue of certain proceedings marked 'Exhibit A,' and made a part of this verdict, and that said Exhibit A is the record of proceedings which were begun and prosecuted for the opening of a cartway, and said cartway purports to be laid off where said defendant cut said fence. We find that judgment was rendered at February term, 1911, dismissing prosecutor's appeal from said proceedings, said judgment marked 'B' and made a part of this verdict. That the cutting of said fence was after the rendition of said final judgment. If the court is of opinion that on those findings defendant is guilty, we find him guilty; otherwise, we find him not guilty."

Attorney General Bickett, Assistant Attorney General Calvert, and H. D. Williams, for the State. Stevens, Beasley & Weeks, for appellee.

**PER CURIAM.** [1] We agree with the judge below that the board of supervisors has jurisdiction to lay out cartways such as appears to have been done in this case. Cook v. Vickers, 141 N. C. 103, 53 S. E. 740; Barbee v. Griffin, 74 S. E. 110, at this term.

[2] There are irregularities in the proceedings, but they are not wholly void on their face so as to subject defendant to indictment for obeying the order directed to him, and commanding him to open the cartway.

We concur with his honor that defendant, upon the special verdict and exhibits called for in it, is not guilty.

Affirmed.

(153 N. C. 403)

**PELLETIER et al. v. INTERSTATE COOPERAGE CO. et al.**

(Supreme Court of North Carolina. March 20, 1912.)

**1. REFORMATION OF INSTRUMENTS (§ 18\*)—MISTAKE OF LAW.**

While a court of equity will not relieve against a mistake of law where the parties correctly expressed the agreement they intended to make, yet where grantors of land did not intend to convey a part which was subject to a widow's dower, but the grantee in drawing the conveyance included all the land, and merely excepted the widow's dower, without describing the particular tract to which it was applicable, the instrument will be reformed, so as to except the entire estate in that part of the land.

[Ed. Note.—For other cases, see Reformation of Instruments, Cent. Dig. §§ 72, 73; Dec. Dig. § 18.\*]

**2. LIMITATION OF ACTIONS (§ 96\*)—COMPUTATION OF PERIOD—ACCRUAL OF RIGHT.**

Under the direct provisions of Revisal 1905, § 395, subsec. 9, the three-year period in which suit may be brought for the reformation of a deed on the ground of a mistake does not begin to run until the discovery by the aggrieved party of the mistake.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 475, 476; Dec. Dig. § 96.\*]

**3. LIMITATION OF ACTIONS (§ 199\*)—COMPUTATION OF TIME—ACCRUAL OF ACTION—QUESTION FOR JURY.**

In the absence of actual knowledge or negligent inattention, the question of the time of the accrual of the right of action for the reformation of a deed, made by mistake, is one for the jury; the party not being affected with notice of a mistake in the deed as a matter of law.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 727-730; Dec. Dig. § 199.\*]

**4. LIMITATION OF ACTIONS (§ 197\*)—ACCRUAL OF RIGHT OF ACTION—QUESTION FOR JURY.**

In an action for the reformation of a deed entered into by mistake, evidence held to support a finding that the mistake was not discovered until a short time before the commencement of the action.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 722-726; Dec. Dig. § 197.\*]

Appeal from Superior Court, Carteret County; Carter, Judge.

Action by Agnes C. Pelletier and others against the Interstate Cooperage Company and others. From a judgment for plaintiffs, the first-named defendant appeals. Affirmed.

Small, MacLean & McMullan and Abernethy & Davis, for appellant. T. D. Warren and A. D. Ward, for appellees.

**HOKE, J.** [1] There was allegation, with evidence, on the part of plaintiffs, tending to show that in 1894 plaintiffs sold and conveyed to C. S. Riley & Co. a tract of land in said county, known as the "Woodsland Tract," for a recited consideration of \$900; that the Pelletier home tract lay near to this, and was, at that time, included in the



widow's dower; that one Lovett Hines, who was acting as agent of C. S. Riley & Co. in the transaction, drew the deed, and in doing so he included this home tract in the description; that this home tract was not embraced in the trade, or intended to be sold or conveyed by the parties, but said Hines, giving the description of a larger boundary in the deed, and endeavoring and intending to exclude this home tract, undertook to do so by exception, in terms as follows: "Saving and excepting the widow, A. A. Pelletier's dower"; that afterwards, in 1904, the woodland tract was conveyed by Riley Bros. to Hines Bros. Lumber Co., in 1905 by the lumber company to one F. A. Emerick, and in 1907 by said Emerick to defendant the Interstate Cooperage Company; the same descriptions appearing in all the deeds. All of the defendants, except Emerick and the cooperage company, made formal answer, admitting the mistake, and against them it was established by the verdict, and that both of said defendants took and hold the property with full notice and knowledge of all the facts.

It was chiefly urged for error by the appellant that the mistake, if any existed, was one of law, and that in such case the courts would not afford relief. The principle relied upon was never, perhaps, as broad as it sounds, and in its practical application has been very much qualified in the later decisions. The position, as it now more generally obtains, is very well stated in 34 Cyc. p. 911, as follows: "It has been frequently asserted that a mistake of law is not a ground for reformation; but in late years the disposition of the courts seems to be to qualify the proposition by many exceptions, so that there is much contrariety of opinion as to the general rule. The most broadly accepted doctrine, however, appears to be that a mere naked mistake of law, unattended by any special circumstances, furnishes no ground for relief by reformation; but if the mistake involves fact, as well as law, or is attended by special circumstances, equity will relieve, if the mistake is mutual, so long as the power is not extended to the making of a new contract for the parties." The cases in our own court, and well-considered decisions elsewhere, are in approval of the general rule as stated. *Condor v. Secrest*, 149 N. C. 201, 62 S. E. 921; *Kornegay v. Everett*, 99 N. C. 30, 5 S. E. 418; *Warehouse v. Ozment*, 132 N. C. 839, 44 S. E. 681; *Sparks v. Pittman*, 51 Miss. 511. In *Kornegay's Case*, it was held: "Where it is admitted or proved that an instrument, executed in pursuance of a prior agreement, by which both parties meant to abide, is inconsistent with the purpose for which it was designed, or that by reason of some mistake of both parties it fails to express their intention, a court of equity will correct it, although the mistake be one of law." And in

the Mississippi case, the same decision was made, as follows: "The rule that equity will not relieve against mistakes of law is not absolute. Relief from the consequences of an agreement formed upon a misapprehension of the law will not, for that reason alone, be granted. But if a deed, or instrument is executed, and by reason of misapprehension of its legal effect fails to effectuate or conform to the agreement, a court of equity will relieve."

The principle is not further dwelt upon, for the reason that in the present case the mistake is clearly one of fact, and not of law. A mistake of law, in this connection, simply means that, in the absence of equitable circumstance, "a mere naked mistake of law," when the parties have correctly expressed the agreement they intended to make, will not be relieved against because they acted in ignorance of the legal effect of the instrument they have executed, such a case as was presented in *Sandlin v. Ward*, 94 N. C. 490, and others of like import; but here they did not make the deed they intended. They had not sold the home tract, and neither of the parties agreed or intended that it should be conveyed, and the mistake made is none the less one of fact, because the draughtsman mistook the legal effect of the terms used in making the exception. This is very clearly stated in one of the authorities cited, as follows: "There are certain principles of equity, applicable to this question, which, as general principles, we hold to be incontrovertible. The first is that, where an instrument is drawn and executed which professes or is intended to carry into execution an agreement, whether in writing or by parol, previously entered into, but which, by mistake of the draughtsman, either as to *fact* or *law*, does not fulfill, or which violates, the manifest intention of the parties to the agreement, equity will correct the mistake, so as to produce a conformity of the instrument to the agreement. The reason is obvious. The execution of agreements, fairly and legally entered into, is one of the peculiar branches of equity jurisdiction; and, if the instrument which is intended to execute the agreement be, from any cause, insufficient for that purpose, the agreement remains as much unexecuted as if one of the parties had refused altogether to comply with his engagement, and a court of equity will, in the exercise of its acknowledged jurisdiction, afford relief in the one case, as well as in the other, by compelling the delinquent party fully to perform his agreement according to the terms of it, and to the manifest intention of the parties" (*Hunt v. Rousmaniere's Adm'r*, 26 U. S. 1-13, 7 L. Ed. 27), and is generally recognized. *Springs v. Harven*, 56 N. C. 98.

[2, 3] It was further contended that plaintiffs' cause is barred by the statute of limitations; but this, too, must be held against

the appellant. Construing the statute applicable (Revisal, § 395, subsec. 9), the court has decided that the statute of three years begins to run from the time the facts constituting the mistake were discovered, or should have been in the exercise of ordinary care (*Peacock v. Barnes*, 142 N. C. 215, 55 S. E. 99); and the same opinion also holds that a party will not be affected with notice of a mistake existent in the deed as a matter of law, but, in the absence of actual knowledge or negligent inattention, the question as to the date when the action accrued is usually one for the jury, under all the facts and attendant circumstances.

[4] Here, according to the testimony, the deed was drawn by the agent of the grantee, and there was nothing to attract the attention of the grantors to the fact that there had been a mistaken description made in the deed. So far as appears, the home place had not been mentioned. It was then in the control and occupation of the grantor's mother, holding the same as her dower, and on her death, in 1905, plaintiffs entered into possession and control as owners, and nothing has ever been done to question their title. There was nothing especial to arouse their attention or put them on their guard as to an adverse claim; and they swear as a fact that they had no notice of it until June, 1909, about seven months before action commenced. Under a clear and comprehensive charge, the jury, as stated, have found all the issues as to the mistake and knowledge on the part of appellant and the statute of limitations in plaintiffs' favor, and we find no reason for disturbing their verdict. The judgment of the superior court is therefore affirmed.

No error.

(158 N. C. 330)

WELLS v. WELLS et al.

(Supreme Court of North Carolina. March 20, 1912.)

On petition for rehearing. Petition dismissed.

For former opinion, see 158 N. C. 246, 72 S. E. 311.

D. L. Ward, for plaintiff. Aycock & Winston and Stevens, Beasley & Weeks, for defendants.

CLARK, C. J. This is a petition to rehear this case, decided in 158 N. C. 246, 72 S. E. 311.

W. D. Wells, deceased, left surviving a widow, who, it is admitted, is entitled to one half the personal estate, and his mother, who claims to be entitled to the other half. Rev. 1905, § 132 (3), provides: "If there be no child nor legal representative of a deceased child then half the estate shall be allotted to the widow, and the residue be distributed to every of the next of kin of the intestate who are in equal degree and to those who

legally represent them." The intestate left no children, and besides his mother he left two sisters and a brother, who claim to share equally with the mother in the half of the estate not conceded to the widow. The next of kin of the intestate is his mother. His brother and sisters are one degree further removed. It follows, therefore, that the mother is entitled to half of the personalty. This language of the statute is so explicit that it can leave no room for doubt. This is what we held on the former hearing, and we see no reasoning that would permit us to change it. Exactly in point on a similar statute is *Trapp v. Billings*, 2 McCord, Eq. (S. C.) 403.

The petitioner contends that there are previous decisions to the contrary. If this were so, they would be clearly erroneous. No decision of any court can change the physical fact that the mother is the next of kin, and that the brother and sisters are one degree further removed. But, in fact, the former decisions relied on by the petitioner are not contrary to this. Indeed, on the former hearing, in their brief, the petitioners admitted that there was "no North Carolina authority to fit the case," and conceded that the mother was next of kin to her son, in preference to the brother and sisters. But they relied upon Rev. 1905, § 132 (6), to take this case out of the rule prescribed in 132 (3). Said subsection 6 does not apply to this case, because that applies only when the husband dies without leaving a widow.

On this rehearing, the petitioner relies upon *Anon.*, 3 N. C. 63, which decides that the mother shares equally with the brothers and sisters when her child dies intestate *without wife, father, or children*, which is the case provided for by subsection 6, above referred to. *Gillespie v. Foy*, 40 N. C. 280, was a decision upon an entirely different state of facts, where the contest was between the brothers and sisters on one side and the grandfather and grandmother on the other; each claiming to be the next of kin to the deceased. In *Ferrand v. Howard*, 38 N. C. 384, it was held that, where the intestate died, "without leaving father, wife, or issue, in the lifetime of his mother, she is to be considered as one of the next of kin, and shall take a share of his personal estate with his brothers and sisters." This, again, is the state of fact provided for in subsection 6 of the present statute. But no case can be found in North Carolina which holds that the mother is not entitled to one-half of the estate, when her son dies intestate, leaving a widow, but no children. Indeed, there could be none under the present statute.

Rev. 1905, § 132 (6), provides that, if the intestate dies without wife or children, "his brother and sisters shall have an equal share with the mother of the deceased child." This of itself is a recognition that the mother is the next of kin, and would have taken the entire estate otherwise. In 132 (3) there is

no such provision; but it is merely provided that if there are no children the widow takes half and the next of kin, which, in this case, is the mother, takes the other half.

At common law, the king took all the personality, which in that rude age was usually of very little value. Afterwards the crown passed this prerogative to the church, which took all the personality, except the reasonable parts for the widow and the children; and the church officials claimed to dispose of it in pious uses. But they were accountable to no one, and were not even required to pay the debts of the decedent. By statute (13 Ed. III, A. D. 1358), the churchmen were required to appoint an administrator, who should be next of blood kin; and this relationship was computed by the civil law, and not by the canon law, which was used in computing relationship in the descent of land. But by statute (21 Henry VIII, A. D. 1530), the administrator was appointed by the ordinary, and was required to be the widow or next of kin, or both, who, after paying the intestate's debts and the reasonable parts for the widow and children, retained the surplus in his own right until the statutes of 22, 23, and 29, Charles II, which required the surplus to be distributed among the next of kin in the manner provided by those statutes which became known as the statutes of distribution.

These statutes, however, did not apply to executors, who retained the surplus for themselves till the statute in North Carolina of 1715, chapter 15. Under the English statutes 22, 23, and 29, Charles II, the mother, as well as the father, succeeded to all the personal effects of their children who died intestate and without wife or issue, to the exclusion of brothers and sisters of the deceased. After the death of the father, there is no one in equal degree with the mother, when there are no children, and therefore, if there is no widow, she, as the next of kin, is entitled to the personal estate of her son, under Rev. 1905, § 132 (5). *Davis v. Railroad*, 136 N. C. 115, 48 S. E. 591, 1 Ann. Cas. 214.

The following terse analysis we find in the brief of the learned counsel of the defendants, and place it on record for the convenience of the profession:

**"Analysis of N. C. Statute of Distribution, Rev. 132.**

**"Widow's Share.**

"Section 1. One-third part to the widow of the intestate.

"Section 2. A child's part to the widow.

"Section 3. One-half of the estate to the widow.

"Section 7. All the personal estate to the widow.

**"Child's Share in Father's Estate.**

"Section 1. If not more than two children, equal portions to and among the children and

such persons as legally represent such children as may then be dead.

"Section 2. If more than two children, an equal share, including the widow as a child.

"Section 4. Equal portions among all the children and such persons as legally represent such children as may be dead.

**"Share of Next of Kin.**

"Section 1. If no child nor legal representative of a deceased child, the residue to be distributed equally to every of the next of kin of the intestate who are in equal degree, and to those who legally represent them.

"Section 5. If neither widow nor child, nor any legal representative of the child, the estate shall be distributed equally to every of the next of kin of the intestate who are in equal degree, and to those who legally represent them.

**"Brothers and Sisters of the Intestate.**

"Section 6. After the death of the father, and in the lifetime of the mother, if any of his children shall die intestate without wife or child, every brother and sister and the representative of them shall have an equal share with the mother of the deceased child."

The English statutes of distribution are to be found in 8 Pickering's Statutes at Large, 348, and are somewhat confused and contradictory. So much so that Lord Hardwicke, in *Stanley v. Stanley*, 1 Atkyns, 455, said that the statutes were "utterly unintelligible and have no meaning," and the court was therefore "compelled to search out the meaning and intent of the Legislature." The English decisions, therefore, can have no bearing in construing our statute, which is clear and unambiguous.

Petition dismissed.

HOKE, J., dissents.

(158 N. C. 380)

**CHADWICK v. LIFE INS. CO. OF VIRGINIA.**

(Supreme Court of North Carolina. March 20, 1912.)

**1. COSTS (§ 216\*)—MOTION TO RETAX—JURISDICTION.**

Where a judgment fixed the amount of expert witness fees and directed the clerk to tax the costs of the action, a subsequent judge could entertain a motion to retax costs, such motion being only a collateral inquiry in which the real parties are the witnesses and others claiming the costs and the party against whom they were taxed.

[Ed. Note.—For other cases, see Costs, Cent. Dig. § 823; Dec. Dig. § 216.\*]

**2. COSTS (§ 3\*)—TAXATION—WITNESS FEES.**

At common law neither party to a civil action could recover costs; each party paying its own witnesses.

[Ed. Note.—For other cases, see Costs, Cent. Dig. §§ 1, 4, 5; Dec. Dig. § 3.\*]

**3. COSTS (§ 184\*)—TAXATION—WITNESS FEES.**

The successful party is entitled to tax costs against the losing party for the two

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

witnesses allowed by Revisal 1905, § 1300, as to each material fact only when such witnesses are subpoenaed and examined or tendered as witnesses, so that, where expert medical witnesses subpoenaed by defendant had not been tendered and sworn or examined when a non-suit was granted on defendant's motion, the costs of such experts should be taxed to defendant, and not to plaintiff.

[Ed. Note.—For other cases, see Costs, Cent. Dig. §§ 715-736; Dec. Dig. § 184; \* Witnesses, Cent. Dig. § 55.]

#### 4. Costs (§ 218\*)—RETAXATION—QUESTIONS CONSIDERED.

The question of whether the evidence of medical experts summoned was material so as to permit the fees of all of them to be taxed as costs, and whether more than two of them were to testify to the same material fact, may be considered on a motion to retax costs, since those questions were not settled by an order fixing the amount allowed the experts, or requiring plaintiff to pay costs, but the amount of the allowance cannot be considered on motion to retax.

[Ed. Note.—For other cases, see Costs, Cent. Dig. §§ 823, 824; Dec. Dig. § 218.\*]

Appeal from Superior Court, Wake County; Whedbee, Judge.

Action by A. E. Chadwick against the Life Insurance Company of Virginia. From an order overruling a motion to retax costs, plaintiff appeals. Reversed.

Douglass, Lyon & Douglass, for appellant. John W. Hinsdale, for appellee.

CLARK, C. J. This is a motion to retax a bill of costs. The action was for a small sum. At the conclusion of plaintiff's testimony, the judge nonsuited the plaintiff and the bill of costs as taxed amounts to \$262.85, including fees to five expert witnesses and mileage of witnesses from Buncombe, New Hanover, Guilford, Durham, and other counties. The judgment entered by his honor was "that the defendant recover against the plaintiff and surety on the prosecution bond the cost of this action to be taxed by the clerk (including an expert fee of \$10 to each of the following witnesses: Drs. W. L. Dunn, W. H. Honeycutt, J. H. Borneman, Charles T. Harper, and A. W. Goodwin)."

[1] The first objection raised by the defendant is that a subsequent judge has no right to review the action of the trial judge, much less can the clerk of the court do so. An examination of the judgment, however, shows that the taxing of the costs was to be done by the clerk himself, and that the judge simply fixed the amount of the expert fees, and ordered defendant to pay the costs. The same point was raised in *Re Smith*, 105 N. C. 167, 10 S. E. 982, and the court held, after full discussion of the authorities, that it was error in the subsequent judge to hold that the taxation of costs by the former court was *res judicata*, and that he had no power to correct the same. In that case the court pointed out that the motion to retax costs can be made at any time within 12 months; that it is not a reopening of the

matter decided upon the issues between the plaintiff and defendant, but that it is a collateral inquiry in which the real parties are the witnesses and others claiming the costs and the party against whom they are taxed. This is cited and approved. *Cureton v. Garrison*, 111 N. C. 272, 16 S. E. 338.

[2, 3] At common law in civil cases neither party recovered costs and each side paid its own witnesses. *Costin v. Baxter*, 29 N. C. 111; *State v. Massey*, 104 N. C. 878, 10 S. E. 608. By statute the losing party is taxed with the costs of the witnesses of the winning party, but to prevent oppression only two witnesses of the winning side to each material fact can be taxed against the losing side (Revisal, § 1300), and then only if subpoenaed and examined or tendered (*Cureton v. Garrison*, 111 N. C. 272, 16 S. E. 338; *Loftis v. Raxter*, 68 N. C. 340; *Wooley v. Robinson*, 52 N. C. 30). These cases have been cited and approved—*Sitton v. Lumber Co.*, 135 N. C. 541, 47 S. E. 609—in which the court says that the court in *Cureton v. Garrison* "sustained the following ruling of the judge (Hoke) below, 'if the witnesses were not sworn and examined or tendered, even though attending under subpoena, and, though they would have given material evidence, their fees cannot be taxed against the losing party.'" The same cases have also been followed and approved in *Moore v. Guano Co.*, 136 N. C. 251, 48 S. E. 641, and in *Hobbs v. Railroad*, 151 N. C. 136, 65 S. E. 755, in which last *Walker, J.*, after citing numerous authorities, lays down the rule: "Only those witnesses of the successful party who have been sworn and either examined or tendered to the opposite party can be taxed against the latter." He adds: "The reason for the rule is that, if the witness is examined, the nature of his testimony will appear, and the court can then judge as to its materiality, or, if he is tendered, the party to whom the tender is made has the opportunity, not only of using him as a witness, but of ascertaining whether or not his testimony is relevant to the controversy, and consequently whether he shall be made to pay for his attendance, if he should be cast in the suit." In *Brown v. Railroad*, 140 N. C. 154, 52 S. E. 198, *Brown, J.*, quotes this as the well-settled rule, and says: "The object of tendering the witnesses is to give the adversary party an opportunity to test their materiality, and to prevent oppression by summoning a multitude of immaterial witnesses for the purpose of increasing costs." In *Herring v. Railroad*, 144 N. C. 209, 56 S. E. 873, *Hoke, J.*, cites the same rule and the same authorities, but made an exception where after a witness had been subpoenaed and attended by amendment of the pleadings he was excused from further attendance, and hence was not present at the trial, and could not be tendered. He cites also as an exception *Henderson v. Williams*, 120 N. C. 339, 27 S. E. 30, where

(159 N. C. 203)

by reason of a voluntary nonsuit the defendant "had no opportunity to tender his witnesses." In the present case the plaintiff had examined her witnesses when on motion of the defendant a nonsuit was ordered. The defendant could and should then and there have tendered its witnesses, and have given the plaintiff an opportunity to examine them, and strengthen her case or to demonstrate their immateriality. Originally the court could not fix an allowance for expert witnesses, but by an amendment to the statute which is to be found in Revisal, § 2803, the court now has such powers.

[4] The allowance of \$10 to each of the five expert witnesses, four of whom were summoned from distant counties, is *res judicata* as to the amount, and is properly taxable at least against the party summoning such witnesses and to that extent it is not reviewable on a motion to retax. But the questions whether the evidence of all five of these experts was material, and whether or not more than two of them were not to testify to the same material point as other witnesses, are matters which were not settled by the order fixing the amount allowed the experts nor by adjudging that the plaintiff pay costs. That means only legal costs, and their legality can be considered on a motion to retax.

In *Porter v. Durham*, 79 N. C. 598, the court allowed the fees of the surveyors, which might be called expert fees, though they were not examined by the plaintiff who summoned them, nor tendered to the defendant, because, said Reade, J., it "was made unnecessary by reason that the defendants examined them as witnesses of their own accord." That was not the case with the doctors who were summoned on this occasion. There was no reason why the defendant company when it moved for nonsuit should not have tendered its witnesses, as much so as if the plaintiff has "rested," or on any other occasion when the party who ultimately gains the case has witnesses in attendance whom it may think it unnecessary to examine. In this case the defendant admits that "none of its witnesses were sworn, examined, or tendered." Under the uniform decisions of this court, many of which have been above cited, the bill of costs should be retaxed by charging said witnesses to the party which summoned them, and not to the opposite party, who was afforded no opportunity to protect itself against oppression by showing the immateriality of their evidence by an examination of them. Indeed, the plaintiff avers that certain of the witnesses, whose mileage and per diem are taxed, were not even in attendance upon the court, and that others were superintendent and other officers of the defendant, who should not have proved attendance.

The bill of costs should be retaxed in accordance with this opinion.

Reversed.

### In re FOWLER'S WILL.

(Supreme Court of North Carolina. March 20, 1912.)

#### 1. WITNESSES (§ 171\*)—COMMUNICATIONS WITH DECEDENT—DISQUALIFICATION—INTEREST.

A witness in a probate proceeding was not disqualified, under Revisal 1905, § 1631 (Code, § 590), providing that a party interested in the event shall not be examined as a witness in his own behalf, or in behalf of the party succeeding to his title, against the administrator of a decedent as to communications between witness and decedent, where witness, who testified as to communications showing undue influence, was a devisee under the will sought to be probated, and would receive less as an heir, if the will were set aside, than under the will, since she testified against her own interest.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. §§ 707, 710; Dec. Dig. § 171.\*]

#### 2. WILLS (§ 165\*)—UNDUE INFLUENCE—DECLARATIONS OF TESTATOR.

Evidence of declarations by decedent after the execution of his will was admissible to show that it was obtained by undue influence.

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. §§ 415-420; Dec. Dig. § 165.\*]

#### 3. WILLS (§ 324\*)—PROBATE PROCEEDINGS—JURY QUESTION—UNDUE INFLUENCE.

Evidence in a proceeding to probate a will held to make it a jury question whether the will was executed through undue influence.

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. §§ 225, 767-770; Dec. Dig. § 324.\*]

#### 4. WILLS (§ 286\*)—PROBATE—SPECIAL ISSUES—UNDUE INFLUENCE.

The questions of undue influence or fraud in executing a will may be tried under the usual issue as to whether the paper offered was decedent's last will and testament, and it is not necessary to submit such questions by a special issue.

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. §§ 647-650; Dec. Dig. § 286.\*]

Appeal from Superior Court, Harnett County; Peebles, Judge.

In the matter of the probate of the will of J. M. Fowler. From a judgment establishing the will, caveators appeal. Reversed, and new trial ordered.

This is a caveat filed to the will of J. M. Fowler, and was before us in a former appeal. 156 N. C. 340, 72 S. E. 357. The real question in the case is whether the execution of the will was procured by fraud or undue influence. The court submitted two issues which, with the answers thereto, are as follows:

"(1) Is the paper writing here offered, and every part thereof, the last will and testament of James M. Fowler, deceased? Answer: Yes.

"(2) If the paper writing was the last will and testament of J. M. Fowler, was it obtained by undue influence or fraud? Answer: No."

Upon the verdict for the propounders, the court entered a judgment establishing the will. The caveators excepted and appealed, and assign the following errors: (1) That his honor erred in submitting the sec-

ond issue of record, as appears in caveators' first exception. (2) That his honor erred in excluding from the evidence the testimony of Rena Jackson, as offered by the caveators, as set forth in caveators' second exception. (3) That his honor erred in charging the jury that there was no evidence of undue influence or fraud, and in his charge on the second issue, as set forth in caveators' third exception. The other assignments were merely formal.

Upon the question whether there was any evidence of undue influence, we make these extracts from the testimony:

Will Smith, a witness for caveators, testified: "I saw testator several times before he died the last of February, 1910. He told me that he had something to tell me, and said that he had made his will and willed to all his children an equal share, and to his grandchildren one-half share. He told me that he was perfectly satisfied with his will. Later I saw him again, and he told me that he had made his will and was perfectly satisfied, as he had made it as his heart desired, but that he was being aggravated mighty bad over it; that some of them were not satisfied, and said that some of them wanted all of his property, and let the rest get nothing. I went up there again on Sunday morning, about 10 days before he died. He said: 'I have something to tell you, if I can get a chance. You know I made my last will, and made it to my heart's desire. I have been aggravated and provoked to do what I didn't want to do. I am sorry; but I can't help it now. I have changed my will, but not as I desired. I was forced to do it. I can't help it now.' He burst out crying, and said he had to do it, or be thrown in the road. He was living in Mr. J. P. Jackson's house. He said: 'You know who paid for the building of this house, and who paid for the work and labor on this house. It is hard to be threatened to be thrown into the road; that has caused me to do what I have done.' I was there on Monday night, and he died Tuesday."

Edna Fowler, a witness for the caveators, testified: "I know the day that Mr. Fowler made his first will. I was down there. He told me he had willed all of his children an equal share and his grandchildren one-half share each. He said: 'I have done as well as I could, and to my heart's desire.' About two weeks after that, I went to see him. He was crying. He told me that he bought that mantelpiece and paid for it, and bought his pump and paid for it out of his own pocket, and said: 'I paid for the sawing of the lumber in this house. I paid for every day's work on it out of my own money. It is pretty hard, don't you think, for me to do that much for one of my children, and for him to threaten to throw me out in the road, and my wife in the condition she is in?' His wife was in a perfectly helpless

condition. Two or three days after that, I was down there again. He was crying, grieving very bad, and said he was feeling very bad. He said, 'My troubles are more than my afflictions.' I asked him what he was troubled about. He replied: 'If J. P. Jackson and Forest Barnes don't quit harassing and tormenting me about my will, I shall lay it in the fire and burn it up, and what is left after my death can be divided by law.'"

The caveators introduced a witness, Rena Jackson, a granddaughter of the testator, who testified to declarations of the testator, which were made after the execution of the paper, tending to show that it had been procured by undue influence. This witness was a devisee under the will to which the caveat was filed, and it is admitted that she will receive less as an heir, if the will is set aside, than she would if it is sustained. It also appears that the testator had made a prior will, and if the caveators succeed in this case that will would be unrevoked, if it had not been canceled. We infer from the admission and the facts stated in the case that it was canceled or destroyed. It does not appear that she was a beneficiary under that will. The court excluded the testimony of Rena Jackson, and charged the jury that there was no evidence of undue influence, and that they should answer the second issue, "No." The caveators excepted and appealed.

R. L. Godwin, E. F. Young, and N. A. Townsend, for appellants. Douglass & Lyon and J. O. Clifford, for appellees.

WALKER, J. [1] The ruling of the court, by which the testimony of Rena Jackson was excluded, was erroneous. Her interests will be adversely affected by the result of this proceeding, if the will is set aside. She testified against her own interest; and in the case of *In re Worth's Will*, 129 N. C. 223, 39 S. E. 956, it was held that, by reason thereof, she is not disqualified by Revisal, § 1631 (Code, § 590) to testify, as the prohibition of the statute only extends to those cases in which the witness testifies in her own behalf or interest, which clause was not in the original section 343 of the Code of Civil Procedure, but is in the Code, § 590, and Revisal, § 1631. The case, therefore, in this respect, is not governed by *Linebarger v. Linebarger*, 143 N. C. 229, 55 S. E. 709, 10 Ann. Cas. 596, and *Hathaway v. Hathaway*, 91 N. C. 139. In those cases, it was held that it was incompetent to prove by an interested party, under Code, § 590 (Revisal, § 1631), declarations of the testator made after the execution of the paper, for the purpose of showing that it was obtained by fraud or undue influence.

[2] It was not decided whether evidence from a competent witness would be admis-

sible to show such declarations, though it was held, in the Linebarger Case, that prior or contemporaneous declarations, proven by such a witness, would be admissible. But such declarations—that is, those subsequent to the execution of the will—were held to be competent in *Howell v. Barden*, 14 N. C. 442, in able and exhaustive opinions by Chief Justice Henderson and Judge Ruffin, and the decision was approved in *Simms v. Simms*, 27 N. C. 684. In the last case, Chief Justice Ruffin said: "It must, of necessity, in every case be inquired whether the paper be the will of the party deceased; whether he had capacity to make a will, and meant to dispose of his estate by the particular script propounded. Such is the law even as to attested wills; for it is competent to show, by subsequent declarations of the supposed testator, that he *never* assented to the instrument as his will, but that it was obtained by duress or fraud." The *Howell* Case holds it to be competent to show, by subsequent declarations of the testator, that he did not have a disposing mind or a free will, as that the will was obtained by "fraud, duress, or undue influence"; in other words, that his free agency was destroyed. When the witness, by whom it is proposed to prove the declarations, has an adverse interest to be subserved, it is not material to inquire as to the extent of that interest. *Campbell v. Everhart*, 139 N. C. 503, 52 S. E. 201. But *Rena Jackson* testified against her own interest, according to the admission. A witness, though interested, may testify as to the state of the testator's mind, his sanity, or even his mental capacity or condition, and may prove his acts and declarations, for the purpose of showing the basis of his opinion in regard thereto. This was expressly held in *McLeary v. Norment*, 84 N. C. 235.

[3] We think the court erred in charging the jury that there was no evidence of undue influence, even if *Rena Jackson's* testimony is excluded. There was evidence that the testator was 74 years old, and was sick and very feeble; that those in whose favor he made the second will were the only persons present when the will was executed, except the witnesses. His wife was in a perfectly helpless condition. There was much evidence to show undue influence besides that contained in the extracts we have made from the case; but what there appears is sufficient, if accepted as true, to show his depressed mental condition, and that he was under some dominating influence, from which he could not rid himself. *J. P. Jackson* and *Forest Barnes* were his sons-in-law, and he was living with *Jackson*; and there is evidence tending to show

that he was under his controlling influence and unable to resist it. *Jackson* was heard by one of the witnesses to say to him: "Mr. Fowler, if I were in your place, I would make my will over again; it is not like it ought to be. I would make another and tear that up." It is, at least, probable that this old and feeble man was referring to *Jackson's* power over him, and his own helplessness and abject submission to his will and dictation, in what he said to the witnesses *Will Smith* and *Edna Fowler*, and other witnesses who testified to the same effect. He said to the witness *David Gregory*: "I am mighty bad off. I have done something that has hurt me to the heart. I made my will, and was forced to make another; and it is wrong." This was during the week before he died. We cannot resist the conclusion that there was sufficient evidence for the jury to consider upon the question of the testator's mental capacity, and also of undue influence, which subjected him, as a helpless and unresisting victim, to the overmastering will of another. The cases of *Linebarger v. Linebarger*, supra, and *Lee v. Williams*, 111 N. C. 200, 16 S. E. 175, relied on by the learned judge, are not authorities against our conclusion. There was no such evidence in those cases as we have in this. The facts disclosed by this record, if found by the jury, are clearly sufficient to establish that an undue, and therefore fraudulent, influence was exercised over this man, enfeebled by old age and bad health, and without the aid of those who could give him disinterested counsel and advice. *Amis v. Satterfield*, 40 N. C. 173; *McRae v. Malloy*, 93 N. C. 154. The relation between these parties, of control on the one hand and dependence on the other, made the task of overcoming and destroying his volition and free agency an easy one. The evidence was fit to be submitted to the jury. Using the language of Judge Henderson in *Howell v. Barden*, supra: "It is not for me to say how much such evidence ought to weigh, having, as I have elsewhere observed, no weights and measures for my own mind. It must, under the circumstances of each case, be left to the judgment and discretion of the jury as rational men. If they believe it, they will give it effect; if they do not believe it, of course, they will pay no attention to it."

[4] It was not necessary to submit the second issue, as the questions of mental capacity and fraud or undue influence can be tried and determined under the usual issue in such cases; that is, the first issue in this case.

There was error in the ruling and charge of the court.

New trial.

**SANDERS v. D. LANDRETH SEED CO.**

(Supreme Court of South Carolina. March 16, 1912.)

**1. GARNISHMENT (§ 95\*)—ATTACHMENT—RETURN—FALSIFICATION.**

Return of a sheriff on a writ of attachment that defendant had no property in the county so far as he had been able to find, while prima facie correct, was subject to falsification by evidence that it was not correct, and that defendant did in fact have property within the county.

[Ed. Note.—For other cases, see Garnishment, Cent. Dig. §§ 181-188; Dec. Dig. § 95.\*]

**2. ATTACHMENT (§ 328\*)—RETURN—FALSIFICATION.**

Where a sheriff having an attachment against a nonresident served a copy of the summons, complaint, affidavit, and attachment bond on the cashier of a bank, but returned no property found, such return was falsified by an affidavit of the cashier that such papers had been served on him and a demand made for property of the defendant in his hands, and that at the time of such service and demand the bank had of defendant's property the sum of \$304.56, which it held subject to the court's order.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. §§ 1170-1173; Dec. Dig. § 328.\*]

**3. GARNISHMENT (§ 96\*)—MONEY—LEVY.**

Service of summons, complaint, affidavit for attachment, and attachment bond on the cashier of the bank which held money belonging to the defendant, and a demand for a surrender of the fund to the sheriff, constituted a sufficient levy on the fund to confer jurisdiction over the same.

[Ed. Note.—For other cases, see Garnishment, Cent. Dig. §§ 189-196; Dec. Dig. § 96.\*]

**4. GARNISHMENT (§ 97\*)—RETURN—FALSIFICATION—CORRECTION.**

Where, in an action against a nonresident by attachment, the writ was validly levied on a sum of money belonging to defendant in the hands of a bank which properly disclosed the same, but the sheriff returned the writ nulla bona, the court properly allowed plaintiff to take the proper steps to have the return corrected.

[Ed. Note.—For other cases, see Garnishment, Cent. Dig. §§ 196-199; Dec. Dig. § 97.\*]

Appeal from Common Pleas Circuit Court of Beaufort County; Geo. W. Gage, Judge. "Not to be officially reported."

Action by Gustave Sanders against the D. Landreth Seed Company. Judgment for plaintiff, and defendant appeals. Affirmed.

W. S. Tillinghast, Mordecai & Gadsden; and Rutledge & Hagood, for appellant. W. J. Thomas, for respondent.

**WOODS, J.** This appeal is from an order refusing to set aside the alleged service of a summons and complaint on the defendant, a foreign corporation. The service was made by publication and personal service out of the state, and the appeal depends on whether the attachment issued against the property of the defendant was illegal and void, for without attachment a foreign corporation cannot be forced to submit to the jurisdiction of the courts of the state. *Emanuel v. Ferris*, 63 S. C. 104, 41 S. E. 20;

*Breon v. Miller Lumber Co.*, 83 S. C. 221, 65 S. E. 214, 24 L. R. A. (N. S.) 276, 137 Am. St. Rep. 803. The writ of attachment was issued in the usual way after due compliance with the conditions precedent required by the statute. The affidavit upon which it was founded stated, among other things, "that said defendant owns property as said affiant is informed and verily believes now in said Beaufort county, South Carolina, in the way of bills of lading, moneys, and moneys due to defendant, and in the possession of parties now in Beaufort county, which property, bills of lading and money this deponent is informed and verily believes said defendant is about to take and carry beyond the limits of this state and beyond the jurisdiction of this court with the intention to deprive their creditors here from having said property subjected to such debts as may be due by them here." The return of the sheriff was as follows: "I hereby certify that on the eleventh day of January, A. D. 1911, at Beaufort, South Carolina, I served on W. F. Marscher, cashier of People's Bank, the summons and complaint in this action by delivering copies thereof to him personally and leaving the same with him. The defendant above named is not a resident of this county or state, and has no property in this county so far as I have been able to find."

At the hearing of the motion to set aside the service of the summons and complaint, the plaintiff introduced an affidavit from W. F. Marscher, cashier of the People's Bank, to the effect that the sheriff had served upon him not only the summons and complaint, but the affidavit and the attachment bond, and demanded of him \$304.56 as the property of the defendant in his hands, that at the time of the service and demand he had in his hands money belonging to the defendant collected on a draft drawn by defendant and two other drafts which he subsequently collected, and that at the time of the hearing he held money of the defendant to the amount of \$304.56, subject to the order of the court. To this affidavit there was no response on the part of the defendant.

[1] The return of the sheriff that the defendant had no property subject to attachment in this state was prima facie correct, but the presumption was subject to rebuttal by evidence that the return was not correct. *Genobles v. West*, 23 S. C. 154.

[2] The affidavit of Marscher showed, not only that the defendant did have property in the form of money in this state and in the hands of the deponent, and that the sheriff had served papers on him as the custodian of the property, which gave him full notice of the attachment, but it showed, further, that the sheriff had actually demanded that he surrender the money to him. On this showing the circuit judge



with good reason found as a conclusion of fact that the defendant did have money in the state in the hands of the cashier of the People's Bank.

[3] That being so, notice by the sheriff to the cashier of the attachment, and demand for the money to be paid thereon, was a sufficient service of the attachment. The statute does not require that the warrant of attachment shall be served on the person in whose hands personal property of the defendant may be found. *Grollman v. Lipsitz*, 43 S. C. 329, 21 S. E. 272. It is sufficient if he give such person notice of the attachment, and demand the surrender of the property.

[4] The circuit judge thereupon properly refused the motion to set aside the service of the summons and complaint, made on the ground that the court had not acquired jurisdiction by attachment or otherwise, and properly allowed the plaintiff to take proper steps to have the irregular and incorrect return of the sheriff corrected.

It is the judgment of this court that the judgment of the circuit court be affirmed.

GARY, C. J., and HYDRICK, J., concur.

(91 S. C. 59)

#### CLINKSCALES v. CLINKSCALES et al.

(Supreme Court of South Carolina. March 22, 1912.)

#### DEEDS (§ 124\*) — CONSTRUCTION — ESTATE CONVEYED.

A grantor executed a deed to his daughter, providing that she was to have and hold the premises described unto herself and her heirs forever, free from control and liability of any husband she might have, reserving, however, to the grantor and his widow the use of the premises for their lives and the life of the survivor, and, should the grantee die without bodily heirs, then the premises to be divided equally between her brothers and sisters, and, if any one or more of the brothers or sisters died before the grantee's death, then the bodily heirs of the deceased brother or brothers or sister should share the portion of the deceased parent. *Held*, that the deed conveyed a fee simple absolute to the grantee, subject to the reservation to the grantor and his wife, and not a defeasible or conditional fee.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 344-355, 416-435; Dec. Dig. § 124.\*]

Appeal from Common Pleas Circuit Court of Anderson County; George W. Gage, Judge.

"To be officially reported."

Action by Isabella Essa Clinkscales against John William Clinkscales and others. Judgment for plaintiff, and defendants appeal. Affirmed.

Bonham, Watkins & Allen, for appellants. Boggs & Dickson, for respondent.

WOODS, J. This appeal depends on the construction of the following language contained in a deed of conveyance from Reuben

Clinkscales to his daughter, Isabella Essa Clinkscales: "To have and to hold, all and singular the said premises before mentioned unto the said Isabella Clinkscales and her heirs forever, free from the control and liability of any husband she may have, reserving to myself and my wife, Isabel E. Clinkscales, the use and proceeds of all the crops, or income of whatever kind or description whatsoever, and should I die before my wife, I. E. Clinkscales, then she is to have the use and possession of the premises before mentioned for her maintenance and support during her lifetime, and at her death the said Isabel E. Clinkscales is to have, hold and forever thereafter occupy, possess and enjoy all and singular the said premises to her bodily heirs, to her and their only proper use, behoof and benefit forever, and should the said Isabel E. Clinkscales die without bodily heirs, then the above described premises is to be divided equally between her brothers and sisters, and should any one or more of her brothers or sisters die before her death, then the bodily heirs of the deceased brother or brothers or sister shall share the portion of the deceased parent."

The question is whether, subject to the reservation of the use of the land to the grantor and his wife, the daughter, Isabella, took a fee simple absolute, or a fee simple defeasible on her death without bodily heirs, or a fee conditional. We agree with the circuit judge that it is settled by authority that Isabella took a fee simple absolute. *Edwards v. Edwards*, 2 Strob. Eq. 101; *Allen v. Fogler*, 6 Rich. 54; *Ex parte Yown*, 17 S. C. 536; *Glenn v. Jamison*, 48 S. C. 316, 26 S. E. 677; *Chavis v. Chavis*, 57 S. C. 173, 35 S. E. 507.

It is the judgment of this court that the judgment of the circuit be affirmed.

GARY, C. J., and HYDRICK, J., concur.

(91 S. C. 127)

#### WATSON v. ATLANTIC COAST LINE R. CO.

(Supreme Court of South Carolina. March 26, 1912.)

#### MASTER AND SERVANT (§ 201\*) — INJURY TO SERVANT — MASTER'S LIABILITY — NEGLIGENCE OF FELLOW SERVANT.

An employé was entitled to recover for an injury caused by negligence of his employer in providing a defective angle cock on the air brake hose of an engine about which he worked, although the negligence of the engineer in moving the train while he was between the cars was also a proximate cause of the injury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 515-534; Dec. Dig. § 201.\*]

Appeal from Common Pleas Circuit Court of Orangeburg County; R. W. Memminger, Judge.

"To be officially reported."

Action by Moses Watson against the Atlantic Coast Line Railroad Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Moss & Lide and Henry E. Davis, for appellant. Adam H. Moss, for respondent.

WOODS, J. The plaintiff, having been caught between two cars and injured, while in the employment of the defendant as a brakeman, recovered judgment for \$600 on a complaint alleging that his injuries were due to the negligence of the defendant in providing for his use an unsafe angle cock on the hose of an air brake. The sole question made by the appeal is whether the circuit judge should have ordered a nonsuit or directed a verdict, on the ground that there was no evidence of actionable negligence on the part of the defendant.

The plaintiff testified, in substance, that he was ordered by the conductor of the freight train to which he was attached to cut off one car on the side track at Vance Station; that when the engineer had stopped the train on signal he went between the cars to cut off the rear car according to his order; that the angle cock of the air hose was defective, and so unusually hard to work that he was unable to break it; and that the delay consequent upon his effort to break the connection prevented him from getting out before the engineer moved the train and caught him between the cars.

This testimony was equivalent to the witness saying that before the accident the angle cock had been fastened too tight for ordinary and safe use; and it is this that differentiates the case from the case of *Green v. Sou. Ry.*, 72 S. C. 398, 52 S. E. 45, relied on by appellant's counsel. In that case, the engine had worked perfectly under the hand of the plaintiff an hour before the accident, and there was not a particle of evidence of any specific defect. The plaintiff testified that he did not know what caused the accident of the engine moving into an open turntable, when he intended it to move the other way, and that it might have been due to any one of five causes which he named; but there was no evidence whatever that any of these causes existed. Under these facts, the court held: "The cause of the accident is purely conjectural. There is no more reason to suppose it was due to a defect in the machine than to an unconscious error of the plaintiff in its operation, or to some other undiscoverable cause for which neither party was responsible." Here, on the contrary, the plaintiff testified to a specific defect existing before the accident, namely, that the angle cock was fastened too tight for ordinary and safe use.

The inference to be drawn from plaintiff's testimony, if true, is that his injury was caused by the negligence of the defendant in

providing a defective angle cock on its air hose, together with the negligence of the engineer in moving the train while the defendant was between the cars. But it would not defeat the action that the negligence of a fellow servant was one of the proximate causes of the injury, if that negligence was combined with the negligence of the master, another proximate cause. *Pinckney v. A. C. L. Ry. Co.*, 89 S. C. 525, 72 S. E. 394.

It is the judgment of this court that the judgment of the circuit court be affirmed.

GARY, C. J., and HYDRICK, J., concur.

(91 S. C. 71)

# WILCOX v. SOUTHERN RY. CO.

(Supreme Court of South Carolina. March 23, 1912.)

## 1. APPEAL AND ERROR (§ 839\*) — REVIEW — EXCEPTIONS—DECISION.

Const. art. 5, § 8, providing that every point made and distinctly stated in a cause and fairly arising on the record shall be considered and decided, does not prevent the appellant from abandoning an exception, nor from grouping similar exceptions.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2915, 3279-3300; Dec. Dig. § 839.\*]

## 2. CARRIERS (§ 278\*) — PASSENGERS — MISINFORMATION—TICKET COLLECTOR—AUTHORITY—QUESTION FOR JURY.

Where, in an action for damages to a passenger by misinformation, given by defendant's ticket collector, the conductor and collector had testified that it was their duty to give correct information to passengers when requested, the court could not say, as a matter of law, that the ticket collector was not acting within the scope of his authority when he undertook to give plaintiff the information in question.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1080, 1081; Dec. Dig. § 278.\*]

## 3. CARRIERS (§ 278\*)—PUNITIVE DAMAGES—INADVERTENCE — RECKLESSNESS — QUESTION FOR JURY.

In an action for damages to a passenger by misinformation as to the running of another train, given by defendant's ticket collector, whether the mistake was due to mere inadvertence, or was a reckless and wanton disregard of plaintiff's rights, so as to authorize the imposition of punitive damages, *held* for the jury.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1080, 1081; Dec. Dig. § 278.\*]

## 4. CARRIERS (§ 264\*) — PASSENGERS — MISINFORMATION—KNOWLEDGE.

Where a carrier's ticket collector gave plaintiff misinformation as to the running of a later train, plaintiff was not chargeable with knowledge that the information was not correct, because the fact that the later train had been taken off was so widely known that every passenger should have had knowledge thereof.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1037-1039; Dec. Dig. § 264.\*]

## 5. DAMAGES (§ 215\*)—INSTRUCTIONS.

In an action for delay of a passenger by misinformation, given by defendant's ticket collector, the court fully charged as to the difference between actual damages for mere negligence and punitive damages for willfulness, and then instructed that in assessing punitive damages the jury might take into consideration inconvenience, annoyance, delay, and humiliation

caused plaintiff by any alleged and proved unlawful act of the defendant. *Held*, that such instruction was not misleading as inducing the jury to allow punitive damages for mere negligence, which was unlawful, as well as for recklessness, wanton, and willful conduct.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. §§ 543-547; Dec. Dig. § 215.\*]

6. TRIAL (§ 193\*) — INSTRUCTIONS — OPINION OF JUDGE.

Where, in an action for damages to a passenger by misinformation, given by defendant's ticket collector, there was evidence that the information was recklessly and willfully given, an instruction that the jury might infer willfulness or wantonness from the facts in the case, and impose punitive damages, was proper.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 436-438; Dec. Dig. § 193.\*]

7. DAMAGES (§ 215\*) — PUNITIVE DAMAGES — INSTRUCTIONS.

An instruction that the jury has discretion in fixing the amount which shall be awarded by way of exemplary damages, but that it is not in their discretion to refuse to award any exemplary damages where a case is made which, in law, justifies such damages, was proper.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. §§ 543-547; Dec. Dig. § 215.\*]

8. CARRIERS (§ 264\*) — SERVANTS — MISINFORMATION.

Where a conductor or person in charge of a carrier's train gives wrong information to a passenger, on which the passenger honestly acts, and the giving of such information is careless and negligent, and is the direct and proximate cause of an injury to the passenger, then he is entitled to recover such actual damages as he has sustained proportionate to the injury.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 1037-1039; Dec. Dig. § 264.\*]

9. CARRIERS (§ 278\*) — TRANSPORTATION OF PASSENGERS — MISINFORMATION — DAMAGES.

Where a passenger was caused to leave the train by misinformation of the carrier's ticket collector that he might take a later train and reach his destination in time to keep an appointment the next day, when in fact the later train had been abandoned, he was not barred from recovering damages, because he might have taken another route and reached his destination in time for his appointment, as a matter of law.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 1080, 1081; Dec. Dig. § 278.\*]

Woods, J., dissenting.

Appeal from Common Pleas Circuit Court of Union County; R. C. Watts, Judge.

Action by J. P. Wilcox against the Southern Railway Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Sanders & De Pass, for appellant. J. G. Hughes, for respondent.

FRASER, J. This is an action by the plaintiff respondent against the defendant appellant for damages arising out of alleged misinformation given to the plaintiff by the agent of the defendant.

The plaintiff, being in the city of Columbia, S. C., purchased of the agent of the defendant a ticket from Columbia, S. C., to Atlanta, Ga., over defendant's road by Spartanburg. The plaintiff claims that on

the way between Columbia and Spartanburg, and before he reached Union, S. C., he learned that he would have to wait in Spartanburg seven hours; that he inquired of the ticket collector of the defendant on the train if he could stop at Union and take a later train on defendant's road that would allow him to catch the train from Spartanburg to Atlanta; that the ticket collector was the only agent of defendant he saw on the train, and the ticket collector told him there was a later train, by which he could catch the train from Spartanburg to Atlanta; that he explained to the ticket collector that it was necessary for him to catch the Atlanta train that night; that the ticket collector had already "punched the ticket to Spartanburg," but took it back and made an entry on it to indicate that it had been used only to Union, and returned it to the plaintiff; that, relying upon the information that he had received from the ticket collector, he left the train at Union; that later in the day he found that there was no train until the next day, and he did not get to Atlanta until too late to transact his business, and thereby lost the sale of goods and his profits thereon, was put to expense occasioned by his delay in Union, etc.

The defendant admitted that the plaintiff was a passenger on said train, and that he disembarked from said train at Union, but denies that the plaintiff was damaged, or that he was misinformed by the ticket collector. The defendant contends that the ticket collector had no authority to furnish any information as to the running of trains; that his sole business was to take up the tickets; that the plaintiff could easily have obtained the information from its agent in Columbia, or from printed folders, or the State newspaper, in which the running of its trains was published; that the plaintiff was careless and negligent in not procuring necessary information before disembarking at Union, and it was his duty to minimize his damage, and he could have done so by taking a train on the Seaboard Air Line Railroad, which would have enabled him to get to Atlanta in time to meet his appointments, if he had any. The defendant further claims that the plaintiff purchased an interstate ticket, and by the rules of the Interstate Commerce Commission, no stop-over was allowed, except for sickness.

[1] There are 13 exceptions and many subdivisions. The Constitution (article 5, § 8) provides: "That every point made and distinctly stated in the cause and fairly arising upon the record of the case, shall be considered and decided." This does not prevent an appellant from abandoning an exception, nor the grouping of similar exceptions. This practice of grouping exceptions is to be commended. It enables the court to decide principles of law for the

guidance of people in future transactions. In the argument, the appellant has made 7 groups, and we will adopt his grouping.

[2] 1. Appellant complains that his honor erred in allowing the plaintiff to introduce evidence tending to prove a promise or statement on the part of the ticket collector, to the effect that the plaintiff would be allowed to stop over and take a later train on the same day in time to make his connection in Spartanburg that night; the objection being: (a) That plaintiff was traveling on an interstate ticket. The question as to plaintiff's right under an interstate ticket does not arise in this case. If the plaintiff had undertaken to use that ticket between Union and Spartanburg, and it had been refused, then the question would have arisen; but plaintiff did not attempt to use the ticket, and the effect of a stop-over is not germane to the issue here. (b) Plaintiff objects further to the conversation with the ticket collector, on the ground that the ticket collector's duties and agency were confined to collecting fares of passengers on this particular train, and he had no authority to make statements in reference to the running of other trains, and seems to further limit the collector's right to furnish information as to trains that do run, and not to trains that do not run.

In the case of *Ford v. Railroad*, 75 S. C. 289, 290, 55 S. E. 448, the court held the railroad company responsible for misinformation, even though it was given by the flagman. In the case now before us, the evidence shows the following: "Q. And it is a matter of duty to give—? A. We would naturally do that; give the information. We would not give the erroneous information. Q. Is it your duty to give the information when asked, though? A. Yes, sir; correct information." This was the testimony of the defendant's witness and the conductor in charge of the train. In the examination of Mr. Bryan, the ticket collector, when he was examined on the same subject, said, in reply to the question, "Q. It was your duty to do it? A. Yes, sir." In view of this case and this testimony, this court cannot say, as a matter of law, that the ticket collector was not acting within the scope of his authority when he undertook to give the information. This group is overruled.

[3] 2. The second statement of error is that his honor ought to have directed the verdict to be rendered in favor of defendant on the question of punitive damages, and not have submitted this question to the jury. We cannot see that his honor was in error here. Whether this information was mere inadvertence, or a reckless, wanton disregard of the plaintiff's rights, was a question for the jury, and his honor, the presiding judge, had no right to take that question from the jury.

[4] The appellant thinks that the fact

that the later train had been taken off was so widely known that every passenger ought to have known it. If the passenger ought to have known it, certainly the ticket collector ought to have known it. Now, whether the plaintiff asked the question or no, whether the ticket collector answered recklessly and wantonly, or because he did not hear or understand the question, were questions for the jury, and his honor had no right to take the question from them. Conduct may be so reckless that a jury may be warranted in saying that it was a willful disregard of duty, and these facts were for the jury, and not for the court.

[5] 3. The appellant complains:

"His honor, it is respectfully submitted, erred in his charge in the following particulars:

"(a) In instructing the jury, at the request of the plaintiff, as follows: '(14) In assessing punitive damages, the jury may take into consideration inconvenience, annoyance, delay, and humiliation caused plaintiff by any alleged and proved unlawful act of the defendant.'"

The error complained of is in the use of the term "any alleged and proved unlawful act of the defendant," thereby allowing the plaintiff to recover punitive damages for mere negligence, which was unlawful, as well as for reckless, wanton, and willful conduct. This instruction was commenced with the words "In assessing punitive damages," and simply told the jury the elements which went to make up punitive damages. His honor had already fully instructed the jury as to the difference between actual damages for mere negligence and punitive damages for willfulness. The charge was remarkably strong and clear. The language is as follows: "If the ticket collector or conductor intentionally and knowingly, or maliciously or willfully, misinformed him, and it was a willful, intentional, malicious act on their part, and did advertently and intentionally give him the wrong information, in order to embarrass him, then, under circumstances of that sort, if you think that he was damaged, and it was a willful, high-handed, outrageous, intentional invasion of his right, and they intentionally and knowingly misled him, and they did it on purpose, and advertently did it, then, under circumstances of that sort, he would be entitled to recover, not only such actual damages as he sustained, but such damages in the way of punishment as you see fit to award him under all the testimony in the case." His honor had also told the jury: "If, however, the agent of the defendant company carelessly and negligently misinformed him and told him there was another train coming, and he acted on that, and that was the direct proximate cause of any actual damage to him in his purse, then, under circumstances of that sort, he would

be entitled to recover any actual damages he sustained proportionate to the injuries sustained." It is hard to see how the jury could have been misled by the charge, which was intended merely to set out the elements of punitive damages.

[6] (b) Appellant complains that his honor also erred in charging the plaintiff's tenth request, to wit: "The jury may infer willfulness or wantonness from the facts in the case."

This point is settled by what we have said before. If there were facts from which the jury might infer willfulness or wantonness, there was no error in the charge. If the jury may, then they may not, and this does not indicate any opinion. This subdivision is overruled.

The appellant further complains:

"(c) His honor erred in charging plaintiff's twelfth request, to wit: '(12) If a conductor or other agent of a railroad company gives a passenger information as to his journey and connections, it is his duty to give correct information; and if the jury finds that the passenger was misled through information negligently, carelessly, or recklessly given by such agent of the railroad company, then the railroad company is liable, and the jury may award both actual and punitive damages, not exceeding the sum sued for.'"

This question has already been settled above by reference to the testimony and the Ford Case. Besides, his honor modified the request as follows: "I charge you that with this modification they can award actual damages, where the proof makes out a case of actual damages, and, in addition, they can award punitive damages where the facts make out such a case, showing a willful, wanton, and high-handed invasion of the plaintiff's rights, and such a case as, under the law as I have given it to you, the plaintiff would be entitled to punitive damages."

[7] 4. Appellant complains: "But, in any event, we submit his honor erred in charging the plaintiff's fifth request, to wit: '(5) The jury has a discretion in fixing the amount which shall be awarded by way of exemplary damages, but it is not within their discretion to refuse to award any exemplary damages where a case is made which, in law, justified such damages.'"

Appellant complains that his honor ought to have said "might award," and that it was in the discretion of the jury, even though willfulness, wantonness, and intentional wrong were proved, not to give punitive damages. This question is settled in this state in the case of *Dagnall v. Southern Railway*, 69 S. C. 116, 48 S. E. 97, where the court reaffirms the case of *Griffin v. Southern Railway*, in 65 S. C. 127, 43 S. E. 447, and says, speaking by Mr. Justice Gary: "The plaintiff is as much entitled to the damages

arising from an act of intentional wrong as those growing out of negligence." This subdivision is overruled.

[8] 5. Appellant says: "The point raised by our seventh exception has already been fully discussed under our second proposition. We respectfully ask the court's attention to that portion of appellant's argument."

The remarks of the presiding judge fully cover the point, and we quote the request to charge and his honor's remarks: "(7) If a railway company does publish its schedules, giving the time for the departure and arrival of its trains, then, if a passenger intending to go from one point to another does enter into a contract with such railway company to be carried as a passenger and purchases a ticket, and enters into a contract with the railway company for a continuous journey from one point to another, and gets on a train which would carry him to his destination, then, if the evidence shows that there was no other train scheduled to leave such point on the same day, I charge and instruct you that a mere conductor has no authority, after such journey is commenced, to enter into a contract with such passenger for his being transported from some intermediate station at a later hour." And in response to this request charged as follows: "I refuse to charge you that—the latter part of it; the first part is good law. But as to whether or not the conductor in this case, or the party in charge of the train, gave wrong information to the plaintiff upon which he acted, and if he honestly acted upon that, and it was carelessness and negligence on the part of the conductor in giving that information, and that carelessness and negligence on their part was the direct and proximate cause of any injury to the plaintiff, then, under circumstances of that sort, he would be entitled to recover such actual damages that he sustained in proportion to the injury sustained." This subdivision is overruled.

6. Appellant says: "We have already discussed the power and authority of a mere ticket collector to bind the defendant by statement or promise made in reference to a train which was not scheduled to run, and shall not repeat the argument here. If the ticket collector, as we contend, has no authority to bind the railroad by any such statement or promise, then the requests brought in our seventh and eighth requests \* \* \* were sound, and should have been charged without modification."

What we have said before is applicable here; and this group is overruled. This was not a contract to carry the plaintiff from Union to Spartanburg on a special train; it simply was a question as to whether the plaintiff had been misinformed or no, and that question was for the jury.

[9] The seventh and last specification of error was as follows:

"In any event, his honor should have granted a new trial for the following reasons: (a) The verdict was contrary to the law, as given by the court. His honor instructed the jury, as requested by defendant in its thirteenth request, to wit: '(13) I charge and instruct you that it is the duty of one to use all reasonable means at his command to lessen his injury, and if the evidence shows that a person failed to do this, when, had he used the means at his command, no injuries would have come to him, then he cannot recover damages.'"

Appellant claims that the plaintiff could have gone from Union to Atlanta by another route and have gotten there in time to keep his appointment, and that it was his duty to have done so and have lessened his damage, if practicable. Could he have gone by that route? Did he know of it? Did he have the means to go? Did the train actually go that night? These were questions for the jury, and we cannot say, any more than his honor, the presiding judge, whether the plaintiff ought to have gone by the Seaboard Air Line or not; and this subdivision is overruled.

Appellant objects: "(b) Because his honor should at least have reduced the verdict to the actual loss of the plaintiff."

That may be, if there were not some evidence to carry the case to the jury on the question of willfulness and recklessness; but that was a question for the jury.

The judgment of this court is that the judgment of the circuit court be, and the same is hereby, affirmed.

GARY, C. J., and HYDRICK, J., concur. WATTS, J., disqualified.

WOODS, J. (dissenting). The only allegation in the complaint of a willful and wanton violation of the rights of the plaintiff is that the conductor or ticket collector on the train willfully and wantonly gave the plaintiff incorrect information as to the time within which he could leave Union and reach Atlanta on one of defendant's trains. There is no evidence whatever supporting this allegation. On the contrary, the plaintiff's own evidence shows that the ticket collector treated him with a courtesy and consideration which negatived any intention to disregard his rights as a passenger. The ticket collector, according to plaintiff's evidence, misled the plaintiff by his erroneous statement as to the defendant's schedules, and for the consequences of the error the passenger was entitled to recover his actual damages; but the error of the ticket collector should not be held malicious, or willful, or wanton, without evidence that it was so, either extraneous, or in the circumstances under which the error

was committed. The many errors of men are looked upon as mistakes due to human fallibility or to negligence, unless there is some evidence, either direct or circumstantial, of malice, or willfulness, or wantonness. Neither in ethics nor law is there place for the harsh rule that malicious or willful or wanton disregard of the rights of others is to be presumed from proof of a mere error or mistake.

I think the judgment of the circuit court should be reversed.

(91 S. C. 81)

#### FOURTH NAT. BANK OF GREENVILLE v. CITY OF GREENVILLE

(Supreme Court of South Carolina. March 25, 1912.)

#### 1. TAXATION (§ 608\*)—TAXES—STAY OF COLLECTION.

Under Civ. Code 1902, § 412, and Act Feb. 26, 1902 (23 St. at Large, p. 972), an injunction will not lie to stay the collection of a city tax illegally imposed on a national bank.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1230-1241; Dec. Dig. § 608.\*]

#### 2. TAXATION (§ 542\*)—PAYMENT UNDER PROTEST—RECOVERY.

Where a city tax, illegally assessed against a national bank, could not be enjoined, the bank was entitled to pay the same under protest before penalty attached or an execution had been issued to enforce its collection; and, having done so, a suit to recover the tax was not subject to defense, on the ground that it had been voluntarily paid.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1003-1005; Dec. Dig. § 542.\*]

#### 3. MUNICIPAL CORPORATIONS (§ 966\*)—NATIONAL BANKS—ASSESSMENT.

Where a national bank was organized in July, 1908, and in February, 1909, lodged with the county auditor a list of its stockholders, as provided by Civ. Code 1902, § 316, against whom taxes for 1909 were assessed, the city in which the bank was located was required to collect its taxes from the stockholders of the bank on the assessment as finally determined by the county board of equalization, and had no authority to assess a tax against the bank, against which no tax was assessed on the county rolls.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 2045-2061; Dec. Dig. § 966.\*]

Appeal from Common Pleas Circuit Court of Greenville County; Geo. W. Gage, Judge.

Action by the Fourth National Bank of Greenville against the City of Greenville. Judgment for plaintiff, and defendant appeals. Affirmed.

The following is the opinion of the trial judge:

"This is an action at law to recover \$912.64 tax money, which the plaintiff claims the defendant wrongly exacted from it in the month of May, 1909.

"At the conclusion of the plaintiff's testimony, the defendant offering none, but relying on the same facts proved by the plaintiff, both sides moved for the direction of a ver-

dict. It therefore appeared that there was no issue of fact for the jury; so I discharged the jury and heard argument on the issues of law.

"The plaintiff started business at Greenville July, 1908. In February, 1909, the plaintiff lodged with the county auditor a list of its stockholders, so that such stockholders might be taxed on their shares. It was the practice of the defendant when it came, for instance, to levy the tax for 1909, to levy it on the auditor's duplicate for 1908, instead of that for 1909. But in the case at bar, the plaintiff or its stockholders did not appear on that duplicate; for the bank had not organized when the duplicate for 1908 was made up.

"It was also the defendant's practice, by a committee of assessors, to add to the auditor's duplicate such taxpayers' names as they should discover liable to taxation, but not on the auditor's duplicate. By this practice, they added in 1909, in the early months of it, some 300 names, representing some \$200,000 of property, onto the duplicate for 1908. At the time the tax was actually collected, in May, 1909, the plaintiff's name was not on the county auditor's duplicate; for that book was not completely made up until the month of August, 1909. The plaintiff's name and property were therefore written by the city assessors into the copy of the auditor's duplicate, of 1908, which the city had.

"The defendant based its motion for direction of a verdict on five grounds; but there are really only three grounds, to wit: (1) That an action like this can only be maintained when it is warranted by statute; and there is no such statute about city taxes, but only state and county. (2) That the payment of the tax was not involuntary as that word has been construed by the courts. (3) That there is no justice in the plaintiff's case; for the plaintiff was liable for city taxes for 1909.

"The statute law on the subject consists in sections 412 and 413 of the Code of Laws and the act of February, 1902, at 23 Stats. 972. This law clearly has reference to city taxes, as well as county taxes; so by its own terms and so by our courts. This law prohibits any order to stay the collection of taxes: and it gives to the person from whom an illegal tax may be exacted the right to pay under protest and recover back the tax by a suit at law. [Western Union Tel. Co. v. Winnsboro] 71 S. C. 231 [50 S. E. 870]; [Wood-Mendenhall Co. v. City of Greer] 88 S. C. 249 [70 S. E. 724]. If that be, then the able argument of the defendant's counsel, about involuntary payment, falls to the ground. But for the statute, the reasoning of counsel and the high authorities which he cited would be conclusive of his contention.

"Is the plaintiff's action against the justice of the case?

"The plaintiff was not liable for taxes for

the year 1908, for it had not started business on the 1st of January of that year, the time when property is required to be listed for taxation. The plaintiff only began business in July, 1908.

"It is true the plaintiff was liable for taxes for 1909; but liable only according to the law of the land, and not according to the unwarranted practice of the defendant. The plaintiff followed the law; it returned for taxation its shares at the right time, in the right way, and in the right place.

"The defendant's duty was to make a copy of the county auditor's duplicate for 1909, and levy its taxes thereon for 1909. The defendant did not do that, but made up a list of taxpayers from two sources, one the county auditor's duplicate for 1908, and the other a report of a committee of assessors designated by the city council. There was no legal warrant for such a procedure, and the tax collected thereby is an illegal tax. Penalty ought always to follow a breach of the law, and, if it does so in this case, the fault is not the plaintiff's but the defendant's.

"I am therefore of the opinion that the plaintiff is entitled to recover judgment against the defendant for \$912.64, with interest from the 10th of May, 1909; and it is so ordered."

Defendant's exceptions are as follows:

"The defendant appeals from the judgment in this case upon the following exceptions:

"(1) The presiding judge erred in refusing to direct a verdict in favor of the defendant upon the following ground: An action for the recovery of taxes illegally or wrongfully assessed or levied can be maintained only under two conditions: (a) Where by statute such action is specifically allowed and provided for; and (b) where there is no such statute, and it appears that the taxes have been paid involuntarily, in the legal sense of the term, and in the absence of an adequate remedy to the complaining taxpayer.

"(2) The presiding judge erred in refusing to direct a verdict in favor of the defendant upon the following ground: There is no statute authorizing the institution of an action against a municipality for the recovery of taxes alleged to have been illegally or wrongfully assessed or levied. Section 413 of the Civil Code applies only to taxes collected by county treasurers.

"(3) The presiding judge erred in refusing to direct a verdict in favor of the defendant upon the following ground: The complaint and testimony show that the plaintiff paid an alleged illegal demand with full knowledge of all the facts which might render such demand illegal; that there was no immediate and urgent necessity for such payment; that it was not made to relieve its property from detention, or to prevent an immediate seizure thereof. Such payment, therefore, must be deemed in law a voluntary payment and cannot be recovered back,

in the absence of a statute authorizing such recovery.

"(4) The presiding judge erred in refusing to direct a verdict in favor of the defendant upon the following ground: The plaintiff had an adequate remedy before paying such taxes to test the validity of the assessment and levy by injunction. Section 413 making no provision for the recovery of municipal taxes wrongfully or illegally assessed or levied, section 412, providing that an injunction shall not be issued restraining the collection of municipal taxes for any cause, is unconstitutional, in that it abridges the constitutional power of the court of equity and the jurisdiction of the Supreme Court to issue an injunction against the enforcement of wrongful or illegal municipal taxes, where the Legislature has provided no adequate remedy for the oppressed taxpayer.

"(5) The presiding judge erred in refusing to direct a verdict in favor of the defendant upon the following ground: Even if section 413 were applicable, relief can be obtained under it only in cases where it is made to appear that the taxes were wrongfully or illegally collected for some reason going to the merits of the question. The plaintiff's testimony, at most, shows that the levying of the tax in question upon the plaintiff for the year 1909 was a mere irregularity, upon an assessment less than the assessment for state and county taxes for 1909, upon which the plaintiff claims it should have been levied; and that, if allowed to recover the taxes paid by it for 1909, the plaintiff will have been relieved entirely of all municipal taxes from July 20, 1908, to January 1, 1910.

"(6) The presiding judge erred in holding that sections 412 and 413 of the Code of Laws and the act of February, 1902, 23 Stat. 972, have reference to city taxes, as well as county taxes; whereas, he should have held that section 413 applies only to taxes collected by county treasurers; and that section 412, in so far as it purports to prohibit the issuance of an injunction against the collection of municipal taxes illegally levied or assessed, is unconstitutional, in that it abridges the constitutional jurisdiction of a court of equity to enjoin the enforcement of an alleged municipal tax, where no other adequate remedy is provided by law for the relief of the taxpayer against such tax.

"(7) The presiding judge erred in holding that section 412 prohibits any order to stay the collection of municipal taxes, and that section 413 gives to the person from whom an illegal tax may be exacted the right to pay under protest and recover the taxes by a suit at law. Section 413 has no application to municipal taxes; no adequate remedy is provided by statute for the recovery of municipal taxes illegally exacted. Section 412, in so far as it purports to prohibit an injunction against the collection of municipal taxes, is unconstitutional, in that it deprives

the court of equity of the constitutional right to issue an injunction against the collection of illegal taxes, where no adequate remedy is provided by statute for the aggrieved taxpayer.

"(8) The presiding judge erred in holding that the plaintiff could proceed and had the right to recover back the taxes paid under protest by virtue of the provisions of section 413, and that the defendant's contention that the tax was not paid involuntarily falls to the ground.

"(9) The presiding judge erred in holding that defendant's answer alleged nothing else than that the defendant had complied with the law; on the contrary, the answer denies the allegations of the complaint; and the defendant was entitled to rely in support of such defense upon the grounds that there is no statute authorizing the institution of an action against a municipality for the recovery of taxes alleged to have been illegally or wrongfully assessed or levied, and upon the ground that the payment of the taxes by the plaintiff was not involuntary.

"(10) The presiding judge erred in holding that the tax collected by the defendant was an illegal tax; whereas, he should have held that, at most, the tax was irregularly levied, assessed, and collected.

"(11) The presiding judge erred in not holding that, this being an action for money had and received, the same was subject to the defense assimilated to the defense in equity, that recovery will not be allowed, except, in case where *ex æquo et bono* the plaintiff establishes his right thereto; that he should have held that the assessment, levying, and collection of the taxes in question upon the plaintiff for the year 1909 was a mere irregularity, upon an assessment less than the assessment for state and county taxes for 1909, upon which the plaintiff claims it should have been levied; and that if allowed to recover back the taxes paid by it for 1909 the plaintiff will have been relieved entirely of all municipal taxes from July 20, 1908, to January 1, 1910.

"(12) That the presiding judge erred in holding that the plaintiff is entitled to recover judgment against the defendant for \$912.64, with interest from the 10th of May, 1909, and in ordering judgment therefor."

Cothran, Dean & Cothran, for appellant.  
J. J. McSwain, for respondent.

WATTS, J. This action was instituted in the court of common pleas for Greenville county on March 5, 1910, for the recovery of \$912.64, with interest from May 10, 1909, on account of municipal taxes alleged to have been wrongfully and unlawfully collected by the defendant from the plaintiff on May 10, 1909, and paid under protest.

The plaintiff's claim is based upon these facts: As a national bank, it was organized



and started business in July, 1908. In February, 1909, it lodged with the county auditor a list of its stockholders, in conformity with section 316, vol. 1, Code of Laws, and section 5219, U. S. Rev. St. (U. S. Comp. St. 1901, p. 3502), upon which taxes for 1909 were to be assessed at the valuation of \$56,525, as afterwards fixed. The city taxes at that time were collectible in January and February of each year, instead of in the fall as state and county taxes are. Assessment rolls are made up by auditor, usually in August, for state and county purposes. The city authorities had fallen in the custom of adopting the assessments for state and county taxes of the year previous, and adding thereto, through a committee of assessors, property acquired during the previous year, and not upon the assessment roll of that year. During January, 1909, the property of the plaintiff did not appear upon the county duplicate for 1908, and was assessed, or attempted to be assessed, by the local assessors at \$55,200, and added to the copy of the county duplicate used for the collection of city taxes. The payment of city taxes, without penalty, was extended from time to time; the last period expiring May 10, 1909. No execution was issued against plaintiff. On May 10, 1909, plaintiff paid taxes and took a receipt; the same showing taxes were paid under protest. On March 5, 1910, this action was commenced.

The plaintiff attacks the tax upon the ground that the entry upon the tax book of the city was unauthorized, and that the stockholders, and not the bank, were liable for city taxes. Upon the close of plaintiff's testimony, the defendant offering none, both sides asked for a directed verdict. The circuit judge held that there were no issues of fact for the jury and withdrew the case from the jury, heard argument upon the legal issues, and subsequently filed his decree, rendering judgment for the plaintiff for the full amount demanded. Defendant appeals upon substantially the same grounds he asked the court to direct a verdict on, and plaintiff asks affirmance of decree on additional grounds, as well as those which Judge Gage based his decree on. Judge Gage's decree sets out the case fully, and should be reported with the exceptions with the case.

[1, 2] As to the first exception, we see nothing in this. As pointed out by Judge Gage, the statute law on the subject consists in sections 412 and 413, Code of Laws, and the act of February, 1902, at 23 Statutes, p. 972, and clearly refers to city taxes, as well as county taxes, and has been so construed by this court in *Telegraph Co. v. Winnsboro*, 71 S. C. 235, 50 S. E. 870, and in the case of *Wood Mendenhall Co. v. City of Greer*, 88 S. C. 251, 70 S. E. 724. It was not a cheerful and voluntary payment on the part of

the plaintiff, but more in the nature of extortion or a holdup under forms of law. It paid under protest, as under the laws it could not stay the collection of taxes by application to the courts. In order to prevent the penalty that would have been added and the issuance of execution to enforce the collection, the plaintiff exercised the remedy given it when an illegal tax was attempted to be exacted, paid it under protest, and brought suit at law.

[3] As to the third ground, we cannot add anything to what has been so well expressed by Judge Gage in reference to this ground: "The city of Greenville is required by law to collect its taxes from the stockholders of the bank on the assessment as finally determined by the county board of equalization, and may still collect from the stockholders under that assessment the taxes for the year 1909. *Milster v. Spartanburg*, 68 S. C. 26 [46 S. C. 539]."

The exceptions are overruled, and judgment of the circuit court affirmed.

GARY, C. J., and WOODS, HYDRICK, and FRASER, JJ., concur.

(21 S. C. 61)

#### FERGUSON v. SOUTHERN RY. CO.

(Supreme Court of South Carolina. March 23, 1912.)

#### 1. CARRIERS (§ 119\*)—LOSS OF GOODS—VIA MAJOR.

Where goods in the possession of a carrier are injured through act of God, the carrier is not liable, unless it was also negligent, and, but for such negligence, the injury would not have occurred, notwithstanding the act of God.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 523-530; Dec. Dig. § 119.\*]

#### 2. CARRIERS (§ 132\*)—INJURY TO GOODS—ACT OF GOD—BURDEN OF PROOF.

Where a carrier claims freedom from liability for loss of goods on the ground that the loss was caused by an act of God, the burden is on it to show that the act of God was the sole cause of the loss.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 578-582, 605; Dec. Dig. § 132.\*]

#### 3. CARRIERS (§ 119\*)—LOSS OF GOODS—ACT OF GOD—EXTRAORDINARY FLOOD.

While an extraordinary flood, causing the loss of goods in the possession of a carrier, is an act of God, whether it will relieve the carrier from liability depends on whether its results or natural consequences could, by the exercise of reasonable foresight and prudence, have been guarded against.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 523-530; Dec. Dig. § 119.\*]

#### 4. CARRIERS (§ 136\*)—LOSS OF GOODS—EXTRAORDINARY FLOOD—NEGLIGENCE—EVIDENCE—QUESTION FOR JURY.

In an action for loss of goods while in the possession of a carrier by an extraordinary flood, evidence held to require submission to the jury of the question whether the carrier by ordinary care might have anticipated the injury and guarded against the same by a timely move-

ment of the cars in which the goods were stored to a place of safety.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 478, 596-598; Dec. Dig. § 136.\*]

Appeal from Common Pleas Circuit Court of York County; Ernest Moore, Special Judge.

"To be officially reported."

Action by W. E. Ferguson against the Southern Railway Company. Judgment for plaintiff, and defendant appeals. Affirmed.

B. L. Abney and McDonald & McDonald, for appellant. Hart & Hart and John R. Hart, for respondent.

HYDRICK, J. Plaintiff recovered judgment against defendant for \$34, the value of a lost shipment of sugar and rice consigned to him at Yorkville, S. C., by the Tiedeman Company of Charleston, S. C., on August 24, 1908, and also the penalty of \$50 provided by statute for the failure of defendant to pay the claim therefor within the time fixed by the statute after the filing thereof. Defendant admitted the loss of the goods, while in its possession, at Kingville, S. C., on August 28, 1908, and undertook to excuse itself from liability by showing that they were destroyed by the act of God, without any fault on its part. At the close of all the testimony, defendant moved the court to direct the verdict in its favor, on the ground that no reasonable inference could be drawn from the testimony, other than that the plaintiff's goods had been destroyed by an unprecedented flood, without any negligence on its part. The court ruled that the flood which destroyed the goods was indeed unprecedented, and was therefore the act of God, but refused the motion, holding that the testimony was susceptible of more than one inference upon the question whether defendant's negligence contributed to the loss. Counsel on both sides agree that the sole question for the consideration of this court is whether there was error in this ruling.

Before considering this question, we desire to notice a proposition announced in the charge which excluded from the consideration of the jury, as an element of negligence of the defendant, the fact that the goods may have been at the place where they were destroyed by reason of negligent delay in their transportation; the court holding that such delay, if proved, was only a remote and not a proximate cause of the loss. Appellant's attorneys cite numerous authorities to sustain this proposition, among others, Slater v. Railway, 29 S. C. 96, 6 S. E. 936; Sonneborn v. Railway, 65 S. C. 502, 44 S. E. 77; Lipford v. Railroad Co., 7 Rich. 409. Neither of these cases sustains the proposition. If anything, the language used in the opinion in the Slater Case, quoted below, makes more strongly against it than for it.

See, also, Campbell v. Morse, Harp. 468. The question is one upon which the authorities elsewhere are divided, and we have found no case in which it has ever been decided by this court, and, as it is not necessary to the decision of this case, we pass it without further comment, except that we must not be understood as approving or disapproving the statement of the law on this subject as made by the court below. We regard the question as still an open one in this state.

[1, 2] The rule upon which this case must be decided was stated thus in Slater v. Railway: "Where an act of God causes injury to property in the hands of a common carrier, and such act is the sole cause of such injury, then the proof of this fact is a perfect shield. But if there be any negligence on the part of the carrier, which, if it had not been present, the injury would not have happened, notwithstanding the act of God, the carrier cannot escape responsibility. And the onus is upon the carrier to show, not only that the act of God was the cause, but that it was the entire cause, because it is only when the act of God is the *entire* cause that the carrier can be shielded."

Before proceeding to a consideration of the testimony, we state some of the principles which should guide the court in deciding whether there is any evidence of negligence on the part of a defendant in a case like this, and which should likewise guide the jury in passing upon its sufficiency, and in determining whether it preponderates.

In 1 Thomp. on Neg. § 28, the author says: "In determining whether the due degree of care has been exercised in any situation, reference must be made to the facts and surroundings of that situation, and the question cannot be determined by abstract theorizing or idealizing. The question must be looked at as the defendant might have looked at it, situated as he was, and surrounded as he was. The jury ought to determine it by their foresight, and not by their hindsight. Speaking with reference to this question, it has been quaintly reasoned that the fact that, after an injury occurs by accident, some man of genius discovers a superior method of preventing such accidents does not show negligence in failing to use such method of prevention. Accordingly, that which never happened before, and which in its character is such that it would not naturally occur to prudent men to guard against its happening, cannot, when, in the course of years, it does happen, furnish good grounds for a charge of negligence in not foreseeing its possible happening, and guarding against that remote contingency."

In Cornman v. Eastern Counties R. Co., 4 H. & N. 786, Bramwell, B., said: "In such a case, it is always a question whether the mischief could have been reasonably fore-

seen. Nothing is so easy as to be wise after the event."

In 21 A. & E. Enc. L. (2d Ed.), it is said: "The mere fact that an injury might have been avoided by the adoption of certain precautions does not prove that there was fault in failing to anticipate and provide against it. Nor is the fact that after the occurrence of an accident it is seen that such accident might have been easily guarded against conclusive of negligence. Thus, where the possibility of a particular occurrence is demonstrated only its happening, there is no liability in negligence. But the fact that no such accident as the one complained of had ever happened before is not, of course, conclusive of the fact that there was no negligence."

[3] In volume 13 of the same work, page 721, it is said: "An extraordinary flood is to be classed among the acts of God which no human power can prevent or avert. Whether it will relieve the carrier from liability depends upon whether its results or natural consequences could, by the exercise of reasonable foresight and prudence, have been foreseen and guarded against. If the emergency was one that no human sagacity, guided by any of the known principles of human reasoning, could have anticipated, the carrier will be relieved. If, on the other hand, its effects might have been foreseen by the exercise of reasonable diligence and prudence, a failure to do so would be negligence and subject the carrier to damages, although the original cause was the act of God."

And on page 722 of the same volume this rule is stated: "If a carrier discovers that goods intrusted to his care are in peril of injury or destruction by a flood, then it becomes his duty to use actively and energetically all the means at his command, or which it might be reasonably expected that one engaged in such business would possess, to meet the emergency and save the property from injury, and any neglect to use the means stated above which prudent, skillful men in that business might ordinarily be expected to use in such an emergency will subject the carrier to liability."

It requires no citation of authority to sustain the proposition that, after a carrier has discovered, or by the exercise of reasonable prudence and diligence should have discovered, that goods in his possession are subject to the perils of an unprecedented flood, or other vis major, it is his duty to exercise reasonable care and diligence to save them from damage or loss.

[4] The testimony covers some 240 pages of the "case," and, while there are some differences between the witnesses as to minor details, the material facts are practically undisputed; yet it would be difficult, if not impossible, to set forth in a brief statement of the testimony—and nothing more can be attempted in this opinion—the settings and colorings of the case in the lights in which it appears from a reading of all the testi-

mony. Neither can the minor details, which impress the mind as the testimony is read, be clearly brought out in such a synopsis.

Plaintiff's goods were destroyed at Kingville, which is a station on defendant's road from Columbia to Charleston, and is the point of junction of that road with another road operated by defendant, running to Marion, N. C., via Camden and Yorkville, the destination of plaintiff's goods. Kingville is situated in the fork of the Congaree and Wateree rivers, which unite about seven or eight miles below to form the Santee. It is between three and four miles from the Congaree, and from five to seven miles from the Wateree. It is in the edge of the swamp of the Congaree, and the land between it and each of the rivers is low, flat, swamp land, subject to inundations by freshets. The station is built upon made land, and the railroad tracks are raised several feet above the adjacent swamps by embankments and trestles. The rivers meet approximately at right angles. Just below their confluence, there is a high bluff on one side, and the highlands come down pretty close on the other, so that the swamp is narrow. Therefore, in times of very high water in both rivers, the passage is inadequate, and the waters are dammed up and thrown back in the swamp above.

Besides the two lines mentioned, the defendant operates other roads in the state which pretty well cover the territory traversed by those rivers and their tributaries, which form the Congaree and Wateree, and it has along its roads telegraph lines as a means of communicating intelligence as to conditions affecting the proper operation thereof. The United States government has a weather bureau at Columbia which co-operates with the railroads in obtaining and sending out information relative to the physical conditions which affect the operation of the roads. It maintains gauges at different places on the principal rivers, from which reports are sent in, and a record of them is kept. In times of high water in the rivers, flood warnings and bulletins, giving information of the present and probable near future conditions, are issued and sent to those who are interested. Besides its own sources of information, the services of this bureau were at defendant's command. Ordinarily, therefore, the defendant would be expected to keep its agents advised of the approach of floods of such magnitude as to cause apprehension of danger.

The testimony shows that, in this instance, the defendant was advised of the conditions existing throughout the state on the streams tributary to the Congaree and Wateree, and that it knew that, beginning about the 19th of August, rains had been continuously falling over the watersheds of these streams, and that, beginning about the 23d, they became unusual, both in quantity and in the extent of territory covered, so that by the

24th nearly all the streams in the upper part of the state began to rise, and on the 25th and 26th they had reached the flood stage. It was known that the floods in some of the larger of these streams were unprecedented in magnitude and destructive power. It was also known that they would surely find their way into the Congaree and Wateree. Defendant also knew the records of previous floods in these rivers. The four greatest, of which there is any record, were those of 1852, 1865, 1888, and 1908. Those of 1852 and 1865 were about the same—about 34 feet in height at Columbia; that of 1888, 33.3 feet; and that of 1908, 35.8 feet. In 1888 the highest reading of the gauge at Camden, on the Wateree, was 33 feet; in 1908 it was 39.7 feet. Just here it should be noted that the channel to which the Congaree is confined at Columbia, even in times of flood, is much narrower than it is at Kingville. At Columbia, it is about 1,300 feet wide; while at Kingville it is between three and four miles wide. Hence ordinarily, after the flood stage is reached, the river rises only about one-fourth as high at Kingville as it does at Columbia. In 1888 the water rose from 8 to 12 inches above the railroad tracks at Kingville. After that flood, the tracks were raised, according to the different witnesses, from 2 to 3 feet to put them safely above high water. In 1908, notwithstanding the river at Columbia was only about 2½ feet higher than in 1888, the water rose about 6 feet higher at Kingville than it did in 1888. The only reasonable explanation of this unusual phenomenon was attempted by Mr. J. W. Bauer, the section director of the weather bureau at Columbia, who thought it was caused by the fact that the crests of the floods in the Wateree and Congaree reached their confluence simultaneously, and, the channel below being too narrow to carry off the combined floods, the waters were thrown back into the swamps above and upon Kingville. His theory was verified, at least to some extent, by the fact that the river gauge at Remini, on the Santee, showed only one flood crest; whereas, if the crests in the two rivers had not reached the Santee at the same time, it would have shown two flood crests, as it had theretofore always done when there were floods in both rivers. He thought it a mere coincidence, which had probably never happened before, and might never happen again.

Under the principles of law hereinbefore announced, it is clear that, if there was nothing more, defendant could not, in reason, have been expected to anticipate such an unprecedented occurrence and provide against it. It appears, however, that on Thursday morning, August 27th, the water began to rise in the swamp around Kingville, and about 7 o'clock that evening it began to run over the railroad tracks, and was rising about 2½ inches an hour. This indicated that it had risen from 2 to 3 feet higher than

the flood of 1888, and that all previous high-water records had been broken. There were on the side tracks in the yard from 15 to 17 cars of merchandise freight, including the plaintiff's goods. There were also some empty cars, and some loaded with dead freight, such as stone, coal, etc. Defendant had two engines on the ground, one attached to a construction train, and the other had just arrived, bringing the regular freight train from Columbia for Charleston. The freight train had to wait for the arrival of two passenger trains bound for Columbia, one a regular train on defendant's road, and the other a train of the Seaboard Air Line Railway, which had been detoured over defendant's tracks on account of a washout on the Seaboard Road. Those trains were not expected, and did not arrive, until 11 o'clock. So far as it appears from the testimony, both the engines at Kingville stood there idle from 7 until 11 o'clock. Either could have carried the cars containing merchandise to Gadsden, a station on defendant's road about 4 miles from Kingville, and put them on the side track there.

It is said, however, that the reason this was not done was because no one thought, or had any reason to think, that the water would rise as high as it did. Bearing in mind, however, that defendant knew of the extraordinary floods in nearly all the tributaries of the Congaree and Wateree, and therefore that it should have anticipated, as it evidently did, an unprecedented rise of the water at Kingville, and that the water had already risen from 2 to 3 feet above all previous records, and was then rising at the rate of 2½ inches an hour, the question whether an ordinarily prudent and diligent person would then have thought that the time had come to take steps to save property which was exposed to the perils of such a flood is one about which reasonable men might differ. When the passenger trains passed, on their way to Columbia, the water had risen from 8 to 12 inches over the tracks. By order of the roadmaster, who was on the ground, the freight train, after leaving about 40 of its cars on the bridges and trestles through the swamp to weight them down and keep them from being washed away, was allowed to proceed on its way to Charleston. The other engine was kept busy cutting out and placing empty cars and cars containing dead freight on the other bridges and trestles in the swamp until 1 o'clock a. m. on the 28th, when the water got so high that it put out the fire in the fire box. When the freight cars were placed on the bridges and trestles on the main line, there could have been no other traffic over the road, and the cars containing merchandise freight could have been carried to safety by placing them on the main line a few hundred yards west of Kingville. Two of defendant's employees testified that they intended to do that as soon as they got through placing the cars

on the trestles, but that when they had finished that work it was too late, because the water was then so high they could not run the engine.

Under the facts and circumstances stated, the question whether an ordinarily prudent and diligent carrier would have removed the goods to a place of safety was properly submitted to the jury.

Judgment affirmed.

GARY, C. J., and WOODS, J., concur.

(91 S. C. 111)

ROUSE et al. v. BRANCH et al.

(Supreme Court of South Carolina. March 25, 1912.)

1. WILLS (§ 651\*)—CONDITIONS—VALIDITY.

A condition in a will for forfeiture of a gift on the beneficiary contesting the will is considered in *terrorem* merely, and the gift is not forfeited by a contest, based on probable cause; but, where there is, not simply a declaration of forfeiture, but a valid gift to a third person in case of breach of the condition, a contest of the will vests the gift in the other beneficiary.

[Ed. Note.—For other cases, see Wills, Dec. Dig. § 651.\*]

2. WILLS (§ 651\*)—CONDITIONS—VALIDITY.

Under a will reducing gifts to beneficiaries who should sue to break the will, beneficiaries do not forfeit their right to the larger gifts by contesting the will on the ground of forgery.

[Ed. Note.—For other cases, see Wills, Dec. Dig. § 651.\*]

Appeal from Common Pleas Circuit Court of Barnwell County; J. W. De Vore, Judge.

"To be officially reported."

Action by M. D. Rouse and others against Jim Branch and others. From the judgment, defendants appeal. Affirmed.

Bates & Simms and W. B. De Loach, for appellants. W. A. Holman and R. C. Holman, for respondents.

GARY, C. J. The record contains this statement: "This is an action for partition between the plaintiffs and the defendants, other than the executors, of the real estate left by the late W. H. Mears of Hampton county, said state, under the terms of his last will and testament, and for the construction of the said will. The defendant executors in their answer likewise desired the instruction of the court as to the rights of the various parties under said will; and all of the defendants denied the right of the plaintiffs to any interest in said estate, by reason of having required the will to be proven in due form of law, contending that the same was a forgery, and because of the proceeding thereunder taken, as contained in the printed record now on file in the Supreme Court in the case of Thomas v. Rouse, which record is likewise printed herein, as required by respondents."

[1, 2] The following provision appears in

the will: "If any of the parties above mentioned, shall enter a suit in law to break my will, he shall have five dollars only, and his share shall be divided among them mentioned in the fourth division of my will." The appellants' attorneys in their argument, after discussing the authorities, say: "According to the weight of the foregoing authorities, the following principles seem to be established: (1) Conditions annexed to legacies and devises, providing a forfeiture in case the will is contested, are valid. (2) In case of a legacy, a breach of the condition will not work a forfeiture, unless there is a gift over, and there was *probabilis causa litigandi*; a breach of the condition will not work a forfeiture, either as regards a legacy or devise. (4) Where the will is contested on behalf of an infant legatee or devisee, the forfeiture will not be decreed, irrespective of whether there was a gift over or not."

In the first place, let us turn to our own decisions to see to what extent this question is determined by them. In the case of *Mallet v. Smith*, 6 Rich. Eq. 12, 60 Am. Dec. 107, the testator by his will, made certain provisions for some of his slaves, which were void under the statute. He bequeathed to his sister, J. M., \$2,000, made her one of his residuary legatees, and then provided as follows: "Should any of my legatees, under this my will complain, or express any dissatisfaction with my disposition of my estate, herein made, I hereby direct and empower my executors, in their discretion, to revoke any and all legacies, such complaining legatee or legatees, might have been entitled to, and to dispose of the same, between my other legatees, as to my executor may seem just and proper." The chancellor on circuit used this language in that case: "It is insisted on the part of the defendant that the complainant has forfeited her legacy of \$2,000, as well as her interest in the residue, by calling in question the validity of the provisions made in the fourth clause. The general proposition on this subject was established as early as *Powell v. Morgan*, 2 Vern. 91. That was a legacy upon condition that the legatee did not disturb or interrupt the will of the testatrix. The validity of the will was, however, unsuccessfully contested by the legatee. It was held that this was no forfeiture of the legacy, as there was *probabilis causa litigandi*, and such is now the well-settled doctrine, to wit, that such condition is considered in *terrorem* merely, and does not operate a forfeiture of the legacy. But where there is not simply a declaration of forfeiture, but a valid bequest to a third person in case of breach of the condition, then if the legatee controvert the will, his interest will cease and vest in the other legatee. The exception is discussed by Sir William Grant in *Lloyd v. Branton*, 3 Mer.

117. He says that different reasons have been assigned by different judges for the operation of a devise over; some holding that it was a clear manifestation of intention that the declaration of forfeiture was not merely in terrorem, and others that it was the interest of the devisee over which made the difference. But all agree that there must be a valid devise over, in order to defeat the legacy." He declared that the said clause of the will was null and void. There was an appeal to the Court of Appeals, in equity, and the case was heard by Chancellors Johnston, Dunkin, Dargan, and Wardlaw, the opinion of the court being delivered by Chancellor Wardlaw, who, after stating that said court was content with the chancellor's conclusion, and, in general, with his reasoning, although there was not entire concurrence of the members of the court in the same views, used the following language:

"Without intention or authority to commit the court to this extent, I express my own opinion, in which Chancellor Johnston fully concurs, that a condition subsequent of this description is void, whether there be a devise over or not, as trenching on the 'liberty of the law' (Shep. Touch. 132) and violating public policy. In *Morris v. Burroughs*, 1 Atk. 404, Lord Hardwicke held such a condition to be clearly in terrorem, and no forfeiture could be incurred by contesting any disputable matter in a court of justice. In *Powell v. Morgan*, 2 Vern. 91, cited in the circuit decree, it was adjudged that breach of such condition involves no forfeiture, where there is *probabilis causa litigandi*. In one of the latest cases on this subject, *Cooke v. Turner*, 15 M. & Wels. 727, a condition was supported as valid that, if the devisee should dispute the sanity and competency of testator to make a will, although testator has been found by inquest to be a lunatic, or should refuse, when required by the executors, to confirm the will, the disposition in favor of such devisee should be revoked. In delivering the judgment of the exchequer, Lord Crannere, now Lord Chancellor, then Sir R. M. Rolfe, admits that the policy of the state prevents a testator from making the continuance of an estate depend on the legatee committing a crime, or refraining to do that which it is, or may be, the interest of the state he should do, such as that he should not marry, should not engage in commerce, should not plow his arable land, or should not do anything else, the performing of which partakes of the character of a duty of imperfect obligation; but he insists that there is no duty of perfect or imperfect obligation on an heir to contest his ancestor's sanity, and that it matters nothing to the state whether the land be enjoyed by devisee or heir. It seems to me that this is a very narrow view of public policy. It is the interest of the state that every legal own-

er should enjoy his estate, and that no citizen should be obstructed, by the risk of forfeiture, from ascertaining his rights by the law of the land. It may be politic to encourage parties in the adjustment of doubtful rights by arbitration or by private settlement; but it is against the fundamental principles of justice and policy to inhibit a party from ascertaining his rights by appeal to the tribunals established by the state to settle and determine conflicting claims. If there be any such thing as public policy, it must embrace the right of a citizen, to have his claims determined by law. \* \* \* But the doctrine of the validity of such a condition, where there is a devise over, is too firmly established to be overruled, except upon grave consideration in some case where the point is necessarily involved in the decision; and that is not the fact here." The decree was affirmed.

There is also another case in our reports which we will discuss later. Turning to the authorities elsewhere, we quote the following language from the case of *Cooke v. Turner*, 15 M. & Wels. 727: "The conditions said to be void, as trenching on the liberty of law, are those which restrain a party from doing some act which it is supposed the state has or may have an interest to have done. The state, for obvious reasons, has an interest that its subjects should marry, and therefore will not, in general, allow parties, by contracts or conditions in a will, to make the continuance of an estate depend on the owner not doing that which it either is or may be the interest of the state that he should be. So the state is interested in having its subjects embarked in trade and agriculture; and therefore the law will not give effect to a condition defeating an estate, in case its owner shall engage in commerce, or sow his arable lands, or the like. The principle on which conditions are void is analogous to that on which conditions defeating an estate, unless the owner commits a crime, are void. In the latter case, the condition has a tendency to induce the violation of a positive duty; in the former, to prevent the performance of what partakes of the character of imperfect obligation. But in the case of a condition, such as that before us, the state has no interest whatever, apart from the interest of the parties themselves. There is no duty, either perfect or imperfect, on the part of an heir to contest his ancestor's sanity. It matters not to the state whether the land is enjoyed by the heir or by the devisee; and we conceive, therefore, that the law leaves parties to make just what contracts and engagements they think expedient as to raising or not raising questions of law or of fact among themselves, the sole result of which is to give the enjoyment of the property to one claimant, rather than to another. \* \* \* Where the condition is bad on the ground of public

policy, it obviously must be bad whether it be precedent or subsequent; for the law will no more allow anything contrary to public policy to be made a means whereby a party shall entitle himself to an estate than it will allow it to be a means whereby he shall be deprived of that of which he is already in possession." See, also, *Smithsonian Institution v. Meech*, 169 U. S. 398, 18 Sup. Ct. 396, 42 L. Ed. 793; *Estate of Hite*, 155 Cal. 436, 101 Pac. 443, and notes to that case in 17 Ann. Cas. 993, and 21 L. R. A. (N. S.) 953.

Conceding that the four propositions hereinbefore mentioned, for which the appellants' attorneys contend, are sound as general statement of law, it does not follow that they are applicable to the facts of this case.

The cases of *Mallet v. Smith*, 6 Rich. Eq. 12, 60 Am. Dec. 107, and *Cooke v. Turner*, 15 M. & Wels. 727, show—in fact, the principle does not seem to be disputed—that a testator cannot provide that the continuance of an estate shall depend upon the condition that the devisee or legatee shall not marry, or engage in commerce, or sow his arable lands, or the like, as such condition would be against public policy. We thus see that all conditions in wills, upon which an estate shall be allowed to continue in the devisee or legatee, are not valid; and the question in this case is whether the right to contest a will on the ground that it is a forgery stands upon the same footing as the right to contest a will when there is a condition that the devisee or legatee shall not marry, or engage in commerce, or sow his arable land, and the like.

In the case of *Breithaupt v. Bauskett*, 1 Rich. Eq. 465, the court had before it the question whether a devise to a mistress or illegitimate children, under the statute, was absolutely void, or only voidable at the election of the wife or legitimate children, and used this language: "Chief Justice Spencer, delivering the opinion of the court says that 'whenever the act done takes effect as to some purposes, and is void as to persons having an interest in impeaching it, the act is not a nullity; and therefore, in a legal sense, it is not utterly void, but merely voidable.' Another test of a void act or deed is that every stranger may take advantage of it, but not a voidable one. 2 Lev. 218, Vin. Abr. tit. Void and Voidable A. Pl. II. Again, a thing may be void in several degrees: '(1) Void so as if never done, to all purposes, so as all persons may take advantage thereof; (2) void to some purposes only; (3) so void by operation of law that he that will have the benefit of it may make it good.'"

A forged will certainly comes under the first head. No case has been cited, and we do not believe any can be found, sustaining the proposition that a devisee or legatee

shall not have the right, upon probable cause, to show that a will is a forgery, without incurring the penalty of forfeiting the estate given to him by the will. The right of a contestant to institute judicial proceedings upon probable cause to ascertain whether the will was ever executed by the apparent testator is founded upon justice and morality. If a devisee should accept the fruits of the crime of forgery under the belief, and upon probable cause, that it was a forgery, he would thereby become morally a particeps criminis, and yet, if he is unwilling to commit this moral crime, be confronted with the alternative of doing so, or of taking the risk of losing all under the will, in case it should be found not to be a forgery. Public policy forbids that he should be tempted in such a manner. This is far more obnoxious to public policy than a condition in the will against marriage.

Judgment affirmed.

WOODS and HYDRICK, JJ., concur.

(91 S. C. 101)

BROWN et al. v. BROWN et al.

(Supreme Court of South Carolina. March 25, 1912.)

WILLS (§ 174\*) — REVOCATION — INTERLINEATION.

Under Civ. Code 1902, § 2401, providing that no will or any clause thereof shall be revocable but by some other will or codicil in writing, attested and subscribed, or by destroying and obliterating the same by the testator himself, or by some other person in his presence and by his direction, the act of the testator in erasing separate clauses of the will by means of interlineation is a revocation pro tanto; for the statute specifically allows the revocation of isolated clauses.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 453; Dec. Dig. § 174.\*]

Appeal from Common Pleas Circuit Court of Anderson County; T. S. Sease, Judge.

"To be officially reported."

Action by Mamie McC. Brown and others, as executors of the last will and testament of Fred G. Brown, against Julia Brown and others. From a judgment for plaintiffs, defendants appeal. Affirmed.

Jaynes, Geiger & Wolfe, for appellants. Paget & Watkins and Bonham, Watkins & Allen, for respondents.

WOODS, J. This action was instituted for the purpose of determining the force and effect of the will of Fred G. Brown, executed on October 9, 1908. The will contained, among other devises and bequests, the following as a part of the third clause: "I will to my nephew, Fred Haltiwanger, one thousand dollars; to my nephew, Fred Brown Ledbetter, one thousand dollars; to my nieces, namesakes of my mother, Julia Ledbetter, Julia Haltiwanger, and Julia Brown one

thousand dollars each; to Ezekiel Martin, my colored servant, two hundred dollars, and it is my desire that he use this to pay for his home." And the following as a fourth clause: "I will and devise five hundred dollars to Mrs. Zoe La Foy and John La Foy to assist them in purchasing a home." The will contained clauses disposing of the residuary estate. In the third clause, the legacies to Julia Ledbetter, Julia Haltiwanger, and Julia Brown of \$1,000 each had a single pen line drawn through them, leaving them thoroughly legible, and through the fourth clause of the will, above quoted, pen lines were drawn, striking out the legacy to Mrs. Zoe La Foy and John La Foy, leaving it thoroughly legible. There were numerous other alterations in the will which do not pertain to this appeal. Subtended to the will was this memorandum: "I made the above erasures after I had signed the above will." Signed, "Fred G. Brown."

The question between the legatees and executors was whether the legacies were revoked. Bearing on this issue the following admissions appear in the record: "(1) That the will admitted to probate is the last will and testament of Fred G. Brown; (2) that the alterations were made by the testator after execution, and without republication of the will; (3) that they were made, not with the intention of revoking the will in toto, but pro tanto; (4) that there was no subsequent will or codicil in writing declaring the same."

The appeal is from a decree of the circuit court holding that the legacies were revoked. The appeal depends on the construction of the following provision of the statute of frauds as it now appears in section 2481 of the Civil Code 1902: "No will or testament, in writing, of any real or personal property, or any clause thereof, shall be revocable but by some other will or codicil in writing declaring the same, attested and subscribed by three witnesses as aforesaid, or by destroying or obliterating the same by the testator himself, or some other person in his presence, and by his direction and consent."

There can be no doubt that the statute contemplates the revocation, not only of the whole will, but of any clause thereof, by destruction or obliteration. Any other construction would require that the words "or any clause thereof" be regarded as having no effect. Although the point was not directly involved, this meaning was expressly assumed in *Pringle v. Executors of McPherson*, 2 Brev. 279, 3 Am. Dec. 713, and *Meanes v. Moore*, Harp. 314. True the statute cannot be extended so as to make an additional specific devise or bequest by mere obliteration of clauses of the will; for that would be making a testamentary disposition of property without the formalities required for such disposition. *Pringle v. Executors of*

*McPherson*, supra. But there is nothing in the statute warranting the court in holding that the power of revocation of a clause of a will by obliteration, expressly conferred by the statute in general terms, and applying to all wills, has no application to wills containing that most common feature, a residuary clause. The increase of the residuary estate which may result from the obliteration is not a new testamentary disposition, but a mere incidental consequence resulting from the exercise of the power conferred on the testator by the statute. The language of the statutes of New York and other states on the subject is so different that a review of the authorities in other jurisdictions would throw little light on the construction of our statute.

It is the judgment of this court that the judgment of the circuit court be affirmed.

GARY, C. J., and HYDRICK, J., concur.

(91 S. C. 135)

CENTRAL NAT. BANK OF KANSAS CITY,  
MO., v. EFIRD et al.

(Supreme Court of South Carolina. March 28, 1912.)

1. ALTERATION OF INSTRUMENTS (§ 9\*)—BILLS AND NOTES (§ 378\*)—EFFECT—NOTE.

The erasure of the words, "See special agreement," following the signature of a party to a note, is a material alteration, and renders it unenforceable by an innocent holder against any party prior to the one responsible for the alteration.

[Ed. Note.—For other cases, see *Alteration of Instruments*, Cent. Dig. §§ 54-56; Dec. Dig. § 9; \* *Bills and Notes*, Cent. Dig. §§ 985-992; Dec. Dig. § 378.\*]

2. EVIDENCE (§ 429\*)—ALTERATIONS—PAROL EVIDENCE.

The rule against the admission of parol evidence to vary written instruments does not exclude parol testimony to prove a material alteration in a note.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 1969-1971, 1973, 1974; Dec. Dig. § 429.\*]

Appeal from Common Pleas Circuit Court of Lexington County; Geo. W. Gage, Judge.

"To be officially reported."

Action by the Central National Bank of Kansas City, Mo., against D. F. Efird and others. From a judgment on a verdict for defendants, plaintiff appeals. Affirmed.

J. Brooks Wingard, for appellant. Graham & Sturkie, Efird & Dreher, and George Bell Timmerman, for respondents.

HYDRICK, J. Plaintiff sued defendants on their promissory note for \$1,333, dated February 6, 1907, payable to the order of McLaughlin Bros., two years after date. The note was given in part payment for a stallion. Plaintiff purchased it in the regular course of business, in good faith, for full value, before maturity, and without notice of any defense, defect, or infirmity. The



defenses set up were: (1) That A. R. Taylor was to sign the note as a comaker with defendants before it was delivered, and the payee agreed that it should not be put into circulation until Taylor had signed it, which he never did. (2) That without the knowledge or consent of the other makers the payee made a special and separate agreement in writing with Samuel B. George, one of the makers, that his liability should be limited to \$200, while on the face of the note the liability of all the makers appeared to be joint and several; that the existence of said agreement was evidenced by said Samuel B. George writing under his name on said note the words, "See special agreement," and that this was done after the execution of the note by all the makers, including the said George; that it was a material alteration, which avoided the note; that said words, "See special agreement," were afterwards fraudulently erased, which also destroyed the validity of the note. (3) Breach of a written contract of warranty of the horse. (4) Failure of consideration. There was evidence tending to prove each of the defenses set up. The court instructed the jury that the first, third, and fourth defenses would not avail defendants, as the note was in the hands of a bona fide holder for value before maturity, unless they found that the evidence established the second defense; that, if the words, "See special agreement," were written under the name of the defendant Samuel B. George, that destroyed the negotiability of the note, and would let in the other defenses, if the evidence established them; but, unless they found that those words had been written under the name of the defendant George, their verdict should be for the plaintiff.

[1] The jury found for the defendants, which clearly established the fact that they found that the words, "See special agreement," had been written under the name of George after the execution of the note, and it necessarily established the fact that they had been erased, for they were not there at the trial. The special agreement was excluded from evidence by his honor. Therefore, not knowing what it was, except in the most general way, and not being able to properly determine its legal effect, we prefer not to pass upon the question whether the words, "See special agreement," written after the name of George, destroyed the negotiability of the note. Nor is the decision of that question necessary. There can be no doubt that the erasure of those words was a material alteration of the note, which invalidated it even in the hands of an innocent holder. *Sanders v. Bagwell*, 32 S. C. 238, 10 S. E. 946, 7 L. R. A. 743; *Vaughan v. Fowler*, 14 S. C. 355, 37 Am. Rep. 731; *Plyler v. Elliott*, 19 S. C. 257. The general rule upon the subject is thus expressed in 2 A. &

E. Enc. L. (2d Ed.) p. 193: "So, where a promissory note is materially altered by the payee or transferee, not only is it vitiated and destroyed in the hands of the party responsible for the alteration, but there can be no recovery thereon against the maker, or any indorser prior to the one who is responsible for the alteration, by a person into whose hands it has come after the change was made, even though he be a bona fide indorsee for value without notice of the alteration." *Exchange Nat. Bank v. Bank of Little Rock*, 58 Fed. 140, 7 C. C. A. 111, 22 L. R. A. 687 and note; *Citizens' National Bank v. Williams*, 174 Pa. 66, 34 Atl. 303, 35 L. R. A. 464 and note.

[2] There was no error in admitting evidence as to when and under what circumstances and by whom the words were written under the name of defendant George. Appellant is clearly in error in supposing that such evidence violates the rule that parol evidence cannot be admitted to contradict, add to, alter, or vary the terms of a written instrument. If that rule were applied to prevent proof of material and fraudulent alterations of instruments, the most flagrant frauds and forgeries could be successfully perpetrated. As the alteration destroyed, not only the negotiability of the note, but the validity of it, there was, of course, no error in admitting evidence to establish the other defenses set up.

Judgment affirmed.

GARY, C. J., and WOODS, J., concur.

(91 S. C. 147)

SETTLEMEYER v. SOUTHERN RY. CO.,  
CAROLINA DIVISION.

(Supreme Court of South Carolina. March 26, 1912.)

1. NEGLIGENCE (§ 119\*)—ISSUES, PROOF, AND VARIANCE.

Though a plaintiff may not recover on proof that he was injured by an act of negligence not alleged in the complaint, it is not essential that the negligence alleged was the sole proximate cause, but a recovery is authorized on proof that such act of negligence was one of the proximate causes.

[Ed. Note.—For other cases, see *Negligence*, Cent. Dig. §§ 200-216; Dec. Dig. § 119.\*]

2. RAILROADS (§ 337\*)—ACCIDENTS AT CROSSINGS—NEGLIGENCE—PROXIMATE CAUSE.

Where foul odors of wild animals in a car standing at a crossing was one of the proximate causes of the fright of a horse, causing it to run away and injure the driver, he could recover, though a box of rabbits on the station platform made a noise, increasing the fright.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1090-1095; Dec. Dig. § 337.\*]

3. RAILROADS (§ 350\*)—ACCIDENTS AT CROSSINGS—NEGLIGENCE—QUESTION FOR JURY.

Whether a railroad company leaving a car of wild animals standing at a crossing for several days was guilty of actionable negligence, and liable for injuries to a driver caused by his horse becoming frightened by odors coming

from the car, *held*, under the evidence, for the jury.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1152–1192; Dec. Dig. § 350.\*]

Gary, C. J., and Watts, J., dissenting.

Appeal from Common Pleas Circuit Court of Cherokee County; Robt. Aldrich, Judge.

"To be officially reported."

Action by W. L. Settlemeyer against the Southern Railway Company, Carolina Division. From a judgment for defendant, plaintiff appeals. Reversed.

Butler & Hall and Otts & Dobson, for appellant. Sanders & De Pass, for respondent.

WOODS, J. The allegations of negligence and injury resulting therefrom on which the plaintiff sought to recover from the defendant are as follows: "That on or about the 9th day of July, 1909, while driving along the public highway leading from Cherokee Falls to his home at Gaffney, in said state and county, and while attempting to cross the tracks of the defendant at a regular crossing, at the depot for Cherokee Falls, a freight car being used by the defendant was across the public road or highway, and had negligently and carelessly been left across said public road for a long time, in violation of the statute laws of this state, and a willful disregard of the rights of the plaintiff and the public; and, in order to continue his journey, the plaintiff was forced, by reason of the willful and negligent blocking of said public road, or crossing, to drive around and above the regular crossing to cross defendant's tracks. That the freight car which was willfully and negligently left standing across said public crossing by the defendant, its lessee, agent, servant, and representatives, was very offensive, in that it smelled very foully, and gave forth a great stench. That plaintiff's horse was made afraid and became very much frightened by reason of the foul smell and great stench arising from said car, became unmanageable, and in surging and violent effort to get away from the foul smelling car, which had been left standing across the public crossing, as aforesaid, ran violently against the bank of the cut of the railroad, which came down even with the public road on the opposite side of the railroad, and just above the public crossing, and by reason of which the plaintiff was thrown violently from his buggy, and was greatly hurt and painfully injured. \* \* \*

[1] The circuit judge directed a verdict on the ground that there was no testimony tending to prove that any act of negligence of the defendant alleged in the complaint was the proximate cause of the injury. On this vital point the plaintiff testified, in substance, that a car in which wild animals were kept by a showman had been left on the track so as to project across the wagon

track of the road, leaving, however, room between the car and the station building for vehicles to pass; that as he approached the car, riding in a buggy, his horse was frightened and excited by the noisome odors emitted from the car, the fright of the horse causing plaintiff to form the intention of turning back; that at this juncture he saw a box or case of rabbits on the station platform; and that the noise made by the jumping of the rabbits in the wire cage so increased the fright of the horse that he became unmanageable, and ran around the car against an embankment, throwing plaintiff out of the buggy. It thus appears that there was evidence of two causes which frightened the horse and made him run away—the foul odor from the car, and the noise made by the rabbits. The complaint contains no allegation of negligence against the defendant with respect to the noise made by the rabbits, and, if the evidence had shown that the horse was frightened by that alone, the case would have failed; for a plaintiff cannot recover on proof that he was injured by an act of negligence by the defendant not charged in the complaint. But, while it is necessary to recovery to show that an act of negligence alleged in the complaint was one of the proximate causes, it is not essential to show that it was the sole proximate cause. There may be a recovery upon evidence tending to show that an injury was received by reason of the negligence alleged in the complaint operating as a proximate cause in conjunction with another independent proximate cause. This rule is familiar and generally recognized. *Thompson v. Seaboard A. L. Ry.*, 78 S. C. 384, 58 S. E. 1094; *Id.*, 81 S. C. 333, 62 S. E. 396, 20 L. R. A. (N. S.) 426; *Blakely v. Laurens County*, 55 S. C. 422, 33 S. E. 503; 29 Cyc. 497.

[2] As the evidence tended to show that the foul odors of wild animals coming from the car, alleged in the complaint as the proximate cause, was one of the proximate causes of the fright, the runaway, and the resulting injury to the plaintiff, it follows under the principle above stated that this was sufficient to require the submission of the issue of proximate cause to the jury, if leaving the car on the crossing was an act of negligence.

[3] On this last point it is important to observe that the car was not stopped on the crossing temporarily as a part of a passing train, but was left standing for several days across the road where the defendant must have known that persons were continually passing in vehicles drawn by horses and mules. Aside from the common knowledge on the subject, the fact that the plaintiff's horse and other horses were excited and frightened by the odor of wild animals made the issue one for the jury to determine

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

whether the defendant should have known that the presence of the car was dangerous to public travel, and whether due care required that it should have placed such a car further away from the crossing.

The judgment of the circuit court is reversed.

FRASER, J., concurs.

HYDRICK, J. I concur in the opinion that the judgment should be reversed for the reasons stated in the opinion of Mr. Justice WOODS, and also for the following additional reasons: The question of proximate cause is ordinarily one for the jury. *Doolittle v. Railway*, 62 S. C. 130, 40 S. E. 133; *Schumpert v. Railway*, 65 S. C. 332, 43 S. E. 813, 95 Am. St. Rep. 802; *Rinake v. Mfg. Co.*, 55 S. C. 179, 32 S. E. 983; *Carson v. Railway*, 68 S. C. 56, 46 S. E. 525. Numerous other cases might be cited from the decisions of this court. The same rule prevails in other jurisdictions. 21 A. & E. Enc. L. (2d Ed.) 508; 29 Cyc. 639. In 29 Cyc. 503, it is said: "It is usually held that, although an injury is caused by frightened animals, yet the negligent act of the person who caused them to be frightened is the proximate cause of the injury; the result being a natural consequence of the original act." Of course, if the evidence is susceptible of only one reasonable inference, the court may draw the inference. But in this case the testimony is certainly susceptible of more than one inference. Several of the witnesses testified that the car gave forth a foul odor, as of wild animals, and that it partially obstructed the public road. Plaintiff testified that his horse was frightened by the odor from the car. It is true there was some confusion in his testimony as to the connection which the cage of rabbits had with the fright of his horse, but I think it was made reasonably clear right at the last of his testimony set out in the opinion of Mr. Justice WATTS that it was the odor of the car, and not the rabbits, which frightened his horse. He says that the horse became frightened just as he was passing or had passed the rabbits, and came in front of the car; and that, when he had passed them, his horse snorted, and then the rabbits began to jump and surge. Two other witnesses testified that their horses became frightened at the car, when the rabbits were not there, so far as it appears from the testimony. It is matter of common knowledge that horses do take fright at the smell of wild animals. From this testimony it is, I think, as probable that the fright of the horse was caused by the odor from the car, and that his snort caused the rabbits to become alarmed, as that the alarm and noise of the rabbits frightened the horse; or it may be, as suggested by Mr. Justice WOODS, that the scent of wild animals emitted from

the car combined with the noise of the rabbits to frighten the horse.

Moreover, the frightening of his horse by the odors from the car is not the only negligence alleged by the plaintiff as the cause of his injury. He alleges, also, that the road was negligently obstructed by leaving the car extending into it, so that in going around the end of the car the horse ran his buggy into a bank, which caused him to be thrown out and hurt. There was testimony tending to support this allegation. So, no matter what caused the fright of the horse, if plaintiff's injury was proximately caused by the negligent obstruction of the road with the car, defendant would be liable. *Carson v. Railway*, supra.

The circuit judge based his ruling upon the authority of *Mason v. Spartanburg*, 40 S. C. 390, 19 S. E. 15, 42 Am. St. Rep. 887, which I do not think at all applicable to the facts of this case. Moreover, in *Blakely v. Laurens*, 55 S. C. 422, 33 S. E. 503, this court expressed dissatisfaction with that case, and also with *Brown v. Laurens*, 38 S. C. 282, 17 S. E. 21, and practically limited their authority to a precisely similar state of facts, saying: "We are not disposed to extend those cases a single iota."

WATTS, J. (dissenting). This is an action brought in 1910 to recover \$3,000 for injuries alleged to have been received by plaintiff in 1909, while driving along the public highway leading from Cherokee Falls to his home in Gaffney, S. C. Plaintiff is a physician, and had occasion to go to Cherokee Falls on a professional visit to a patient. It is alleged in the complaint that the defendant had left a freight car across the public highway or road, in violation of the statute law of this state, and in willful disregard of the right of plaintiff and the public, and that, by reason of the blocking of the said public highway, the plaintiff was obliged in crossing the railroad track to drive around and above the regular crossing. It is further alleged that this car gave out offensive odors, by reason of which plaintiff's horse was frightened and became unmanageable, and that, after driving past the end of the car, the plaintiff was unable to bring his horse back into the public road or highway, and in his efforts to get away from the foul stench from the car ran violently against the bank of the cut, throwing plaintiff from his buggy and injuring him seriously. Defendant answered, denying allegations of plaintiff's complaint, and setting up the defense of contributory negligence. At close of testimony in the case, upon motion of defendant, his honor, Judge Aldrich, directed a verdict for defendant, under authority of *Mason v. Spartanburg County*, 40 S. C. 390, 19 S. E. 15, 42 Am. St. Rep. 887. The grounds of motion were: (1) Because the evidence fails to prove that the accident

occurred on a public road, or any public road was obstructed by defendant. (2) Because even if this was a public road, and even if it was obstructed, the evidence fails to show that any notice was given to the defendant of any obstruction. (3) Because, in any event, the evidence fails to show that the fright of the horse was caused by the car being on or near the road, or from any odor arising therefrom. (4) Because the evidence shows that the proximate cause of the injury to plaintiff was the fright of the horse caused by a cage of rabbits on the platform of defendant's depot, and not by the car which it alleged was on the road.

There is no doubt but there was sufficient testimony in the case to carry it to the jury to determine whether it was a public road, and whether defendant obstructed it or not, and there is no question but that plaintiff received injuries. But even if the evidence established clearly that the road was a public highway, and was obstructed in violation of law, the plaintiff must go further, and introduce evidence tending to establish the negligence which he alleges existed, and that that negligence was the proximate cause of his injury. In other words, even if the defendant was careless and negligent as alleged in the complaint, if that carelessness and negligence on their part was not the direct and proximate cause of plaintiff's injuries, he cannot recover. If the facts in the case show that the injuries to the plaintiff were not the natural and probable consequences of the alleged acts of negligence of defendant set out in the complaint, then his honor committed no error in directing the verdict for defendant. What acts of negligence does the plaintiff allege in his complaint as to the cause of his injury? Complaint alleges that the defendant had carelessly and negligently left a car across the public road or highway; that it "smelled very foully" and gave forth a great stench; that "plaintiff's horse was made afraid and became very much frightened by reason of the foul smell and great stench arising from the car, became unmanageable, and the plaintiff after driving past the end of the car was unable to bring his horse back into the public highway, but the horse in his fright became unmanageable, and in surging and making a violent effort to get away from the foul smell of the car which had been left standing across the public highway, as aforesaid, ran violently against a bank of the cut of the railroad, which came down even with the public road on the opposite side of the other roadbed just before the public crossing; that by reason of which plaintiff was thrown violently from his buggy, and was greatly hurt and painfully injured." The complaint, in substance, charges that by the negligence of defendant in obstructing highway with its car and the foul smell emanating therefrom that his

horse became unmanageable, frightened, and ran away, injuring him after he had driven past the car. Now what does plaintiff testify as to what frightened his horse?

"Q. Did you receive any information that made it necessary for you to return to Gaffney? A. Yes, sir; just after 4 o'clock I left the company store on my way to Gaffney, coming up towards the depot. In about 150 yards of the depot I let the top of my buggy down, put my lines down. It may have been 200, 150, or 200 yards below. I went on. The horse was in a walk. I went uninterruptedly until I turned the corner of the depot platform. On the lower corner I suppose you would say, towards the river or next to the road. Just as he was turning that corner, he raised his head and blowed, snorted, or whatever you may call it. At the time I noticed he was mighty excited. Q. What did he do? A. He stepped backwards two or three steps, I hollered, 'Whoa,' and stopped him with the lines, intended to jump out, and catch him, catch the lines. My first intention was to turn back toward Cherokee Falls. I noticed the road was blocked with a car, and on the corner of the platform, just below the corner, I suppose half way between the corner and the door of the depot, was a box of jack rabbits. Q. Go ahead. A. A box of jack rabbits. These jack rabbits were making a fuss, frustrating, I mean shaking the box, a wire top box. Just about that time the horse sprang forward with me with all his might. There was an opening between the car and a coal pile up at the side track. The horse was moving towards that. I thought he was going down the cut. I seen there was no other way to escape, but, when he went past the car, he turned to the right towards the road, and in doing so he went right over the high bank, and, just as I saw the buggy was going to strike the high bank, I grabbed a wire with my left hand, a kind of silver wire around the seat, and when it struck, it threw me up full length, but I struck back in, struck in the cushions. My right hand struck outside. After going over the bank, just on the other side there is a ditch, a side ditch of the road. Q. What was the first indication that you had from your horse that he was frightened? What was the first thing that he did that convinced you that he was frightened? A. He raised his head and snorted loudly, and then he stepped backwards, possibly two steps, and just at this instant he rushed forwards. Q. Just as he rushed forwards what were you doing? A. I was sawing him with the lines all that I could. I was pulling, trying to stop him. Q. Was it then your intention or not to go on by the cars? A. I was trying to go back by Cherokee Falls. I saw that he was too much excited, and I saw that it would be hard to get him to go by. Q. What prevented you from turning back to Cherokee

Falls? A. I suppose it was these rabbits giving this second frustration. Q. Before you could turn him towards Cherokee Falls, your horse rushed forward with all his might? A. Yes, sir. Q. Now, what was all along here at the time this accident occurred? A. Back here was shingles. Q. All along here? A. Yes, sir; stacked up I think about 10 or 12 feet high. The shingles were on the side of the road, and, when the horse backed, I thought he was going to run into this pile of shingles. Q. Do you remember where these rabbits were sitting? A. This is the depot here. The door there. These rabbits were just about the corner of that depot proper. Q. Not the corner of the platform? A. No; about the corner of the depot proper. Q. I believe you say that just at the time your horse ran back that the rabbits were making a noise? A. Yes, sir; I heard the noise myself that they were making, a great deal of noise, and they were not only doing that, but they were frustrating the cage. Q. Were they making that noise before that time? A. No, sir. Q. Did you see the rabbits about that time? A. Yes, sir; I noticed it just as I was passing. Q. At the point where I place figure '1,' is it intended to represent the cage of rabbits? A. Yes, sir. Q. Your horse with reference to that cage of rabbits—your horse when it began to get frightened, where was it? A. He had turned about the length of the horse around the corner. Q. I will put a cross-mark near that point. A. Yes, sir. Q. What is the distance from the cage of rabbits to the corner of the platform, how close were the rabbits to the corner of the platform? A. I think they must have been about eight or ten feet, about eight. Q. The first sign that you saw of the fright of the horse, the horse became frightened just as you were passing or had passed the cage of rabbits? A. Yes, sir; when it came in front of that car. Q. They were jumping, surging, and shaking the cage? A. When I passed them, they were all of them very quiet. Q. So just when you passed them they began to make that noise and jump? A. Yes, sir; after the horse blew or snorted. Q. Then they began to jump and surge? A. Yes, sir."

A careful examination of all the evidence will not show that any inference can be drawn that the cause of the horse's fright was any of the allegations of negligence specified in the complaint, but, on the contrary, the conclusion must be reached that the cage of jack rabbits on the platform of defendant's depot was the cause of horse's fright, and, while the highway might in part have been obstructed by the car, plaintiff had room to cross said highway and did get over it without collision with the car. The defendant had the right to put the rabbits on its platform at depot. That is what platforms and depots are erected for, and it had the right to unload its cars there and to haul

shows, wild animals, and any other freight in the way of its business. The rule on the subject of proximate consequences is thus stated in *Harrison v. Berkley*, 1 Strob. (S. C.) 525, 47 Am. Dec. 578, and quoted with approval in *Pickens v. Railway*, 54 S. C. 498, 82 S. E. 567: "Only the proximate consequences shall be answered for. 2 Greenleaf, Ev. 210, and cases there cited. The difficulty is to determine what shall come within that designation. The next consequence only is not meant, whether we intend thereby the direct and immediate result of the injurious act, or the first consequence of that result. What either of these would be pronounced to be would often depend upon the power of the microscope with which we should regard the affair. Various cases show that in search of the proximate consequences the claim has been followed for a considerable distance, but not without limit, or to a remote point. 8 Taun. 535, *Peak's Cases*, 205. Such nearness in the order of events, and closeness in the relation of cause and effect, must subsist that the influence of the injurious act may predominate over that of other causes and shall concur to produce the consequence, or may be traced in those causes. To a sound judgment must be left each particular case. The connection is usually enfeebled, and the injurious act controlled, where the wrongful act of a third person intervenes, and where any new agent, introduced by accident or design, becomes more powerful in producing the consequences than the first injurious act. 8 East, 1, 1 Esp. 48. It is therefore required that the consequences to be answered for should be natural as well as proximate. 7 Bing. 211; 5 B. & Ad. 645." Here, if defendant was negligent as complained of, these acts of negligence did not produce the fright of his horse, but an independent cause intervened and produced that fright, to wit, a cage of playing jack rabbits. In *Brown v. Laurens County*, 38 S. C. 282, 17 S. E. 21, a nonsuit was granted and sustained by the Supreme Court. The facts of that case were plaintiff was driving her horse and buggy on a bridge across a public stream. The horse shied at a piece of timber which had been put there for the purpose of repairing the bridge, and the buggy was backed over the side of the bridge at a point where there were no side railings, and plaintiff was thrown into the stream and injured. At close of plaintiff's testimony, defendant moved for a nonsuit on the grounds that the cause of the injury was "a frightened horse, not a defective bridge." This case was followed by case of *Mason v. Spartanburg*, 40 S. C. 390, 19 S. E. 15, 42 Am. St. Rep. 887, case relied on by Judge Aldrich on circuit. The plaintiff's injury in this case was caused by a frightened horse. The horse was not frightened by any of the acts of negligence set out in plaintiff's complaint as a direct and proximate cause of his injury, and to

allow a recovery in such a case would, in my opinion, inflict untold annoyance, litigation, and injury, and would be a most pernicious and dangerous doctrine to establish.

I think the circuit judge was right, and the judgment of the circuit court should be affirmed.

GARY, C. J., concurs.

(90 S. C. 447)

McCRAVEY et al. v. OTTS et al.

(Supreme Court of South Carolina. March 1, 1912.)

1. EXECUTORS AND ADMINISTRATORS (§ 138\*)  
—TESTAMENTARY POWER OF SALE.

The second clause of a will contained a bequest to the wife of the testator of a one-sixth interest in certain lands "when my executors dispose of the same." The first item placed the conduct of all the testator's business in the hands of his executors until one of his sons reached 21. The fifth item expressed a desire for the testator's wife and children to own jointly the land mentioned in the second item. *Held*, as the second item did not grant an express power of sale to the executors, and a construction which would give them such an implied power would be in conflict with the other portions, no such power was granted therein.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 560-568; Dec. Dig. § 138.\*]

2. WILLS (§ 649\*)—CONDITIONS—RESTRAINT OF ALIENATION—VALIDITY.

Civ. Code 1902, § 2436, provides that joint tenants or tenants in common may be compelled to make severance and partition of all lands so held at the instance of their coholders. A will provided that lands devised jointly to the testator's wife and children should not be sold until all the tenants agreed with the testator's sister. *Held*, the statute states a rule of public policy, and the restriction is void both by statute and by common law as an unreasonable limitation on the power of alienation.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1540; Dec. Dig. § 649.\*]

Appeal from Common Pleas Circuit Court of Spartanburg County; R. C. Watts, Judge.

"To be officially reported."

Action by S. T. McCravey and others against Laura A. Otts and others. From a judgment for plaintiffs, defendants appeal. Affirmed.

The will of R. M. Otts was as follows:

"State of South Carolina—Spartanburg County.

"I, R. Miller Otts, of the state and county aforesaid, being of sound mind, memory and understanding, in view of the uncertainty of this frail and transitory life, do hereby make, ordain, publish and declare this to be my last will and testament, and do hereby revoke, make void and of none effect all other wills made heretofore by me, to-wit:

"1st. It is my will and wish that all my just debts be paid, and in order to enable my executors to do the same I desire them to conduct all of my business as it now stands, to make it the most profitable and to pay all expenses they may have to incur,

and to pay the debts as fast as they can. This arrangement I desire to continue until my youngest son, Christmas M. Otts, becomes twenty-one years old.

"2nd. I do hereby will, give and bequeath unto my beloved wife, Laura A. Otts, one horse or mule, one cow and calf, one buggy and harness, one one-horse wagon, farming tools for a one-horse farm, and in addition to the above I give to her (my wife) five shares of Merchants' & Farmers' Bank stock I hold, and one-sixth of my interest in the Mill and Bettie King places when my executors dispose of the same, in consideration of money she has let me have heretofore. Also I give to her one tract of land whereon Andy Wofford now lives, known as lot No. 4 of the S. C. Miller lands, containing 88 acres, more or less, during her natural life or widowhood, and at her death, or should she marry again, then I desire the said tract of land to be sold and the proceeds equally divided between my children.

"3rd. It is my will and wish that my family stay together as much as possible and receive their support from my estate.

"4th. It is my will and wish that my two youngest sons, viz.: Christmas M. Otts and J. Coan Otts, be educated at the expense of my estate, equal to my oldest son, R. J. Otts.

"5th. It is my will and wish that when my youngest son, Christmas M. Otts becomes twenty-one years old, that all of my estate, both real and personal, except what is known as the Mill and Bettie King places, be equally divided between my children, viz.: Lily G. Otts, Nannie M. Otts, Robert J. Otts, J. Coan Otts and Christmas M. Otts, this to be done by three discreet persons chosen by my executors or under the conduct of my executors. *My interest in the Mill and Bettie King places (which is two-thirds of the whole) I desire my wife and children to own jointly after my youngest child, Christmas M. Otts, becomes twenty-one years of age, until such time as they may all agree with my sister, and sell those two tracts to the best advantage, and the proceeds of such sale I desire to be divided equally between them, viz., my wife, Laura A. Otts, Lily G. Otts, Nannie M. Otts, Robert J. Otts, J. Coan Otts, Christmas M. Otts; my wife's share I give to her in consideration of moneys she has let me have heretofore, the same being understood by me and her.*

"6th. I do hereby nominate, constitute and appoint Robert J. Otts and D. M. Coan my executors to this, my last will and testament.

"In witness thereof I do hereby subscribe my name and affix my seal. This the eleventh day of June, one thousand eight hundred and ninety-four.

"R. M. Otts. [Seal.]

"In the presence of;

"W. P. Wingo.

"G. P. Moore.

"T. M. Hatchett."

Bomar & Coan, for appellants. H. K. Osborne, for respondents.

GARY, C. J. R. M. Otts, late of Spartanburg county, S. C., departed this life, on the ——— day of ———, 1894, leaving of force and effect his last will and testament, which will be set out in the report of the case.

This appeal involves the construction of said will.

[1] Lily G. Otts died in 1899, leaving as her only heirs at law the other devisees named in said will. Christmas M. Otts conveyed all his right, title, and interest in said lands by way of mortgage to B. G. Landrum and others, and, under a judgment of foreclosure, his interest was sold at public outcry, and purchased by the plaintiffs. Christmas M. Otts was over 21 years of age when he executed said mortgage. Mortgages have also been executed by several others of the devisees on their respective interests.

The question presented by the exceptions is whether the said lands are now subject to partition, or must the sale be delayed, until such time as the executors can sell by and with the consent of the devisees. The second clause of the will contains this provision: "I do hereby will, give and bequeath unto my beloved wife, Laura A. Otts, \* \* \* one-sixth of my interest in the Mill and Bettie King places when my executors dispose of the same." It is contended that the words, "when my executors dispose of the same," authorize and empower the executors to sell said lands. In the first place, these words were used to designate a certain time, and not for the purpose of conferring a power of sale. Therefore it cannot be contended that the power of sale is given to the executors in express terms, and it can only be contended that power to sell the lands was conferred upon them by implication. In the next place, the words, "when my executors dispose of the same," are inconsistent with the first item of the will, which is as follows: "It is my will and wish that all my just debts be paid, and in order to enable my executors to do the same I desire them to conduct all of my business as it now stands, to make it the most profitable and to pay all expenses they may have to incur, and to pay the debts as fast as they can. This arrangement I desire to continue until my youngest son, Christmas M. Otts, becomes twenty-one years old." This shows that the testator did not contemplate a sale of the lands by the executors before Christmas M. Otts became 21 years of age, nor are there any other words in the will, showing that he contemplated a sale of the lands by the executors after that time; on the contrary, the words, "when my executors dispose of the same," are inconsistent with

the provisions of the fifth item of the will, which is as follows: "It is my wish that when my youngest son, Christmas M. Otts, becomes twenty-one years old, that all of my estate, both real and personal, except what is known as the Mill and Bettie King places, be equally divided between my children, viz.: Lily G. Otts, Nannie M. Otts, Robert J. Otts, J. Coan Otts, and Christmas M. Otts, this to be done by three discreet persons chosen by my executors or under the conduct of my executors. My interest in the Mill and Bettie King places (which is two-thirds of the whole) I desire my wife and children to own jointly after my youngest child, Christmas M. Otts, becomes twenty-one years of age, until such time as they may all agree with my sister, and sell these two tracts to the best advantage, and the proceeds of such sale I desire to be divided equally between them, viz., my wife, Laura A. Otts, Lily G. Otts, Nannie M. Otts, Robert J. Otts, J. Coan Otts, Christmas M. Otts; my wife's share I give to her in consideration of moneys she has let me have heretofore, the same being understood by me and her."

[2] The next question to be considered is whether the provision in the fifth item of the will, that the lands were not to be sold, "until such time as they may all agree with my sister," prevents partition until such agreement. Section 2436 of the Code of Laws is as follows: "All joint tenants and tenants in common, and every of them which now hold or hereafter shall hold, jointly or in common, for term of life, year or years, or joint tenants or tenants in common, where one or some of them have, or shall have estate or estates for term of life or years, with the other that have or shall have, estate or estates of inheritance or freehold of any lands, tenements or hereditaments, shall and may be compellable to make severance and partition of all such lands, tenements and hereditaments which they hold jointly or in common for term of life or lives, year or years, where one or some of them, hold jointly or in common for term of life or years with other, or that have an estate or estates of inheritance of freehold. \* \* \*" The words "until such time as they may all agree with my sister" are inconsistent with the provisions of this section, which states a rule of public policy. Therefore they must be construed as having no force and effect. Not only are they without force and effect by reason of the statute, but they are, under the common law, an unreasonable limitation upon the power of alienation, and therefore against public policy.

Judgment affirmed.

WOODS, HYDRICK, and FRASER, JJ., concur. WATTS, J., disqualified.

123 Va. 214)

ATLANTIC COAST LINE R. CO. v.  
GRUBBS.†(Supreme Court of Appeals of Virginia.  
March 14, 1912.)1. RAILROADS (§ 348\*)—CROSSING ACCIDENT—  
CONTRIBUTORY NEGLIGENCE.

In an action for injuries to a traveler in a collision at a railroad crossing, evidence held to sustain a finding that plaintiff was not negligent.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1138-1150; Dec. Dig. § 348.\*]

2. RAILROADS (§ 348\*)—CROSSING ACCIDENT—  
CONTRIBUTORY NEGLIGENCE—BURDEN OF PROOF.

Contributory negligence in an action for injuries at a railroad crossing is an affirmative defense, the burden of maintaining which is on the defendant.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1117-1123; Dec. Dig. § 346.\*]

## 3. TRIAL (§ 156\*)—CONTRIBUTORY NEGLIGENCE—QUESTIONS OF LAW OR FACT.

When a consideration of the evidence in a negligence case is taken from the jury by a demurrer to the evidence, if the jury could have found therefrom that plaintiff was free from negligence contributing proximately to the causes of his injury, the court is bound to so find.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 354-356; Dec. Dig. § 156.\*]

## 4. RAILROADS (§§ 314, 328\*)—CROSSING ACCIDENT—CARE REQUIRED.

Where a railroad crossing and the view approaching it are obstructed, a higher degree of care is required of both the traveler and railroad company; the degree of caution required being in proportion to the danger, obstructions, noises, etc.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 965, 1057-1070; Dec. Dig. §§ 314, 328.\*]

## 5. INTEREST (§ 21\*)—DAMAGES—VERDICT.

Under the express provisions of Code 1904, § 3390, the damages awarded in an action for injuries bear interest from the date of the verdict.

[Ed. Note.—For other cases, see Interest, Cent. Dig. § 42; Dec. Dig. § 21.\*]

Error to Hustings Court, Part 2, of Richmond.

Action by H. L. Grubbs against the Atlantic Coast Line Railroad Company. Judgment for plaintiff, and defendant brings error. Modified and affirmed.

Wm. B. McIlwaine and E. P. Cox, for plaintiff in error. Geo. C. Gregory and Samuel A. Anderson, for defendant in error.

CARDWELL, J. H. L. Grubbs brought this action in 1908 against the Atlantic Coast Line Railroad Company and the Norfolk & Western Railway Company, jointly, to recover damages for personal injuries alleged to have been sustained by the plaintiff because of the negligence of the defendants. Later the plaintiff filed an amended declaration against the Atlantic Coast Line Railroad Company alone; the case having been dismissed as to the Norfolk & Western Railway Company.

At the trial of the cause upon the issue

joined on the amended declaration, the defendant demurred to the evidence, filing its grounds of demurrer, in which demurrer the plaintiff joined. The jury assessed the plaintiff's damages at \$3,000, subject to the opinion of the court on the demurrer to the evidence, and the court, overruling the demurrer, entered judgment for the plaintiff, to which judgment this writ of error was awarded.

By agreement of counsel for the respective parties appearing in the record, all questions raised on the pleadings, except the demurrer to the evidence, are waived, and therefore the sole question for consideration here relates to the action of the trial judge in overruling the demurrer to the evidence and entering judgment thereon for the plaintiff.

The plaintiff, an employé of the Eagle Steam Laundry, Inc., on the morning of Thursday (Thanksgiving Day), November 28, 1907, about 9 o'clock, was driving a gentle horse hitched to a closed wagon belonging to the laundry company eastwardly along Hull street, in what was then the city of Manchester, but subsequently became a part of the city of Richmond, and at the point where the defendant's line of railroad crosses Hull street at right angles, a regular scheduled train of the defendant, commonly known as the "Cannon Ball" train, running about one minute behind its schedule time, collided with the wagon which the plaintiff was driving, and he was thrown to the ground and injured.

At the point of the accident the defendant's railroad track has the general direction of north and south, while Hull street has the general direction of east and west, and along the center of Hull street and over the railroad tracks crossing it a trolley street car line is operated. Pursuant to an ordinance of the city of Manchester requiring the defendant to constantly keep its crossing of certain named streets, including Hull street, guarded by flagmen or proper gates, the defendant undertook to maintain gates at the Hull street crossing, which is a much used crossing. These gates are operated from a tower located north of Hull street and east of the railroad, at the northeast corner of the intersection of the railroad and Hull street; and just across the street from the tower to the south, on the same side of the railroad tracks as the tower, but setting back further from Hull street, is situated the defendant's depot. Three railroad tracks cross Hull street at this point; the middle one being the main track over which the defendant operates its through trains, and the other two being side tracks upon which cars are shifted and trains made up. On the Swansboro, or west, side of these tracks were two gates—a short one across the sidewalk and a long one across the greater

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

† Rehearing denied



portion of the roadway, but leaving room enough to drive around it on that side when the gate was down. On the Manchester and Richmond, or east, side of the railroad were three gates—one across the sidewalk of Hull street, and two across the driveway of the street, entirely closing it when the gates were down.

On the occasion of the accident to the plaintiff, he was driving his laundry wagon along Hull street from the direction of the locality known as Swansboro towards the cities of Manchester and Richmond; and when he approached the gate in the street on the Swansboro side, which was down and where he stopped, a shifting engine, moving freight cars, was passing on the middle or the east track of the railroad, either pulling or pushing the cars attached to it to the south, but soon changed its direction and came back northwardly on the west track and across Hull street, stopping just as Hull street was cleared. Whether this train of cars stopped after clearing Hull street with its engine next to the street or its rear car is not by any means made clear by plaintiff's evidence, since his statement is that the rear car was next to the street, while other witnesses for him say that the engine was pushing the cars and stopped at the north side of the street after clearing it. Be this, however, as it may, for whether this train stopped with its engine or rear car next to Hull street, vision of a train approaching from the north on the main track was obstructed from the point at which plaintiff was standing with his wagon waiting for the street crossing to be cleared.

When plaintiff stopped with his horse at the gate across Hull street, an electric car coming also from the west, or Swansboro, side of the railroad, came up and stopped immediately behind his wagon. The evidence very clearly shows that, as soon as the freight cars cleared the street, the gate on the Swansboro side went up sufficiently high for plaintiff's wagon to pass under it, and he thereupon started across the railroad tracks with his horse in a trot, being urged on by the whipping of the reins upon his back, and at the same time the conductor of the electric car, E. V. Bowles, went forward, as was his custom and duty, towards the main line of the railroad with the view of signaling his car forward if the way was found to be clear. Bowles, testifying for the plaintiff in this cause, after stating that his car came down from Swansboro and stopped at the gate with plaintiff's wagon in front of his car, or almost in front of it, says: "There was a shifting engine pulling some cars by. After the shifting engine pulled by, the gates went up, and I went out to flag the motorman across. \* \* \* Then the laundry wagon drove by. I was right beside him. He and I went both across together. \* \* \* Just as I got by the box car I saw the other train coming up. I jumped back out of the

way. Just as I jumped back, the train hit the wagon and knocked it back over there. I got back out of the way myself. When I got back the gates were down. \* \* \* He had let them down again." Then after stating that the gates were down when his car reached the railroad crossing, that when the cars pulled by and the gates went up plaintiff's wagon started across, and he started almost at the same time, Bowles says that the plaintiff did not go around the gate, and his statements are borne out by that of the plaintiff, and by other witnesses testifying for him who were eyewitnesses of what took place.

As to whether the gates on the Manchester side went up at the same time or not, five witnesses have testified, two of them for the plaintiff and three for the defendant; plaintiff's witnesses saying they "did not know whether they were up or down," while defendant's witnesses state positively that they were down. There is evidence for the plaintiff tending to prove that the mist and smoke from the shifting engine impaired, if it did not obstruct, the view of the gates on the Manchester side by the plaintiff while standing at the gate on the Swansboro side. These gates at the Hull street crossing, as we have seen, were operated from a tower, erected and used for the purpose of keeping watch for approaching trains, and were to be lowered as the situation might require for the purpose of preventing travelers of Hull street from coming in contact or collision with railroad trains crossing the street. One Morgan, the employé of the defendant at the time of the accident out of which this suit arises, was in the tower at his post of duty a short while before the accident, but with the purpose in view of preparing a "Thanksgiving stew," went to the ground floor below, leaving one C. H. Fowler, a boy about 14 years of age, alone in the tower, with instructions to look out for passing trains or engines, and how to lower the gates in case an engine or train was seen approaching the crossing, but no instructions as to how to raise the gates. These gates were, of course, not intended to be raised by any other agency than that installed by the defendant, and why or how those on the Swansboro side were raised on this occasion is wholly unexplained. Fowler, who just happened to be in the tower and had been there but once before, testifying for the plaintiff, says that Morgan told him how to lower the gates, but gave him no instructions as to how to raise them; that after he had lowered the gates, and the shifting engine had gone across, "he called to Morgan twice and told him that the train had gone across that crossing, to which Morgan replied that he would be up there directly"; and that he called to Morgan to raise the gates because he (witness) knew they should be raised when the train was off the crossing, but made no attempt to raise them himself and

did not know anything about how they came to be raised, as there was not anybody in the tower but him—"I know I didn't raise them." Morgan, the gatekeeper, was at the bottom of the tower, and when called to by the boy, Fowler, twice to come and raise the gates, replied to each call by saying that he would come up into the tower and raise the gates, but he had not gotten up into the tower when the accident to the plaintiff occurred.

It is true that defendant's witnesses testify that these gates never went up before the accident, and that the plaintiff drove around the end of the gate on the Swansboro side as soon as the shifting engine had passed, in his endeavor to hurry over the crossing; but, although none of plaintiff's witnesses state that the gates on the Swansboro side went up entirely, they do testify that they went up sufficiently for the plaintiff to pass his wagon under them, and Morgan, who was on the ground, familiar with the operation of these gates, and who doubtless might have given some explanation as to how the gates on the Swansboro side came to go up after the shifting engine and cars had passed the street and before he returned to the tower, was not introduced to testify concerning the occurrence.

[1] Upon this evidence, had the case been submitted to the jury properly instructed, it would have been sufficient to warrant a finding by them that the defendant was guilty of the negligence charged in the declaration with respect to the lack of due care in the operation of the gates on the occasion of this accident as a safeguard against accidents to travelers in Hull street at its crossing of the defendant's tracks, and under the well-established rule governing the consideration of the case upon a demurrer to the evidence this court must so hold.

[2] The case was also one for the jury upon the question of the plaintiff's contributory negligence, which is an affirmative defense, the burden of maintaining it being upon the defendant; and therefore we are brought to the question (which has been given the careful consideration which the nature of the evidence requires) whether or not, had the case been fairly submitted to the jury, they would have been warranted in finding from it that the plaintiff was free from such negligence as would have barred his right to recover in this action.

[3] It is also well settled that when the consideration of the evidence is taken from the jury by demurrer to the evidence, if the jury could have found therefrom that the demurree was free from negligence contributing proximately to the causes of his injury, the court must so find.

Much stress has been laid in the argument for the defendant upon the admission of the plaintiff that he was perfectly familiar with the Hull street crossing and all its surround-

ings, as he had been driving across it, about the same time of the day, for about a year prior to the accident to him; but when this admission is considered along with the other evidence for him, we do not think the admission is entitled to the weight that the learned counsel argues should be given it. Fowler in the tower did not see or hear the "Cannon Ball" train coming on the main track, and thought the crossing was clear after the shifting engine and cars cleared it, as he called to Morgan twice to come up in the tower and raise the gates. Bowles, conductor of the electric car, evinces familiarity with the crossing and testifies that when the shifting engine and cars cleared the crossing and the gate went up, he, as did the plaintiff, thought the crossing clear and went forward to flag his car across, barely escaping being himself struck by the "Cannon Ball" train, the approach of which he did not discover until he had passed the freight cars. He further says that when he first knew of the approach of the train and jumped back to prevent being hit by it, the plaintiff's horse was on the main track with the train moving at a rapid speed and only a few feet from him.

Tinsley, motorman on the electric car, corroborates the statements of the plaintiff and Bowles as to the situation at the crossing, the passing of the shifting engine and cars to the north of the crossing, the going up of the gate in front of plaintiff's horse where he had been standing about two or three minutes, and that the approaching "Cannon Ball" train could not be seen from where they were standing because of the obstruction of the view by the engine and cars which had stopped on the west track just north of the crossing. He further testifies: "My conductor jumped off the car, and as the gates were raised, the wagon pulled on across the crossing. After he heard the (shifting) engine pass, the conductor ran alongside the wagon about the rear of it. About the time I got ready to start, this 'Cannon Ball' train hit the laundry wagon and knocked the horse on the other side of the track and the wagon stayed on the side towards Swansboro—knocked the driver (plaintiff) out. I got off to help pick him up. After that the gates were let down again, after the wagon was struck. If it had been a half a minute longer, it would have struck my car. I was fixing to cross myself after the gates were raised, and it came near about hitting my conductor."

Clements, another of plaintiff's witnesses, was standing between the gate on the Swansboro side and the railroad tracks waiting for the shifting engine and train to pass, and when it cleared the crossing he too started across a little behind plaintiff's wagon, and escaped being hit by the "Cannon Ball" only by jumping back. He describes the occurrence fully, and says that he was

thinking about something else at the time, and only heard the train coming in time to jump back out of its way; the plaintiff being then with his horse's head on the main track.

Hinchey, another witness for the plaintiff, was the only eyewitness of the accident who saw it from the east or Manchester side. He was standing with his back to the gates on the Manchester side, facing the gates on the opposite side of the railroad tracks where the plaintiff's wagon had been standing, and says that as soon as the crossing was passed by the shifting engine and cars going towards Richmond, the plaintiff started across, and he (witness) waved and yelled at him, but "he didn't stop at all. Just kept coming." This witness, however, fails to show that the plaintiff saw him waving or heard him yelling; nor does he say that the plaintiff could have seen or heard the approaching train had he looked and listened for it. All the witnesses agree that the vision of the approaching train was obstructed from the point where plaintiff's wagon had been standing, and a number of them practically say that the noise made by the ringing of the bell on the shifting engine was sufficient to prevent the plaintiff from hearing the train coming from the north. The plaintiff says that he neither heard nor saw it. True he says that he only glanced in both directions before starting across the railroad tracks; but he could not have seen the approaching train had he looked after starting, and he was not alone in believing it to be safe to go across after the gates went up, as the witnesses Bowles, Clements, and Tinsley took the same view of the situation.

Kelley, engineman on the "Cannon Ball" train, examined as a witness for the defendant, when asked on cross-examination if he could see plaintiff's wagon, answered: "I couldn't see it until it passed the man's tank (referring, doubtless, to the tank or tender of the shifting engine standing on the west track at the street crossing). Q. Could the man have seen you? A. No, sir; not to save his life. Q. You could not have seen the man, and that man could not have seen you? A. I don't think he could have seen me because the smoke and steam of that engine would have hid my train from him and also hid him from me. Q. Neither could see the other? A. No."

[4] Under similar conditions to those described by witness Kelley, this court said, in *Southern Ry. Co. v. Aldridge's Adm'r*, 101 Va. 142, 43 S. E. 333, *infra*, that a higher degree of caution is required of both the traveler and the railroad company than if the obstructions and noises did not exist; the degree of caution required of both parties being in proportion to the danger caused by the obstruction and noises.

The case of *Rangeley v. Southern Ry. Co.*,

95 Va. 715, 30 S. E. 386, holds, as do practically all the authorities, that open gates at a railroad crossing are no guaranty of safety, meaning, of course, that open gates do not relieve a traveler of a highway crossing the railroad of the duty to exercise ordinary care for his own safety; but those cases recognize that the raising of the gates is a circumstance which justifies the traveler of the highway in starting to cross the railroad, and further recognize that whether one injured in such circumstances exercised due care for his own safety is a question for the jury.

In the case of *Rangeley v. Southern Ry. Co.*, *supra*, where the facts were very similar to those which the evidence in this case tended to prove, the question whether the plaintiff's intestate used that degree of care which an ordinarily prudent person would use under like circumstances was fairly submitted to the jury, who found for the defendant, and this court held that the evidence, considered as upon a demurrer thereto, justified the jury in finding the verdict they did, and affirmed the judgment of the trial court.

So, in the case of *Southern Ry. Co. v. Aldridge's Adm'r*, 101 Va. 142, 43 S. E. 333, where the railroad company had been permitted by the city of Danville to temporarily substitute a watchman for gates at a grade crossing, and the accident to Aldridge followed, it was held that the railroad company was guilty of negligence, and although the accident might not have happened, if the deceased had stopped or paused, still his failure to stop did not, as a matter of law, make a case of contributory negligence so plain as to justify the court in withdrawing it from the jury.

In the case before us, we have discussed, perhaps at greater length than was necessary, the evidence bearing upon the question of the plaintiff's contributory negligence, and the conclusion reached is that the facts do not so plainly disclose his negligence that reasonable men should not differ in their judgment upon it. *Rangeley v. Southern Ry. Co.*, *supra*; *Kimball & Fink v. Friend*, 95 Va. 125, 27 S. E. 901; *Marshall's Adm'r v. Valley R. Co.*, 99 Va. 798, 34 S. E. 455; *C. & O. Ry. Co. v. Williams*, 108 Va. 689, 63 S. E. 796, and cases cited.

[5] The plaintiff assigns as cross-error the failure of the trial court in its judgment to make plain that the amount of damages ascertained by the verdict of the jury should bear interest from the date of the verdict.

It is conceded that the assignment is meritorious, since the statute (section 3390, Code of 1904) provides: "If a verdict be rendered which does not allow interest, the sum thereby found shall bear interest from its date, and judgment shall be entered accordingly."

It follows that the judgment of the trial

court will be corrected in the respect that the cross-error assigned by the plaintiff points out, and as so amended will be affirmed.

Amended and affirmed.

(113 Va. 411)

WASHINGTON-SOUTHERN RY. CO. v.  
GROVE'S ADM'R.†

(Supreme Court of Appeals of Virginia.  
March 14, 1912.)

1. MASTER AND SERVANT (§ 243\*)—INJURIES—  
CONTRIBUTORY NEGLIGENCE—VIOLATION OF  
ORDERS.

Intestate, a yard brakeman, was ordered by his conductor to go to a switch and set it for a certain track and remain there until the front end of his train had passed, but instead, after setting the switch, intestate walked back to his train and got on the front car. Meanwhile the train of another company attempted to pass over the switch and fouled it and collided with intestate's train. Had he remained at the switch as ordered, intestate could have avoided the accident. *Held*, that intestate was guilty of contributory negligence.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 682, 759-775; Dec. Dig. § 243.\*]

2. NEGLIGENCE (§ 122\*)—CONTRIBUTORY NEGLIGENCE—BURDEN OF PROOF.

The burden of establishing contributory negligence is on defendant, unless it appears by plaintiff's evidence, or can be fairly inferred from all the circumstances.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 221-223, 229-234; Dec. Dig. § 122.\*]

3. TRIAL (§ 156\*)—DEMURRER TO EVIDENCE—  
EXCLUSION OF CONFLICTING EVIDENCE.

On demurrer to plaintiff's evidence, all evidence which fairly conflicts therewith should not be considered, but evidence favorable to defendant may be considered if it does not conflict with plaintiff's evidence.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 354-356; Dec. Dig. § 156.\*]

4. MASTER AND SERVANT (§ 229\*)—CONTRIBUTORY NEGLIGENCE—CARE REQUIRED.

A servant engaged in dangerous work must exercise care for his own safety commensurate with such dangers as may be discovered by him by the exercise of ordinary care.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 687-700; Dec. Dig. § 229.\*]

Error to Circuit Court, Alexandria County.

Action by Grove's Administrator against the Washington-Southern Railway Company. Judgment for plaintiff, and defendant brings error. Reversed.

Hill Carter and Francis L. Smith, for plaintiff in error. Leckie, Fulton & Cox, Jos. T. Sherler, Lewis H. Machen, and Moncure, Tebbs & Gaines, for defendant in error.

CARDWELL, J. Silas B. Grove's administrator brought this action to recover damages for the death of his intestate, which he alleges was occasioned by the negligence of the defendant railway company. The defendant demurred to the evidence, and the circuit court gave judgment for the plain-

tiff for the damages ascertained by the verdict, which judgment we are asked to review and reverse.

The defendant company was, on the 25th day of January, 1909, engaged in the business of a common carrier by railroad in Alexandria county, Va., and in the conduct of its business as such owned and controlled certain yards and tracks known as the Potomac yards. Within these yards there are about 52½ miles of trackage, consisting of about 100 tracks and 200 switches. The yards are used by the defendant company in handling its own cars and those of four other railroads, including the Southern Railway Company. All movements in the yards are made under the direction and supervision of the defendant company.

At the date of the accident causing the death of Grove, viz., January 25, 1909, about 2,000 cars were handled each day within the yards. The crews operating trains belonging to other railroad companies become subject to the control and direction of the defendant company as soon as they enter the yard limits. Among the tracks contained within these yards was one known as the "naught" track, and another known as the "thoroughfare" track, which was connected with the "naught" track by means of a switch, and a portion of the "naught" track south of said switch was known as the "ladder" track.

At the time of this accident, Grove was an experienced brakeman, thoroughly familiar with the method of operating the yards, the trains, and the cars handled, having been in the employ of the defendant company at its said yard for the previous year. Upon the occasion of the accident by which Grove received his injuries, he was, in his usual employment, engaged as brakeman on a train of 28 freight cars which had been made up on the shop repair tracks in the yards and was being pushed by an engine up and over the "thoroughfare" track to the point where that track runs into and adjoins "naught" track, and were intended to be moved over "naught" track after passing through and over the switch connecting that track with "thoroughfare" track. This train was being moved in a northerly direction, with the engine at the south end pushing and backing it, and at the north end or front of the train was a car loaded with lumber. Grove had been sent by Conductor Bayliss, who was in charge of this train, forward with instructions to set the switch for the passage of that train from the "thoroughfare" track to the "naught" track, and, as he (Bayliss) states, to remain there until the front of his train reached that point. After giving this order, Conductor Bayliss walked back down his train, about 10 car lengths from the front and there got up on top of one of the cars. In the meantime Grove had, after setting the switch, walked back to the front end of his train and mounted the car loaded

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

† Rehearing denied.

with lumber. During this time a train of the Southern Railway Company was moving north along and over "naught" track to the point where it was connected with the "thoroughfare" track by the switch just mentioned, said train consisting of an engine and three cars, with the engine in front carrying a headlight, causing a brilliant light in advance of the approaching train which could be seen when 1,000 feet away by a person standing at the switch, and thence all the way in its progress to that point. As the Southern train approached the switch, it was found set against the train's movement, and thereupon a brakeman from that train was sent forward to change the switch for the passage of the Southern train over it; but this train, instead of having stopped clear of the switch connecting the two tracks, had run upon the frog of the switch so as to foul the connection at that point and prevent a train running over the "thoroughfare" track from passing over the switch to the "naught" track without colliding with it. After the engine of the Southern train ran on the switch and fouled it, a brakeman of that train, who was on the left side of the engine, got down upon the ground, walked around the engine to the switch, and was just about to throw it for his train, when he heard some one shout, "Look out!", and the defendant company's (Washington-Southern) train ran into the Southern train at the frog; the defendant's front or leading car was derailed by the collision and turned upon its side, the lumber with which it was loaded was thrown out, and the body of the deceased, Grove, was found under the lumber on the west side of the track. Grove, the front brakeman of his train, was subject to the orders of his conductor who had authority to assign the brakemen to the places where they were to work and to prescribe the duties to be performed by them.

The contentions of the plaintiff are that the collision between the said trains resulted from the negligence of the defendant company: (1) in making up the train upon which Grove was employed in an improper manner, so that it had to be operated at the point of collision at an unreasonable and dangerous rate of speed and at a rate in excess of that limited by the rules and custom of the defendant company; (2) in giving improper and conflicting orders to the crews of the respective trains, and without giving each of said crews information as to the order given the other, and without taking any precaution whatever to prevent a collision; and (3) in causing and allowing the Southern train, in violation of the rules and practice of the defendant company, to be stopped upon the switch by its crew, who at the time were under the defendant company's control and direction.

On the other hand, it is the contention of the defendant company that it was not guilty of negligence resulting in the injury

to Grove, but that, had he obeyed the instructions given him by his superior—Conductor Bayliss—and remained at his post of duty, there would have been no accident, and certainly he would not have been injured, for, standing at the switch, he could have seen the Southern Railway engine with its bright headlight when 1,000 feet distant and thence all the way to the scene of the accident; he would have had an unobstructed view of 500 feet of the track over which his own train was going, and which he knew was approaching, for, as a member of its crew, he had been sent forward to throw the switch for it and told to remain there as a sentinel to guard and protect its approach to that point; and, had he performed his duty and remained at his post, he could not have failed to observe the approach of the Southern Railway train, whose progress he could have arrested and prevented its engine from fouling the switch, and in so doing would himself have been in a place of safety.

[1] It very clearly appears from the evidence that neither the speed of the train, nor the darkness of the night, nor the length of the train upon which Grove was at work, caused the accident; but upon the demurrer to the evidence it does appear that the defendant company was negligent in the conduct of its business upon its shifting yards at Alexandria on the occasion of the accident in which Grove sustained his fatal injuries, and therefore the sole question for our decision is whether or not his own negligence contributed proximately with that of the defendant company causing his injuries.

[2] Unquestionably, contributory negligence is an affirmative defense, and the burden of establishing it is upon the demurrer, unless it is disclosed by the demurree's evidence, or can be fairly inferred from all the circumstances of the case; but on the question of contributory negligence in this case, which consists, if at all, in disobedience by the deceased of the orders of Conductor Bayliss, as well as his failure to see the engine and train of the Southern Railway Company before his train struck it, which, as the evidence clearly shows, he could have done had he been at the switch where the accident occurred, authority is abundant to sustain the proposition that if Grove disobeyed the orders of Conductor Bayliss to remain at the switch until his train reached that point which neglect or failure of duty contributed to injuries to him resulting in his death, the plaintiff cannot recover in this action.

The evidence as to Grove's neglect of duty and disobedience of the orders of Conductor Bayliss, viewed as upon a demurrer to evidence, is as follows: Conductor Bayliss, who was in charge of the train on which Grove was at work, and who was in control of both the train and Grove, testify-

ing as a witness summoned by the plaintiff but introduced by the defendant company, said: "I instructed Mr. Grove in the shop to go to the switch and throw it and stay there until the north end of the train came, after we got train made up on the 'naught' track onto the 'thoroughfare' track. Also went to the rear end of the train with him and gave him Py. 702, which states the numbers and initials of the train, to deliver to the north-bound hump, and instructed him then to go to the switch and throw it and stay there until the train came. He went on up to the switch and gave a signal it was all right to come back; then I went on back up about 10 cars pulled up; after he stopped, I gave the engineman a signal to come on back and we came on back." The witness further states that his instruction to Grove to stay at the switch until the train arrived there was in accordance with the customary rule, and that, when Grove gave him the signal for the train to come on back, he (Grove) was standing on the ground at the switch.

[3] As conflicting with this evidence given by Bayliss so as to require its exclusion from consideration in determining whether or not the trial court erred in overruling the defendant company's demurrer to the evidence, the testimony given by Murphy, who was also a brakeman under Conductor Bayliss on the occasion of the accident to Grove, is alone relied on by the plaintiff.

It will be observed that Bayliss said that twice on the night of the accident he instructed Grove as to what he should do in connection with the operation of the train of 28 cars made up at the shops in the Potomac yards, and to be moved up and over the "thoroughfare" track to the point where that track runs into and joins another track known as "naught" track, intending that the 28 cars were to be moved over "naught" track after passing through and over the switch connecting that track with the "thoroughfare" track. Murphy, in speaking of the first instructions given by Conductor Bayliss to Grove, said he heard him say, "You go and line up switches up naught track." When asked with respect to his said statement, "Was that all the instructions or directions he gave him?" answered: "In my hearing it was." Now Murphy does not pretend to deny that he was not in a position to hear all that passed between Bayliss and Grove, but states facts and circumstances going to show that all his statement amounts to or was intended to mean was that he only heard a part of what passed between Bayliss and Grove when the former first directed the latter as to what he should do in connection with the moving of the train. Moreover, the other facts and circumstances shown clearly establish that the witness Murphy was necessarily separated from both Bayliss and Grove before they last parted and the sig-

nal for the train to back up to the switch was given, and he does not attempt to locate either until he received that signal.

Upon this state of the evidence, the testimony given by Bayliss that he instructed Grove to remain at the switch until the rear end of the train reached that point is uncontradicted.

The rule governing where a case is before us upon a demurrer to evidence does not require the exclusion from consideration evidence favorable to the demurrant with which the evidence of demurree does not conflict; but in such a case the evidence of the demurrant as to which there is no conflict or contradiction is entitled to the same consideration as if the demurrer to evidence had not been interposed. *Russell Creek Coal Co. v. Wells*, 96 Va. 416, 31 S. E. 614.

The evidence, as we view it, is conclusive that if Grove had obeyed the instructions given him by Bayliss the accident in which he lost his life would not have happened.

Plaintiff's witness, R. M. Colvin, general yardmaster of the Potomac yards, testifies that, owing to the place where the work (of shifting cars on the yards) was conducted and the nature of the business transacted, the only way to move the trains was by requiring each train crew to protect themselves by the exercise of the vigilance and care required under the circumstances; and the witness Murphy says, with reference to instructions given him by the conductor in the movement of freight trains in the yards, "He would always tell us to line up the switches and look out for the head end of the train." Grove, instead of remaining as instructed at the switch and keeping a lookout for the head end of an approaching train which could only have been effectively executed by him when standing on the ground, left that position and met his train before it reached the switch, and mounted to the top of its front car loaded with lumber, from which position he could not, by a proper signal, stop any other train approaching the switch, as he could have done had he remained on the ground at the switch. Very clearly from the evidence, if Grove had remained at the switch, he could not have failed to see the approaching engine and train of the Southern Railway Company as it was approaching the switch, and avoided, at least, an injury to himself, either by signaling that train, or by placing himself beyond danger from the inevitable collision of the two trains.

[4] It is a well-settled principle of law that it is as much the duty of the servant to provide for his own safety from such dangers as are known to him, or are discoverable by ordinary care on his part, as it is the duty of the master to provide for him. *Russell Creek Coal Co. v. Wells*, supra, and authorities cited; *Pittard's Adm'r v. Southern Ry. Co.*, 107 Va. 1, 57 S. E. 561; *N. & W. Ry. Co. v. Belcher*, 107 Va. 342, 58 S. E. 579.

The duty of a servant engaged in the carrying on of dangerous work to exercise care for his own safety is commensurate with such dangers as are known to him or are discernible by ordinary care on his part.

"The yard of a railroad is the scene of ceaseless activity, the shifting of cars, and the movement of engines; and in order to carry on their work and promptly discharge their duties there must be a careful economy of time, and, as far as possible, every moment must be utilized. Under such conditions, those engaged within yard limits are exposed to more than ordinary peril, and should be on the alert and vigilant to guard against injury from the movement of engines and cars always to be expected." *Pittard v. Southern Ry. Co.*, supra.

1 Labatt on Master and Servant, § 334, says: "The general effect of authorities is that, where the evidence shows that the injury complained of was due to the fact that at the time of the accident the servant was occupying a position which was obviously more dangerous than another which was available, the prima facie presumption of contributory negligence arises, which will warrant a court in declaring, as a matter of law, that the action cannot be maintained." *Holland v. S. A. L. Ry. Co.*, 143 N. C. 435, 55 S. E. 835.

Section 363 of Labatt on Master and Servant, supra, further says: "According to nearly all the decisions, contributory negligence should be inferred, as a matter of law, whenever the injury resulted from the servant's noncompliance with a specific order given by the master or his representative, even though such an inference might not be a necessary one if the order were not a factor in the case. This doctrine is applicable whether the order related to the position which the servant was to take at a given time or place or to the manner in which an act incident to his duties was to be done. \* \* \*"

The doctrine just stated has been repeatedly sanctioned in the opinions of this court.

In *R. & D. R. Co. v. Risdon's Adm'r*, 87 Va. 335, 12 S. E. 786, where a flagman left his switch, although told to remain there, and entered a car of a train standing on a sidetrack where he was killed in a collision, it was held that his disobedience of orders was contributory negligence and barred a recovery for his death, the opinion of the court saying: "His death was caused, not by the defendant's negligence, but by his own disobedience of instructions."

In the case here, it plainly appears from plaintiff's own evidence that if his decedent, Grove, had performed the duty resting upon him of keeping a proper lookout for the dangers to be expected in the performance of the work in which he, an experienced employé, was engaged, he would have seen the Southern engine and train a long distance

before he or it reached the switch, whereby injury to him could, and doubtless would, have been avoided. But, if the negligence of Grove in not keeping a proper lookout for approaching trains in this crowded and constantly used railroad yard was not sufficient to defeat a recovery in this action, there is also no escape from the conclusion that his disobedience of the order of Conductor Bayliss to throw the switch and remain there until the front end of his train arrived at that point so contributed to the accident causing his death as to bar a recovery of damages therefor.

The effort of the plaintiff to prove that the known rule which Grove was instructed by Bayliss to observe on the occasion of this accident had, with the knowledge of the defendant company, been habitually violated, signally failed. If this, however, were not the case, the evidence of Bayliss as to the instructions given by him to Grove is, as we have seen, uncontradicted, and this evidence shows that Grove's death was caused by his disobedience of orders in failing to remain at the switch, instead of leaving the switch, a place of safety, and going some distance therefrom and getting up on the car load of lumber. Had he remained at the switch until the train got there and then attempted to get on it and been injured because the train was moving at an improper speed, the case would have been quite different; but this case, upon the evidence, is that he not only neglected his duty under the custom and conditions known to him, but disobeyed the positive instructions given him, whereby the right of recovery in this action is defeated. Labatt on Master and Servant, supra; *Shenandoah, etc., R. Co. v. Lucado*, 86 Va. 390, 10 S. E. 422; *N. & D. R. Co. v. Risdon's Adm'r*, supra; *Southern Ry. Co. v. Johnson*, 111 Va. 499, 69 S. E. 323, and authorities there cited.

It follows that we are of opinion that the circuit court erred in its judgment for the plaintiff upon the demurrer to the evidence, which judgment has to be reversed, and this court will proceed to enter such judgment as the circuit court ought to have entered.

Reversed.

(113 Va. 391)

# BOARD OF SUP'RS OF FAUQUIER COUNTY v. SPILMAN et al.

(Supreme Court of Appeals of Virginia.  
March 14, 1912.)

## 1. COURTS (§ 250\*)—JURISDICTION—SUPREME COURT OF APPEALS—BOND ELECTION CONTEST.

Under Const. 1902, § 88 (Code 1904, p. cccxx), prescribing the jurisdiction of the Supreme Court of Appeals, such court has jurisdiction of a contest of an election to determine the issuance of county bonds for road and bridge improvements.

[Ed. Note.—For other cases, see *Courts*, Cent. Dig. §§ 773-780; Dec. Dig. § 250.\*]

## 2. COUNTIES (§ 174\*)—IMPROVEMENT BONDS—CONSTITUTIONALITY OF STATUTE.

Acts 1908, c. 70 (Code Supp. 1910, p. 729), providing for the issuance of county bonds for permanent road and bridge improvements in magisterial districts, is constitutional.

[Ed. Note.—For other cases, see Counties, Cent. Dig. §§ 264, 265; Dec. Dig. § 174.\*]

## 3. PLEADING (§ 36\*)—PLEADINGS—CONFLICTING POSITIONS.

A plea by the defendants in a bond election contest that the election was fairly and honestly conducted estopped them from subsequently assuming a defensive position contradictory thereto, though the plaintiffs had taken such position in their petition and afterwards abandoned it.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 81-86; Dec. Dig. § 36.\*]

Error to Circuit Court, Fauquier County.

Action by E. M. Spilman and others against the Board of Supervisors of Fauquier County. From a judgment for plaintiffs, defendant brings error. Affirmed.

Keith & Richards and C. E. Nicol, for plaintiff in error. R. A. McIntyre and J. S. Barbour, for defendants in error.

WHITTLE, J. On June 5, 1911 (the preliminary requirements of law having been complied with), the circuit court of Fauquier county ordered an election to be held August 8, 1911, to take the sense of the qualified voters of the county, including the qualified voters of Center magisterial district, to determine whether or not the board of supervisors should issue county bonds to the amount of \$75,000 for the purpose of macadamizing or otherwise permanently improving the roads and bridges in said magisterial district.

The certificate of the commissioners of election showed that, though a majority of the votes cast in the county at large was for the bond issue, a majority of two of the votes cast in Center magisterial district was against it. Thereupon the defendants in error, E. M. Spilman and 18 other qualified voters of Fauquier county, hereinafter called the plaintiffs, presented their petition to the circuit court to contest said election, on the grounds that it was an undue election, and that the returns were false returns. The petition sets out in detail various objections to the regularity and validity of the election.

The board of supervisors of Fauquier county were made defendants and demurred to the petition, and, their demurrer having been overruled, filed their answer, in which they alleged that the election was fairly and honestly conducted, and a true return of the result thereof showed that the bond issue had been defeated. And on motion of the plaintiffs, and without objection on the part of the defendants, the court proceeded to open the ballots cast in Center magisterial district and counted the same in open court; and, without exception, having rejected a ballot as being void, ascertained that a ma-

jority of two of all the ballots cast in Center magisterial district were in favor of the bond issue, and it was so determined and declared. It also appearing from the return of the commissioners of election that a majority of the qualified voters of the county voting in said election likewise voted in favor of the bond issue, it was ordered that the board of supervisors of Fauquier county proceed at their next meeting to issue the bonds in question. The court, moreover, awarded costs against the defendants.

After the recount of the ballots had thus been made by the court and the result announced, counsel for the plaintiffs stated that they did not desire to introduce further evidence and rested their case. Counsel for the defendants then filed a motion in writing, setting out various objections to the order of the court deciding the result of the election as shown by the recount of the ballots; but the court overruled the motion and adhered to its decision, and the defendants excepted.

No further evidence having been offered, the court proceeded to make a record of its judgment, which is fully set forth in its order. The court also directed the clerk to seal the original ballots and transmit them to the clerk of this court, instead of certified copies.

[1] We may in the outset dispose of the motion of the plaintiffs to dismiss this writ of error as having been improvidently awarded, because, it is said, the court has no jurisdiction of the controversy, and that an election contest is not a case within the meaning of section 88 of the Constitution.

We think this question falls within the influence of, and is ruled by, the decision of this court in *Eggborn v. Board of Supervisors of Culpeper County*, 109 Va. 94, 63 S. E. 424.

It is true the proceeding in that case was by bill in equity on behalf of a resident and taxpayer of the town of Culpeper to enjoin the board of supervisors from issuing or disposing of the road bonds in controversy. But relief was granted, not because the act under which the election was held was unconstitutional, as counsel seem to suppose, but because "the election was not held agreeably to the mandatory requirement of the statute, and for that reason was illegal and the bond issue invalid."

[2] We may also dispose of what appears to be the chief reliance of the defendants in their specification of objections to the court ordering the issuance of the bonds, namely, that the act under which the election (Acts. 1908, c. 70 [Code Supp. 1910, p. 729]) was held is unconstitutional.

That is no longer an open question in this jurisdiction. The constitutionality of the statute was upheld, without qualification, by this court in an opinion handed down at the last (November) term (*Moss v. Tazewell Coun-*

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.



ty, 72 S. E. 945), and also by the court's refusal, on that and other grounds, of an appeal from a decree of the circuit court of Lee county in the case of Holliday, for, etc., v. Board of Supervisors of Lee County.†

The case in its other aspects presents a truly anomalous situation. As already observed, upon the face of the returns the bond issue had been defeated by a majority of one vote, and the plaintiffs filed their petition contesting the election upon sundry grounds set forth therein. But the defendants (after their demurrer had been overruled) filed their answer, virtually denying all the allegations of the petition, by insisting "that the election \* \* \* was fairly and honestly conducted, and in accordance with law, and a true return of the result of said election was made by the officers charged with that duty. \* \* \*". We have also seen that the court, without objection, recounted the ballots cast in Center district, and rejected a *void ballot*, and ascertained that the bond issue was carried by a majority of two votes. The only evidence before the circuit court was the ballots, and the correctness of the recount is not questioned. Nevertheless, it is gravely insisted on behalf of defendants that it was the duty of the court to have set aside the election on the abandoned and unsupported allegations of the petition, which were explicitly denied by their answer.

[3] It is quite clear that no such duty rested upon the court, and that it was without authority to pursue that course. The contention of the defendants is violative of the well-settled principle that a party cannot assume successive positions in the course of a suit which are inconsistent with each other and mutually contradictory, but will be held to the defenses set up in his pleadings. *Tatum v. Ballard*, 94 Va. 370, 26 S. E. 871; *C. & O. Ry. Co. v. Rison*, 99 Va. 18, 37 S. E. 320; *Norfolk & Ocean View Ry. Co. v. Turnpike Co.*, 111 Va. 131, 132, 133, 68 S. E. 346.

We are of opinion that there is no error in the order complained of, and it must be affirmed.

Affirmed.

(113 Va. 208)

ALVIS et al. v. SAUNDERS et al.  
(Supreme Court of Appeals of Virginia.  
March 14, 1912.)

1. JUDGMENT (§ 485\*)—INVALIDITY ON FACE—COLLATERAL ATTACK.

A decree, unauthorized on its face, may be attacked directly or collaterally.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 919; Dec. Dig. § 485.\*]

2. JUDGMENT (§ 486\*)—COLLATERAL ATTACK.

A decree of a court of competent jurisdiction in a suit between proper parties is conclusive, until reversed in some proper proceeding in the same suit and the same court or on appeal, unless there be some sufficient ground of fraud or surprise to entitle the injured party to relief in another suit.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 919, 920-923; Dec. Dig. § 486.\*]

3. JUDGMENT (§ 504\*)—COLLATERAL ATTACK.

Decrees adverse to decedent in an action concerning land are not subject to collateral attack, though they were not pronounced until two years after his death, which appeared of record, where the cause was never revived against his heirs; the decrees being merely voidable, and not void.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 944-947; Dec. Dig. § 504.\*]

Appeal from Chancery Court of Richmond.

Bill by one Alvis and others against E. A. Saunders and others. Judgment sustaining a demurrer to the bill, and plaintiffs appeal. Affirmed.

William L. Royall, for appellants. Geo. Bryan, for appellees.

HARRISON, J. The facts essential to a clear understanding of this appeal, which involves the propriety of the action of the chancery court of the city of Richmond in sustaining a demurrer to the plaintiffs' bill, are shown by the record to be that Robert Alvis became, in April, 1877, the owner of a valuable estate in Charles City county known as Weyanoke; that he paid part of the purchase money, and secured \$20,000, the residue thereof, by a deed of trust on the property bearing even date with the deed, conveying the same to him; that in 1885 Alvis being heavily in debt, with numerous judgments against him, a chancery suit was brought by one of his creditors in the hustings court of Manchester, where he owned other real estate, for the purpose of subjecting his lands to the payment of a judgment. This suit became a general creditors' suit for the benefit of all his creditors; an injunction being awarded in the cause, restraining the trustees from selling the Weyanoke estate until the further order of the court.

In 1894, while the suit was still pending, Alvis died intestate, and in 1895 his death was suggested of record, and his widow, who was his administratrix, was made a party to the suit; but his heirs were not made parties at that time, nor have they since been made parties. In October and December, 1895, decrees were entered directing an account of liens, which were duly executed; the report of liens being returned to the court and confirmed. In July, 1896, a decree was entered appointing several commissioners to sell the lands of Alvis for the satisfaction of the liens binding the same. By the terms of the deed of trust securing the purchase money on the Weyanoke estate, that property was to be sold on 30 days' advertisement; but the decree directed a sale on 10 days' advertisement. In pursuance of the decree the sale was made in August, 1896, and E. A. Saunders and A. H. Drewry, who had acquired the unpaid purchase money bonds due thereon, became the purchasers at the price of \$15,000, which was far below

the amount necessary to satisfy the outstanding purchase money then due. This sale was confirmed by decree of August 24, 1896, and a deed was ordered to be made to the purchaser.

By sundry wills and conveyances, the title that was by these proceedings vested in the two purchasers of Weyanoke has now passed to E. A. Saunders, Jr., the appellee in this case. Although this creditors' suit was still pending in the hustings court of Manchester, this independent suit was brought in the chancery court of Richmond by the heirs of Robert Alvis, deceased, alleging that, inasmuch as they were not made parties to the suit in the Manchester court, all decrees and proceedings had in that cause, after the death of their ancestor, were null and void as to them, and could be assailed collaterally in the present proceeding, and that inasmuch as the legal title to Weyanoke had passed to the defendant, E. A. Saunders, Jr., though without warrant of law, they could not maintain ejectment, and were, therefore, compelled to go into a court of equity for relief; and they pray that Saunders may be required to deliver to them possession of Weyanoke with all of its improvements and free from all liens and charges whatsoever, and may be decreed to pay them all rents and profits since he has been in possession. There is no question of any fraud alleged in the bill.

[1-3] Several grounds of demurrer are relied on by the defendant but in our view of the case it is only necessary to consider the ground upon which the chancery court rested its decree dismissing the bill. That ground involves the question, whether the complainants can in this independent suit assail collaterally the decrees of the Manchester court by which the sale of Weyanoke was ordered and confirmed.

It is a familiar principle that, if it appears upon the face of the record that the court was without authority to enter a decree, such decree binds no one and may be assailed either directly or collaterally. Nor is it necessary to cite the numerous decisions of this court in support of the equally well understood doctrine that the decree of a court of competent jurisdiction, in a suit between proper parties, is valid and conclusive until reversed on some proper proceeding in the same suit and the same court, or on appeal, unless there be some sufficient ground of fraud or surprise to entitle the injured party to relief in some other suit. Such a decree cannot be collaterally attacked, unless it is void. If it is merely erroneous, it is only voidable, and objection on that account must be made, if at all, in the same suit in which the error was committed, or by appeal from the decree therein, and not by an independent suit.

As was said in *Lancaster v. Wilson*, 68 Va. 629: "This is not merely an arbitrary rule

of law, established by the courts; but it is a doctrine founded upon reason and the soundest principles of public policy. It is one which has been adopted in the interest of the peace of society and the permanent security of titles."

It is undoubtedly true that, when the creditors of Robert Alvis brought their suit in the hustings court of Manchester to subject his real estate to the satisfaction of their debts, and made the judgment debtor, who was the sole owner of such real estate a party defendant, they were in a court of competent jurisdiction, with full power and authority over the parties and the subject-matter. Nor did this rightful jurisdiction of the Manchester court, as contended by appellants, cease upon the death of the defendant Alvis. The decrees entered therein after the death of Alvis, without his heirs being made parties, did not make such decrees void, but merely voidable. It is well settled in this state that where the court has acquired jurisdiction of the defendant and the subject-matter, and the defendant dies before the rendition of the judgment or decree, and the fact of death does not appear on the face of the record, such judgment or decree is not thereby made void, so as to permit its impeachment in a collateral proceeding. Under such circumstances, the failure to make the heirs of the deceased defendant parties would be error which could be taken advantage of only in some direct proceeding taken to vacate the decree. *Evans v. Spurgin*, 47 Va. 107, 52 Am. Dec. 105; *Neale v. Utz*, 75 Va. 480; *Wilcher v. Robertson*, 78 Va. 602; *Robnett v. Mitchell*, 101 Va. 762, 45 S. E. 287, 99 Am. St. Rep. 928.

In the case last cited it is said: "The judgment, though erroneous and voidable, if assailed in a direct proceeding for that purpose, is effective unless and until set aside, and may not be collaterally attacked. That is the settled doctrine of this court, and a different rule would lead to great inconvenience and mischief."

The only difference between the case at bar and those we have cited is that in the present case the fact of the defendant's death was suggested of record before the decrees were entered, while in the cases cited the fact of death did not appear on the record when the judgment or decree was rendered. Does the circumstance that the death of the defendant appeared of record render the decrees in the suit pending in the hustings court of Manchester void, and make them subject to collateral attack? This precise question has never before been presented for our consideration. It has, however, we think, been answered by high authority.

In *Freeman on Judgments*, § 153, after stating the rule as laid down in *Evans v. Spurgin*, supra, the learned author says: "Even in such cases," where the death of a party appears on the record, "the judgment

is simply erroneous, not void. This is because the court, having obtained jurisdiction over the party in his lifetime, is thereby empowered to proceed with the action to a final judgment; and while the court ought to cease to exercise its jurisdiction over a party when he dies, its failure to do so is an error to be corrected on appeal, if the fact of death appear on the record, or by writ of error coram nobis, if the fact must be shown aliunde."

This statement of the law is adopted by the court in *Watt v. Brookover*, 35 W. Va. 325, 13 S. E. 1007, and is again repeated in the note to that case found in 29 Am. St. Rep. 817.

In *Yaple v. Titus*, 41 Pa. 195, 80 Am. Dec. 604, a case often referred to, and which is cited in *Allan v. Hoffman*, 83 Va. 134, 2 S. E. 602, the court says: "Now, it would seem to be well established that, in civil proceedings against a person, his death does not so completely take away the jurisdiction of a court which has once attached as to render void a judgment subsequently given against him. The judgment is reversible in error, if the fact and time of death appear on the record, or in error coram nobis, if the fact must be shown aliunde. But it is not void."

In *Claffin v. Dunn*, 129 Ill. 245, 21 N. E. 834, 16 Am. St. Rep. 263, the court adopts and approves the quotation we have made from *Yaple v. Titus*, supra.

It would be difficult to suggest any substantial reason why a court should be held to have been without jurisdiction to proceed with a pending cause after it had been formally notified of the death of the defendant, when it is held not to have lost such jurisdiction where the death of the defendant does not appear of record. In either case it is mere error, like the mistake alleged with respect to the advertisement, subject to correction directly, but not collaterally.

Upon reason and authority, we are of opinion that the decrees of the hustings court of Manchester are not liable to collateral attack in this suit, notwithstanding the fact that Robert Alvis died in 1894, that his death appeared of record, that said decrees were not pronounced until two years after his death, and the cause never revived against his heirs.

The learned judge of the chancery court properly dismissed the bill without prejudice to the right of the complainants to make application to the Manchester court in the creditors' suit pending therein; the questions raised by the other grounds of demurrer being left open for the decision of that court, should complainants be advised to present their case to that tribunal.

The decree appealed from is without error, and must be affirmed.

Affirmed.

# COLLIER et al. v. SEWARD et al.

(Supreme Court of Appeals of Virginia.  
March 14, 1912.)

## 1. EQUITY (§ 422\*)—"FINAL DECREE"—WHAT CONSTITUTES—"INTERLOCUTORY DECREE."

A decree is interlocutory, and not final, if the further action of the court in the cause, as distinguished from proceedings necessary to execute the decree, is necessary to give completely the relief contemplated by the court.

[Ed. Note.—For other cases, see *Equity*, Cent. Dig. §§ 932-944, 947-949; Dec. Dig. § 422.\*

For other definitions, see *Words and Phrases*, vol. 3, pp. 2774-2798; vol. 8, p. 7663; vol. 4, pp. 3712-3715; vol. 8, p. 7692.]

## 2. EQUITY (§ 181\*)—ANSWER—TIME OF FILING—"FINAL DECREE."

The decree, in a suit by judgment creditors to subject to their liens defendants' interest in a trust estate, overruled a demurrer to the supplemental bill, amended and confirmed a commissioner's report of the liens and priorities of the creditors and of the judgment debtor's interest in the trust estate, determined what creditors were entitled to participate therein, found that partition could not be conveniently made, and that the rents would not satisfy the liens within five years, and that the other parties interested in the estate desired that one-eighth interest therein be allotted them upon paying its fair value, and decreed that they be permitted to do so by depositing the sum in a bank payable to the court, and appointed special commissioners to convey to such defendants such one-eighth interest in the trust estate, and required a report by the special commissioners as to how they had executed the decree. *Held*, that the decree was not final, so that defendants could file their answer, tendered at the following term of court, under Code 1904, § 3275, to the amended and supplemental bill, of which one the original bill was made a part.

[Ed. Note.—For other cases, see *Equity*, Cent. Dig. § 417; Dec. Dig. § 181.\*]

Appeal from Hustings Court of Petersburg.

Action by J. W. Seward and others against Charles F. Collier and others. From a decree for plaintiffs, defendants appeal. Reversed and remanded, with directions.

The suit was instituted by judgment creditors for the purpose of subjecting to their liens the interest of a defendant in a testamentary trust estate.

E. P. Buford and Willcox & Willcox, for appellants. Roper & Davis, Chas. E. Plummer, and W. B. McIlwaine, for appellees.

BUCHANAN, J. The first question to be considered in this case is whether or not the decree of January 19, 1911, is a final decree. If it is, the appellants were not entitled to file their answer, when tendered at the April term of the court following.

[1] What constitutes a final decree in a cause has been frequently considered by this court, and the rule laid down by Judge Baldwin in *Cocke's Adm'r v. Gilpin*, 40 Va. 20, has been, as was said by Judge Staples in *Ryan v. McLeod*, 73 Va. 367, and reiterated by Judge Burks in *Rawlings v. Rawlings*,

75 Va. 76, "repeatedly recognized by this court, and is now the established doctrine."

That rule is as follows: "Where the further action of the court in the cause is necessary to give completely the relief contemplated by the court, there the decree upon which the question arises is to be regarded, not as final, but interlocutory. I say the further action of the court in the cause, to distinguish it from that action of the court which is common to both final and interlocutory decrees, to wit, those measures which are necessary for the execution of a decree that has been pronounced, and which are properly to be regarded as adopted, not in, but beyond, the cause, and as founded on the decree or mandate of the court, without respect to the relief to which the party was previously entitled upon the merits of his case."

[2] The decree of January 19th overrules the demurrer to the amended and supplemental bill filed in the cause the previous December, amends and confirms a commissioner's report of the liens and priorities of the creditors and of the interest of the judgment debtor in the trust estate under the will of Sarah V. Fisher, and determines what creditors are entitled to participate in the distribution of the interest of the judgment debtor in that estate, and in what proportions. After declaring that it appears to the court that partition of the real estate in which the judgment debtor has an one-eighth interest cannot be conveniently made, that the rents and profits thereof will not satisfy the liens thereon in five years, that the appellants, the other parties interested in the said trust fund, desire that the one-eighth interest therein may be allotted to them, they to pay therefor the sum of \$8,341.05, the fair value thereof in the opinion of the court, the offer of the appellants is accepted, and it is decreed that the appellants, naming them, do pay that sum, with interest on a certain part thereof, on or before March 13, 1911, into some bank in the city of Petersburg payable to the court in the cause. Special commissioners are appointed to convey to the appellants, with covenants of special warranty, the said one undivided eighth interest of the judgment debtor in the said trust estate; and the special commissioners are required to report how they have executed the decree.

While the decree settles the principles of the cause, and is clearly an appealable decree, it is not a final decree under the rule established by our own decisions as stated above. The further action of the court "in the cause" was necessary before the creditors could receive payment out of the proceeds of the sale of the trust fund which was ordered to be deposited in some bank of the city, payable to the court in the cause, and the title of the purchasers of the land would not be perfected until the conveyance di-

rected had been made, the action of the special commissioners had been reported, and their report confirmed by the court.

The decree does not purport to be a final decree. There is no decree for costs, and the decree shows upon its face that further action "in the cause" was intended and was necessary to give completely the relief contemplated by the court, both as to the creditors of the judgment debtor and the purchasers of the real estate sold in the cause.

We are of opinion, therefore, that the trial court erred in holding that the said decree was final, and in refusing, on that ground, by its decree of April 8, 1911, to permit the appellants to file their answer to the amended and supplemental bill, of which bill the original bill is made a part. Under section 3275 of the Code of 1904, the appellants had the right to file an answer at any time before final decree, as therein provided. *Bean v. Simmons*, 50 Va. 389, and cases cited in Va. Rep. Ann.

For this error, without deciding any other question in the cause, the decree of April 8, 1911, refusing appellants leave to file their answer, must be reversed, and the cause remanded to the hustings court, with directions to permit the appellants to answer the amended and supplemental bill, and for further proceedings in the cause.

Reversed.

(113 Va. 270)

**LAMBERT'S POINT CO. v. NORFOLK & W. RY. CO.**

(Supreme Court of Appeals of Virginia. March 14, 1912. On Motion to Modify Decree, March 27, 1912.)

**1. NAVIGABLE WATERS (§ 36\*) — LITTORAL RIGHTS—RIVERS—BOUNDARY BETWEEN ADJOINING OWNERS.**

In determining the division line between the lands in a river between the shore line and the port warden's line, or line of navigability, to which adjoining owners of shore lands are entitled, the shore line for some distance from the point where the dividing line of the uplands reaches the shore being straight, the whole shore of both parties and the whole of the port warden's line in front thereof need not be considered.

[Ed. Note.—For other cases, see *Navigable Waters*, Cent. Dig. §§ 180-200; Dec. Dig. § 36.\*]

**2. NAVIGABLE WATERS (§ 36\*) — LITTORAL RIGHTS—RIVERS—BOUNDARY BETWEEN ADJOINING OWNERS.**

In establishing the division line between the lands in a river between the shore line and the port warden's line or line of navigability, to which adjoining owners of shore lands are entitled, Code 1904, § 944a (31), providing that any person owning land on a water course may erect a wharf on it, provided navigation be not obstructed, nor the private rights of any other person be injured thereby, a line is not to be run at right angles from the port warden's line to the point where the two properties corner on the shore, but the shore line is to be treated as the base line.

[Ed. Note.—For other cases, see *Navigable Waters*, Cent. Dig. §§ 180-200; Dec. Dig. § 36.\*]

### 3. NAVIGABLE WATERS (§ 38\*) — LITTORAL RIGHTS — RIVERS — BOUNDARIES BETWEEN ADJOINING OWNERS—SHORE LINE.

So far as the shore line of a river enters into the determination of the dividing line of owners of adjoining lands thereon, as respects the lands between the shore line and the port warden's line, or line of navigability, it cannot be changed by one of them filling in in front of his uplands.

[Ed. Note.—For other cases, see *Navigable Waters*, Cent. Dig. §§ 180-200; Dec. Dig. § 36.\*]

Appeal from Circuit Court of City of Norfolk.

Suit by the Lambert's Point Company against the Norfolk & Western Railway Company. From the decree, complainant appeals, defendant assigning cross-errors. Reversed in part and remanded, and affirmed in part.

G. M. Dillard, for appellant. Ro. M. Hughes and W. L. Williams, for appellee.

BUCHANAN, J. The appellant, Lambert's Point Company, and the appellee, Norfolk & Western Railway Company, are adjoining landowners on the shore of Elizabeth river. This suit was brought by the appellant to have "the extent of its enjoyment of the flats and land under the water and of the line of navigability of the said water in front of its land, at Lambert's Point," determined and set apart, and the division line over said flats between the properties of the appellant and the appellee defined and established.

With the action of the court in fixing the rights of the parties and establishing the division line between their properties neither party is satisfied. One has appealed, and the other has assigned cross-errors. In the view we take of the case, the errors and cross-errors assigned may be considered together.

In making the apportionment sought, and in determining and establishing the division line between the properties, the court was governed by the principles laid down in the case of *Groner v. Foster*, 94 Va. 650, 27 S. E. 493, which was also a controversy between riparian owners on the shore of Elizabeth river.

In this case, that portion of the shore line of both parties at Lambert's Point, taken into consideration in making the apportionment and in establishing the boundary line between the two properties, was irregular and curved, though not so much so as in *Groner v. Foster*. The port warden's line, or line of navigability, in front of said portion of the properties of the parties, was longer than, and not parallel with, the shore line. There is nothing in the facts of this case to take it out of the general rule laid down in *Groner v. Foster*.

[1] The court did not, in making the apportionment in this case, take into consider-

ation the whole shore line of both parties and the whole of the port warden's line in front of them, and its failure to do so is assigned as error by the appellant.

It appears that the shore line on the northern portion of the appellant's land, and the shore line on the southern portion of the appellee's land, are almost continuing straight lines, and as to them there is practically no dispute as to the rights of the parties. This being so, we do not see that there was any necessity for taking into consideration the shore lines of the entire front of both properties, which were nearly two miles in length, in order to ascertain the rights of the parties, where the shore lines were curved and irregular, and to determine and establish the division line between their properties, which latter object seems to have been the principal object of the suit.

[2] The appellee insists that the court, in establishing the division line between the parties, erred in not running that line at right angles from the port warden's line to the point where the two properties corner on low-water mark.

Section 944a, subsec. 31, of Pollard's Code, provides that any person owning land upon a water course may erect a wharf on the same, or pier, or bulkhead, provided navigation be not obstructed, nor the private rights of any other person injured thereby. Such owner is, therefore, entitled in the apportionment of the water front to have his portion thereof laid off as nearly in front of his land as is practicable. *Groner v. Foster*, supra, 94 Va. 652, 27 S. E. 493. Where the shore line and the port warden's line are parallel, it would make no difference which of them was treated as the base line; but where they are not parallel, then the proper rule, in waters like Elizabeth river, having no defined stream running in a confined and continuous bed, is to treat the shore line as the base line, and extend the lines of the port warden's line as nearly as practicable in the front of the land of the riparian owner. The port warden's line establishes the line of navigability, and shows how far into the water course the riparian owner may improve his property; but that line can ordinarily have no effect in the determination of the boundaries of the riparian owners as between themselves. They derive their rights from grants from the commonwealth and the statutes of the state. The port warden's line has no effect upon their property rights beyond fixing the line of navigability, which they must respect in improving their water fronts. *Bay City, etc., Co. v. Industrial Co.*, 28 Mich. 182, 184; 3 *Farnham on Waters*, § 841, p. 2479.

"Very much of the confusion," it was said in *Bay City, etc., Co. v. Industrial Co.*, supra, "which is supposed to exist on this subject, has arisen from confounding things quite dissimilar. The controversies arising

concerning riparian rights upon waters having no middle thread, properly so called, can have no bearing on rivers. Whether the proprietary right is confined by high or low water mark, or extends further, it is manifest that upon the open sea, or on a bay or other body of water having no defined stream running in a confined and continuous bed, the shore may be the only tangible element of computation or measurement, and it has very properly in such cases been regarded as the most important. But even there some regard has usually been paid to the common-sense rules which would prevent inequalities from being created by any blind adhesion to the accidental conformation of the shore line at the extremity of any riparian property; and regard is paid to extent, as well as to other considerations."

In *Blodgett v. Davis*, 87 Mich. 498, 507, 49 N. W. 917, 919 (24 Am. St. Rep. 175), it was said: "We cannot deal with Green Bay as we could with the rivers in the state, where the lines are to be drawn at right angles to the thread of the stream. The rules laid down for the boundary of owners of land bordering upon the ocean and great inland seas are more proper for the disposition of the case before us."

[3] The manner in which the commissioner, whose action in this respect was approved by the trial court, ascertained the shore line of the appellant's property, is assigned as error.

It appears that in front of a portion of its land at Lambert's Point the appellee has filled in and built wharves, etc., out to the port warden's line. The appellee insisted that its shore line should be ascertained by taking into consideration the shore line filled in by it, instead, as was done by the commissioner, of ascertaining the shore line as if the filling in had not been done. The action of the commissioner was clearly right, and his reasons therefor conclusive of the question. The contention of the appellee, he says, would have given the "railway company as a basis of apportionment a much greater extent of shore line than I deem it is entitled to. The railway company undoubtedly has a right to fill in this area, and the filled-in portion belongs to it; but I do not think that by making this improvement which it had a right to make, and which the land company could not prevent its making, it can thereby enlarge its riparian rights and advance the division line (which has always in contemplation of law existed, but has not been judicially ascertained) between its riparian rights and the riparian rights of the land company, the adjoining owner. If this contention were sound, it would lie in the power of one riparian owner, by its own voluntary act, which could not be prevented by the adjoining owner, to increase its riparian rights, and encroach upon the

riparian rights of the other adjoining owner to any extent. \* \* \*

The other assignments of error on either side are so connected with or dependent upon the questions which we have considered and disposed of, it will be unnecessary to consider them in detail, but will be sufficient to say that upon the whole case we see no error in the decrees appealed from, and that they must be affirmed.

Affirmed.

CARDWELL, J., absent

#### On Motion to Modify Decree.

PER CURIAM. Upon the motion of the appellant to modify the decree entered in this cause at this term, and the objections of the appellee to any change being made in said decree unless the whole case is reopened and reheard, the court is of opinion that there is no reason why the cause should be reheard; but, not being satisfied that the lines from the points B and D, on the shore line, to the port warden's line, as shown upon map No. 1 of Surveyor Gwathmey, filed in the cause, were located in accordance with the views expressed in the written opinion filed with the decree entered in this cause at a former day of the term, or that the division line, as established between the parties by the circuit court in its decree of January 23, 1911, is located in accordance with the views expressed in said written opinion, it is adjudged, ordered, and decreed that the decree entered at a former day of the term, affirming the decrees of the circuit court, be and the same is hereby set aside and annulled, in so far as it affirmed the decrees of the trial court in reference to the said lines from the said points B and D to the port warden's line, and the said division line between the parties, and that the cause be remanded to the circuit court, with directions to have the said lines, if not so located, run in accordance with the views expressed in said written opinion, the true division line between the parties established, and for such further proceedings as may be proper in the cause.

(113 Va. 224)

#### CITY GAS CO. OF NORFOLK v. POUDRE

(Supreme Court of Appeals of Virginia.

March 14, 1912.)

#### 1. FALSE IMPRISONMENT (§ 20\*) — ACTIONS — PLEADINGS — ISSUES.

A defendant, who pleads not guilty to a declaration alleging that he wrongfully arrested plaintiff, may introduce any evidence that he did not commit the trespass, though he failed to file his grounds of defense as required by order of court, since Code 1904, § 3249, providing that, if a party fail to comply with an order requiring the filing of grounds of defense, the court may exclude evidence of any matter not described in the pleading of the party, does not deprive a defendant of the right to support a

plea of not guilty by evidence as to any matter, the character of which is pointed out by the plea, such as the denial of the wrongful act charged.

[Ed. Note.—For other cases, see False Imprisonment, Cent. Dig. §§ 86-97; Dec. Dig. § 20.\*]

## 2. PLEADING (§ 370\*)—GROUNDS OF DEFENSE—FILING—ORDER OF COURT.

The object of Code 1904, § 3249, providing that, if a party fails to comply with an order requiring the filing of grounds of defense, the court may exclude evidence of any matter not described in his pleading, is to give plaintiff reasonable notice of the particular defense on which defendant expects to rely, so that he may not be prejudiced by surprise.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 1210; Dec. Dig. § 370.\*]

Error to Law and Chancery Court of City of Norfolk.

Action by Theodore Poudre against the City Gas Company of Norfolk. There was a judgment for plaintiff, and defendant brings error. Reversed and remanded.

Loyall, Taylor & White, for plaintiff in error. Daniel Coleman, O. L. Shackelford, and Scott & Buchanan, for defendant in error.

HARRISON, J. This action of trespass was brought by the plaintiff to recover of the defendant Gas Company damages for its alleged wrongful act in having him arrested. The trial resulted in a verdict and judgment against the defendant, which is now to be reviewed.

The first assignment of error is that the lower court declined to permit the defendant to introduce any evidence, because no grounds of defense had been filed, although the general issue had been pleaded, and the plaintiff had replied generally thereto.

Bill of exceptions No. 1, which embodies the defendant's objection to this action of the court, shows that the defendant, at the call of the docket, tendered its plea of not guilty, that the plaintiff replied generally thereto, and that on motion of the plaintiff an order was then and there entered requiring the defendant to file in writing its grounds of defense; that upon the subsequent trial of the case, after the plaintiff had introduced all of his evidence, and the defendant was proceeding to call its witnesses, the court, upon motion of the plaintiff, refused to allow the defendant to introduce any evidence, because it had failed to file its grounds of defense. Thereupon the defendant tendered in writing its grounds of defense, which were rejected because they had not been filed previous to the trial of the case, and thereupon the defendant asked to be allowed to show what would be testified to by his witnesses, in order that a proper bill of exceptions might be made up; but the court declined to allow this to be done, on the ground that the defendant had

failed to comply with the order of the court requiring the written grounds of defense to be filed, and therefore could not properly introduce any evidence.

[1] The ruling of the court that, under the circumstances stated in this bill of exceptions, the defendant could introduce no evidence to sustain its plea of not guilty is plainly erroneous. Under the plea of not guilty the defendant had the right to introduce any evidence which showed that it did not commit the alleged trespass, notwithstanding its failure to comply with the order requiring it to file its grounds of defense.

Section 3249 of the Code of 1904 (which provides that, if a party fails to comply with an order requiring grounds of defense to be filed, the court may, when the case is tried, exclude evidence of any matter not described in the pleading of such party so plainly as to give the adverse party notice of its character) was not intended to deprive a defendant of the right to support his plea of not guilty by the introduction of evidence as to any matter, the character of which was plainly pointed out by the plea itself. Under such circumstances, the evidence of the defendant is confined to the point covered by the language of the plea, namely, the denial of the wrongful act alleged.

Mr. Minor states the form of a plea in an action of trespass as follows: "And the said defendant, by his attorney, comes and says that he is not guilty of the said trespass above laid to his charge, or any part thereof, in manner and form as the said plaintiff hath above thereof complained, and of this the said defendant puts himself upon the country." 4 Minor's Inst. p. 1348.

This is a plain statement that the defendant is not guilty of the trespass alleged and that his defense rests on such denial.

The declaration alleged that the defendant wrongfully arrested the plaintiff. The plea of not guilty gave the plaintiff full notice that the defense relied on was that the defendant did not commit the alleged trespass, and would introduce proof showing that he did not. This, and no more, the defendant had the right to show under his plea of not guilty, because the plea had given plain notice that such evidence would be introduced, which is all the statute required.

[2] The object of section 3249 of the Code is to give the plaintiff reasonable notice of the particular defense upon which the defendant expects to rely, so that he may not be prejudiced by surprise. The statute was not intended to punish the defendant for failing to comply with an order requiring grounds of defense to be filed, but its purpose was to protect the plaintiff against any prejudice he might suffer by reason of such failure.

In support of the contention that the defendant in this case could introduce no evi-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

dence to sustain its plea, the plaintiff relies on two recent decisions of this court, namely, *Colby v. Reams*, 109 Va. 308, 63 S. E. 1009, and *Chestnut v. Chestnut*, 104 Va. 539, 52 S. E. 348, 2 L. R. A. (N. S.) 879, 7 Ann. Cas. 802.

In the first-named case, the decision was rested upon the ground that no plea was filed, and, therefore, no issue was joined; the court holding that a judgment could not be sustained which was given upon a verdict rendered as upon the trial of an issue, when no issue had been joined. The subsequent remark, that the plea in that case would, if filed, have been not guilty, and that under it the defendant could not have introduced his evidence, was directed alone to the facts of that particular case. There the evidence of the defendant had been introduced, and the court could see from its inspection that it related to matters not properly provable under the general issue of not guilty, where grounds of defense had been ordered, and not filed, for the reason, as stated, that the plea of not guilty would give the plaintiff no sufficient notice that evidence of the character introduced would be relied on. It was never intended to lay down the broad proposition, now contended for, that, in any case where the defendant fails to comply with an order requiring grounds of defense to be filed, he is thereby deprived of the right to introduce any evidence in his defense, although it be apparent that the plea gave full notice that such evidence would be relied on.

As to the case of *Chestnut v. Chestnut*, supra, it is sufficient to say that there is nothing therein to justify its citation as authority in support of the proposition now under consideration. Opinions of courts, to be correctly understood, should always be read in the light of the facts of the case in which they are rendered.

As the evidence on another trial may change the whole character of the case, we will not consider the other assignments of error made in the petition.

On account of the error we have pointed out, the judgment complained of must be reversed, the verdict of the jury set aside, and the case remanded for a new trial, to be had not in conflict with this opinion.

Reversed.

(113 Va. 434)

#### WHITLEY v. BOOKER BRICK CO.

(Supreme Court of Appeals of Virginia.  
March 14, 1912.)

#### 1. JUDGMENT (§§ 178, 183\*)—SUMMARY PROCEEDINGS—REQUISITES.

A proceeding by motion, under Code 1904, § 3211, for judgment for a debt, is intended to furnish a simpler, more expeditious, and less expensive remedy for the collection of debts than by action, and an issue may be tendered by a plea, or by an informal statement in writ-

ing of the grounds of defense, unless otherwise required by statute.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 844; Dec. Dig. §§ 178, 183.\*]

#### 2. JUDGMENT (§ 183\*)—MOTION FOR JUDGMENT—DEFENSE—REMEDY OF PLAINTIFF.

The remedy of plaintiff, in a proceeding by motion, under Code 1904, § 3211, to recover a debt, who is not apprised of the nature of the defense, is by motion, under section 8249, for a statement of the grounds of defense.

[Ed. Note.—For other cases, see Judgment, Dec. Dig. § 183.\*]

#### 3. PAYMENT (§ 63\*)—DEFENSES—ISSUES—PLEA OF NON ASSUMPSIT.

A defendant, in a proceeding by motion to recover on an open account for goods sold and on a note, who pleads non assumpsit, may show a contract for the building of a structure by him for defendant, and the amount due for the work, as a payment in part of plaintiff's demand, pursuant to an understanding of the parties that the amount due for the structure was to be a payment on the indebtedness of defendant to plaintiff.

[Ed. Note.—For other cases, see Payment, Cent. Dig. §§ 152-161; Dec. Dig. § 63; Assumpsit, Action of, Cent. Dig. § 144.]

#### 4. PLEADING (§ 261\*)—AMENDMENTS—ALLOWANCE.

A defendant, in a proceeding by motion to recover on an open account and on a note, subject to partial payment, who admitted a part of the claim and pleaded non assumpsit as to the residue, should be permitted to amend, by alleging that he was entitled to a credit for work in erecting a building for plaintiff pursuant to contract therefor.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 794-800; Dec. Dig. § 261.\*]

#### 5. PLEADING (§ 239\*)—AMENDMENTS—CONTINUANCE.

Where the court in its discretion allows amendments to a pleading in the interest of justice, the rights of the adverse party may be safeguarded by a postponement or continuance.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 626-635; Dec. Dig. § 239.\*]

Error to Corporation Court of Newport News.

Proceeding by motion by the Booker Brick Company against G. W. Whitley. There was a judgment for plaintiff, and defendant brings error. Reversed, and new trial granted.

Maryus Jones and T. J. Christian, for plaintiff in error. J. Winston Read, for defendant in error.

WHITTLE, J. This is a proceeding by motion under Code Va. 1904, § 3211, to recover \$490.95. \$286.05, part thereof, was evidenced by open account for the sale of bricks, and the residue by note, subject to a payment of \$40.

The plaintiff in error, the defendant in the trial court, admitted the plaintiff's claim to the extent of \$150.95, and as to the residue pleaded non assumpsit, to which the plaintiff replied generally, and the issue thus made was submitted to a jury.

The president of the plaintiff company, having testified to the correctness of the demand, was asked on cross-examination if the \$40 payment for which credit was given did



not arise out of a contract between the parties for building a brick kiln, to which question the witness replied that he did not know, but supposed so; that the \$40 credit had been given by another agent of the company. Witness was then asked if, under that contract, the defendant was not entitled to a credit of \$180, instead of \$40, and again replied that he did not know, as another agent transacted that business. To sustain the issue on his part, the defendant thereupon produced a written contract for building the kiln, and proposed to prove the amount due upon it as a payment in part of the plaintiff's demand; but objection was raised to its admissibility on the ground that it amounted to an offset, "but, whether payment or offset, it could not be proved, in the absence of any account filed with the general issue, or special plea of payment or set-off filed in the case." The court sustained the motion to exclude the evidence on the ground of objection referred to, "and because no sort of notice of payment or set-off, oral or otherwise, was given by defendant when the issue was made up"; and to this ruling, and to the refusal of the court to permit the pleadings to be amended in conformity with its opinion, the defendant excepted. The jury found a verdict for the plaintiff for the full amount of its claim, and the court overruled the motion of the defendant to set aside the verdict as contrary to the law and the evidence, and entered the judgment now under review.

[1] A proceeding by motion under Code Va. 1904, § 3211, is intended to furnish a simpler, more expeditious, and less expensive remedy for the collection of debts than by action, and the same is true of motions generally. Hence we find that the uniform course of decision in this state has been to view with more leniency and to allow greater laxity in the pleadings in that form of procedure. *Board of Supervisors v. Lunn*, 68 Va. 608; *Carr v. Meade's Ex'r*, 77 Va. 142, 158; *Preston v. Salem Imp. Co.*, 91 Va. 583, 22 S. E. 486; *Hall v. Ratcliffe*, 93 Va. 327, 328, 24 S. E. 1011, citing *Bunch's Ex'r v. Fluvanna Co.*, 86 Va. 452, 454, 10 S. E. 532; 4 Min. Inst. (1st Ed.) 1090.

In *Preston v. Salem Imp. Co.*, supra, the court held: "In a proceeding by motion to recover money under section 3211 of the Code, in order to entitle the defendants to a trial by jury, as provided by section 3213 of the Code, an issue must be made up. This issue may be tendered by a plea, or by an informal statement in writing of the grounds of defense. A mere oral statement is not sufficient; and in cases where the statute requires the plea to be verified by affidavit, that requirement of the statute must be complied with."

To the same effect is the decision in *Liskey v. Paul*, 100 Va. 764, 42 S. E. 875, where the court says: "The pleadings on a motion for a judgment for money, after notice, are

intended to be of an informal nature, except where statutes require otherwise, as under section 3299 of the Code (special plea of set-off). \* \* \*

In *Stimmel v. Benthall*, 108 Va. 141, 144, 60 S. E. 765, it was said: "This court has upon numerous occasions said that, both with respect to the proceeding by motion and the defense by way of set-off, the strict rules of pleading do not apply."

[2, 3] The foregoing limitations on the pleadings in proceedings by motion are essential; but we are not disposed to destroy the efficiency of that useful remedy by the imposition of needless restrictions. It is apparent from the record that at an early stage of the proceeding the plaintiff was apprised of the nature of the defense. Yet, if such had not been the case, the remedy was to demand a statement of the grounds of defense as provided by section 3249 of the Code. As remarked, the defendant offered in evidence the contract for building the brick kiln, and, moreover, sought to prove that he had given an order for \$200, alleged to be due by the plaintiff on that contract, in part payment of its demand, all of which the court excluded.

We think the evidence was pertinent and plainly admissible under the plea of non assumpsit.

In 4 Min. Inst. (3d Ed.) 774, it is said: "But, whatever may be the explanation, the fact is undeniable that for more than a century past there have been admitted under the plea of non assumpsit in all actions of assumpsit, whether founded on an implied or express promise, any matter of defense whatever (with a few exceptions), the same as in the case of *nil debet* (ante, p. 770), which tends to deny the defendant's liability to the plaintiff's demand." The excepted matters are "such defenses as are allowed by statute to be made by the plea of special set-offs. \* \* \* The statute of limitations, bankruptcy, and tender are believed, with this qualification, to be the only defenses which may not be proved under this plea, and they are excepted because they do not contest that the debt is owing, but insist only that no action can be maintained for it." See, also, *City Gas Co. of Norfolk v. Poudre*, 74 S. E. 158, and *Williamson v. Simpson*, 74 S. E. 160, decided at the present term.

[4] The question, whether a particular item constitutes a set-off or a payment, depends largely upon the understanding of the parties. It is not infrequently the case that by agreement what would otherwise be a set-off may be converted into a payment. And that it was the understanding of the parties in this instance that the amount due for building the brick kiln was to be a payment on the indebtedness of the defendant to the plaintiff is shown by the allowance of the \$40 credit as a payment on the plaintiff's demand. But, even if the court had correct-

ly excluded the evidence, nevertheless, in the interest of justice, the defendant ought to have been permitted to amend the pleadings.

[5] In 1 Robinson's Pr. (Old Ed.) 233, we are told that "it is in the discretion of the court at any time before verdict is rendered to allow amendments of the pleadings, which will operate in favor of justice." Perkins v. Hawkins, 50 Va. 653.

Where such amendments are allowed, the rights of the opposite party can always be safeguarded by a postponement of the trial, or, if need be, by a continuance of the case.

For those reasons, the judgment complained of must be reversed, the verdict of the jury set aside, and a new trial granted.

Reversed.

(113 Va. 439)

#### WILLIAMSON v. SIMPSON.

(Supreme Court of Appeals of Virginia.  
March 14, 1912.)

Error to Circuit Court of City of Norfolk. Action by C. H. Simpson against W. C. L. Williamson. Judgment for plaintiff, and defendant brings error. Reversed, and remanded for new trial.

N. T. Green and J. M. Keeling, for plaintiff in error. Page, Page & Page and Daniel Coleman, for defendant in error.

CARDWELL, J. Defendant in error, plaintiff below, brought this action of assumpsit against plaintiff in error, defendant below, filing an original and amended declaration; both declarations containing a special count alleging in substance that the defendant had employed the plaintiff to find a purchaser for the defendant's spinach crop at the price of \$4,000, and had agreed to pay plaintiff therefor \$500, that the plaintiff had found and produced to the defendant such a purchaser, ready, willing, and able to buy, and that thereby defendant became indebted to plaintiff in the sum of \$500, which he, the defendant, refused to pay. The declaration also contained the common counts in assumpsit.

The defendant appeared and pleaded the general issue, and plaintiff asked that the grounds of defense be required, and the court entered its order to that effect. This order was entered on the same day of the term of the court, and as a part of the same order then entered permitting the filing of the amended declaration, and the case was set for trial on a later day of the term. In the order requiring the grounds of defense to be filed, no time within which they were to be filed was specified.

On the day of and before the trial, and before the jury was sworn, the defendant tendered a statement of his grounds of defense, to the substantial effect that no contract had been entered into between him and the plaintiff such as was set forth in the declaration; that there was no implied agreement or contract between him and the plaintiff; that, even if there had been any such contract or agreement, the plaintiff had not complied with it; and that, even if plaintiff had complied with it, he was not entitled to the amount claimed by him. The grounds of defense tendered by the defendant contained simply and solely denials of facts which the plaintiff was obliged to prove to sustain the demand made in his declaration, if no grounds of defense had been filed.

Objection being made by the plaintiff to the filing of the statement of the defendant's grounds of defense, because not filed earlier, the court sustained the objection, and the defendant duly excepted. A jury being impaneled and sworn, plaintiff introduced evidence tending to sustain the averments of his declaration and rested, whereupon the defendant offered to introduce evidence for the purpose, substantially, of disproving the case sought to be proved by the plaintiff; but, upon objection being made, the court refused to allow the defendant to introduce any evidence whatsoever, and thereupon the defendant again duly excepted. The jury found for the plaintiff, their verdict fixing his damages at \$500, which verdict the defendant moved the court to set aside; but the court overruled the motion, and entered judgment on the verdict, to which judgment this writ of error was awarded.

We are of opinion that the question presented upon the writ of error is controlled by the cases of City Gas Co. of Norfolk v. Poudre, 74 S. E. 158, and Whitley v. Booker Brick Co., 74 S. E. 160, just decided by this court. Therefore, for the reasons given in the opinions filed in those cases and the authorities cited, the judgment complained of in this case has to be reversed, and the cause remanded for a new trial.

Reversed.

(113 Va. 333)

#### POTOMAC, F. & P. R. CO. v. CHICHESTER.

(Supreme Court of Appeals of Virginia.  
March 14, 1912.)

##### 1. EVIDENCE (§ 211\*)—INJURY TO SERVANT—DEFECTIVE APPLIANCES—ADMISSIBILITY.

The testimony of the general manager of a railroad company in an action for injuries to an employé, caused by a defective brake on a car, that the lever and pin in use more than a year after the accident were the same as in use at the time of the accident, is unambiguous, and merely identifies the parts of the brake; and it is error to admit the testimony on a subsequent trial as an admission that the brake was in the same condition more than a year after the accident that it was in at the time of the accident, especially where on the subsequent trial the general manager testified that he merely intended to identify the parts of the brake, and that he had no knowledge of its condition at the time of the accident.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 738-744; Dec. Dig. § 211.\*]

##### 2. MASTER AND SERVANT (§ 270\*)—INJURY TO SERVANT—DEFECTIVE APPLIANCES—EVIDENCE—ADMISSIBILITY.

Where, in an action for injuries to a railroad employé, the issue was whether the brake on a car was defective, evidence of the condition of the brake about 13 months after the accident was inadmissible, in the absence of evidence that its condition was unchanged.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 913-927, 932; Dec. Dig. § 270.\*]

##### 3. MASTER AND SERVANT (§ 270\*)—INJURY TO SERVANT—DEFECTIVE APPLIANCES—EVIDENCE—ADMISSIBILITY.

Evidence of the condition of machinery a reasonable time after an accident to an employé is admissible, in the absence of evidence of a change of condition in the meantime; but, when considerable time has elapsed, the burden of proof shifts, and the evidence is inadmissible, unless the condition has not changed.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 913-927, 932; Dec. Dig. § 270.\*]

**4. APPEAL AND ERROR (§ 1053\*)—ERRONEOUS ADMISSION OF EVIDENCE—CORRECTION BY INSTRUCTIONS.**

Where, in an action for injuries to a railroad employé, the issue was whether the brake on a car was defective, and the court erroneously admitted the testimony of the general manager of the company, given on a former trial, as an admission that the brake on the car was in the same condition more than a year after the accident as at the time of the accident, the error was not cured by a charge that, if the general manager did not intend to say that the brake was in the same condition at the last trial as at the date of the accident, his testimony on that subject must be disregarded; he testifying at the last trial that on the former trial he merely intended to identify the parts of the brake.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4178-4184; Dec. Dig. § 1053; Trial, Cent. Dig. § 977.]

Error to Circuit Court, Orange County.

Action by one Chichester, administrator of Charles S. Waller, deceased, against the Potomac, Fredericksburg & Piedmont Railroad Company. There was a judgment for plaintiff, and defendant brings error. Reversed.

See, also, 111 Va. 152, 68 S. E. 404.

St. Geo. R. Fitzhugh and John G. Williams, for plaintiff in error. E. H. De Jarnette, Jr., for defendant in error.

WHITTLE, J. On February 19, 1908, Charles S. Waller, a brakeman in the employment of the plaintiff in error, while endeavoring to bring a flat car loaded with green hickory timber downgrade from a switch known as a "Y" to the main track by means of hand brakes, lost control of the car, and, as was supposed, to avoid the result of collision with a box car on the track below, either jumped or fell from the car and was killed.

There was a verdict and judgment for the plaintiff, to which judgment this writ of error was awarded.

The case has been twice tried, and this is its second appearance in this court. On the first writ of error it was held that "where evidence shows that the method adopted by the defendant railroad company of handling its cars on a siding was a reasonably safe one, and had been used for many years without injury to any one, and was in common use on railroads, it is error to submit to the jury, in an action for personal injury to a servant, the question whether or not such method was a negligent one." 111 Va. 152, 68 S. E. 404. For that error the judgment was reversed, and the case remanded for a new trial.

The grounds relied on to justify the present recovery are twofold: (1) That the brakes on the flat car were defective; and (2) that the car was overloaded.

There are also but two main assignments of error. The first involves the ruling of the court on the admission of evidence, and

the second the overruling of the defendant's motion to set aside the verdict as contrary to the law and the evidence. Of these assignments, the first alone demands our attention.

[1] The court, over the objection of the defendant, admitted the stenographic report of part of the examination of W. H. Richards, general manager of the defendant company, on the former trial, in respect to the condition of the brakes on car No. 12, in March, 1900, more than a year after the accident. The theory on which the court admitted this statement was that it constituted an admission by an official of the company that the brakes on the car were in the same condition when examined by Richards as when the accident occurred. Upon that assumption, the court permitted the plaintiff to introduce the testimony of several of the jurors at the first trial as to the condition of the brakes at that time.

The statement attributed to Richards was as follows: "There is the same lever—the same thing—to the best of my knowledge and belief and inquiry as there was when the accident occurred, and is to-day; the same chain is upon it. Q. That dead lever is, you say, the same to-day as when the accident occurred? A. Yes; and that pin that is there; it is the same pin."

It is quite apparent that, while the witness identifies the various parts of the brake as being the same as when the accident occurred, he does not say that they were in the same condition.

Richards, in his testimony at the second trial, says: "I meant to say that it was the same pin and the same lever; that no other had been substituted in place of it. I did not mean that it was in the same condition as it was, because there was wear. I mean to state that the same lever and same pin were there. Q. Did you, or not, mean to say by that answer that the brakes on No. 12 were in the same condition on the day of the accident as they were on the day you were testifying? A. No, sir." Witness then proceeded to state that he had no personal knowledge as to what the condition of the brakes was when the accident occurred.

But, independently of Richards' explanation, it is clear that the language attributed to him at the other trial was not susceptible of the construction placed upon it. If, therefore, the statement was admissible for any purpose, Richards being present in court and subject to examination, it was unambiguous, and should have been interpreted by the court. The condition of the brakes at the time of the accident was a vital issue in the case, upon which the evidence was conflicting; and the effect of the court's ruling was to cast in the scale against the defendant the inadmissible evidence of jurors at the former trial.

[2, 3] The court correctly held that evidence

of the condition of the brakes at the date of the first trial was too far removed in point of time (about 18 months) to be admissible, in the absence of evidence that their condition was unchanged. The general doctrine on that subject is that evidence of the condition of machinery, etc., a reasonable time after an accident (determinable by the character of the appliance) is admissible, in the absence of evidence of a change of condition in the meantime. But, when considerable time has elapsed, the burden of proof shifts, and such evidence is not admissible, unless it is made to appear that the condition has not changed. 1 Wigmore on Evidence, § 437; 37 Cent. Dig. "Negligence," § 251; 29 Cyc. 614; Wash., Alex. & Mt. V. Ry. Co. v. Vaughan, 111 Va. 785, 69 S. E. 1035.

[4] The situation was not relieved by the court's instruction that, if the jury believed from the evidence that Richards did not intend to say that the brakes were in the same condition at the last trial as at the date of the accident, they must disregard the evidence of the jurors on that subject. Richards made no such statement, and the only remedy for the original error in admitting the evidence based upon the false premise was to have unqualifiedly instructed the jury to disregard it.

For these reasons, the verdict of the jury must be set aside, the judgment reversed, and the case remanded for further proceedings.

In these circumstances it is unnecessary, if not improper, to consider the second assignment of error.

Reversed.

(113 Va. 266)

# JEFFERSON v. SCHOOL BOARD OF AMELIA COUNTY.

(Supreme Court of Appeals of Virginia.  
March 14, 1912.)

## SCHOOLS AND SCHOOL DISTRICTS (§ 65\*) — SCHOOL LAND—SALE—CONFIRMATION—NATURE OF PROCEEDINGS.

Code 1904, § 1466a, as amended by Acts 1910, c. 243, provides that a school board may petition the circuit court, or a judge thereof, to sell school property, and on evidence that such sale or exchange is proper the court or judge may order a sale or exchange, provided that, if the property is sold, it shall be sold to the highest bidder at public auction after due notice, etc. *Held*, that a proceeding under such section was an ex parte proceeding, in which the court or judge was expected to exercise discretion, so that, where a sale was made subject to confirmation, an order, at the instance of the school trustees, directing that the property be reoffered because of alleged inadequacy of offer at the first sale, did not constitute an abuse of discretion, so as to justify reversal at the instance of the bidder.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. §§ 162-167; Dec. Dig. § 65.\*]

Appeal from Circuit Court, Amelia County.

Application by the School Board of Amelia County for the sale of land purchased for

school purposes. A sale having been made to John G. Jefferson, the trustees applied for a nonconfirmation for inadequacy of price, to which application Jefferson filed objections. From an order refusing confirmation, he appeals. Affirmed.

J. G. Jefferson, Jr., for appellant. Thos. R. Hardaway, Atty. Gen., for appellee.

KEITH, P. The school board of Giles district, in Amelia county, filed a petition in the circuit court of the county, asking leave of the court to sell a lot of land containing three acres; it being in their opinion not suitable for the purposes for which it had been purchased. In accordance with the prayer of this petition, the circuit court entered an order authorizing the sale of the property and directing the school board to make the sale to the highest bidder, after due publication of the time and place of sale, and to report their proceedings to the court. At the September term, 1910, the trustees constituting the school board reported that upon the 24th day of June, 1910, after due advertisement in accordance with the directions of the order theretofore entered, they had offered the property for sale at public auction, and that the highest bid was made by John G. Jefferson, who offered \$300 for the three acres. The trustees further reported that the sale was advertised to be made subject to the approval of the court, and that in the opinion of the trustees the amount bid was not as much as the property was worth, and they therefore asked that the same be not confirmed, but that they be directed again to offer the property for sale.

Jefferson, the bidder referred to, appeared before the court and moved to exclude and dismiss the report of the trustees, upon the ground that the court had no power or duty in the matter, except to grant leave to the trustees to make the sale; that the proceeding was not a suit in chancery; that the sale was not made by officers of the court, and was not dependent for validity upon the approbation of the court, but that it was a purely statutory proceeding, in which the only function of the court was to grant leave to the trustees to make the sale; and that they, acting under a statute, had no discretion but to sell to the highest bidder and make him a deed to the property.

The proceeding is under section 1466a of the Code of 1904, which provides, that "any county, district or city school board may file its petition in the circuit court of its city or county, or in the corporation or hustings court of its city, or before the judge thereof in vacation, asking leave to sell or exchange any public school property which in its judgment it is desirable to sell or exchange, and upon evidence being produced before the court, or judge thereof in

vacation, that such sale or exchange is proper to be made, the said court, or judge thereof in vacation, shall make such order as may be proper providing for the sale of said property, or that the same may be exchanged; provided, that if the said school property is sold it shall be sold to the highest bidder at public auction after due public notice of time and place of sale be made known by posting notices in the school district, or city in which said school property is located, and in case of sale of said property the court or judge shall make an order for the proper use or investment of the proceeds of the same; the court may make such order as to the cost as to it may seem proper. In case of sale or exchange of district school property the deed for the same shall be made by the school trustees of the district or districts in which the property is situated." Acts 1910, p. 356.

The proceeding provided for in this section is an ex parte one. It is not a suit in equity for the sale of land, and it is purely a statutory proceeding in which a good deal seems to be left to the discretion of the court or judge. The property is to be sold to the highest bidder at public auction, after due public notice of the time and place of sale in the manner prescribed by the statute. The court or judge is required to make an order for the proper use or investment of the proceeds of sale, and such order as to costs as may be deemed proper.

In order to secure a compliance with the provisions of the statute, the circuit court saw fit to direct in this instance that the trustees should offer the property for sale in accordance with the terms of the statute, and should report their proceedings to the court in order that it might determine whether the sale had been made in obedience to the provisions of the law.

It is not necessary for us to say that some other mode might not with propriety have been adopted by the court. It is enough that in proceeding as it did the circuit court did not so far exceed the discretion reposed in it as to constitute reversible error.

The history of the case seems to be that the land in question was purchased for school purposes in 1908; that the board paid for the three acres the sum of \$450, or \$150 an acre; that at the time of its purchase Jefferson, the appellant here, was the chairman of the school board making the purchase, which was negotiated by him and R. H. Bruce, who was then a member of the board. There is evidence that lands in that community have since 1908 greatly increased in value; that land adjoining the lot in controversy has sold for the sum of \$200 per acre. Under these circumstances, with a unanimous report from the trustees, stating that the property has not brought a fair price, and asking that the sale be not confirmed, we cannot say that in refusing con-

fimation (if confirmation were necessary) the court exceeded its discretion. As we have said, this is an ex parte proceeding. It differs from a suit in chancery, where a sale of land to pay debts, or for some other cause, is asked, and the adverse interests of parties are to be considered.

Upon the whole case, we are of opinion that there is no error to the prejudice of the appellant, and the order of the circuit court of Amelia county is affirmed.

Affirmed.

(113 Va. 236)

DEANE v. TURNER et al.

(Supreme Court of Appeals of Virginia.  
March 14, 1912.)

1. BOUNDARIES (§ 26\*) — EQUITY — JURISDICTION—DISPUTED BOUNDARY.

A bill alleged that complainants had the legal title to and were in possession of land, and that a cloud had been created upon their title by defendant's recording of an old survey, and prayed for relief quieting complainant's possession, and further alleged that defendant had trespassed upon the woodland of complainants, claiming title thereto, and was disturbing them in the quiet enjoyment of their land, and prayed that he be enjoined from such trespass and from making any further claim to the land; but the pleadings and the evidence showed that the only matter in controversy was the true location of a boundary line between the land of the parties. Held that, considered as a suit to settle a disputed boundary line, equity had no jurisdiction, and that no peculiar equity appeared, entitling complainants to invoke the aid of equity.

[Ed. Note.—For other cases, see Boundaries, Cent. Dig. §§ 139, 140; Dec. Dig. § 26.\*]

2. INJUNCTION (§ 118\*) — PLEADING — TRESPASS.

A party seeking to restrain a trespass must set forth the facts constituting the injury, and either allege that an irreparable damage will result if the injunction is denied, or that the defendant is insolvent, or otherwise his bill is fatally defective.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 223-242; Dec. Dig. § 118.\*]

Appeal from Circuit Court, Greene County.

Bill by Emma M. Turner and another against D. C. Deane. Decree for complainants, and defendant appeals. Reversed, and bill dismissed.

John S. Chapman, for appellant. Chas. A. Hammer, for appellees.

HARRISON, J. It is manifest that the real object of this suit in equity is to settle a disputed boundary line. It is true that the bill alleges that the complainants have the legal title, are in possession, and that a cloud has been created upon their title by the rec- ordation by the defendant of an old survey recently discovered by him, which the court is asked to remove, thereby quieting complainants in their possession. But the bill, the answer, and the evidence all show that the only matter in controversy is the true lo- cation of the boundary line between the land

of complainants and that of the defendant. The proof is directed alone to this controverted title, and the decree appealed from makes no reference to any other subject, and settles the controversy by determining the location of the disputed line in favor of the complainants and adversely to the earnest contention of the defendant.

In *Callaway v. Webster*, 98 Va. 790, 37 S. E. 276, it is said: "Where it appears at the hearing of the cause, upon the pleadings and the proof offered, that the real object of the bill is to settle, in a court of chancery, a controverted boundary of lands, it should be dismissed for want of jurisdiction."

[1] For many years the law has been established by numerous decisions of this court that courts of equity will not interpose to ascertain and determine boundaries, unless, in addition to the naked confusion of the controverted boundaries there is suggested some peculiar equity, which has arisen from the conduct, situation, or relation of the parties. *Collins v. Sutton*, 94 Va. 127, 26 S. E. 415; *Miller v. Wills*, 95 Va. 337, 28 S. E. 337; *Callaway v. Webster*, supra.

In the present case no peculiar equity appears to have arisen which would give the complainants the right to invoke the aid of a court of chancery. The bill alleges that the defendant has trespassed upon the woodland of complainants, claiming title thereto, and is annoying, vexing, and disturbing them in the quiet and peaceable enjoyment of their land, and prays that he may be enjoined and restrained from such trespasses, and from making any further claims to the land. There are no facts set forth constituting the alleged trespass, nor is there any charge that irreparable damage will result if the injunction is denied, or that the defendant is insolvent.

[2] When a party comes into a court of equity to restrain a trespass, he must set forth the facts constituting the injury, and make at least one of the allegations mentioned; otherwise his bill will be fatally defective. *Collins v. Sutton*, supra.

In *Callaway v. Webster*, supra, citing *Manchester Cotton Mills v. Town of Manchester*, 66 Va. 825, it is said to be well settled "that an applicant in possession of land, with a clear title or a prima facie title, is entitled to an injunction against a trespasser, threatening irreparable injury, or often repeated trespass. But even in a case of a fair prima facie title, if it turns out from the evidence that the right of the applicant is in doubt, and the title and the boundaries of the land are really in issue, such a controversy cannot be settled in equity, though the property, in an urgent case, may be protected by the injunction until the question of right can be settled by a trial at law."

The answer of the defendant denies that the old plat and survey recorded by him is any cloud upon the complainants' title; that

the line of his land indicated on the plat complained of, with the proper variations added, is the identical description of the same line in the old deed under which he holds. The answer further denies that the defendant has ever trespassed upon the land of complainants; indeed, every material allegation of the bill is denied, and the issue squarely made, which involves alone the true location of the boundary line, which is left in doubt by the evidence.

Both by demurrer and answer the jurisdiction of a court of equity to take cognizance of the controversy is called in question, and we are of opinion that, for want of jurisdiction, the bill should have been dismissed on the hearing. The decree complained of must therefore be reversed, and this court will enter such decree as the circuit court ought to have entered, dismissing the bill.

Reversed.

(113 Va. 232)

#### CRUTCHFIELD et al. v. GREER.

(Supreme Court of Appeals of Virginia.  
March 14, 1912.)

#### 1. WILLS (§ 601\*)—CONSTRUCTION—FEE SIMPLE—LIMITATION REPUGNANT TO FEE—"HEIRS."

Testatrix, dying without children, declared that, should she die without heirs, her entire property was to go to her husband, to dispose of as he wished, and by a following clause declared that, should the husband die without will after her decease, the property was to go to her brother. *Held*, it being conceded, that "heirs" meant "children," that the first paragraph devised to the husband a fee simple in the real estate and an absolute estate in the personal property, with the right of absolute disposition, so that any limitation over was repugnant to the fee and void.

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. §§ 1340-1350, 1608; Dec. Dig. § 601.\*

For other definitions, see *Words and Phrases*, vol. 4, pp. 3241-3265; vol. 8, pp. 7677, 7678.]

#### 2. WILLS (§ 470\*)—CONSTRUCTION AS A WHOLE.

In arriving at the intention of a testator, not only must his will be read as a whole, but the established rules of law as to the construction of wills are also to be considered.

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. § 988; Dec. Dig. § 470.\*]

#### 3. WILLS (§ 600\*)—ESTATES CREATED—FEE SIMPLE—ABSOLUTE POWER OF DISPOSITION.

When an estate is given, coupled with the absolute power of disposition, either express or implied, it comprehends everything, and the devisee takes the fee.

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. §§ 1335-1339; Dec. Dig. § 600.\*]

Error to Circuit Court, Franklin County.

Ejectment by Etta Greer against Olivia Crutchfield and others. Judgment for plaintiff, and defendants bring error. Reversed, and remanded for new trial.

Samuel A. Anderson and L. W. Anderson, for plaintiffs in error. W. J. Henson and Dillard & Lee, for defendant in error.

**HARRISON, J.** This action of ejectment was brought by the defendant in error to recover of the plaintiffs in error a tract of land containing 267 acres, situated in the county of Franklin.

It is conceded that the whole controversy turns upon the proper construction of the will of Olivia J. Helms, dated June 21, 1870, which is as follows:

"I, Olivia J. Helms, declare the following lines to be the last wishes in regard to the disposal of my property:

"Should I have an heir or heirs, I will my property after my just debts are paid to be equally divided among the said children at the death of my husband (G. M. Helms), but until that time the said husband is to have the management of the said property for the benefit of the said heirs and himself; however, none of the said property is to go for the debts he contracts, but is to be a home for himself and my children, allowing all he makes off the said property to go in the manner he wishes.

"Should I die without heirs, the entire property I own is to go to my beloved husband (G. M. Helms) to dispose of as he may wish.

"Should I die without husband or heirs, the said property is to go to my beloved brother Samuel Helms, or should my husband die without a will after my decease the said property is to go to the said Samuel Helms.

"The above is written when I am in perfect health and sound mind."

It is conceded that the testatrix, in the use of the term "heirs" in this will, meant children. As the testatrix died about one year after the date of this will, without children, the first clause sheds little or no light upon the construction of the subsequent clauses.

[1, 2] The second paragraph of the will, which is as follows: "Should I die without heirs, the entire property I own is to go to my beloved husband (G. M. Helms) to dispose of as he may wish"—is so clear and unequivocal in its meaning that it admits of but one interpretation, and that is that the beneficiary thereunder took a fee simple in the real estate left by the testatrix and an absolute estate in her personal property, with the right to dispose of such estate as he might wish.

The third and last clause of the will is as follows: "Should I die without husband or heirs, the said property is to go to my beloved brother Samuel Helms, or should my husband die without a will after my decease the said property is to go to the said Samuel Helms."

It is contended that, to ascertain the intention of the testatrix, the second and third clauses must be read together, and that, when so considered, it makes the language of the second clause, "to go to my beloved husband (G. M. Helms) to dispose of as he may wish," mean "to go to my beloved husband

to dispose of *by will* to whomsoever he may wish." In other words, the contention is that the husband (G. M. Helms) only took under the will a life estate, with power of appointment by will, with limitation over to Samuel Helms if he failed to make such an appointment. This view cannot be sustained. The language, "Should I die without heirs, the entire property I own is to go to my beloved husband (G. M. Helms) to dispose of as he may wish," does not admit of being restricted to a disposition by will. "To dispose of as he may wish" means a disposition at any time and in any manner that he may wish. The power of alienation in the husband is unrestrained and unlimited.

"In arriving at the intention of a testator, not only must his will be read as a whole, but the established rules of law as to the construction of wills are also to be considered." *Whittle v. Whittle*, 108 Va. 22, 60 S. E. 748.

In the construction of wills it is a well-settled rule of law that an absolute power of disposal by the first taker renders a subsequent limitation repugnant and void. As said in *Rolley v. Rolley*, 109 Va. 449, 63 S. E. 988, 21 L. R. A. (N. S.) 64, this is one of many cases where the testator has sought to bestow upon the beneficiary of his bounty an estate with the attributes of a fee simple, or authority to consume it, and yet provide that, if the beneficiary shall fail to exercise such authority, the property shall go over to another.

The language of the third clause, "or should my husband die without a will after my decease the said property is to go to the said Samuel Helms," is repugnant to the fee simple, which carries with it the absolute power of disposition, given to the husband (G. M. Helms) in the second clause, and is therefore void.

This doctrine has been reiterated by this court in numerous cases, of which it is sufficient to cite the following: *Farish v. Wayman*, 91 Va. 430, 21 S. E. 810; *Bing v. Burrus*, 106 Va. 478, 56 S. E. 222; *Hunter v. Hicks*, 109 Va. 615, 64 S. E. 988. In the case last cited it is said: "The cases cited clearly establish that, whenever it is the intention of the testator that the devisee shall have an unrestrained power of disposition over the property devised, whether such intention be expressed or necessarily implied, a limitation over to another is void, because it is inconsistent with and repugnant to the estate given to the first devisee, although the will shows that it was the testator's intention, in respect to the property given to the first taker, that what remained of the same, or whatever may remain at his death, or so much thereof as may be in existence at his death, or such part as he may not appropriate, or what may be on hand at his death, should go to another. Such intention must fail on account of its uncertainty, and the first taker acquires the absolute property."

[3] The rule in these cases, which has become a canon of property, is that when an estate is given, coupled with the absolute power of disposition, either express or implied, it comprehends everything, and the devisee takes the fee.

The husband (G. M. Helms) having taken a fee-simple estate in the land in controversy, under the will of his wife, Olivia J. Helms, it is immaterial whether he disposed of it or not. It is sufficient that he had the power to dispose of it.

The circuit court having instructed the jury that G. M. Helms took only a life estate in the property in controversy, with power of appointment by his last will, and that in default of making a will the property passed to Samuel Helms, its judgment must be reversed, the verdict of the jury set aside, and the case remanded for a new trial, to be had in accordance with the views expressed in this opinion.

Reversed.

(113 Va. 318)

**PETERS et al. v. WAVERLY WATER-FRONT IMPROVEMENT & DEVELOPMENT CO. et al.**

(Supreme Court of Appeals of Virginia.  
March 14, 1912.)

**1. CORPORATIONS (§ 439\*)—CORPORATE POWERS—CHARTER.**

Where the charter of a corporation organized for the purpose of acquiring and disposing of water-front property provided that it should have power to sell real estate and generally do all other things necessary about the acquisition and selling of property, it had authority to sell all of its water-front property as a whole.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1774; Dec. Dig. § 439.\*]

**2. CORPORATIONS (§ 320\*)—OFFICERS—AUTHORITY.**

Minority stockholders cannot maintain a suit in equity to invalidate the action of the directors in selling and directing a conveyance of the entire corporate property, though in excess of their powers, but within the powers of the corporation, for such an act is only voidable and may be ratified by the stockholders, and, having been ratified, is binding on the corporation.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1428-1439; Dec. Dig. § 320.\*]

**3. COSTS (§ 13\*)—PERSONS ENTITLED TO COSTS.**

In an action by minority stockholders to set aside an act of the directors ratified by a large majority of the stockholders of a corporation, it is improper where the bill is dismissed to impose any costs on defendants.

[Ed. Note.—For other cases, see Costs, Cent. Dig. §§ 21, 25; Dec. Dig. § 13.\*]

Appeal from Hustings Court of Portsmouth.

Bill by William H. Peters and others against the Waverly Water-Front Improvement & Development Company and others. From a decree dismissing the bill, complainants appeal. Modified and affirmed.

Garnett & Garnett, for appellants. Williams & Tunstall, Watts & Hatton, and James F. Wright, for appellees.

WHITTLE, J. In November, 1908, appellants filed a bill in equity in the court of hustings for the city of Portsmouth against appellees, the Waverly Water-Front Improvement & Development Company, Leigh R. Watts, and William G. Maupin, Jr., individually and as directors of the company, and the Atlantic Coast Terminal Company and others. The material allegations of the bill are as follows:

That plaintiffs are owners of 42 shares out of 800 shares of the stock of the Waverly Water-Front Improvement & Development Company (hereafter called the "Waverly Company"). That the company (a Virginia corporation) was chartered for the purpose of acquiring, improving, and developing real estate, and especially a valuable water-front property owned by it situated on Elizabeth river, in the harbor of Norfolk and Portsmouth, on the northern water front of the latter city. That in November, 1902, the Waverly Company made a contract with Middendorf and Williams for the sale of all its property at the price of \$90,000, \$2,500 cash, and the balance in two annual installments. That three years elapsed after the date of the contract, during which time no other payment was made, and at the expiration of that time the principal with accrued interest amounted to over \$100,000. That on June 22, 1905, at a regular meeting of the stockholders of the company, a resolution was adopted calling on the purchasers for immediate compliance with their contract. At that meeting officers holding 453 shares of the entire stock were elected for the ensuing year, and composed the board of directors. At a called meeting of the board of directors, held on December 13, 1905, all being present, a resolution was adopted authorizing the sale of the property to the Atlantic Coast Terminal Company in lieu of the sale to Middendorf and Williams for \$92,500. This action on the part of the directors was had, and the deed conveying the property was executed, without the authority of all the stockholders of the Waverly Company, and the act of the president and directors in so attempting to sell all the company's property was beyond their power and authority, and a fraud upon the rights of the plaintiffs, and all other stockholders who had not received any notice of the intention to make the deed conveying away the company's entire property, and who had not in any way consented thereto. At this meeting \$2,500 of the cash payment of \$15,000 which was to be paid by the substituted purchaser was assigned by the directors to Middendorf and Williams, who were known to the president and directors to be promo-



ters of the Atlantic Coast Terminal Company and largely interested therein. Legh R. Watts, president of the Waverly Company, was acting in their behalf and interested in effecting the sale. The president and directors at the December meeting resolved that Legh R. Watts should be paid \$5,000 for his services and expenses, and that Watts and Hatton should be paid the further sum of \$5,000 for legal services, and these payments were not made in pursuance of any previous contract. That all these acts by the directors were contrary to equity and good conscience, and in violation of their duties as officers and directors of the Waverly Company. That prior to the execution of the deed to the Atlantic Coast Terminal Company plaintiffs had notified Legh R. Watts, president, that they would not consent to a sale of the property for a less price than was due from Middendorf and Williams. That the president and directors knew that plaintiffs had no notice of the sale, and had not consented thereto. That Legh R. Watts and William G. Maupin, Jr., styling themselves a committee of the directors, notified the plaintiffs by letter that the property had been sold, and that a dividend of \$187.50 on each share of the company's stock had been declared, to be paid in cash and notes on surrender of the certificates of stock held by plaintiffs. That this notice was in furtherance of an understanding between Legh R. Watts and the Atlantic Coast Terminal Company and Middendorf and Williams to get in and cancel all outstanding shares of stock held by plaintiffs, to which proposition they had declined to accede. That the president and directors of the Waverly Company were trustees for all the stockholders, and could not lawfully sell the property against the will and consent of plaintiffs as stockholders. That the property had been sold at a sacrifice. That the Atlantic Coast Terminal Company had not paid its notes for the deferred purchase money, and the property was still in their possession. That plaintiffs had promptly and repeatedly, but in vain, sought redress for the acts complained of, which constituted a fraud upon their rights. The bill concludes with a prayer for parties; that the deed to the Atlantic Coast Terminal Company be declared null and void and set aside; that Legh R. Watts and William G. Maupin, Jr., be held personally liable for loss and injury suffered by plaintiffs; that they may have an accounting with the Atlantic Coast Terminal Company for all profits derived by them from the possession and control of the property; and, finally, that it be enjoined from selling and disposing of the same until such an accounting is had.

To this bill the Atlantic Coast Terminal Company interposed a demurrer, which the court overruled; and each of the defendants

filed separate answers, in which they controvert many of the allegations of fact contained in the bill and conclusions of law drawn therefrom. Every suggestion of oppression, unfair dealing, bad faith or fraud in law or in fact on the part of the defendants, individually or officially, is explicitly and emphatically denied. The answer of Judge Legh R. Watts is specially full, and furnishes an exhaustive review of the history of the case, giving in detail all the material facts and circumstances which led up to and induced the formation of the Waverly Company, and presents a frank and unreserved statement of his actions and motives in the conduct of its affairs from beginning to end.

The defendants, other than the Atlantic Coast Terminal Company, declined to demur to the bill, but, on the contrary, invited a full and thorough investigation on the merits of all charges affecting their character and conduct in the premises.

At the final hearing, the court upon the pleadings and evidence passed the decree under review, dismissing the bill at the cost of the plaintiffs, except only the expense incident to taking depositions, with respect to which it was ordered that the parties, plaintiffs and defendants, at whose instance depositions were taken, should, respectively, pay the costs thereof.

In disposing of this case, we prefer to deal with it, as the hustings court did, on the merits. And at the threshold it is due to Judge Watts and his associates to say that we find nothing in the record to justify the averment that they have been guilty of any of the acts of impropriety and misconduct with which they are charged. They owned and represented nearly 90 per cent. of the stock of the Waverly Company; and from a painstaking examination of the record it is apparent that in the negotiations, sale, and conveyance of the property they exercised their best business judgment, and did what they believed to be for the interests of themselves and the minority stockholders, all of whom were placed upon precisely the same plane.

[1] In these circumstances the question for our determination is solely one of power—that is to say, whether the corporation, as an original proposition, had authority to do what its agents, the board of directors, did do; for, if the company possessed such power, its authority to ratify the irregular acts of its agents follows as a matter of course.

The charter of the Waverly Company was granted by the circuit court of Portsmouth on June 12, 1893, and among other things provides:

"II. The said company shall have power and authority to \* \* \* sell real estate in the county of Norfolk and in the city of Portsmouth \* \* \* and generally to do all other things requisite and necessary in

and about the acquisition \* \* \* and selling such property as the company may acquire.

"III. The said company may own real estate in the county of Norfolk and in the city of Portsmouth, Virginia, not to exceed, at any one time, one hundred acres, and may dispose of, sell, grant, improve, and convey the same."

The corporation, as was well understood, was organized for the very purpose of acquiring and disposing of this water-front property. Indeed, it owned no other property. The water-front property was acquired as a whole and sold as a whole; and it was not practicable to dispose of it in any other way.

[2] We may concede that the action of the board of directors in selling and directing a conveyance of the entire corporate property, as set forth in the bill, was in excess of their authority. Nevertheless, the power exercised by them was plainly within the competency of the corporation itself, as we have seen from the charter, and, being within the charter powers, was therefore not void, but voidable merely, and capable of ratification by a majority of the stockholders. And it, furthermore, appears that the acts of the directors were so ratified by the acquiescence and assent of a large majority of the stockholders (all, indeed, except the plaintiffs) by acceptance of their proportionate shares of the purchase money, and the surrender of their stock certificates for cancellation. In this connection we shall adopt the summary of the learned hustings court in its decree.

"The acts of the directors complained of, namely, the release of Middendorf and Williams from their contract of purchase, the sale and authorization of the conveyance of the property of the Waverly Company to the Atlantic Coast Terminal Company, Incorporated, the repayment to Legh R. Watts of the money expended by him in promoting the sale, the payment to Watts and Hutton of their fee for professional services in defending the suit brought by E. W. White et al., relative to the riparian rights of the Waverly Company in the property sold, and the resolution to dissolve the company, were all matters relating to the internal management of the company's affairs, were acts exercised in good faith and with fair business judgment, with a common purpose for the benefit of all the stockholders of the Waverly Company, without thought of advantage to any one stockholder over another, and are therefore free from any suggestion or stain of fraud.

"The acts of the directors, as aforesaid, not being fraudulent in character, and having been ratified by a large majority of the shareholders of the Waverly Company, were thereby validated."

The result reached upon the controlling

question in the case is well sustained by the authorities.

A leading case on the subject is the decision of Vice Chancellor Wigram in *Foss v. Harbottle*, 2 Hare, 461. That case was decided in the year 1843, and the principle enunciated by the learned Vice Chancellor has been uniformly laid down by leading text-writers on the subject and repeatedly followed by courts of the highest respectability. The doctrine is accurately epitomized in the brief of counsel as follows: "When an act is done by some particular agency of a corporation (as in this instance by the board of directors), which is beyond the powers of that particular agency, but is nevertheless within the powers of the corporation itself, a court of equity will not interfere at the instance of minority stockholders, for the reason that the majority of the stockholders, acting within the powers of the corporation, may at once ratify the unauthorized act, thus rendering of no effect the action which the court is requested to take."

In *MacDougall v. Gardner*, 1 Ch. Div. 13, the court adhered to the rule in *Mozley v. Alston*, 1 Ph. 790, *Lord v. Copperminers' Company*, 1 Ph. 740, and *Foss v. Harbottle*, supra. In the main case, at page 25, Mellish, L. J. (concurring in the opinions of his associates), observes: "In my opinion, if the thing complained of is a thing which in substance the majority of the company are entitled to do, or if something has been done irregularly which the majority of the company are entitled to do regularly, or if something has been done illegally which the majority of the company are entitled to do legally, there can be no use in having litigation about it, the ultimate end of which is only that a meeting has to be called and then ultimately the majority gets its wishes. Is it not better that the rule should be adhered to that, if it is a thing which the majority are the masters of, the majority in substance shall be entitled to have their will followed? If it is a matter of that nature, it only comes to this, that the majority are the only persons who can complain that a thing which they are entitled to do has been done irregularly; and that, as I understand it, is what has been decided by the cases of *Mozley v. Alston* and *Foss v. Harbottle*. In my opinion that is the rule to be maintained. Of course, if the majority are abusing their powers, and are depriving the minority of their rights, that is an entirely different thing, and then the minority are entitled to come before this court to maintain their rights; but, if what is complained of is simply that something which the majority are entitled to do has been done or undone irregularly, then I think it is quite right that nobody should have a right to set that aside or to institute a suit in chancery about it, except the company itself."

See, also, *National Car Co. v. L. & N. R. Co.*, 110 Va. 413, 66 S. E. 88, 24 L. R. A. (N. S.) 1010; *Cohen v. Big Stone Gap Co.*, 111 Va. 468, 69 S. E. 359; *Shaw v. Davis*, 78 Md. 308, 28 Atl. 619, 23 L. R. A. 294; *Dudley v. Kentucky High School*, 9 Bush (Ky.) 576; 1 *Morawetz on Corp.* §§ 246, 247; 2 *Clark and Marshall on Private Corp.* p. 1688.

[3] Upon cross-error, we are of opinion that no part of the costs should have been imposed upon the appellees.

For these reasons, the decree appealed from, modified in the particular indicated as to costs, must be affirmed.

Affirmed.

(113 Va. 262)

HOFFMAN v. SHARTLE et al.

(Supreme Court of Appeals of Virginia.

March 14, 1912.)

1. TRIAL (§ 340\*)—REDUCTION OF VERDICT—POWER OF COURT.

The trial court, in exercising its right to reduce a verdict, may not act arbitrarily; and where the issue is the quantum of damages, and there is evidence to sustain the verdict, a mere difference of opinion does not justify the court in reducing it.

[Ed. Note.—For other cases, see *Trial, Cent. Dig.* §§ 795-799; *Dec. Dig.* § 340.\*]

2. TRIAL (§ 340\*)—REDUCTION OF VERDICT—POWER OF COURT.

Where the items of damages claimed could have legitimately resulted from a breach of contract complained of, and on the evidence the quantum of damages was for the jury, a reduction of the verdict is unauthorized, in the absence of any ground for interference therewith.

[Ed. Note.—For other cases, see *Trial, Cent. Dig.* §§ 795-799; *Dec. Dig.* § 340.\*]

3. APPEAL AND ERROR (§ 1151\*)—DISPOSITION OF CASE ON APPEAL—JUDGMENT.

Where the trial court erroneously reduced the damages awarded by the jury, and gave judgment for a part only, the court, on writ of error, will render judgment for the balance of the damages, with interest thereon from the date of the judgment of the trial court, with costs.

[Ed. Note.—For other cases, see *Appeal and Error, Cent. Dig.* §§ 4498-4506; *Dec. Dig.* § 1151.\*]

Error to Circuit Court of City of Lynchburg.

Action by C. C. Hoffman against H. Shartle and others. There was a judgment granting insufficient relief, and plaintiff brings error. Reversed.

Don. P. Halsey and Thos. J. O'Brien, for plaintiff in error. Roper & Davis, for defendants in error.

HARRISON, J. This action of trespass on the case in assumpsit was brought by the plaintiff in error to recover of the defendants in error damages for their breach of a contract, wherein they undertook and agreed to assign and convey to the plaintiff in error an unexpired lease on the Hotel Atwood, and

to sell and convey to him certain furniture located in said hotel at the price of \$1,700, of which \$500 was paid in cash, and the residue secured by deed of trust upon such furniture.

The record shows that, relying upon the promise and agreements mentioned, the plaintiff in error took possession of the hotel and the furniture, and proceeded to incur considerable expense, with a view to conducting the hotel business, which was his purpose in purchasing the furniture and the unexpired lease, which was to run until April, 1910, with an option in favor of the lessee of continuing the same two years longer.

The agreements between the parties were entered into July 10, 1909, and in September, 1909, the plaintiff in error was evicted from the hotel property by a judgment of the corporation court of the city of Lynchburg in favor of the owner in an action of unlawful detainer. No defense to this action was made by the defendants in error; but at their instance the trustee in the deed of trust sold at public auction, in September, 1909, the furniture that had been thereby pledged to the satisfaction of the notes given for the balance outstanding on the purchase of the furniture. Thereupon this suit was brought to recover the damages sustained in consequence of the failure of the defendants in error to comply with their agreements. The amount of damage claimed was \$1,429.58; but the jury evidently cut out an item of \$200, claimed for salary, and returned a verdict for \$1,229.58. The record shows that the circuit court, of its own motion and over the protest of the plaintiff in error, reduced the damages found by the jury to the sum of \$619.28, and gave judgment for that amount. To that judgment this writ of error was awarded.

The sole question presented for our consideration is the propriety of the action of the circuit court in reducing the damages found by the jury. The record sheds no light on this subject. It fails to suggest any reason why the court should have cut the damages found by the jury in half, and given judgment only for the reduced amount.

At the request of the defendants the plaintiff filed a statement of the particulars of his claim, all the items of which, except possibly that for salary, may have reasonably and legitimately arisen in consequence of the failure of the defendants to perform their contract. The items of damage claimed were proved by the plaintiff, and no attempt was made to disprove one of them.

The defendants attempted to defend the action upon the ground that they had not undertaken to assign the lease, and that if they had agreed to do so the plaintiff had suffered no damage, because the lease was of no value.

[1] The case was fairly submitted to a

jury, and their verdict rendered, based upon ample evidence to support their conclusion. The practice which permits the court to reduce a verdict to an amount deemed reasonable and proper is a wise one, and it should not lightly be interfered with. The court cannot, however, in this matter act arbitrarily. Generally the record must show the grounds relied on in support of such action; otherwise, it cannot be upheld. The assessment of damages is peculiarly the province of the jury, and when the question before the jury is merely as to the quantum of damages to which the plaintiff is entitled, and there is evidence to sustain the verdict found by the jury, no mere difference of opinion, however decided, justifies an interference with the verdict for that cause. *Southern Mut. Ins. Co. v. Trear*, 70 Va. 255.

[2] In the present case, as before stated, all of the items of damage claimed could have legitimately resulted from the breach by the defendants of their contract. Upon the evidence, the question before the jury was as to the quantum of damages, and the record furnishes no ground for interfering with the settlement of that question by their verdict.

[3] The verdict of the jury was for \$1,229.58, and the judgment of the court thereon was for \$619.26, leaving \$610.32 of the verdict for which no judgment was given. The judgment complained of, in so far only as it failed to include the \$610.32, which was necessary to recover the whole verdict, must therefore be reversed, and this court will enter its judgment in favor of the plaintiff, C. C. Hoffman, against the defendants in error, for said sum of \$610.32, with interest thereon from the 27th day of May, 1910, that being the date from which the judgment given by the circuit court for the other part of the verdict bore interest, together with his costs in the circuit court in this behalf expended, and also his costs incurred in the prosecution of this writ of error.

Reversed.

(113 Va. 299)

#### MCINTYRE v. WRIGHT.

(Supreme Court of Appeals of Virginia.  
March 14, 1912.)

#### 1. WITNESSES (§ 159\*) — COMPETENCY — "TRANSACTION" WITH DECEDENT.

Code 1904, § 3346, which provides that, where one of the original parties to a "transaction" is incapable of testifying by reason of death, etc., the adverse party shall not testify thereto, prevents a wife, in suing her husband's estate for her distributive share in the estate of her brother, of which her husband was administrator, from testifying whether her husband paid her such distributive share (quoting 8 Words and Phrases, 7062).

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 664, 666-669, 671-682; Dec. Dig. § 159.\*]

#### 2. EXECUTORS AND ADMINISTRATORS (§ 513\*) — ACCOUNTS — FALSIFICATION—EVIDENCE—SUFFICIENCY.

Testimony that an administrator paid individual debts with checks drawn by him as administrator is insufficient to show a misappropriation of funds, as against a confirmed report of a commissioner of accounts, showing that the checks were proper and satisfactory vouchers, and that all funds coming into the administrator's hands had been properly accounted for.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 2267-2291; Dec. Dig. § 513.\*]

Error to Circuit Court, Fauquier County.

Bill by Loretta Wright against R. A. McIntyre. Decree for plaintiff, and defendant brings error. Reversed and remanded.

R. A. McIntyre, in pro. per. Keith & Richards, for defendant in error.

WHITTLE, J. In August, 1908, appellee, as administratrix of the estate of her late husband, J. W. Wright, deceased, filed her bill in the circuit court of Fauquier county against his distributees, praying, amongst other things, that her accounts be settled and the estate administered under the direction of the court. She also sought to recover from the estate of her decedent (who had been the administrator of her brother, John H. Orrison) \$1,035.41, her distributive share in that estate, which she alleged had never been paid. There was exhibited with the bill a final settlement of the account of J. W. Wright, as administrator of Orrison, taken before the commissioner of accounts of Loudoun county, July 8, 1904, which was examined by the circuit court of that county, and confirmed, and ordered to be recorded October 15, 1904. J. W. Wright died June 7, 1908, and shortly thereafter this suit was brought.

The bill waived an answer under oath, but the defendants averred in their answer that the fund had been fully and properly accounted for, and they relied on the confirmed commissioner's report as prima facie evidence of that fact.

The statute on the subject, Va. Code 1904, § 2699, declares that "the report, to the extent to which it may be so confirmed, shall be taken to be correct, except so far as the same may, in a suit, in proper time, be surcharged or falsified." See, also, *Leavell v. Smith*, 99 Va. 374, 38 S. E. 202, and authorities cited.

The circuit court, upon the pleadings and evidence, passed the decree complained of, establishing plaintiff's demand as a debt against J. W. Wright's estate, and from that decree the defendants appealed.

[1] The first assignment of error involves the action of the court in admitting the testimony of the plaintiff, Loretta Wright, over the objection of the defendants. The competency of Mrs. Wright as a witness turns upon the question whether payment of a debt con-

stitutes a "transaction" in contemplation of Va. Code 1904, § 3346.

In 8 Words and Phrases, 7062, discussing the word "transaction," it is said: "It is a broader term than 'contract,' for, while every contract is a transaction, every transaction is not a contract. But the courts have interpreted the term as the justice of each case seemed to demand, rather than by any abstract definition, as will be seen by the decided cases. The execution of a note by a deceased person, or the delivery of a letter or of property, is such a transaction with the deceased as to render the adverse party incompetent to testify to the same, under the statute. The word 'transaction' means the doing or performing any business; the management of an affair." *Cunningham's Adm'r v. Speagle*, 106 Ky, 278, 50 S. W. 244.

It would seem that this case plainly falls within the mischief intended to be prevented by our statute, if not within its express terms, in denying to the survivor the right to testify. Its declared purpose is: "Where one of the original parties to the contract or other transaction, which is the subject of the investigation, is incapable of testifying by reason of death," etc., to exclude the testimony of the adverse party; and in this instance all the conditions contemplated by the statute are present. The parties to the subject under investigation, namely, whether J. W. Wright had paid to Loretta Wright her distributive share in her brother's estate, are the husband and wife, and the former was dead. The fact that the payment had been made was, as we have seen, *prima facie* established by the confirmed report of the commissioner of accounts. And it is sought to overcome that presumption chiefly by the testimony of the wife. Her deposition, it is true, was negative in its character—that is to say, that the debt had not been paid; nevertheless, if her evidence is to be admitted, we throw down the bars in all investigations involving the question of payment between the estate of a decedent and a living party, and render the latter a competent witness to defeat or sustain the fact of payment according to his interest, which, in all such instances, would nullify the statute.

Payment, generally speaking, arises out of and is a vital part of a pre-existing contract; and whenever the fact of payment is "the subject of the investigation," and one of the parties is dead, and the adverse party is called to testify in his own behalf, the statute applies and renders him an incompetent witness.

We are, therefore, of opinion that the circuit court erred in admitting the testimony of Mrs. Wright.

[2] Other witnesses testified that in the year 1901, three years before Wright's final account was settled, he paid individual debts with checks drawn by him as adminis-

trator of Orrison, amounting in the aggregate to over \$1,000. From that circumstance the inference is attempted to be drawn that Wright was guilty of a misappropriation of his wife's funds.

It is not permissible for us to assume that a commissioner of accounts would treat such checks as "proper and satisfactory vouchers," showing that "all funds coming into his [the administrator's] hands had been properly accounted for," or that an intelligent court would have confirmed a report based upon such vouchers. The admissible evidence is not sufficient to surcharge and falsify the account, and it must be taken as correct.

For these reasons, the decree of the circuit court will be reversed, and the case remanded for further proceedings.

Reversed.

The clerk will note that Loretta Wright is now dead, and the decree for costs against her personal representative should be *de bonis testatoris*.

CARDWELL, J., absent.

(113 Va. 388)

# SOUTHERN RY. CO. v. VALENTINE'S PERSONAL REPRESENTATIVE.

(Supreme Court of Appeals of Virginia.

March 14, 1912.)

## 1. RAILROADS (§ 327\*)—HIGHWAY CROSSINGS—DUTY OF TRAVELERS.

A railroad track crossing a highway is a proclamation of danger, which requires a traveler to look and listen for approaching trains before attempting to cross, and to use ordinary care to make looking and listening effective.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1043-1056; Dec. Dig. § 327.\*]

## 2. RAILROADS (§ 348\*)—HIGHWAY CROSSING ACCIDENTS—CONTRIBUTORY NEGLIGENCE—EVIDENCE—SUFFICIENCY.

That decedent, who was killed by a train while driving across a track, when within 200 yards of the crossing, again when within 100 yards of it, and when at the edge thereof, could have seen a train approaching in time to prevent a collision, shows that he was guilty of contributory negligence, barring recovery for his death.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1138-1150; Dec. Dig. § 348.\*]

Error to Circuit Court, Mecklenburg County.

Action by Tinker Valentine's personal representative against the Southern Railway Company. Judgment for plaintiff, and defendant brings error. Reversed and remanded.

Williams & Tunstall, for plaintiff in error. Faulkner & Faulkner and Chas. T. Reekes, for defendant in error.

BUCHANAN, J. This is an action brought by the personal representative of Tinker Valentine against the Southern Railway Company to recover damages for causing the death of the decedent by the alleged neg-

ligent running of one of the railway company's trains.

It appears that between the hours of 11 and 12 o'clock of the night of July 20, 1907, the plaintiff's intestate left a church, where he was last seen alive, for his home, in a top buggy, with curtains off and drawn by a gentle horse. The next morning, near a highway crossing, were found his dead body and broken buggy on the north side of the railway near the end of the ties, and the dead body of his horse on the opposite side of the track. The evidence tends to show that the death of the deceased and the destruction of his property were caused by the railway company's passenger train, which passed over the crossing about 1 o'clock that morning. There was no eye-witness to the accident. The engineman of the railway company, who was a witness for the plaintiff, knew nothing of it, except that some hours after passing the crossing he found blood and hair on the pilot of his engine. He further stated that his engine, which was running 35 or 40 miles an hour, was equipped with an electric headlight, and that he saw no one as he passed the crossing. He also testified that the whistle was sounded and the bell rung for the crossing. This latter statement of his is contradicted by several witnesses, who testified positively to the contrary.

[1, 2] The contention of the plaintiff is that the failure on the part of the railway company to give the statutory warning as its train approached the crossing, and to keep a proper lookout for the crossing (as he claims), was sufficient evidence of negligence to sustain the verdict of the jury. The railway company, on the other hand, insists that, even if this were true (which it denies), the facts and circumstances disclosed by the record show that the plaintiff's decedent was guilty of contributory negligence.

It appears that the crossing is between  $1\frac{1}{2}$  and 2 miles west of South Hill, a station on the railway company's road. From that station the highway over which the deceased traveled in going to his home ran not far from the railroad. From a point within 200 yards of the crossing trains approaching from South Hill can be plainly seen. After passing that point, which is on the summit of a cut, or "bump," as it is sometimes called by the witnesses, the highway and railroad approach each other, and when about 100 yards (295 feet) east of the crossing until the crossing is reached they are only a few feet from each other, and the ground between the two is about level. It does not appear very clearly how far from the eastern end of that 100 yards, near which there is a curve in the railroad, a train can be seen approaching from South Hill, but some short distance at least. From South Hill

to within about 100 yards of the crossing, the railroad is upgrade, and from there to the crossing is downgrade.

When near or at the edge of the crossing, a train can be seen approaching from the east about 100 yards. One witness testified that you could not, when traveling along said 100 yards in a vehicle, hear a train coming from the east, "unless it blows mighty loud and is right at you." The witness did not attempt to explain why the approach of a train cannot be heard there, and there is no fact in evidence which does tend to explain it. Be that as it may, it seems to be clear that, if the deceased had been exercising ordinary care, the accident would not have happened. His home, where he had lived for some time, was within a mile or two of the crossing. He was, therefore, acquainted with the crossing and the conditions there, and must be held to have known, as are all travelers, that the railroad track across the highway is a proclamation of danger, and that he must look and listen for approaching trains before attempting to cross. It was not only his duty to look and listen before going upon the crossing, but to exercise ordinary care to make the act of looking and listening effective. *Wash. S. Ry. Co. v. Lacey*, 94 Va. 460, 461, 26 S. E. 834.

All, or nearly all, of the witnesses who testified that the train did not give the statutory warning as it approached the crossing testified that the whistle did blow when at South Hill. Those witnesses were west of the crossing, and, therefore, farther from South Hill than the deceased. When within 200 yards of the crossing, he could have seen a train approaching from South Hill; when within 100 yards of the crossing, he could have seen it a short distance back; and when at the edge of the crossing, he could have seen its approach 100 yards away. It seems to us clear, under the facts and circumstances disclosed by the record, that the plaintiff's intestate was not in the exercise of ordinary care when he drove upon the railroad crossing. *Southern Ry. Co. v. Hansbrough*, 107 Va. 733, 745, 746, 60 S. E. 58.

The judgment complained of must be reversed, the verdict set aside, and the cause remanded to the circuit court for a new trial.

Reversed.

(113 Va. 421)

WESTERN UNION TELEGRAPH CO. v.  
WHITE.†

(Supreme Court of Appeals of Virginia.  
March 14, 1912.)

1. TELEGRAPHS AND TELEPHONES (§ 78\*)—  
STATE REGULATION—STATUTES—INTERSTATE  
BUSINESS.

Where the points of transmission and destination of a telegram sent over the lines of a

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

† Rehearing denied.

single company were within the state, the fact that the telegraph company, in transmitting the message, sent it to a relay office in the District of Columbia, where it was lost, did not prevent the application of Code 1904, § 1294h, imposing a penalty for a telegraph company's failure to promptly transmit and deliver messages, though the message as so transmitted be treated as interstate, since the statute as to such messages can be enforced without in any manner affecting the condition of the telegraph company's business or the performance of its duties in other states.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent.Dig. §§ 79-81; Dec. Dig. § 78.\*]

**2. TELEGRAPHS AND TELEPHONES (§ 78\*)—MESSAGES—FAILURE TO DELIVER — PENALTIES—STATUTES.**

Code 1904, § 1294h, imposing a penalty for a telegraph company's failure to promptly transmit messages, does not apply to a message sent from Virginia to a foreign state, in which it is to be delivered.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent.Dig. §§ 79-81; Dec. Dig. § 78.\*]

Keith, P., and Cardwell, J., dissenting.

Appeal from Corporation Court of Fredericksburg.

Action by Fannie C. White against the Western Union Telegraph Company. Judgment for plaintiff, and defendant appeals. Affirmed.

St. Geo. R. Fitzhugh and A. L. Holladay, for appellant. W. W. Butzner, for appellee.

**BUCHANAN, J.** This is an action to recover the statutory penalty of \$100 provided by clause 5, § 1294h of Virginia Code 1904, for failure by the Western Union Telegraph Company to transmit to Fredericksburg a prepaid message accepted for transmission at that company's office at Staunton.

[1] It appears that the message was promptly transmitted from Staunton to the company's relay office in the city of Washington, D. C., received at that office, but never transmitted to the Fredericksburg office.

The question involved in this case is substantially the same as that involved and decided in the cases of *Western Union Telegraph Company v. Reynolds*, 100 Va. 459, 41 S. E. 856, 93 Am. St. Rep. 971, and *Same Company v. Hughes*, 104 Va. 240, 51 S. E. 225. Since those cases were decided there has been no decision of the Supreme Court of the United States (the court of last resort upon the question involved) upon the precise question in issue in this case, nor is there anything in the cases decided by that court since that time which seems to militate against the conclusion reached in the *Reynolds* and *Hughes* Cases.

In *Western Union Telegraph Company v. Commercial Milling Company*, decided in November, 1910, and reported in 218 U. S. 406, 31 Sup. Ct. 59, 54 L. Ed. 1088, 21 Ann. Cas. 815, a telegram was accepted at the company's office at Detroit, Mich., to be delivered at Kansas City, Mo. The message,

which was an acceptance of an offer to sell wheat, was promptly transmitted to the company's relay office in Chicago, Ill. What became of it afterward is not shown, but it was never delivered. An action for damages for failure to deliver the message in Kansas City was brought in the state of Michigan, and upon appeal the validity of a statute of that state was upheld, as not being in conflict with the commerce clause of the Constitution of the United States. That statute (Pub. Laws 1893, No. 195) is as follows:

"Section 1. The people of the state of Michigan enact that it shall be the duty of all telegraph companies incorporated either within or without this state, doing business within this state, to receive dispatches from and for other telegraph companies' lines and from and for any individual, and on payment of the usual charges for individuals for transmitting dispatches as established by the rules and regulations of such telegraph company, to transmit the same with impartiality and good faith. Such telegraph companies shall be liable for any mistakes, error or delays in the transmission or delivery or for the nondelivery of any repeated or nonrepeated message, in damages to the amount which such person or persons may sustain by reason of the mistakes, errors or delays in the transmission or delivery, due to the negligence of such company, or for the nondelivery of any such dispatch due to the negligence of such telegraph company or its agents, to be recovered with the costs of suit by the person or persons sustaining such damage."

In that case, in discussing the difference between the *Pendleton Case*, 122 U. S. 347, 7 Sup. Ct. 1128, 30 L. Ed. 1187, and the *James Case*, 162 U. S. 650, 16 Sup. Ct. 934, 40 L. Ed. 1105, Mr. Justice McKenna said, at 218 U. S. 419, 420, 31 Sup. Ct. 63 (54 L. Ed. 1088, 21 Ann. Cas. 815): "A statute of Georgia, which required telegraph companies having wires wholly or partly within the state to receive dispatches, transmit, and deliver them with due diligence under the penalty of \$100, was sustained as a valid exercise of the power of the state in relation to messages by telegraph from points outside of and directed to some point within the state. It will be observed that this case in some particulars exhibits a contrast to *W. U. Tel. Co. v. Pendleton*, supra, and yet they are entirely reconcilable, having a common principle. In the latter case the law passed on clearly transcended the power of the state, because it directly regulated interstate commerce, as we have already shown. In the *James Case* the power of the state was exercised in aid of commerce. In the latter case prior cases were reviewed, and the principle determining the validity of the respective statutes was declared to be whether they could be 'fully carried out

and obeyed without in any manner affecting the conduct of the company with regard to the performance of its duties in other states.' It was said that a statute of that kind, as it would not 'unfavorably affect or embarrass' the telegraph company in the course of its employment, should be held valid 'until Congress speaks upon the subject,' and it was observed that 'it is a duty of a telegraph company, which receives a message for transmission, directed to an individual at one of its stations, to deliver that message to whom it is addressed with reasonable diligence and in good faith. That is a part of its contract, implied by taking the message and receiving payment therefor.' And there can be liability to the sender of the message, as well as to him who is to receive it. The telegraph company in the case at bar surely owed the obligation to the milling company not only to transmit the message, but to deliver it."

It will be observed in the above quotation it is said that "the principle determining the validity of the respective statutes was declared to be whether they could be 'fully carried out and obeyed without in any manner affecting the conduct of the company with regard to the performance of its duties in other states.'" Applying that principle or rule laid down in that case for the determination of the validity of our statute to the facts of this case, its validity would seem clear. The statute imposed no additional duty upon the telegraph company in requiring it to transmit the message to the office of the sendee. It was the clear duty of the company to do this independent of the statute.

Treating the message in question as interstate, since its regular course from Staunton to Fredericksburg, in accordance with the regulations of the company, was through the District of Columbia, though the message could have been transmitted from Staunton to Fredericksburg over the company's lines entirely within this state, the statute affects the transmission of interstate commerce. But, as was said in the James Case, *supra*, 162 U. S. 660, 16 Sup. Ct. 938 (40 L. Ed. 1105): "Such transmission is not completed until the message is delivered to the person to whom it is addressed, or reasonable diligence employed to deliver it. But the statute can be fully carried out and obeyed without in any manner affecting the conduct of the company with regard to the performance of its duties in other states. It would not unfavorably affect or embarrass it in the course of its employment, and hence, until Congress speaks upon the subject, it would seem that such a statute must be valid."

What is said in that case as to the Georgia statute is equally true of our statute.

It contains no requirement, as did the Indiana statute involved in the Pendleton Case, *supra*, which could in any manner affect the conduct of the company with regard to the performance of its duty in another jurisdiction. *W. U. Tel. Co. v. Crovo*, 220 U. S. 364, 31 Sup. Ct. 399, 400, 55 L. Ed. 498.

The fact that the failure to transmit the message to Fredericksburg was the result of negligence at the company's relay office in Washington city furnishes no better reason for holding that the company is not liable to the penalty for failing to transmit than did the fact that the negligence which caused the message not to be delivered in the Milling Company Case, *supra*, was in a state other than the state of Michigan, whose statute was involved and where suit was brought for the violation of the statute.

[2] It is not sought in this case to give effect to our statute outside of the limits of this state, as was held could not be done in the Chiles Case, 214 U. S. 274, 29 Sup. Ct. 613, 53 L. Ed. 994; but the object of the suit is to give effect to the statute and to impose the penalty for the company's failure to transmit the message to Fredericksburg. If the message had never been transmitted at all from Staunton, it is clear, under the case of *Western Union Telegraph Co. v. Crovo*, 220 U. S. 364, 31 Sup. Ct. 399, 55 L. Ed. 498, the company would have been liable. If the point of delivery had been in Washington city, and the message had been duly transmitted to that place and never delivered, then there could be no recovery, as decided in the Chiles Case, *supra*. If the message had been duly relayed and transmitted from Washington city to Fredericksburg, and the only default had occurred there in failing to deliver the message to the sendee, it is clear that an action would lie to recover the penalty under the decision in the James Case. Why, then, since there was default in the failure to transmit the message from one point in this state to another point in the state, should the statute not be enforced and the penalty imposed, for it was as clearly the duty of the company to transmit the message to Fredericksburg as it was to transmit the message from Staunton? The fact that the company was negligent in Washington city in receiving or transmitting the message ought not to protect it from the penalty for its default in failing to transmit the message to Fredericksburg.

We are of opinion that this case is controlled by the Reynolds and Hughes Cases, *supra*. This court will therefore adhere to its former decisions and dismiss the writ of error for want of jurisdiction.

KEITH, P., and CARDWELL, J., dissent.



(113 Va. 385)

VIRGINIA BLACK MOUNTAIN COAL CO.,  
Inc., v. VIRGINIA-LEE CO., Inc., et al.  
(Supreme Court of Appeals of Virginia.  
March 14, 1912.)

**1. CONTRACTS (§ 183\*)—JOINT AND SEVERAL CONTRACTS.**

Plaintiff coal company executed three contracts with the three defendant coal companies, each of which were separate in form but identical in terms, and each referred to the respective defendants as "party of the first part," and to plaintiff as "party of the second part," the purpose of the contracts being to market the output of the parties without harmful competition. The second paragraph of each contract provided that the party of the second part would accept all coal delivered by the first party and pay on the 15th of each month, following. Another paragraph required the second party to secure a sufficient car supply. Another paragraph provided that, if a full settlement was not made by the second party within 30 days after due, the first party might cancel the agreement, and the last paragraph provided that "this agreement is to be construed as though all the parties to such agreements had executed one and the same agreement." *Held*, that the contracts were several, and not joint, so that plaintiff could not join all of defendants in an action for breach of one of them.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 780-785, 788; Dec. Dig. § 183.\*]

**2. CONTRACTS (§ 147\*)—JOINT OR SEVERAL CONTRACTS—INTENTION.**

Whether a contract is joint or several or joint and several depends upon the intention of the parties ascertained therefrom, and such intention must prevail over the literal interpretation of detached words and clauses.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 730, 743; Dec. Dig. § 147.\*]

Error to Circuit Court of City of Norfolk.

Action by the Virginia Black Mountain Coal Company, Incorporated, against the Virginia-Lee Company, Incorporated, and others. Judgment sustaining a plea of abatement by the unnamed defendants, and plaintiff brings error. *Affirmed*.

The declaration is as follows:

"Virginia Black Mountain Coal Company, Incorporated, a corporation organized and existing under the laws of the state of Virginia, the plaintiff in this action, complains of the Virginia-Lee Company, Incorporated, a corporation organized and existing under the laws of the state of Virginia, Bondurant Coal & Coke Company, Incorporated, a corporation organized and existing under the laws of the state of Virginia, and the Black Mountain Mining Company, a corporation organized and existing under the laws of the state of Virginia, the defendants, of a plea of trespass on the case in assumpsit, for this, to wit: That heretofore, to wit, on the 29th day of November, A. D. 1909, the said defendants were indebted to the said plaintiff in the sum of seventy thousand dollars (\$70,000) for the price and value of work before that time done by the plaintiff for the defendants at their special instance and request; and also in the sum of seventy thou-

sand dollars (\$70,000) for money before that time lent by the plaintiff to the defendants at their special instance and request; and also in the sum of seventy thousand dollars (\$70,000) before that time paid by the plaintiff for the use of the defendants at their special instance and request; and also in the sum of seventy thousand dollars (\$70,000) for money before that time had and received by the defendants to the use of the said plaintiff. And, being so indebted, the said defendants, in consideration thereof, afterwards, to wit, on the day and month and year aforesaid, undertook and faithfully promised the said plaintiff to pay it the said several sums of money in the above counts mentioned, when the said defendants should be thereunto afterwards requested.

"And for this, also, that heretofore, to wit, on the day, month, and year last aforesaid, the said defendants accounted with the said plaintiff of and concerning divers other sums of money before that time due and owing to the said plaintiff and then in arrears and unpaid; and, upon such accounting, the said defendants were found in arrears and indebted to the said plaintiff in the further sum of seventy thousand dollars (\$70,000), and, being so found in arrear and indebted, they, the said defendants, in consideration thereof, undertook and then faithfully promised the said plaintiff to pay to it the said sum of money in this count last mentioned when they, the said defendants, should be thereunto afterwards requested.

"And for this, also, that heretofore, to wit, on a certain day, to wit, on the 11th day of March, A. D. 1909, the said defendant the Virginia-Lee Company with J. D. Palmerlee and C. K. Mount executed a certain paper writing, which said paper writing is in words and figures as follows, to wit:

"This agreement made and entered into (in duplicate) this the eleventh day of March, 1909, by and between Virginia-Lee Company, Incorporated, a corporation organized and existing under the laws of the state of Virginia, party of the first part, and J. D. Palmerlee and C. K. Mount, of Norfolk, Virginia, partners under the name of Black Mountain Coal Company, hereinafter referred to as party of the second part, witnesseth:

"That the parties to this agreement for and in consideration of the mutual covenants and agreements herein expressed and set forth, and for other good and valuable consideration, have respectively agreed as follows, to wit:

"First. That the party of the first part agrees to deliver, for sale, during the continuance of this agreement, to the party of the second part on railroad cars at the mines of the party of the first part all the coal produced by its said mines, located in the

Black Mountain District, Lee county, Virginia, after deducting the amount of coal used for domestic and steam purposes in and about its own mines, and any coal that the said party of the first part may desire to use in making coke at its said mines, and after deducting any coal excepted in clause 12 of this agreement.

"Second. The party of the second part agrees to accept all the coal delivered to it by the party of the first part and to pay the party of the first part, on the 15th day of each month, the amount due for the coal delivered during the previous calendar month, which amount shall be determined as hereinafter set forth, less ten per cent. of the said amount, which is to be given to the party of the second part for its commission, costs and expenses of selling, which are accepted by it as in full of such.

"Third. The amount to be paid to the party of the first part by the party of the second part on the 15th day of each month to be ascertained as follows:

"The party of the second part is to average the prices which it has received per ton for each grade of coal and from each seam or vein separately, delivered to it by the party of the first part and all other mines having contracts identical with this one, and is to pay the party of the first part the net average prices obtained therefor, after deducting the said ten per cent. commission above provided for.

"Fourth. The party of the first part is to deliver to the party of the second part a clean and merchantable coal, free from slate, bone or other impurities, and to be thoroughly screened and prepared according to sizes ordered, and the standard of grade and inspection determined upon and adopted by the second party to govern. The party of the second part agrees to establish an office at St. Charles, Virginia, for receiving and shipping coal and to thoroughly inspect said coal prior to billing the same and shall issue a certificate to the party of the first part covering each car received, setting forth the grade and weight of such car, and the said certificate shall be final in settlement between the parties hereto. A competent inspector shall be appointed by the party of the second part, who shall be acceptable to a majority in interest of the mining companies entering into this and similar agreements; such majority to be determined in accordance with section nine hereof, and said inspector may be discharged at any time for cause, either by the party of the second part or by a majority in the interest of said mining companies, as aforesaid. One-half the salary of the said inspector shall be paid by the party of the second part and the other half shall be paid by the said mining companies. The proportion to be paid by each company is to be determined as aforesaid, in accordance with section nine thereof. The whole

salary to be paid by the said party of the second part and each company's proportion of said one-half to be deducted upon each monthly settlement.

"Fifth. In determining the rights and dues of the parties to this agreement, the weights as returned by the initial railroads are to be accepted as final, by both parties hereto, and a ton as used herein is to be construed to mean 2,000 lbs.

"Sixth. The party of the second part shall endeavor, at all times, to secure a sufficient car supply, but in the event of a car shortage, the available supply shall be prorated among the several mines having identical contracts herewith with the party of the second part on a basis of their respective capacities, which capacities are to be determined as hereinafter set forth, in clause nine.

"Seventh. The party of the first part agrees to meet, from time to time, at the request of the party of the second part or any of the other mining companies entering into a similar contract with this one, with representatives of such other mining companies in the Black Mountain field, for the purpose of determining minimum prices at which coal may be sold for any stated period, and said party of the first part agrees to accept the prices so fixed by majority vote. The value of the vote of each representative to bear the same proportion to the total vote cast, that the capacity of such representative's mines bears to the total capacity of all the mines so represented.

"Eighth. At any time when market conditions necessitate curtailing output, in order to dispose of the coal mined, party of the first part agrees to curtail the output of its mines as may be necessary and in like proportion with all other mines under similar contracts herewith, with the party of the second part, on a basis of their respective capacities.

"In the event the party of the second part shall fail to procure orders for all the coal the party of the first part can produce, then the party of the first part shall, after ten days' written notice to the party of the second part and to the other mining companies entering into agreements similar to this, have the right to sell its surplus output, but not at less than the minimum price established, and it shall not book orders for a period exceeding thirty days ahead, except to railway companies operating in the Black Mountain field, and to such companies orders shall not be booked for a period exceeding six months ahead.

"Ninth. The capacity of the mines of the party of the first part, along with the capacities of the other mines entering into agreements similar to this shall be determined as required by law by the railroads entering the Black Mountain field in conjunction with the operators of the said mines, and the said

party of the second part shall be governed by the capacities as thus fixed, but if any difference arises among the said operators as to the capacity of any mine, the party aggrieved shall give ten days' notice in writing to the other operators entering into such agreements and the question of capacity shall thereupon be submitted to arbitrators. The local division superintendent of the Louisville & Nashville Railroad and the local division superintendent of the Virginia & Southwestern Railway for the time being, or of the successors of the said railroads shall be, and they are hereby constituted, permanent arbitrators for the said parties, and these two shall select a third arbitrator, and the decision of any two of the board so constituted shall be final and binding on all parties.

"Tenth. The party of the second part shall advertise and sell the said coal under a suitable trade-name, to be copyrighted, if possible, in order to establish for it an identity with the trade, but seam No. 5, now being mined in the said field shall be copyrighted and sold under a separate trade-name, and if hereinafter other seams in the said field are mined and sold under this agreement such other trade-name or trade-names as may be deemed best may be adopted for the same. Party of the second part shall seek to market said coal, where by reason of its recognized special qualities and high efficiency the best prices can be obtained, and shall at all times use its best efforts to sell the complete output of the party of the first part at the best prices obtainable therefor.

"Eleventh. The party of the second part guarantees to the party of the first part the payment in full for all coal that is delivered to it under the terms of this agreement, and if full settlement is not made by the party of the second part at any time within thirty days after the same shall be due, in accordance with the terms of this agreement, the party of the first part may, at its option, cancel the same.

"Twelfth. Notwithstanding anything herein contained, all contracts of the party of the first part, for the sale of coal, which are now in force, shall be reserved from the operation of this agreement, but upon the execution hereof said party of the first part is to deliver to the party of the second part, copies of such contracts, and after the same have expired, no renewals thereof are to be made except by the party of the second part. And further, the party of the first part is to have the privilege, for a period not exceeding one year from and after date thereof, of selling free from the terms of this agreement to the Louisville & Nashville and Virginia & Southwestern Railroad Companies, coal for their engines, and, if at any time during the said year the party of the second part can market the grade of coal so sold

to the Louisville & Nashville and Virginia & Southwestern Railroad Companies at a price to net the party of the first part as much as the amount received from said Louisville & Nashville and Virginia & Southwestern Railroad Companies, then the party of the second part is to have the privilege of selling the same, if allowed so to do, by the contract with said Louisville & Nashville and Virginia & Southwestern Railroad Companies.

"Thirteenth. It is further agreed that neither the party of the first part as a corporation nor any officer thereof or stockholder therein shall directly or indirectly own or be interested in the stock or the management of the party of the second part.

"Fourteenth. Party of the first part shall have the right at any time to examine the books of the party of the second part in order to satisfy itself that the amounts received by it for coal delivered to the party of the second part are the proper amounts.

"Fifteenth. In case any dispute shall arise between the parties hereto otherwise than is provided for in clause 9 hereof, it is mutually agreed that such dispute shall be adjusted by arbitration, each party hereto choosing one disinterested arbitrator, and the two so chosen to select the third, and the award of any two of said arbitrators shall be final and binding upon both parties hereto.

"Sixteenth. This agreement shall continue in full force for a period of three years from and after the first day of April, 1909, and shall continue beyond said period subject to the right of either party hereto to terminate same upon sixty days written notice to the other.

"Seventeenth. It is understood that agreements identical with this, except as to names or parties, will be executed and delivered simultaneously with the execution and delivery of this agreement with other mining companies operating in the Black Mountain field of Lee county, Virginia, and this agreement is to be construed as though all of the parties to said agreements had executed one and the same agreement.

"In testimony whereof, the parties hereto have caused these presents to be signed by their respective presidents and their corporate seals to be hereunto affixed duly attested by their respective secretaries, this the day and year first above written. [Signed] Virginia-Lee Company, Incorporated, by J. M. Barr. J. D. Palmerlee. C. K. Mount."

"And the said Bondurant Coal & Coke Company and the said J. D. Palmerlee and C. K. Mount on the day and year last aforesaid executed a paper writing identical with the one herein above set out, except as to the name of the party of the first part therein, and on the day and year last aforesaid the defendant the Black Mountain Mining Company and the said J. D. Palmerlee

and C. K. Mount also executed a paper writing identical with the one herein above set out, except as to the name of the party of the first part, which said paper writings were deposited in escrow until a corporation could be formed to take over the rights and assume the obligations of the said C. K. Mount and the said J. D. Palmerlee under the terms of the said writing and the said J. D. Palmerlee and the said C. K. Mount then and there entered into a contract with the said defendants in words and figures as follows, to wit:

"This agreement made this, the 11th, day of March, 1909, by and between the Virginia-Lee Company, Incorporated, the Bondurant Coal & Coke Company, Incorporated, and the Black Mountain Mining Company, Incorporated, all three being Virginia corporations, parties of the first part, and J. D. Palmerlee and C. K. Mount, of Norfolk, Virginia, parties of the second part, witnesseth:

"That, whereas, each of the respective parties of the first part have entered into separate agreements with the said Palmerlee and Mount, with reference to a sales agency of coal from the mines of the first parties, in the Pocket, Lee county, Virginia, which agreements are identical, except as to names, and all bear date thereof, and are to be considered as a part of this agreement as fully as if each one thereof were spread at length herein, and

"Whereas, the said agreements are the result of negotiations extending over several months last past, in which it was contemplated that the said Palmerlee and Mount should organize a corporation as a sales agency, controlled by them, with sufficient financial strength to satisfy the respective parties of the first part herein, but owing to the continued financial depression they have been unable to do so, and

"Whereas, it is thought to be for the interest of all parties herein to vary the terms of the said identical agreements as is set forth herein, but not in other respects,

"Now, therefore it is agreed:

"(1) That the parties of the second part herein will until the first day of August, 1909, prosecute the business of selling the coal of the mines of the first parties in accordance with the terms and conditions of the aforesaid identical agreements, and the parties of the first part hereby agree to allow them to do so, and said identical agreements shall be in full force and effect between the parties hereto, except as modified by this agreement.

"(2) The sales made by the second parties for the first parties during said period shall be for and on account of the said first parties collectively, and all remittances shall be made direct by customers to a trustee, to be named by the first parties, whose duty it shall be to collect same and pay to each of the first parties its proportion as

arrived at under the said identical agreements and to the second parties their commissions each month. The second parties are to use all proper care in making good orders, but losses, if any, are to be borne by the first parties ratably, under the aforesaid agreements:

"(3) The second parties during the said period shall use the partnership name of the Black Mountain Coal Company, and shall have checks, made payable to W. T. Goodloe, treasurer of said company, who is hereby designated as trustee for the first parties for the purpose set out in the last foregoing paragraph.

"(4) The aforesaid agreements, after being properly executed by all the parties are to be delivered, in duplicate, to R. T. Irvine, attorney at law, Big Stone Gap, Virginia, and by him held during the period covered by this supplemental agreement, and for the purposes thereof, and if on or before the first day of August the parties of the second part shall organize a corporation with sufficient capital and resources to satisfy the parties of the first part, then the parties of the second part shall have the right to assign the said agreements to the said corporation and be relieved of any further liabilities thereunder upon the said corporation's assuming all the obligations and duties of the said identical agreements, and thereupon the said Irvine shall deliver the said agreements to the respective parties entitled, and after the said date the original agreements shall be in full force and effect, the same as if executed and delivered on this date but if by the first day of August, 1909, the parties of the second part shall not have succeeded in organizing a corporation satisfactory to the first parties, as aforesaid, then this agreement shall terminate, and the aforesaid identical agreements shall not be delivered but shall be void. Collections and settlements, however, shall continue after the first day of August, covering sales made prior thereto, until the whole of such business shall be wound up, in accordance with the terms hereof; and the parties of the first part may, at any time, name a new trustee in the place of the said Goodloe.

"Witness the following signatures, this the day and year first above written. [Signed] Virginia-Lee Company, Incorporated, by W. G. Wigton, Manager. Bondurant Coal & Coke Company, Incorporated, by C. W. Bondurant. Black Mountain Mining Company, Incorporated, by R. T. Irvine. J. D. Palmerlee. C. K. Mount."

"And subsequently on a certain day, to wit, on the 26th day of August, A. D. 1909, the said J. D. Palmerlee and the said C. K. Mount, by and with the consent of the said defendants and each of them, assigned to the above-named plaintiff all of their rights and interests under said paper writings and under certain contracts that had been entered

into with the defendants and others for the sale of coal, all of which contracts had been made in pursuance of the said agreements, and the said defendants and each of them caused the said paper writings to be delivered to this plaintiff and the said defendants jointly and severally then and there contracted and agreed with the plaintiff according to the terms of the said paper writings above set out, this plaintiff then and there taking over all the rights and advantages and assuming all the obligations of the said C. K. Mount and the said J. D. Palmerlee, as set out in the said paper writings and the said contracts, and the said defendants, jointly and severally agreeing thereto, became and were jointly and severally bound to this plaintiff by the terms of the said paper writings, in consideration of the mutual promises and agreements in the said paper writings contained, as fully and effectually as though the said paper writings had been then and there executed with this plaintiff, naming this plaintiff, instead of the said C. K. Mount and J. D. Palmerlee, as the party of the second part.

"And, in pursuance of its duty under the terms and provisions of said contract with the said defendants, this plaintiff proceeded, with the utmost diligence, to carry out and perform all and singular the covenants and agreements in said contract mentioned to be performed and carried out by this plaintiff until this plaintiff was prevented from so doing by the defendants wrongfully and illegally refusing to carry out their part of the said contract by neglecting and refusing to fill orders for coal sent by the plaintiff to said defendants, by selling their coal to other parties, and refusing to account for the commissions due on the same to the plaintiff, by selling their coal to other parties at prices lower than the prices given to this plaintiff, by selling their coal to other parties under the pretense that it was sold, under the terms of \* \* \* the said contract, to the railroad companies named therein, by fixing a minimum price for this plaintiff which was above the market price, by refusing to fix a minimum price in accordance with the then existing market conditions, by not preparing the said coal, as the contract required, in accordance with the orders sent in, by delivering unmerchantable coal, by unreasonable delays in shipment, and by failing and refusing to fix properly the various percentages of the different grades of coal making up the output of the mines of the defendants and finally by repudiating the said contract and refusing to fill any orders for coal sent to the said defendants by this plaintiff.

"And, in pursuance of its duty to carry out the said terms of said contract to be performed by this plaintiff, the said plaintiff expended large sums of money in renting, equipping, and maintaining its offices, in organizing its corps of employees, and in keep-

ing its salesmen traveling and soliciting orders for the coal produced and to be produced by the defendants, and by such expenditures and the efforts of its expert salesmen this plaintiff succeeded in building up an ever increasing business, and had built up a large and lucrative business, and was able to find sale for the output of the mines of the said defendants, as required by the said contract, and could have so done during the contract period, when the said defendants and each of them, on or about the 29th day of November, A. D. 1909, unmindful of their promises and the agreements in the said contract contained and to be performed by them, but contriving and craftily intending to deceive and defraud the said plaintiff in this behalf, did not or would not, when so requested by this plaintiff, fill the orders for coal sent to them by and through this plaintiff, utterly repudiating said contract and refusing to fill any orders for coal sent them by this plaintiff and refused to pay to this plaintiff commissions on coal which had been sold, but which the defendants had neglected to ship after the orders therefor had been sent in to them by this plaintiff, and refusing to allow proper rebates upon unmerchantable and improperly prepared coal which had been shipped by the said defendants and by repudiating said contracts, prevented and prohibited this plaintiff from making the commissions provided by the terms of the said contract for the sale of the output of the said mines from the time of such repudiation up to the end of the period during which the plaintiff should, under the terms of the said contract, have had the right to sell the coal of the said defendants, as provided by the terms of the said contract. Wherefore, the said plaintiff says that it has sustained damages by reasons of the said divers breaches of the said several promises and undertakings in the said contract to be performed by the said defendants, to the amount of seventy thousand dollars (\$70,000), and therefore it brings its suit."

Williams & Tunstall and Frick & Williams, for plaintiff in error. Irvine & Morrison, for defendants in error.

KEITH, P. The Virginia Black Mountain Coal Company brought an action of assumpsit against the Virginia-Lee Company, the Bondurant Coal & Coke Company, and the Black Mountain Mining Company to recover damages for a breach of contract. The Virginia-Lee Company appeared and pleaded the general issue. The other defendants appeared and filed pleas in abatement, in each of which it is averred that the supposed cause of action arose upon a several and not upon a joint agreement. The question was submitted to the court, which, having considered the questions of law and fact arising upon these pleas, was of opinion

that the law was with the defendants, sustained the pleas and abated the suit as to the Black Mountain Mining Company and the Bondurant Coal & Coke Company; and thereupon the Virginia Black Mountain Coal Company applied for and obtained a writ of error.

[1] At the threshold it is to be observed that there were three contracts entered into and set forth in the declaration. In the first contract the Virginia-Lee Company is named as party of the first part, in the second the Black Mountain Mining Company is the party of the first part, and in the third the Bondurant Coal & Coke Company is the party of the first part. In all of them the Virginia Black Mountain Coal Company is named as the party of the second part. There is no single paper writing containing the contract executed by all the parties, but, while the contracts are identical in terms, they are in form wholly separate and distinct, the one from the other.

The incorporated companies named as parties of the first part owned and operated coal mines in one of the coal fields of Wise county. Their ownership of these mines was wholly separate and distinct. There was no joint, no common, interest, and the contracts seem to have been entered into merely for the purpose of controlling and marketing the output upon an equitable basis promotive of the interests of all, and to prevent injurious competition. There was a certain community of interest which was to be subserved, and to this end the contracts were entered into and a common agent appointed to superintend their execution. The contracts entered into were intended, not only to regulate the duties and obligations of the parties as between the agent and the mining companies, but also the duties and obligations of the mining companies inter se, so that no advantage might be taken the one of the other, and their general interests promoted and subserved.

The contracts, which as we have said are identical, consist of 17 paragraphs or sections, many of which plainly contemplate individual action, and are seemingly inconsistent with the idea of joint obligation. In the second paragraph, for instance, it is provided that the party of the second part agrees to accept all the coal delivered to it by the party of the first part, and to pay the party of the first part, on the 15th day of each month, the amount due for the coal delivered during the previous calendar month. Suppose the party of the second part had paid to one of the coal companies its share of the proceeds of coal delivered, but had not settled satisfactorily, or had not settled at all, with one or both of the other companies. Can it be contended that the three companies must have united in a suit to compel a settlement? Or, conversely, suppose one or two of the companies had delivered coal in accordance with the contract. Can

it be maintained that the company which had settled in accordance with the terms of its contract would have been suable and compelled to make good the delinquency of the defaulting company or companies?

The coal companies, under the fourth clause, were to deliver clean and merchantable coal, free from slate or other impurities, and suppose one of the companies, fraudulently or negligently failed in the performance of this duty?

Take the sixth paragraph, where the party of the second part, the plaintiff in error here, undertakes to secure a sufficient car supply and so discharges that function as to be satisfactory to one or more of the companies. Should a suit for a violation of that duty be instituted by the party which was satisfied and sustained no injury as well as by that which had been wronged?

Take the eleventh paragraph, where the party of the second part, the plaintiff in error here, guarantees to the party of the first part the payment in full for all coal delivered to it under the terms of this agreement, and, if a full settlement is not made by the party of the second part within 30 days from the time the same is due, the party of the first part may, at its option, cancel the agreement. Two of the coal companies may have been satisfied; two of them may have been willing to condone the default; but the third would still have the arbitrary right to cancel the contract if it saw fit.

[2] Whether a contract is joint or several or joint and several "depends upon the intention of the parties, as ascertained from the contract by the ordinary rules of construction." Page on Contracts, § 1132.

In section 672 of Beach on Modern Law of Contracts it is said: "Whether the contract is joint or several, or joint and several, is one of intention. The contract must be considered as a whole, and if, upon such consideration, the intention of the parties becomes apparent, it must prevail over the literal interpretation of detached words, phrases, and clauses. A contract which is plainly meant to be several is not to be treated as joint merely because several persons have signed it on one side or the other. When persons engage for the performance of distinct and several duties, mere words of plurality, such as 'we bind ourselves,' will not make the contract joint."

In *Shipman v. Straitsville Cent. Mining Co.*, 158 U. S. 356, 15 Sup. Ct. 886, 39 L. Ed. 1015, Shipman was the sales agent for the coal of three mining companies. The agency contract was evidenced by one contract in which all united, instead of three separate agreements as in the case before us, between the agent and the principals. There were a number of mutual duties, similar to the ones in this case. Shipman, the sales agent, committed a breach of his contract, and each of the three mining companies brought

separate actions against him for damages, and he raised the point that it was a joint contract, and there could be only one suit in which the three companies must be joint plaintiffs. Mr. Justice Brown said: "There is nothing in the contract indicating that the three parties were connected in any way, except that each was to furnish an equal quantity of coal. They are spoken of in the contract as 'the other three parties,' as if it were intended that each of them should stand for himself. If either of them had failed to furnish his quota of coal, Shipman might have brought an action against him; but it is clear that, if he had sued them jointly for such default, the two others might answer that they had done all that they agreed to do, and could not be held liable for the default of the third. These parties did not agree to furnish any definite amount of coal, but merely that they would ship the defendant the product of their mines in equal quantities. \* \* \* If Shipman had settled with plaintiff according to the account rendered by it in this case, it seems to us that it could not be seriously contended that the other parties could not sue him for the coal furnished by them without joining the plaintiff."

In that case the contract was evidenced by one instrument of writing. Here there are three instruments, identical it is true in terms, in each of which the producing company is described as the party of the first part and the sales agent as the party of the second part.

It is true that by paragraph 17 it is declared that "this agreement is to be construed as though all the parties to said agreements had executed one and the same agreement," but that language is insufficient to convert into a joint agreement what in its nature appears plainly to be a several undertaking. It cannot be that language of doubtful import would have been employed when, if such had been the purpose, it could have been accomplished by simply declaring that the parties intended to enter into a joint obligation.

We are of opinion that there is no error in the judgment, and it is affirmed.

Affirmed.

(113 Va. 246)

# RIVERSIDE & DAN RIVER COTTON MILLS CO. v. CARTER.

(Supreme Court of Appeals of Virginia.  
March 14, 1912.)

## 1. TRIAL (§ 139\*)—INJURY TO EMPLOYÉ—INSTRUCTIONS—PROMISE TO REPAIR.

In an action for injury to an employé in a dimly lighted place caused by unguarded machinery, an instruction which required the jury to find for plaintiff if he complained to the superintendent of the defective conditions and the superintendent promised to remedy them, but failed to do so within a reasonable time, and if plaintiff continued at work in reliance on

such promise, was erroneous as taking from the jury the question whether plaintiff reassumed the risk by continuing the employment after lapse of a reasonable time for remedying the conditions complained of, where it appeared that several weeks intervened between his first complaint and the accident, and that repeated promises of the superintendent made in the meantime had been broken.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 332, 333, 338-341, 365; Dec. Dig. § 139.\*]

## 2. MASTER AND SERVANT (§ 221\*)—DEFECTIVE CONDITIONS—PROMISE TO REPAIR—RIGHT OF EMPLOYÉ TO RELY UPON.

An employé may for a reasonable time rely upon his employer's promise to repair defects, but, if he remains in the service after expiration of such time, he assumes the risk arising from the employer's failure to repair.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 638-647; Dec. Dig. § 221.\*]

## 3. MASTER AND SERVANT (§ 238\*)—INJURY TO MACHINERY OILER—CONTRIBUTORY NEGLIGENCE.

An employé cannot recover for injury received while oiling machinery due to a lack of light in the place, if no restriction was placed upon him as to the time of day when the oiling should be done, and if by waiting until later in the day the light would have been sufficient to enable him to perform his work with safety, since ordinary care required him to adopt the safer method.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 681, 743-748; Dec. Dig. § 238.\*]

## 4. TRIAL (§ 251\*)—INSTRUCTIONS.

In an employé's personal injury action, an instruction that the jury must try the case without being influenced by sympathy, and that they should disregard the relative financial conditions of the parties, as the jury equally with the court was bound by oath to decide according to the law and the facts, was properly refused where punitive damages were not claimed.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 587-595; Dec. Dig. § 251.\*]

## 5. DAMAGES (§§ 171, 181\*)—EVIDENCE—RELATIVE FINANCIAL CONDITION OF PARTIES.

In an employé's personal injury action, wherein punitive damages are not claimed, evidence as to the relative financial condition of the parties is inadmissible.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 473, 474, 499, 498; Dec. Dig. §§ 171, 181.\*]

Error to Corporation Court of Danville. Action by Felix B. Carter against the Riverside & Dan River Cotton Mills Company. Judgment for plaintiff and defendant brings error. Reversed.

D. Lawrence Groner, for plaintiff in error.  
Eugene Withers, for defendant in error.

HARRISON, J. This action was brought by Felix B. Carter to recover of the defendant Cotton Mills damages for an injury which he alleges resulted from the negligence of the defendant. Carter was employed in July or August, 1910, by the Cotton Mills as a watchman; one of his duties, as claimed by him, being to oil every morning a pump machine situated in the basement of the mill. The vats where the oil

had to be poured were low so that he had to stoop to reach them, and were located within  $8\frac{1}{4}$  inches of certain small uncovered cogwheels and gearing. The evidence tends to show that the room was not sufficiently lighted to enable one to discharge the duty of oiling the machine without danger, having to stoop very low by the open cogwheels to see if the vat was full. About a week after beginning to oil this machine, Carter complained to the foreman of the mill that there was no hood covering the cogwheels, and asked him to have one put on, which the foreman promised to do as soon as possible. About 10 days later, the foreman having failed to cover the cogwheels, Carter again requested that it be done, and also asked for more light as oiling the machine was dangerous in a dark room. More than two weeks later, nothing having been done, Carter again requested that the additional light be furnished and a hood put over the cogwheels, and the foreman promised to attend to it. Some three or four weeks later a fourth request was made for these repairs and the promise to make them was repeated by the foreman. Several weeks after the last-mentioned request was made, while in the act of oiling the machine, the sleeve of Carter's coat was caught in the uncovered cogwheels, and his right arm was lacerated and torn.

There was a verdict and judgment in favor of the plaintiff which this writ of error brings under review.

The demurrer to the declaration was properly overruled. The objection to this action of the court was practically abandoned in the petition, and was not pressed in the oral argument.

[1, 2] Over the protest of the defendant company, the court gave, at the request of the plaintiff, instruction No. 2 which tells the jury that if they believe from the evidence that the machine which caused the injury was defective, and that the plaintiff complained of its defective condition, and of the lack of light in the room in which the machine was placed, to the superintendent of the mills, that the superintendent promised to have such defects remedied, and lights placed in said room, that the superintendent failed to remedy such defects and to place lights in the room within a reasonable time, but that the plaintiff, relying on the promise to repair and furnish lights, proceeded to oil the machine, and in consequence thereof the injuries complained of were inflicted upon the plaintiff, then the jury must find for the plaintiff, etc.

The objection to this instruction is that there is no limitation upon the time in which the servant can recover if the master fails to remedy the trouble within a reasonable time. The question whether or not the plaintiff remained in the employ of the mills beyond that period of time within which he might reasonably have expected the de-

fects to be remedied was not submitted to the jury.

Assuming the complaint and the promise, the instruction merely required the jury to ascertain whether the repairs had been made in a reasonable time after the promise to make them had been made, leaving out of view the duty of the jury to consider and determine, from the evidence, whether or not the plaintiff had waived his objections and assumed the risk of remaining in the service after the defendant had failed to remedy the defects complained of in a reasonable time. The instruction told the jury, in effect, that, no matter how long the plaintiff remained in the service after the defendant had failed to make the repairs, he might recover. In other words, if the promised repairs were not made in a reasonable time, that the plaintiff could thereafter remain in the defendant's service indefinitely, confronting constantly the danger of which he had complained, and hold his employer responsible for the resulting injury.

This position cannot be sustained either upon reason or authority. A servant may rely upon the promise of the master to repair defects for a reasonable time, but, if he remains in the service after the expiration of a reasonable time for remedying the defects, he is thereby deemed to have waived his objection and assumed the risk. The question for the jury to determine is not so much whether the repairs were made within a reasonable time as it is whether the time which elapsed between the promise to repair and the injury was sufficient to put the plaintiff upon notice that the defendant did not intend to make the repairs, thereby shifting again to the plaintiff the risk which the master assumed when he made the promise.

That the failure of the master to make the repairs within a reasonable time makes him liable, no matter what period may have elapsed before the injury, is a wholly untenable proposition.

So far as advised, this precise question has not been directly passed upon by this court. In the case, however, of *Wheel Co. v. Chalkley*, 98 Va. 62-68, 34 S. E. 976, 978, the court says: "Where the master promises, or gives the servant reasonable ground to infer or believe, that the defect will be repaired, the servant does not assume the risk of an injury caused thereby within such period of time after the promise or assurance as would be reasonably allowed for its performance." The inference from this language is clear that, if the servant does remain in the service after the expiration of a reasonable time for the master to fulfill his promise and make the repairs, he thereby again assumes the risk which had shifted to the master by reason of his promise.

In 1 *Labatt on Master & Servant*, § 425, it is said: "The only rational view seems to be that, as soon as the period contemplated



for the removal of the dangerous conditions terminated, the servant's position is precisely what it would have been if no promise had been given; that is to say, he reassumes the risk."

In Wharton on Negligence, § 221, the rule is laid down as follows: "The only ground on which this exception can be justified is that in the ordinary course of events the employé, supposing the employer would right matters, would remain in the employer's service; and that it would be reasonable to expect such continuance. But this reasoning does not apply to cases where the employé sees that the defect has not been remedied, and yet continues to expose himself to it. In such case, on the principles heretofore announced, the employer's liability in this form of action ceases. He may be liable for breach of promise; but the casual connection between his negligence and the injury is broken by the intermediate voluntary assumption of the risk by the employé."

In Bailey's Master's Liability, p. 206, it is said: "If repair is not made within a reasonable time after the promise, the servant will be deemed to have waived his objections and assumed the risk." See, also, same author, pages 208-215.

The statement of the law by these text-writers is abundantly supported by numerous courts of high authority. *Eureka v. Bass*, 81 Ala. 200, 8 South. 216, 60 Am. Rep. 152; *Stephenson v. Duncan*, 73 Wis. 404, 41 N. W. 337, 9 Am. St. Rep. 806; *Corcoran v. Milwaukee Gas Co.*, 81 Wis. 191, 51 N. W. 328; *Illinois Steel Co. v. Mann*, 170 Ill. 200, 48 N. E. 417, 40 L. R. A. 781, 62 Am. St. Rep. 370; *City of Houston v. Owen (Tex.)*, 67 S. W. 788; *Kazmir Andrecsik v. New Jersey Tube Co.*, 73 N. J. Law, 664, 63 Atl. 719, 4 L. R. A. (N. S.) 913, 9 Ann. Cas. 1006; *Albrecht v. Chicago & N. W. R. Co.*, 108 Wis. 530, 84 N. W. 882, 53 L. R. A. 653; *Counsell v. Hall*, 145 Mass. 468, 14 N. E. 530.

In several of these cases the promise was made to repair at a fixed time, and in the others it was to repair, without any time being specified for the performance of the promise. Taken as a whole, the cases establish the doctrine that, where the time is fixed for making the repairs, the employé is entitled to continue to operate the defective machine at the master's risk until such time has elapsed; and, if the promise to repair is, as in the case at bar, indefinite as to time of performance, the employé can continue to operate the defective machine at the master's risk only for such reasonable period as would be sufficient to enable the master to make the promised repairs; but if, after the time mentioned in either case, the master has not made good his word and made the repairs, and the employé still continues to operate the machine the risk shifts from the master, and is again assumed by

the employé as part of his contract of employment.

In the light of the authorities cited, it is clear that the instruction under consideration was erroneous, in that it took from the jury the determination of the question whether the plaintiff had reassumed the risk by continuing the employment after the lapse of a reasonable time for repairing the defects complained of.

[3] With respect to instruction No. 6, which was asked for by the defendant and refused, it is sufficient to say that if upon another trial the evidence tends to show that it was the duty of the plaintiff to oil the machine and no restriction was placed upon him as to the time of the day when the oiling should be done, and further tends to show that on account of the darkness he could not oil the machine with safety in the morning, but that by waiting until later in the day the light would be sufficient to enable him to oil it with safety, then the defendant would be entitled to an instruction that it was the duty of the plaintiff, in the exercise of ordinary care, to adopt the safe method; and that, if his injury resulted from his failure to oil the machine at the time of day when he could do so with safety, he could not recover. *N. & W. R. Co. v. Mann*, 99 Va. 180, 37 S. E. 849.

[4] Instruction No. 7, asked for by the defendant, was properly refused. This instruction told the jury that it was their duty to try the case without being influenced by sympathy and that they should disregard all question of the relative financial condition of the plaintiff and the defendant, as the jury, equally with the court, is under the solemn obligation of an oath to decide according to the law and the facts.

[5] This is not a case which calls for punitive damages, but involves alone the question of liability for negligence. If therefore evidence had been offered, which was not done, to show the relative financial condition of the parties, it would have been inadmissible. There was no evidence, and could not properly have been any, upon which to base this instruction. 2 *Greenleaf on Ev.* § 269; *Singer M. Co. v. Bryant*, 105 Va. 408, 54 S. E. 320.

Instructions Nos. 8 and 8½, asked for by the defendant, and refused, are fully covered by what has been said in considering instruction No. 2, given at the instance of the plaintiff, which subject need not be further discussed. If the evidence on another trial is the same, and an instruction is asked for by the defendant which embodies the law as stated in the discussion of instruction No. 2, it should be given.

As the case must go back for another trial, the evidence will not be commented upon.

The judgment complained of must be re-

versed, the verdict set aside, and the case remanded for a new trial not in conflict with the views expressed in this opinion.

Reversed.

(113 Va. 310)

**NORFOLK FIRE INS. CORPORATION v. WOOD.**

(Supreme Court of Appeals of Virginia.  
March 14, 1912.)

**1. INSURANCE (§ 377\*)—CONCURRENT INSURANCE—FORFEITURE—ESTOPPEL.**

Where defendant insurance company was willing to write \$15,000 on plaintiff's property, but plaintiff had refused to permit defendant to write more than \$5,000, and, before delivering a policy for \$5,000, defendant's agent again requested plaintiff to permit defendant to write the entire insurance, which he refused, whereupon the agent delivered a policy for \$5,000 containing a concurrent insurance forfeiture clause, the agent knowing that plaintiff intended to procure additional insurance from others, which he subsequently did without knowledge of such forfeiture provision, defendant in case of loss was estopped to enforce a forfeiture because of such concurrent insurance.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 942, 966, 967, 975-997; Dec. Dig. § 377.\*]

**2. INSURANCE (§ 378\*) — KNOWLEDGE OF AGENT—EFFECT.**

Knowledge of an insurer's agent when he delivered a policy to plaintiff and collected the premium that plaintiff intended to take out other insurance pursuant to what plaintiff conceived to be binding agreements with other companies to that effect was notice to the insurer.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 968-997; Dec. Dig. § 378.\*]

Error to Circuit Court, Nottoway County.

Action by T. Gilbert Wood against the Norfolk Fire Insurance Corporation. Judgment for plaintiff, and defendant brings error. Affirmed.

Peatross & Savage, for plaintiff in error.  
Caskie & Caskie, for defendant in error.

KEITH, P. Wood, the defendant in error, who was the owner of a building at Burkeville, then in course of construction, was approached by Jones, the Burkeville agent of the Norfolk Fire Insurance Corporation, who asked to be allowed to write a policy of insurance on the property for \$7,500. This Wood refused to do, saying that he had promised other agents insurance on the building, but, after the other agents were satisfied, he would give the agent of plaintiff in error a policy. Jones insisted on \$7,500, saying that he was a local agent and entitled to more insurance than outsiders, but Wood said that he could not fulfill his promise to other agents if he did this, but that he would give Jones \$5,000, and a policy was written for that sum. Wood then called the attention of the agent to the fact that the premium was too large, and that the policy should be what is known as a "builder's risk," and this error was corrected.

The policy thus taken expired on November 12th at 12 o'clock, and on November 11th a Mr. Legg, the managing underwriter for the plaintiff in error, came to Burkeville for the purpose of inspecting the property, and he in company with Wood and Jones, the agent, inspected the building. Legg stated that his company would like to carry \$15,000 upon it, and later Jones saw Wood and tried to induce him to permit him to write \$15,000 on the building, to which Wood replied that he would not give it all to one company, as he had promised other agents. Jones, the agent, then asked to be allowed to write \$7,500, but Wood told him he could write \$5,000 or nothing. On the next day, November 12th, just about one hour before the first policy expired, Jones again saw Wood, and asked, "Have you agreed to let me control the full amount of insurance on that hotel building?" Wood replied, "No," whereupon Jones produced and delivered the policy now sued on. Wood put the policy in his pocket, and went into the schoolhouse where he was teaching. The delivery and conversation took place during the recess of school. Wood did not unfold the policy, but looked at the face of it, and did not read or open it until after the fire.

The policy contained the following clause: "This entire policy, unless otherwise provided by agreement endorsed hereon or added hereto, shall be void if the insured has or shall hereafter make or procure any other contract of insurance, whether valid or not, on property covered in whole or in part by this policy."

At sundry times subsequent to November 12th, and before the fire occurred, Wood took out other policies on the building aggregating \$6,500, making a total insurance with the policy in this suit of \$11,500.

The property was destroyed by fire on February 2, 1910, with a total loss, and proof of loss was duly given, but the company refused to pay upon the sole ground that the clause above quoted had been violated. Thereupon Wood brought suit, and, when all of his evidence had been produced before the jury, the defendant, without introducing any testimony, demurred, whereupon the jury returned a verdict in favor of the plaintiff for \$5,000, with interest from May 25, 1910, subject to the opinion of the court upon the demurrer. The court overruled the demurrer and entered judgment for the plaintiff, and the defendant company applied for and obtained a writ of error, which brings before us for consideration the rulings of the court upon the trial.

The plaintiff in error took several exceptions to the admissibility of evidence, to permitting the plaintiff to show that prior to the issuance of the policy in suit he had told the agent of the defendant that he in-

tended to take additional insurance in other companies, that the agent had solicited as much insurance as \$15,000 on the insured premises, and other evidence of like character, which the plaintiff in error objected to because it tended to vary the terms of a written instrument, but which the court admitted upon the ground that it tended to establish a state of facts which estopped the defendant from claiming a forfeiture for breach of the condition of the policy against additional insurance. We shall consider the assignments of error as to the admissibility of testimony along with that with respect to the judgment upon the demurrer to the evidence, for they all involved the same general principle.

In *Insurance Co. v. Yates*, 69 Va. 585, Judge Staples, after stating the familiar rule of evidence that all previous verbal agreements must be taken to be merged in the written agreement of the parties made for the purpose of embodying the terms of the contract, and designed to be the depository and proof of their final intention, says: "The exceptions to this rule that are sanctioned by the courts are found in those cases in which the insured is misled by the assurances or declarations of the agent of the insurer, or where the latter seeks to take advantage of a forfeiture of his own creation, or where the insured has given a correct description of the property, which has not been followed by the insurers or their agents in preparing the policy, or where the parties stand on unequal ground, and one of them uses his superior knowledge or influence to mislead the other as to the true import of the contract. \* \* \* It must be conceded that many of these exceptions, if they can be so termed, are utterly irreconcilable with the rule itself, or any just principle upon which it is founded. In such cases it is said, however, the oral evidence is not offered to contradict the writing, but to show that the representation as it is written ought not to be used against the party, upon the ground of an equitable estoppel"—citing *Insurance Co. v. Kinnler's Adm'r*, 69 Va. 88, and *Insurance Co. v. Well & Ullman*, 69 Va. 389, 26 Am. Rep. 364.

*Fire Ins. Co. v. West*, 76 Va. 575, 44 Am. Rep. 177, fully supports *Insurance Co. v. Yates*, and reinforces the doctrine there maintained by additional authorities.

In *Fire Insurance Co. v. Ward*, 95 Va. 231, 28 S. E. 209, it is said that "facts relating to the risk, communicated to an agent of an insurance company before or at the time of issuing the policy in suit, bind the company, whether communicated to it by such agent or not; and that, notwithstanding the provision in an insurance policy which avoids the policy if there be other insurance on the property, unless it be made known to the company and indorsed on the policy or otherwise acknowledged in writing, if the existence of such other insurance was communicated

to an agent of the company, the company is estopped to enforce the forfeiture, although the agent may have neglected to communicate his knowledge to the company, and the company was in ignorance of the fact at the time the policy was issued, unless the limitation upon the agent's powers was in some way brought home to the assured."

And in *Insurance Association v. Williams*, 95 Va. 248, 28 S. E. 214, it is held that "knowledge of facts material to the risk, communicated to the agent of an insurance company who fills out the application for the policy, which is subsequently delivered, is imputed to the company, whether communicated to it by its agent or not, unless it is shown that special limitations on the powers of the agent were known to the assured."

[1] By these authorities, we think it is abundantly established that if insurance in other companies had existed at the time of the negotiations which led to the execution and delivery of the policy in suit, and the fact that there was such other insurance upon the property had been, before the issuing of this policy, communicated to Jones, the agent, and with that knowledge he had received the premium and issued the policy, the company would have been affected by his knowledge of that fact and been estopped to insist upon the forfeiture.

In the case under consideration, there was no other policy in actual existence, but it appears that the plaintiff in error was willing to write a policy for \$15,000 upon the property. There was, then, no excessive insurance. It further appears that it applied for and insisted upon being permitted to write a policy larger than the one in suit; that it was informed through its agent that Wood declined to give them more than \$5,000 of insurance, upon the ground that he had entered into agreements with other insurance companies to permit them to write policies upon his building. Almost at the instant when the policy in suit was delivered, the agent renewed the request and was again informed that he could write \$5,000 or nothing, because of the agreement which Wood had entered into with other companies, though other policies had not in point of fact been issued. Thereupon, with this knowledge the premium was received and the policy was issued, and without being read, as was also known to the agent, was put by Wood into his pocket, and he went about his duties as schoolmaster.

[2] It would be a somewhat singular result if the policy should be held good, notwithstanding the clause of forfeiture, in case of concurrent insurance, if the concurrent policies had actually been issued with the knowledge of the insurance company through its agent, but that the forfeiture should prevail if, in reliance upon the act of the company through its agent in receiving the premium and issuing the policy with full knowledge of his purpose, Wood should take out

other insurance in pursuance of what he conceived to be binding agreements with other companies to that effect.

We have reached, then, this point, that the authorities establish that the policy under consideration would not have been defeated by the actual existence of other policies, because the insurance company would have been estopped by its knowledge of the facts to insist upon the forfeiture; but it is insisted by the plaintiff in error that the estoppel did not arise, although the premium was received and the policy issued with full knowledge that the insured intended to do, and had actually agreed to do, that which, if executed, would have tied the hands of the company. In both instances the result is the same; as a moral question, both seem to involve identical propositions, and there is abundance of authority in support of both.

In *Kitchen v. Insurance Co.*, 57 Mich. 135, 23 N. W. 616, 58 Am. Rep. 344, where an applicant for fire insurance told the agent that he meant to obtain further insurance in other companies, and asked him so to notify the company he represented, the agent replied that it would be needless to do so until such insurance was obtained. The applicant had no notice of any limitations upon the agent's authority. Held, that the company was estopped from denying liability on the ground that its policies forbade additional insurance without its consent.

In *Erb v. Insurance Co.*, 99 Iowa, 727, 69 N. W. 261, it was held that a provision of a policy of insurance against additional insurance was waived where the agent of the insurer, whose knowledge is imputable to it, knows at the time the policy is issued that an existing policy issued by another company is about to be renewed.

In *Fitchner v. Fidelity Mutual Fire Ins. Ass'n*, 103 Iowa, 277, 72 N. W. 530, it was held that the insurance company is charged with the knowledge of its soliciting agent that the insured desired, and was placing \$12,000 of concurrent insurance on the merchandise.

In *Independent School Dist. of Doon v. Ins. Co.*, 113 Iowa, 65, 84 N. W. 956, where an insurance company issued a policy on certain property, while its agent who procured the risk knew of a certain other policy to be obtained on the same property, it consented to the additional insurance and its policy was not void in consequence thereof since its agent's knowledge was the knowledge of the company.

See *St. Paul Fire & Marine Ins. Co. v. Wells*, 89 Ill. 82.

In *Fireman's Ins. Co. v. Norwood*, 69 Fed. 71, 16 C. C. A. 36, the general agent of certain insurance companies called upon the plaintiff and asked to be allowed to place some of the insurance on plaintiff's stock. He inquired how much insurance plaintiff

intended to carry, and plaintiff told him \$40,000, and subsequently authorized him to place \$10,000 of such insurance. The general agent afterwards delivered to plaintiff policies, including two of \$2,500 each, to which were attached riders allowing other insurance to the amount of \$27,500, and both contained the condition that if the assured should have or afterwards effect other insurance, without the written consent of the company, the policy should be void, and also provided that only certain specified officials should have authority to waive or modify the conditions of the policy. When plaintiff received the policies, he examined them to see that the amounts were correct, but, relying on his conversation with the agent, did not examine them further, and placed them in his safe. It was held "that by delivering the policies with knowledge, through their agent, of the amount of insurance intended to be taken, the companies waived the condition as to other insurance, and were estopped to set the same up, after a loss; plaintiff having a right to rely on such knowledge of the agent."

See *McElroy v. British American Co.*, 94 Fed. 990, 36 C. C. A. 615; *Palatine Ins. Co. v. McElroy*, 100 Fed. 391, 40 C. C. A. 441; *Queen Ins. Co. v. Union Bank*, 111 Fed. 697, 49 C. C. A. 555.

What we have said and the authorities we have discussed in no way conflict with the opinion of this court in *Metropolitan Life Ins. Co. v. Hall*, 104 Va. 572, 52 S. E. 345, where it was held, in an action to recover on a life insurance policy, that "a contemporaneous parol agreement or understanding between the agent of an insurance company who solicits the insurance and the insured as to the time and place of paying the premiums, different from that stated in the policy, cannot be given in evidence, as it varies or contradicts the terms of the written contract of the parties." The effort of the insured there was virtually to introduce into the policy of insurance a new term with respect to the authority of the agent, doing away with the limitation which the company had imposed upon the agent's authority, which it was held could not be done, unless the company, by a course of business or otherwise, had waived the limitation on the agent's power. In other words, that case in substance reaffirms the law as stated by Judge Staples in *Insurance Co. v. Yates*, supra, which already appears in this opinion, and need not be repeated.

This case is considered as upon a demurrer to the evidence, and, without again discussing rule governing courts in such cases, we are of opinion that there is no error in the judgment complained of, which is affirmed.

**Affirmed.**

(113 Va. 254)

**HARRIS et al. v. WYATT et al.**  
(Supreme Court of Appeals of Virginia.  
March 14, 1912.)

**1. WILLS (§ 311\*)—ACTIONS TO ESTABLISH OR IMPEACH—JURISDICTION.**

In an action under Code 1904, § 2544, to impeach or establish a will, the court has jurisdiction only to ascertain, as prescribed in that section, whether the paper in question is the last will and testament of the decedent.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 738; Dec. Dig. § 311.\*]

**2. EQUITY (§ 22\*)—ADMINISTRATION OF ESTATES.**

A court of equity has jurisdiction of an action to construe a will, determine the rights of the beneficiaries thereunder, ascertain the indebtedness of the estate, settle the accounts of the executor, and administer the estate.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 51-62; Dec. Dig. § 22.\*]

**3. WILLS (§ 344\*)—PROBATE—CONSTRUCTION OF ORDER.**

An order of the probate court stated that, a will "being proved by the oaths of J., one of the subscribing witnesses thereto, except that the erasures of lines 2, 3, 4, 5, inclusive, in clause 6, on page 1, were made since the signing and acknowledging of said paper writing by the testator, \* \* \* it is ordered that the said will be recorded." *Held*, that this order did not exclude the lines mentioned from probate.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 800, 801; Dec. Dig. § 344.\*]

**4. WILLS (§ 206\*)—REVOCATION—EFFECT OF ERASURES.**

In the absence of evidence that erasures in a will were made by the testator, or by his direction, or that the will was found after his death under such circumstances that the fact of revocation to the extent of the erasures might be presumed, the whole will should be admitted to probate.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 513, 514; Dec. Dig. § 206.\*]

**5. WILLS (§ 353\*)—PROBATE — RECORDING—EFFECT OF IRREGULARITIES.**

The failure of the clerk of the probate court to transcribe on the records a part of the will as admitted to probate does not affect the rights of the parties.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 809; Dec. Dig. § 353.\*]

Appeal from Circuit Court, Loudoun County.

Action for the construction of the will of Charles Harris, deceased, and the administration of his estate. From decrees granting the relief asked for, Newton Harris and others appeal. Affirmed.

J. W. Foster and Cecil Conner, for appellants. Chas. P. Janney and Moore, Barbour & Keith, for appellees.

BUCHANAN, J. While there are averments in the bill filed in this cause which would not be inappropriate in a bill filed under section 2544 of the Code, either to establish or impeach the writing filed with it as the last will and testament of Charles Harris, deceased, it is clear from the whole bill that it was not filed under that sec-

tion of the Code. It was not filed by "a person interested" in the decedent's estate. It sought for the construction of the writing filed therewith, which, it alleged, had been admitted to probate, and sought other relief, none of which could have been granted upon a bill filed under section 2544, and did not specifically ask for the relief, and the only relief, provided for by that section.

[1] In a proceeding under that section, the court can only exercise the special powers conferred by it, viz., to ascertain in the manner prescribed by it whether or not the paper or papers in question is or are the last will and testament of the decedent. No other relief can be had in the case. This is so well settled that it is hardly necessary to cite authorities upon the subject. *Malone's Adm'r v. Hobbs*, 40 Va. 366, 39 Am. Dec. 263; *Lamberts v. Cooper*, 70 Va. 61; *Connolly v. Connolly*, 73 Va. 657.

Neither was this a suit brought for the purpose of interpreting the provisions of a will, which deals with and disposes of purely legal estates or interests in land, and which makes no attempt to create trust relations with respect to the property of the testator, as was the bill in *Hart v. Darter*, 107 Va. 310, 58 S. E. 590, 15 L. R. A. (N. S.) 599, 13 Ann. Cas. 1, in which it was held that a court of equity did not have jurisdiction to construe the will.

[2] The object sought by the bill in this case, as we interpret it, was to construe the will of the decedent as admitted to probate, and to determine the rights of the beneficiaries thereunder, to ascertain the indebtedness of the estate of the testator, to settle accounts of the executor, and to have the estate administered, settled, and distributed according to law, and for such other and further relief as might be proper in the cause. A court of equity clearly had jurisdiction to grant the relief sought.

Decrees were entered construing the will, ascertaining the debts of the decedent's estate, directing their payment, and settling the accounts of the executor. From those decrees, this appeal was granted upon the petition of three children of the testator, viz., Newton Harris, Thomas Harris and Adabel Spriggs.

[3] The material question in the case is as to the extent to which the paper filed with the bill was admitted to probate.

By the second, third, fourth, and fifth clauses of the will, the testator makes specific bequests. By a codicil, the gift in the fifth clause is revoked. The remaining or sixth clause is a residuary clause, and is as follows:

"Sixth. All the rest and residue of my estate of every kind and description, I hereby give to my grandson, John Franklin Allen, son of my deceased daughter, Martha Allen, now living with me, he to take the surplus

*of the personal property if he be of age and if not the same to be held by his properly qualified guardian and he to receive the rents, issues and profits of my real estate until he becomes of age, when he is to have the same in his own absolute right. But if he dies before coming of the age of twenty-one years, the said land shall pass to and belong to my two sons, Newton Harris and Thomas Harris and my daughter, Adabel Spriggs and their heirs to be divided between them. In the event of my grandson not living until he is of age and my real estate having to be divided among my children as aforesaid then I empower my executor with authority to sell and convey the same at public sale and to divide the proceeds among those entitled."*

The contention of the appellants is that the probate court in admitting the will to probate excluded the italicized words. The appellee, on the other hand, asserts that the whole paper, including the italicized words, was admitted to probate as the will of the testator. Which of these contentions is the correct one must be determined from the record in the probate court.

The order of probate is as follows:

"At a circuit court held for Loudoun county, Oct. 16, 1907.

"A paper purporting to be the last will and testament of Charles Harris, deceased, together with a codicil thereto, was this day presented to the court, the said will being proved by the oaths of Chas. P. Janney, one of the subscribing witnesses thereto, except that the erasure of lines 2, 3, 4, 5, in clause 6, on page 1, were made since the signing and acknowledging of said paper writing by the testator in his presence, and the codicil being proved by the oaths of Chas. P. Janney and N. S. Purcell the subscribing witnesses thereto, it is ordered that the said will be recorded. And on motion of J. D. Lambert, the executor therein named, who made oath and qualified as such by executing a bond with the Fidelity & Deposit Company of Maryland, by J. H. Alexander and Cecil Connor, attorneys in fact, his surety in the penalty of five thousand dollars conditioned according to law, certificate is granted him for obtaining a probate of the said will in due form, and it is ordered that the said bond be recorded. J. M. Darne, G. H. Lyne, W. W. Myers, Andrew Norman, and M. D. Ellmore, or any three of them, appraisers."

The clerk of the probate court, in transcribing the will upon the will book, omitted the italicized words in the sixth clause.

It appears from the order of probate that the writing, purporting to be the last will and testament of Charles Harris, deceased, together with a codicil thereto, was presented to the circuit court of Loudoun county for probate. The order states that, "the said will being proved by the oaths of Chas. P. Janney, one of the subscribing witnesses thereto, except that the erasures of lines

2, 3, 4, 5, inclusive, in clause 6, on page 1, were made since the signing and acknowledging of said paper writing by the testator in his presence, and the codicil being proved by the oaths of Chas. P. Janney and N. S. Purcell, the subscribing witnesses thereto, it is ordered that the said will be recorded."

It seems clear to me that what is said in the order of probate as to the erasures in the sixth clause of the will was the statement of the subscribing witness, Janney, that the said erasures had been made since the will was signed and acknowledged by the testator in his presence, and not a declaration of the court that, to the extent of the erased lines, the will had been revoked, and that in probating it those lines were excluded. There is nothing in the order of probate to indicate that the erased lines in the paper presented for probate were not a part of the will ordered to be probated. On the contrary, the sentence of the court is that "it is ordered that the said will be recorded." What will? Manifestly the paper offered for probate. Not only does not the order of probate justify the conclusion that the court intended to admit the will to probate, excluding the italicized words, but, upon the evidence before it, as declared by the order, it would have been erroneous to have excluded them.

Section 2518 of the Code provides that "no will or codicil or any part thereof shall be revoked unless under the preceding section," which does not affect this case, "or by subsequent will or codicil, or by some writing declaring an intention to revoke the same and executed in the manner in which a will is required to be executed, or by the testator or some person in his presence and by his direction cutting, tearing, burning, obliterating, cancelling or destroying the same or the signature thereof with the intent to revoke."

[4] The paper offered for probate, including the italicized words, and proved to have been properly executed as a will, was to be treated by the probate court as the last will and testament of the deceased, in the absence of some evidence that the cancellation was done by the deceased, or by some person in his presence and by his direction, which would be sufficient to show that fact, or that the instrument was found, after the testator's death, among his repositories in the mutilated condition it was in when offered for probate, and under such circumstances that the fact of revocation might, to the extent of the cancellation, be presumed. See *Throckmorton v. Holt*, 180 U. S. 552, 583, 584, 21 Sup. Ct. 474, 45 L. Ed. 663, and authorities cited; 1 *Minor's Inst.* (1st Ed.) 1086; *Thomas v. Thomas*, 76 Minn. 237, 79 N. W. 104, 77 Am. St. Rep. 639; 1 *Jarman on Wills* (5th Ed.) 133; *Schouler on Wills*, § 401.

No authority has been cited, nor have I found any case in my examination, which

goes to the extent of holding that, where a will finds its way into a probate court, as did the one in this case (for the order of probate does not show how it came into the court, nor upon whose motion it was admitted to probate) partially canceled or obliterated, without other evidence as to the cancellation or obliteration than that the cancellation or obliteration had occurred since the will was executed, there is any presumption that the cancellation or obliteration was made by the hand of the testator; for, as was said in *Johnston v. Johnston*, 1 Phillim. Ecc. Rep. 447, 497, cited with approval by the Supreme Court of the United States in *Throckmorton v. Holt*, supra, 180 U. S. page 584, 21 Sup. Ct. page 487, 45 L. Ed. 663, "where it appears that a will was regularly made, the presumption of law is strong in its favor; the intention to revoke must be plain and without doubt."

I am of opinion that the language of the order of probate shows that the paper as offered for probate, including the italicized portion, was admitted to probate as the last will and testament of Charles Harris; and I am further of opinion that, even if the language of the order of probate were ambiguous as to whether the will was admitted to probate including or excluding the words italicized, the order should be construed as admitting the entire paper to probate; for to hold otherwise would be to solve the doubt, not in favor of, but against, the presumed correctness of the court's action—a thing which ought not to be and, so far as I am advised, is never done.

I am confirmed in the conclusion that I have reached, that the entire paper offered for probate was admitted to probate as the last will and testament of the deceased, by the opinion of the learned judge who decided this case, who was the same judge that admitted the will to probate. He says in the decree construing the will "that said words [referring to the italicized words] constitute an essential part of and are to be construed as a part of the last will and testament of Charles Harris, deceased, as it was proven and admitted to probate in the circuit court of Loudoun county, Virginia, on the 16th day of October, 1907, and should have been spread upon the will book of said court by the clerk in transcribing the same."

[5] Of course, the clerk's error in failing to transcribe upon the will book the will as it was admitted to probate can have no effect upon the rights of the parties.

Having reached the conclusion, as did the trial court, that the canceled or obliterated words in the writing offered for probate were parts of the will admitted to probate, the construction placed upon that clause of the will by the trial court was correct. Conceding that the name of the devisee and legatee in the sixth clause of the will is entirely obliterated, the other words scratched over can

be deciphered with little difficulty, especially with a magnifying glass, and reading them as a part of that clause of the will, in the light of the evidence that the testator had only one grandson, the son of his daughter, Mariah Allen, it is clear that the appellee, John Franklin Allen, was the devisee and legatee whose name had been obliterated, independent of the admissions and direct testimony in the case that the obliterated name was John Franklin Allen.

Since the appellee is entitled, under the sixth clause of the will, to the residue of the testator's estate after the payment of the debts of the estate, the legacies provided for by the other clauses of the will, and the costs of administration, the appellants' eighth assignment of error need not be considered, as they are not prejudiced by the decrees of June 22, 1910, even if they were erroneous, as they have no interest in the matters disposed of by those decrees.

I am of opinion that there is no error in either of the decrees appealed from to the prejudice of the appellants, and that they should be affirmed.

Affirmed.

(113 Va. 326)

PETTUS v. HENDRICKS et al.

HOWARD v. FIREMEN'S RELIEF ASS'N et al.

(Supreme Court of Appeals of Virginia.  
March 14, 1912.)

1. INSURANCE (§ 782\*) — MUTUAL BENEFIT CERTIFICATE—CHANGE OF BENEFICIARY.

A letter written by a member of a mutual benefit society, requesting the society to change the beneficiary of his certificate from his first cousin to the woman he was engaged to marry, if insufficient to make the latter his legal beneficiary, was not sufficient to terminate the rights of the former beneficiary so as to make the insurance payable to his heirs at law.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1948; Dec. Dig. § 782.\*]

2. INSURANCE (§ 770\*)—MUTUAL BENEFIT SOCIETY — BENEFICIARY — CHANGE — STATUTES—"SHALL."

Code Supp. 1910, p. 619, provides that, in the case of benefit societies, payment of death benefits shall be to families, heirs, blood relatives, affianced husband or wife, or to persons dependent on the member, as may be designated by him, or to such other beneficiaries as may be permitted by the laws of the state in which the society is chartered, etc. *Held*, that the word "shall" should be construed "may," so that the statute did not extend the class of persons capable of receiving benefits under the charter of an association, providing that benefits should be paid to the nearest relative, or such other dependent of the member as might be designated according to the society's by-laws, etc. (citing Words & Phrases, "Shall").

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1933, 1937; Dec. Dig. § 770.\*]

3. INSURANCE (§ 782\*)—MUTUAL BENEFIT SOCIETY — CHANGE OF BENEFICIARY — INEFFECTUAL ATTEMPT—EFFECT.

Where a member of a mutual benefit society attempted to change the beneficiary of his

certificate by designating a person not within the class entitled to take benefits according to the association's charter, the person originally designated, who was within such class, continued as the legal beneficiary, entitled to the proceeds of the certificate on the member's death.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1948; Dec. Dig. § 782.\*]

**4. INTERPLEADER (§ 85\*)—COSTS—ADVERSE CLAIMANTS.**

Where adverse claimants of a fund were made parties to a bill of interpleader to determine which was entitled thereto, costs were properly allowed in favor of the successful against the unsuccessful claimant.

[Ed. Note.—For other cases, see Interpleader, Cent. Dig. § 76; Dec. Dig. § 35.\*]

**5. INTERPLEADER (§ 85\*)—COMPLAINANT'S COSTS—COUNSEL FEE—GUARDIAN AD LITEM.**

Where a bill of interpleader was filed in good faith, and it was necessary to join certain infant defendants for whom a guardian ad litem was required, the court properly decreed that the counsel fee awarded to complainant, and a fee to such guardian ad litem should be paid in the first instance out of the fund.

[Ed. Note.—For other cases, see Interpleader, Cent. Dig. § 76; Dec. Dig. § 35.\*]

**Appeal from Chancery Court of Richmond.**

Interpleader by the Firemen's Relief Association and others to compel Ella Hendricks, Lella B. Pettus, and C. L. Howard to litigate their adverse claims to the proceeds of a certificate of insurance on the life of Charles A. Burbank, deceased. From a decree awarding the fund to claimant Hendricks, Lella B. Pettus and C. L. Howard appeal. Affirmed.

**In Howard Appeal:**

Ordway Puller and C. R. Sands, for appellant. John A. Lamb, B. Lamb, Bev. T. Crump, and Robt. M. Jeffress, for appellees.

**In Pettus Appeal:**

Wm. W. Crump and Robt. M. Jeffress, for appellant. John A. Lamb, B. Lamb, Ordway Puller, and C. R. Sands, for appellees.

**KEITH, P.** Charles A. Burbank was at the time of his death, in February, 1909, a member in good standing in the Firemen's Relief Association. A certificate in which the society agreed to pay \$1,000 to Ella Hendricks upon Burbank's death was issued to the deceased, and was by him delivered to her; she being his first cousin and one of his nearest relatives. On October 6, 1908, Burbank requested the association in writing that Mrs. Lella B. Pettus be named as his beneficiary. The minutes of the association on this subject read as follows: "His request was sent back to have his certificate attached, before a new one could be issued."

Mrs. Pettus was not a relative of Burbank, nor was she in any manner dependent upon him, but it seems that there was an engagement of marriage between them. Burbank, it appears, knew that the association did not act upon his request to change his beneficiary, and there is conflict of evi-

dence as to whether he requested Ella Hendricks to return the certificate to him which had been issued to her. The minutes of the association show no other mention of the attempted change of beneficiary between October 6, 1908, and the death of Burbank.

Upon the death of Burbank, Ella Hendricks, Lella B. Pettus, and other relatives and heirs at law of the deceased claimed the \$1,000, whereupon the association filed its bill of interpleader in the chancery court of the city of Richmond, and upon the deposit of the sum of \$1,000 was discharged from further liability; and, upon the pleadings and proofs, the chancery court decreed in favor of Ella Hendricks, the original beneficiary, and from that decree Lella B. Pettus in her own behalf and C. L. Howard, representing the heirs at law, both appealed.

The by-laws of the association do not regulate the manner in which a change of beneficiary of a benefit certificate shall be made. The charter of the association was granted by the circuit court of the city of Richmond on December 7, 1898, and among other things provides that the association will "pay to the nearest relative or such other dependent as may be designated by the member according to its by-laws, such sum of money upon the death of such member as said by-laws shall provide." The phrase, "according to its by-laws," is merely intended to reserve to the association the right to prescribe a method of designation if it should see fit to do so, and the charter is in this respect self-executing.

The beneficiary was designated and the certificate was issued in this case on a printed form, in accordance with the uniform custom of the association.

The claim of the appellee Ella Hendricks is that she was regularly designated as the beneficiary upon the issuance of the certificate and the certificate placed in her keeping; that she comes within the designated class, being amongst the nearest relatives of the deceased; and that, no other person capable of being chosen by the terms of the charter having been designated, she is entitled to the fund in question.

By an act approved March 8, 1898 (Acts 1897-98, p. 734), it was provided, among other things, that "payment of death benefits shall be to families, heirs, blood relatives, affianced husband, or affianced wife of, or to persons dependent upon the member, as may be designated by the member."

This act was repealed by an act of March 14, 1904, but the provisions affecting this case were re-enacted by an act approved March 9, 1906, and are to be found in Pollard's Supplement to the Code 1910, at page 619, where it is provided that:

"Payment of death benefits shall be to families, heirs, blood relatives, affianced husband or affianced wife of, or to persons dependent upon the member, as may be desig-



nated by the member, or to such other beneficiaries as may be permitted by the laws of the state or province in which such order or association is chartered.

"Each member shall have the right to designate his beneficiary, and from time to time have the same changed in accordance with the by-laws, rules or regulations of the order or association, and no beneficiary shall have any vested interest in the said benefit until the same has become due and payable upon the death of the member."

The designation of Mrs. Hendricks as the beneficiary seems to have been made in 1903 upon the death of Burbank's mother. The claim of Mrs. Pettus, therefore, rests upon the proposition that the designation of Mrs. Hendricks had been revoked, that she had been named in her stead, and that, while not a relative or a dependent upon Burbank, she was his affianced wife and came directly within the terms of the statute above quoted, and was therefore in one of the classes from which the beneficiary might lawfully be chosen.

[1] On behalf of the heirs at law, the contention is that the letter from Burbank expressing his desire to recall the designation of Mrs. Hendricks and to make Mrs. Pettus his beneficiary was sufficient to destroy the rights of the former without conferring any upon the latter. We have no doubt, however, that this position cannot be maintained, and that the fund should be paid either to Mrs. Pettus or to Mrs. Hendricks.

[2] The chancery court was of opinion that Mrs. Hendricks having been lawfully designated, and being among the classes capable of taking under the terms of the charter, she had the better right, and that her claim should be preferred to that of Mrs. Pettus, who was not among any of the classes designated by the charter as capable of receiving the benefit fund; that the law in providing a larger class of persons capable of being designated than that found in the charter was not intended to alter, modify, or repeal the charter, but merely to enumerate the objects for which a benefit association could be organized; and this we think is the true construction. It is true that the statute in declaring who may be beneficiaries uses the word "shall"; but, while that word may primarily be mandatory in its effect, and the word "may" primarily permissive, yet the courts in endeavoring to arrive at the meaning of written language, whether used in a will, a contract, or a statute, will construe "may" and "shall" as permissive or mandatory in accordance with the subject-matter and context. See Words & Phrases, "Shall."

[3] Having reached the conclusion that Mrs. Pettus could not lawfully be designated as a beneficiary because not among the classes for whose benefit the association was organized, the court was of opinion that her designation was ineffectual for all pur-

poses; that for the reasons already stated it conferred no right upon her; and that the original designation of Mrs. Hendricks remained in force.

In Bacon on Benefit Societies, § 310c, the law is stated as follows: "The question occurs as to the effect on the rights of the beneficiaries first designated by an attempted change of beneficiary which is incomplete, or where the change, being effected by compliance with the required formalities and the issuance of a new certificate, is illegal because the second beneficiaries are not entitled to take. While it seems to be taken for granted in the cases cited in the preceding sections that if the attempted change of beneficiary is not complete the rights of the first beneficiaries are not affected, because the revocation is not made complete by the issuance of the new certificate, it is now settled that if for any reason the change of beneficiaries is invalid the rights of the first beneficiary remain in force"—citing a number of authorities.

See, also, *Grace v. N. W. Mut. Relief Association*, 87 Wis. 562, 58 N. W. 1041, 41 Am. St. Rep. 62; *Sturges v. Sturges*, 126 Ky. 80, 102 S. W. 884, 12 L. R. A. (N. S.) 1014; *Elssey v. Odd Fellows Mut. Relief Ass'n*, 142 Mass. 224, 7 N. E. 844.

We are of opinion, therefore, upon this branch of the case, that Mrs. Pettus was not among the classes enumerated in the charter as capable of becoming beneficiaries, and for the reasons already given the statute upon the subject of benefit associations does not serve to add to the classes enumerated; that, the attempted designation of Mrs. Pettus being ineffectual, the right of Mrs. Hendricks was thereby unimpaired.

A question is raised as to costs, with respect to which the judge of the chancery court in his opinion says: "The general costs will be charged against the active and losing claimants thus: One half to Lelia B. Pettus and the other half jointly to Minnie Engleking and the five others who joined with her in an answer and cross-bill. In the general costs are included the fee of \$50 allowed to the plaintiff's counsel, the \$25 to be paid out of the fund to the guardian ad litem, the costs of Ella Hendricks' depositions and the clerk's and sheriff's fees likewise to be paid out of the fund."

[4] With respect to the costs exclusive of the fee to the plaintiff's attorney and to the guardian ad litem, no further authority is needed than that of *Beers, etc., v. Spooner*, 36 Va. 153, and it will appear from the cases cited with respect to those fees that that case is in harmony with the general current of opinion upon the subject of costs in interpleader cases.

[5] This suit was brought in unquestioned good faith. There were, as we have seen, three sets of claimants to the fund for which the Fireman's Association confessed its liability. In order to have the controversy so

determined that it might safely pay over the fund, this suit was brought, and the guardian ad litem of the infants made a party defendant. The litigation was not rendered necessary by any default on the part of the Fireman's Association, but by the conflicting claims of the parties defendant. If the infant defendants had had any estate which could have been made responsible for the costs, the fee to the guardian ad litem would have been properly charged upon it; but the presence of the wards in court, by guardian ad litem, being necessary, and they having no estate which the court could reach, the fee became a proper charge in the first instance upon the fund to be administered.

The same is true with respect to counsel fee allowed to the plaintiff.

See 2 Daniel's Ch. Pr. (5th Ed.) 1570; Pomeroy's Eq. Rem. § 59; Swiger v. Hayman, 56 W. Va. 123, 48 S. E. 839, 107 Am. St. Rep. 899, 3 Ann. Cas. 1030; Miller v. Watts, 4 Duer (N. Y.) 203.

In Canfield v. Morgan, 1 Hopk. Ch. (N. Y.) 224, it is said that the stakeholder in a proper case is to have his costs out of the fund, which costs are eventually to fall on the party who fails.

As was said by the learned judge of the chancery court: "The payment of the plaintiff's costs out of the fund settles no question except that the plaintiff is entitled in any event to his costs; and the question as to what party is to be eventually charged with these costs is reserved to the final hearing, when 'the saddle is put on the right horse'; that is, on the losing claimant of the fund."

In Woodmen of the World v. Wood, 100 Mo. App. 655, 75 S. W. 377, the court allowed to the interpleader its costs including \$100 as attorney's fee, all to be paid out of the fund. The court said: "We think the court acted within the rule in making such allowance. That rule is that when the plaintiff in the interplea has acted in good faith, and has grounds upon which to base his call for the interposition of a court of equity requiring the adverse claimants to interplead, he is entitled to his costs out of the fund in his hands or which he may pay into court. And these costs may include an attorney's fee."

Upon the whole case, we are of opinion that the decree of the chancery court should be affirmed.

Affirmed.

(113 Va. 275)

MILLER & CO. v. LYONS.†

(Supreme Court of Appeals of Virginia.  
March 14, 1912.)

**1. BROKERS (§ 38\*)—STOCK TRANSACTIONS—CONVERSION—INCONSISTENT DEFENSES.**

In an action by plaintiff against his stockbrokers for alleged conversion of certain stocks by selling the same for alleged want of sufficient

margins, propositions that the brokers had no right to sell the stocks without notice to plaintiff as they did, because of a prior course of dealing, and also because of an express contract to wait for called margins until the succeeding day, were not inconsistent.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. §§ 31-36; Dec. Dig. § 88.\*]

**2. BROKERS (§ 24\*)—MARGIN TRANSACTIONS—BROKER'S RIGHT TO CLOSE ACCOUNT—WAIVER.**

A provision in a broker's contract with its customer, reserving the right to close transactions without further notice whenever margins were running out, could be waived by the broker, either in express terms or by a course of dealing giving the customer the right to believe that his transactions would not be closed under such authority without notice.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. § 19; Dec. Dig. § 24.\*]

**3. BROKERS (§ 24\*)—MARGIN TRANSACTIONS—RIGHT TO CLOSE—ESTOPPEL—COURSE OF DEALING.**

Where, by a course of dealing between a broker and customer for more than four years, the broker had not exercised or claimed an alleged right to close transactions without notice to the customer and an opportunity to deposit further margins, the broker might be estopped thereby from closing the customer's transactions contrary to such customary course of dealing.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. § 19; Dec. Dig. § 24.\*]

**4. BROKERS (§ 38\*)—MARGIN TRANSACTIONS—RIGHT TO CLOSE—COURSE OF DEALING—EVIDENCE.**

Evidence held to warrant a finding that by a course of dealing between broker and customer the broker had no right to close the customer's margin account without notice because the margins were running out.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. §§ 31-36; Dec. Dig. § 88.\*]

**5. BROKERS (§ 38\*)—STOCKS—WRONGFUL SALE—CONVERSION—INSTRUCTIONS.**

In an action against brokers for conversion of plaintiff's stocks, held on margin, by sale thereof without notice, an instruction that if, by a course of dealing, defendants had waived their right to strict performance of the contract and gave plaintiff time to maintain his margin, then defendants could not recall such waiver at their option without reasonable notice to plaintiff, so that he might have an opportunity to protect his stock, nor could defendants, if they made such waiver, sell the stock without notice to plaintiff, etc., was not inconsistent with another instruction that if plaintiff and defendants' agent, on the day of the sale, agreed that it would be satisfactory if he deposited additional margin on the next day, and plaintiff deposited the amount demanded on the next day, then defendants' prior sale of his stock was wrongful.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. §§ 31-36; Dec. Dig. § 88.\*]

**6. TRIAL (§ 203\*)—THEORIES OF CAUSE.**

Plaintiff may properly advance more than one theory under which he may be entitled to recover, and introduce evidence in support of each, and ask the court to instruct with respect to both.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 477-479; Dec. Dig. § 203.\*]

**7. BROKERS (§ 38\*)—SALE OF STOCK—DUTY TO MINIMIZE DAMAGES.**

Where stockbrokers sold a part of plaintiff's securities held by them on margins, without authority, plaintiff was not bound, on dis-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

† Rehearing denied.

covering the fact, to immediately repurchase the stock so as to minimize the damages and diminish his loss, and was therefore not limited to a recovery of the difference between the price for which his stock was sold by the brokers and what it would have cost him to recover his position by a repurchase on a subsequent day.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. §§ 31-36; Dec. Dig. § 38.\*]

**8. BROKERS (§ 38\*) — WRONGFUL SALE OF STOCK—DAMAGES.**

Where stockbrokers wrongfully converted certain of plaintiff's stock held by them on margins by a sale without authority on a declining market on July 26, 1910, plaintiff was not bound to repurchase the stock at once, but was entitled to a reasonable opportunity to consult counsel, to employ other brokers, to watch the market to determine whether it was advisable to purchase on a particular day or when the stock reached a particular quotation, and to raise funds if he decided to repurchase; and hence the court properly held that plaintiff was entitled to the time intervening between the time of the sale and August 16th following for that purpose, and was entitled to recover the difference between the price for which the stock sold and the highest price of the stock in the market between the date of the sale and the date fixed.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. §§ 31-36; Dec. Dig. § 38.\*]

Error to Circuit Court of City of Richmond.

Action by John H. Lyons against Miller & Co. Judgment for plaintiff, and defendant brings error. Affirmed.

The following are the instructions given and refused:

"No. 1. The jury are instructed that the relation between the plaintiff and defendant in this case was that of pledgor and pledgee, with the right in the defendant to exercise all powers of sale of the securities mentioned in the evidence as having been sold, as are set forth in the defendant's statement of purchases, unless modified or lessened by the defendant's conduct or acts towards the plaintiff, as explained in subsequent instructions.

"No. 2. The jury are further instructed that the pledgee or defendant had the right to exact strict performance of the contract according to its terms and upon default on the part of the plaintiff to comply with its terms to sell the stock held by the defendant. But strict performance of such contract by the plaintiff may be waived by any agreement, or course of conduct on the part of the pledgee, or defendant, and, if there be any such, which reasonably led the plaintiff to believe that a sale would not be made without an opportunity being given him to increase or maintain his margin. The good faith which the laws exact from a pledgee dealing with a pledge or trust property upon a default by the pledgor in the performance of the terms of the contract under which such property is held will not permit the pledgee after having, by its acts or course of dealings, waived the forfeiture or the right to dispose of the pledge upon

such default by the pledgor, to suddenly stop short and insist upon the right to dispose of said property, without notice, because of any such default, when the pledgor is unprepared to perform said terms.

"No. 3. If the jury believe that the defendant by any course of conduct in their dealings with the plaintiff in the purchase and carrying of stock upon a margin waived their right to exact strict performance of the contract, and gave the plaintiff time and indulgence in increasing and maintaining his margin, then the defendants could not recall such waiver at their own option without reasonable notice to the plaintiff, so that he might have an opportunity to protect his stock, nor could the defendants, if they made such waiver, sell the stock of the plaintiff without giving such reasonable notice to him. And if the jury further believe from the evidence that the defendants did make such waiver, and without giving such notice did sell the stock of the plaintiff complained of in the declaration, then they must find for the plaintiff, if they believe from the evidence that he has been damaged by such conduct of the defendants.

"No. 4. The jury are also instructed that if they believe that in the conversation between the plaintiff and Roden on July 26, 1910, the said Roden asked the plaintiff to put up additional margin, the plaintiff replied by asking whether it would not be satisfactory if he would put it up the next day, and, if so, that he would send the said Roden \$5,000 the next day, and that to such inquiry the said Roden replied that it would be satisfactory if he would send up that amount the next day, and that Roden had power and authority from the scope of agency to make such promise, and, further, that the plaintiff did send up that amount the next day, then the defendants had no right to sell on July 26th the 500 shares of Atlantic Coast Line and 200 shares of American Car & Foundry, and for any such sale they are liable to the plaintiff for damages, if any, as hereinafter stated.

"No. 5. The court further instructs the jury that under all circumstances as to the sale of the stock purchased for the plaintiff an obligation rested upon the defendants to act with entire good faith and to sell the securities for the highest price that they could obtain."

And the defendants asked for the instructions hereinafter numbered Nos. 1, 4, 5, 6, 7, 7½, 8, 8a, 9, 9a, 10, 11, 12, C, 13, and 14, which are as follows:

"No. 1. The court instructs the jury that if they believe from the evidence in this case that the defendant informed the plaintiff that they required enough money to keep 10-point margin on the Car & Foundry stock and the Atlantic Coast Line stock of the plaintiff, and that they reserved the right

to sell the same unless said margins were so kept, and that the plaintiff failed to keep said margins, then the defendants had a right to sell said stocks without further notice to the plaintiff, and the jury must find for the defendants."

"No. 4. The court instructs the jury that, before Roden could waive any provisions of the contract between the plaintiff and the defendants, he, Roden, must have had authority to make such a waiver. If there is no proof of authority in Roden to so waive, and there must be a verdict for the defendants.

"No. 5. That if the jury believes that the defendants postponed to July 27, 1910, by agreement, the payment of the margin called for on the morning of July 26, 1910, such postponement of the payment of the margin called for did not preclude the defendants from exercising their right to sell the securities of the plaintiff if the securities further declined after such first call, and the fact that such further decline took place on the same day did not affect the right of either party differently than if such decline had taken place the following day or the following week.

"No. 6. The court instructs the jury that before Roden could waive evidence in this case that John H. Lyons in buying and selling stocks through Miller & Co., as brokers, was doing what is known as 'marginal business'—that is, that he did not pay outright for the stocks which he bought, but put up a margin or portion of the purchase price—and that Miller & Co. furnished the balance of the money with which to purchase the stock and charged him interest on same, and that he had notice that the defendants Miller & Co. reserved the right to close the transactions when margins were running out or below a certain amount without further notice to the said Lyons and settled with him in accordance with sales made, and if they further believe at the time, to wit, on the 26th day of July, 1910, at which the sales of the 500 shares of Atlantic Coast Line and 200 shares of American Car & Foundry stocks were sold, the margin on the stock held by the said Lyons was running out or below a point contemplated by the agreement above referred to, and the said defendants sold the stocks because of the small margin at the market price then obtaining on the New York exchange, that they must find for the defendants.

"No. 7. The court instructs the jury that, before the plaintiff can recover in this case, the burden of proof rests upon him to show by a preponderance of the evidence that he deposited as margins with said defendants such sums of money or securities as said defendants required of the said plaintiff to protect said defendants against loss on account of the fluctuations in the market as to the stocks being carried by the defendants for the plaintiff on July 26, 1910, or that the plain-

tiff was then excused or relieved by the defendants from depositing such margins, and that unless the plaintiff does so prove the jury must find for the defendants.

"No. 7½. The court further instructs the jury that if they believe from the evidence in this case the plaintiff for a long time before July 26, 1910, had been dealing with the defendants as brokers, and that the said plaintiff had received written statements from the defendants which provided that 'it is further understood that on all marginal business the right is reserved to close transactions when margins are running out without further notice,' and if they further believe that on the morning of July 26, 1910, that the defendants notified the plaintiff that the market was declining, and called on him for the sum of \$4,000 additional margin, and the plaintiff thereupon promised to pay the \$4,000 the next day, and that the defendants promised to give the plaintiff till the next day, to wit, July 27, 1910, to pay the said \$4,000, yet if they further believe that after said promise the market price of all the stocks of the plaintiff referred to in the declaration continued to decline so that it required an additional margin over and above the aforesaid sum of \$4,000 to keep the margin required to protect the plaintiff's stock, and that the plaintiff did not keep in touch with said market, and did not inform the defendants where he could be found or located, and that the defendants made reasonable effort to locate the said plaintiff so as to give him notice of the further declining condition of the market and did not find the said plaintiff, and that thereafterwards, on July 26, 1910, that the defendants sold the said 500 shares of the Atlantic Coast Line and 200 shares of American Car & Foundry stocks at a time when the market was further declining and the margins upon all the stock of the plaintiff referred to in the declaration were running out, that then the defendants had a right to sell said stock without further notice to the plaintiff, and the jury must find for the defendants.

"No. 8. The court further instructs the jury that if they believe from the evidence that there was an agreement between the plaintiff and defendants through its agent E. L. Roden, on the 26th day of July, 1910, that the defendants would not carry the stocks through the day without additional margin if the stocks declined, and the stocks did decline and the plaintiff did not put up additional margin, that then the plaintiff cannot recover any damages, and the jury must find for the defendants.

"No. 8a. The court instructs the jury that although they may believe from the evidence in this case that E. L. Roden agreed with the plaintiff to forego the call for margin then necessary at the time the call was made, and if they also further believe that there was a further decline in the market

that made it necessary to call for additional margin, and that Roden exercised all diligence in endeavoring to locate the plaintiff so as to apprise him of the fact that there was a further decline and to call upon him for additional margin, and he was unable, by the exercise of such diligence, to find the plaintiff and that the margins were so running out, that the defendants, acting in good faith, sold out a part of the account of the plaintiff, that then the jury are instructed they must find for the defendants.

"No. 9. The court instructs the jury that if they believe from the evidence that, when the plaintiff employed the defendants as brokers, that the plaintiff contracted with the defendants to deposit with them certain sums of money or securities as a margin above the market price of said stocks so purchased so as to protect the said defendants against loss on account of the fluctuations in the market, then it was and became the duty of the plaintiff without notice from the defendant to at all times constantly watch the market so as to keep enough money or securities deposited with the said defendants to maintain said margin so as to protect the defendants against loss, and if they believe from the evidence that the said plaintiff failed to do so, and that the defendants sold the stock of the plaintiff set out in the declaration at a time when the plaintiff did not have enough money deposited with the defendants to maintain and keep said margin, then they must find for the defendants.

"No. 9a. The court instructs the jury that if they believe that the plaintiff was illegally sold out that then it was the duty of the plaintiff to require the brokers to replace the stock at the earliest moment, and, if they failed to do so, then to purchase the same himself, the court telling the jury that the party who suffers from a breach of a contract must so act as to make his damages as small as he reasonably can.

"No. 10. The court tells the jury that if they believe from the evidence that the plaintiff was illegally sold out that the law allows him just indemnity for the loss that he has sustained by the sale of his stock, and, in case where loss of profits is claimed, it should be an amount sufficient to indemnify the party injured for the loss which is the natural, reasonable and proximate result of the wrongful act complained of, and which a proper degree of prudence on the part of the plaintiff would not have averted that it was the duty of the plaintiff so soon as he learned that he was sold out to require the defendants to reinstate him, and, if they failed to do so, within a reasonable time, then to purchase for himself, the court telling the jury that the party who suffers from a breach of contract must so act as to make his damages as small as he reasonably can.

"No. 11. The court instructs the jury that if they believe from the evidence that the

plaintiff was illegally sold out, and damaged thereby, that then the measure of his damages is the difference between the price at which the plaintiff was illegally sold out and the price at which the said stocks which were so sold could have been repurchased within a reasonable time, and that the next day, the 27th day of July, 1910, was a reasonable time for the plaintiff to repurchase said stock under the facts and circumstances of this case, and that in ascertaining the damages, if any, which they may find the plaintiff to be entitled, they cannot allow the plaintiff more than the difference between the price at which the 500 shares of the Atlantic Coast Line and 200 shares of American Car & Foundry stock was sold on the 26th day of July, 1910, and the market price at which the plaintiff could have repurchased the same on July 27, 1910.

"No. 12. The court instructs the jury that the burden of proof in this case is upon the plaintiff to prove, by a preponderance of evidence, to the satisfaction of the jury all the material allegations of his declaration, and also to prove by like evidence that there was a waiver by the defendants of their agreement, or that a new contract was made by him with the defendants on July 26, 1910, and that said Roden had power and authority from Miller & Co. to make such a promise, if any such was made.

"No. C. The court instructs the jury that it is for them to determine what the agreement was between Mr. Roden and the plaintiff on the 26th day of July, 1910, and whether or not Miller & Co., through Mr. Roden, agreed to carry the plaintiff's account over until the next day, regardless of the condition of the market. They are further instructed that, if they believe from the evidence in this case that there was an agreement on the part of Miller & Co. to so carry the plaintiff's account over until the next day, then this became a new contract, and the question as to whether or not the defendants, by their course of conduct and previous dealing, had waived a strict compliance with the original contract, cannot be taken into consideration, but that this new agreement superseded both the original contract and the previous course of dealing.

"No. 13. The court tells the jury that waiver is the intentional relinquishment of a known right, with both knowledge of its existence and an intention to relinquish it. And that if the plaintiff claims that the defendant waived any of the conditions of the contract of pledge, or that they waived the right to a 10-point margin, the burden of proof is upon the plaintiff to prove by a preponderance of evidence such waiver, and to prove the intent on the part of the defendant to make such waiver.

"No. 14. The court instructs the jury that, where a person deals with an agent, it is his duty to ascertain the extent of the agen-

cy, and that he deals with him at his own risk, and they are further instructed that it is for them to determine from the facts in this case whether or not the agent, E. L. Roden, had the power to waive the provisions of the contract requiring the plaintiff to keep a margin of 10 points on his stock, and they are further instructed that the contract in this case was that the plaintiff should keep at all times a margin of 10 points on the amount of his purchases, and that, if the plaintiff seeks to excuse himself from performing the contract, he must show by a preponderance of the testimony that he did so keep his account, or that the defendants themselves waived this contract, or that an agent who had authority to waive said contract did so waive the provisions thereof."

But the court refused to give instructions asked for by the defendants Nos. 1, 4, 5, 7½, and C, and modified and amended the defendants' aforesaid instructions Nos. 6, 7, 9, 11, and 13, and as modified and amended, gave them as follows (the amendments being italicized):

"No. 6. The court instructs the jury that if they believe from the evidence in this case that John H. Lyons in buying and selling stocks through Miller & Co. as brokers was doing what is known as a marginal business—that is, that he did not pay outright for the stocks which he bought, but put up a margin or portion of the purchase price—and that Miller & Co. furnished the balance of the money with which to purchase the stock, and charged him interest on same, and that he had notice that the defendants Miller & Co. reserved the right to close the transactions when the margins were running out or below a certain amount without further notice to the said Lyons, and settled with him in accordance with sales made, and if they further believe at the time, to wit, on the 26th day of July, 1910, at which the sales of the 500 shares of Atlantic Coast Line and 200 shares of American Car & Foundry stocks were sold the margin on the stock held by said Lyons was running out or below a point *a point* contemplated by the agreement above referred to, and the said defendants sold the stocks because of the small margin at the market price then obtaining on the New York Exchange, that they must find for the defendants, *unless the jury shall believe from the evidence that the defendants by their course of action waived such right to sell without notice, or do not believe from the evidence that on July 26th the defendants agreed with the plaintiff that they would wait until the next day for additional margins.*

"No. 7. The court instructs the jury that, before the plaintiff can recover in this case, the burden of proof rests upon him to show by a preponderance of the evidence that he deposited as margins with said defendants

such sums of money or securities as said defendants required of the said plaintiff to protect said defendants against loss on account of the fluctuations in the market as to the stocks being carried by the defendants for the plaintiff on July 26, 1910, or that the plaintiff was then or *had previously been* excused or relieved by the defendant from depositing such margins, and that, unless the plaintiff does so prove, the jury must find for the defendants."

"No. 9. The court instructs the jury that if they believe from the evidence that when the plaintiff employed the defendants as brokers that the plaintiff contracted *by the terms of the agreement between them* with the defendants to deposit with them certain sums of money or securities as a margin above the market price of said stocks so purchased, *and to maintain the same at all times* so as to protect the said defendants against loss on account of the fluctuations in the market, then it was and became the duty of the plaintiff, without notice from the defendants, to at all times constantly watch the market so as to keep enough money or securities deposited with the said defendants to maintain said margins so as to protect the defendants against loss, *unless the terms of said contract were waived by the defendants as explained in the other instructions*; and, if they believe from the evidence that the said plaintiff failed to do so, *that the defendants had not waived the terms of their agreement as explained in another instruction*, and that the defendants sold the stock of the plaintiff set out in the declaration at a time when the plaintiff did not have enough money deposited with the defendants to maintain and keep said margin, then they must find for the defendants, *provided you do not believe from the evidence that on July 26th the defendants agreed with the plaintiff that they would wait until next day for additional margins.*"

"No. 11. The court instructs the jury that if they believe from the evidence that the plaintiff was illegally sold out, and damaged thereby, that then the measure of his damages is the difference between the price at which the plaintiff was illegally sold out and the price at which the said stocks which were so sold could have been repurchased within a reasonable time, and that the 16th day of August, 1910, was a reasonable time for the plaintiff to repurchase said stock under the facts and circumstances of this case, and that in ascertaining the damages, if any, which they may find the plaintiff to be entitled, they cannot allow the plaintiff more than the difference between the price at which the 500 shares of the Atlantic Coast Line and 200 shares of American Car & Foundry stock was sold on the 26th day of July, 1910, and the market price at which the plaintiff could have repurchased the same on 16th day of August, 1910."

"No. 13. The court tells the jury that waiver is the intentional relinquishment of a known right with both knowledge of its existence and an intention to relinquish it. And if the plaintiff claims that the defendants waived any of the conditions of the contract of pledge, or that they waived the right to a 10-point margin, the burden of proof is upon the plaintiff to prove by a preponderance of evidence such waiver, and to prove the intent on the part of the defendant to make such waiver. *Waiver need not be proved by express statement to that effect. It may be proved by the acts, conduct, or dealings of the defendants.*"

O'Flaherty & Fulton, Scott, Buchanan & Cardwell, and Simpson, Werner & Cardozo, for plaintiff in error. Page & Leary and C. V. Meredith, for defendant in error.

KEITH, P. Lyons brought an action of assumpsit in the circuit court of the city of Richmond against the firm of Miller & Co., stockbrokers of the city of New York, with a branch office in the city of Richmond, and recovered a verdict and judgment for \$7,145, to which Miller & Co. applied for and obtained a writ of error.

During the progress of the trial several bills of exceptions were taken to the admission of evidence, but as they present no question of particular interest, and were, we think, correctly decided, they need not be further noticed in this opinion.

The testimony and other evidence before the jury tends to prove that Lyons during a series of years, commencing in 1906 and coming down to July, 1910, was the purchaser of stocks through the firm of Miller & Co. upon margins. The nature of the contract between Miller & Co. and Lyons is disclosed by the statements and receipts given by Miller & Co. to Lyons upon the purchase or sale of stocks or the receipt of money paid by Lyons to Miller & Co., as, for example, upon the purchase of stocks Miller & Co. would issue to Lyons a receipt in the following form, printed in red ink:

"The amounts of securities specified in this receipt are deposited with Miller & Co., and are to be used by them as margin or collateral security to protect them from loss in any present or subsequent transaction between them and the party to whom it is issued. If the said Miller & Co. shall at any time, for any reason, deem the said margin insufficient, then the said Miller & Co. may close any or all of such transactions without demanding further payment or additional security and may buy in or sell any stocks, bonds, securities, grain, provisions, or other property, sold or purchased for the party to whom this receipt is issued, and may sell any securities held as collateral on the N. Y. Stock Exchange, N. Y. Produce Exchange, N. Y. Cotton Exchange, N. Y. Coffee Ex-

change, Chicago Board of Trade, or elsewhere at public or private sale without demand or notice."

And on each transaction, where there was a purchase or a sale made, a notice of the same was sent, at the bottom of which was printed plainly the following:

"It is understood that on all marginal business we reserve the right to close transactions for your account without further notice, whenever your margins are running out, and to settle contracts in accordance with the rules and customs of the New York Stock Exchange."

It is admitted by both parties, plaintiff and defendant, that such was the contract between them.

The business between the plaintiff and the defendant was carried on through a Mr. Roden, the agent of Miller & Co., in charge of the Richmond office, and on the 26th of July, 1910, Lyons was the holder of 1,100 shares of Atlantic Coast Line stock and 500 shares of American Car & Foundry stock, and measured by the opening prices of those stocks upon the morning of that day his account was \$4,000 less than a 10 per cent. margin; thereupon Mr. Roden called Mr. Lyons over the phone about half past 10 o'clock, but Mr. Lyons was not at that time in his office. He again called about a quarter past 11 o'clock, and, when Mr. Lyons came to the phone, Roden, according to his statement, told him that his account required \$4,000 additional margin, to which Mr. Lyons responded: "I have just gotten to the office. I have got a great big pile of mail in front of me. I am very busy. I won't have time to attend to it to-day; won't it be satisfactory to send it up to-morrow?" To which Roden (according to Roden's account) replied that it would be satisfactory to send it "to-morrow, if the market did not decline further." Lyons replied: "I haven't got time to attend to it to-day, but I will certainly send it up in the morning." Roden said, "All right, Mr. Lyons;" and that was all. An hour later the market had declined. Coast Line had opened at 107 and Car Foundry at 44. Coast Line sold off to 106 and Car Foundry to about 42; and whereas, Mr. Lyons' account had required \$4,000 at the opening, this decline of a point in Coast Line and two points in Car Foundry made it necessary to have about \$3,000 more. Roden testified: "I had not any doubt in the world but what I could get hold of Mr. Lyons, and I went to the phone about 12 o'clock, when Coast Line was selling at a still lower price, about 104, called up his office, and I was told that he had gone home. Then I went back to the desk and penciled a note to Mr. Lyons. I wrote him a note, and told him the market had declined further, and we must have \$5,000 at once or we would have to liquidate part of his account. I called my young man, Mr. Hotze, and gave him this note. He read

it, and I put it in an envelope, and addressed it to Mr. John H. Lyons, care Richmond Leather Company, and told Mr. Hotze to take it down there and give it to Mr. Lyons, and if he was not there to leave it. After he had gone, I went to the phone and called up Mr. Lyons' home. I was told that he was not there. I thought perhaps Mr. Lyons had not had time to get home. So, in the meantime, Mr. Hotze got back, and said that Mr. Lyons was not there at his office, but he had left the note. I again called up his home, but he was not there. I left word with whoever answered the phone to have Mr. Lyons call my phone, Monroe 801, as soon as he got there." He then called up the Commonwealth Club, of which Mr. Lyons was a member, and was told that Mr. Lyons had just left. Then he informed the New York office that he could not locate Mr. Lyons anywhere; that he had called Mr. Lyons in the morning, and told him that they must have this \$4,000 margin, and informed the New York office of what had taken place between them. Later in the day the decline was so constant and of such a general character, and the market in such a precarious condition that Miller & Co., acting upon the authority which they had under the contract, and according to their best judgment, closed out a portion of the plaintiff's account, and sold 500 shares of Coast Line and 200 shares of Car Foundry at the best bids which they could get, selling them in lots of 100, and members of the firm personally executing the sales of the stock upon the New York Stock Exchange. Miller & Co. assert that these sales were made in good faith and in the exercise of their best business judgment for the protection of both parties, and in accordance with the terms of the contract had with the plaintiff, after he had violated his contract and failed to keep up his margins.

On the next day Lyons wrote a letter to Miller & Co. and sent a check for \$5,000, demanding that he be reinstated. In this letter he claimed that the agreement between himself and Roden was that it would be satisfactory if a check for \$5,000 was sent the next day; Roden claiming that the agreement was it would be satisfactory, provided the market did not decline.

It may be as well to give here Lyons' statement of what occurred on the 26th of July.

He said he had just gotten to his office when he was told that Mr. Roden was at the phone and wished to speak to him; that Mr. Roden said: "Mr. Lyons, the market looks very weak, and I must have \$5,000 today." Mr. Lyons states: "I took my watch out and said, 'Gee, Mr. Roden,'— That is the way I know it was 11:15, I took out my watch and looked at it and said, 'Gee, Mr. Roden, it is 11:15, and I have just this minute gotten to my office.' I don't think I had taken my coat off. 'Can't you wait until tomorrow?' He said, 'Mr. Lyons, will you cer-

tainly attend to it to-morrow?' I said, 'I certainly will.' He said, 'Don't fail,' and he repeated it again. I said 'Mr. Roden, I will certainly attend to it the first thing in the morning.' He said, 'All right, that will do.' I said, 'I thank you very much, Mr. Roden. I am very much obliged to you.'"

It will be observed that this differs from Roden's account in two particulars: In the first place, Roden claims to have asked for \$4,000, while Lyons says the demand was for \$5,000, but this difference is not material; and, according to Mr. Roden's account his promise was conditional, that it would be satisfactory to have the money the following day, if the market did not decline further, whereas, according to the statement of Mr. Lyons, the undertaking was unconditional.

Mr. Lyons' statement is corroborated by his bookkeeper—that is to say, corroborated so far as a conversation can be corroborated by a witness who hears only one of the interlocutors.

The case for the defendant in error rests upon two propositions: First, that Miller & Co. did not have a right to sell his stocks, or any of them, without notice, as was done on July 26, 1910, after having, by their acts, and by the course of dealings between themselves and him, covering a period of four years, led him to believe that a sale would not be made without an opportunity being given him to increase and maintain his margin; second, that he made with Miller & Co. on the morning of July 26, 1910, a valid contract, whereby Miller & Co. bound themselves unconditionally to wait until the following day for the margin called for, and therefore they (Miller & Co.) did not have the right to sell his stocks, or any part of them, on that day.

[1] These two defenses (propositions) are by no means contradictory, the one of the other, or even in any degree inconsistent. Either one of them would be sufficient if maintained by satisfactory proof, or both of them together may be relied upon by the plaintiff to maintain his suit.

[2, 3] That covenants and stipulations made by covenantor for his benefit may be waived by him, either by express terms or by a course of dealing, is a well-established principle in every system of enlightened jurisprudence. That a covenantor may, by his conduct, so lull his covenantee into a sense of security as thereby to estop himself from the exercise of a right for which he had contracted, is equally clear. Instances illustrating this principle abound in the law with reference to contracts of insurance, but its operation is not limited to any specific class of contracts and dealings between men. Such estoppels are founded upon principles of morality and public policy; their object being to prevent that which deals in duplicity and inconsistency. *Bower v. McCormick*, 64 Va. 310.

In *Georgia Home Ins. Co. v. Kinnier's*



Adm'r, 69 Va. 88, it was held that "any acts, declarations, or course of dealing by the insurers, with knowledge of the facts constituting a breach of a condition in the policy, recognizing and treating the policy as still in force, and leading the assured to regard himself as still protected thereby, will amount to a waiver of the forfeiture by reason of such breach, and estop the company from setting up the same as a defense when sued for a subsequent loss."

In the case before us, under the contract between the parties, it may be conceded that Miller & Co. had the right to sell the stocks carried by them for Lyons whenever his margin fell below ten points, and that they were the sole judges of the necessity and propriety of sale; yet, applying the principle declared by Judge Burks in the case just cited, any acts, declarations, or course of dealing upon the part of Miller & Co. with knowledge of the facts, and which led Lyons to believe that they would not exercise their right to sell without giving him timely notice, estops them from setting up their right to sell under the contract, when sued for a loss incurred by reason of a sale made in derogation of such course of dealing.

That the evidence in the record does tend to establish such a course of dealing as tended to lull Lyons into a false sense of security, and such as to induce a reasonable man to believe that the power of sale would not be exercised without an opportunity upon his part to put up additional margin, is plain. Running through the whole course of their transactions, covering about four years, there were many instances in which Lyons' margin fell below 10 per cent.

[4] On May 28, 1907, they had demanded \$1,000 margin, and he had sent \$500, and thereupon they wrote to him as follows: "In response to our request for \$1,000 margin you sent us to-day \$500. In the present state of the market it is very necessary that we should have full margin on all accounts, and we would, therefore, thank you to let us have tomorrow \$500 additional in accordance with our original request."

On August 9, 1907, they wrote to him: "In the absence of additional funds, as requested by us several times, we have placed an order to sell your Atlantic Coast Line when present margin is exhausted, at 82%."

On August 10, 1907, they wrote: "We have wired you to-day at Woodberry Forest requesting fifteen hundred dollars more on your Atlantic Coast Line stock. Our New York office informs us that they have, in the mean time entered a stop loss order at 74%. The stock closed at 79."

October 7, 1907: "Atlantic Coast Line is selling now at 77. Your account requires \$1,000 additional amount early to-morrow. We were unable to get you on the phone to-day"

On October 9, 1907: "We have no response

to our request made on Monday, the 7th inst., for additional margin. Unless you attend to this matter at once, we will have to close the account out when present margins are exhausted."

October 10, 1909: "We beg to acknowledge \$1,000 received to-day. Same has been credited to your account. Coast Line broke again, selling at 71½. The account now requires \$1,000 in addition to the \$1,000 above named. Please see that we receive check for this amount to-morrow."

October 11, 1907: "Coast Line closed at 70 to-day. We have been trying all day to get you over the phone. So far we have been unable to reach you. We must have \$1,500 additional margin on your stock before 11 o'clock to-morrow morning; if it is not received we will have to enter an order to close the account when present margins are exhausted."

October 26, 1909: "We wired you to New York, requesting you to let us have \$1,000 additional margin, and also requesting you to reply to our telegram. At this writing we have not received a reply, although we are informed by the telegraph company that our message was delivered to you in person. We must have this check Monday morning, otherwise, we will have to enter an order to sell your stocks when present margins are exhausted."

We think these letters justify the comment made upon them in the brief of defendant in error: They show "the demands for margins, when required to be paid and notice of Miller & Co.'s intention to close out account on stop loss order, or 'when the margins are exhausted.' They show that the fact that they could not get him over the phone did not lead them to believe that they were justified in selling without giving Lyons until the next day to put up more margins. They afford a fair sample of Miller & Co.'s course of dealings with Lyons throughout the entire term covered by the account."

In the instances cited, and in many others that appear in the record, it seems that although the market might be weak and falling, although the margin had fallen below the 10 per cent. limit, although the demands for margins were not always promptly met, that Miller & Co. never went beyond the point of reiterating the demand for margins, with the declaration in some instances that they had put in a stop loss order—in other words, that the stock would be sold when the existing margin was exhausted.

Upon this evidence, the court instructed the jury as to the rights of plaintiffs in error under the original contract, unmodified and unaffected by the course of dealing between the parties. It then instructed the jury as to waiver of the right by express agreement or by a course of dealing be-

tween the parties; and those instructions we think fully and fairly submitted the question to the jury.

[5] There is in our opinion no conflict between instructions Nos. 3 and 4, given by the court at the instance of the defendant in error. In No. 3 the jury is instructed as to the effect of the general course of dealings between the plaintiff and the defendants, as to the purchase and carrying of stocks upon margin, and in instruction No. 4 the attention of the jury was directed to what occurred between Lyons and Roden on the 26th of July, 1910. As we have seen, the plaintiff relied upon two theories to maintain his case—the general course of dealing between the parties, and the specific contract of July 26, 1910. The law as applicable to the two branches of the case is presented in instructions 3 and 4, and we find in them no insufficiency, no inconsistency, but are of opinion that they fairly and properly present the law of the case upon the points covered by them.

[6] A great deal of reliance was placed by counsel for plaintiffs in error upon instruction "C," which was offered by them and refused by the court. What we have already said disposes of this question. The plaintiff could properly advance both theories of his case before the jury, introduce evidence in support of each, and ask the court to instruct with respect to them; and the assertion of defendant in error's right, under the arrangement of July 26, 1910, did not in our judgment involve an abandonment or in any degree diminish his right to rely upon the course of dealing which had prevailed between the parties up to that time.

The real source of trouble in this case was that Miller & Co., the principals, disapproved of and repudiated the act of their agent, Roden, when he advised them of what he had done. This view is strongly supported by a letter from Roden on the evening of July 26, 1910, to Mr. Lyons, in which he says: "After my talk with you on the phone to-day, the market broke very badly, and additional margins were demanded on your account. I called your office and sent down there, but you were gone. I tried your house and the club, at neither of which places could you be had. I left word at each place for you to call me up, and have not yet heard anything from you. No answer being obtainable, our New York office gave orders to liquidate part of your account, which was done by selling 200 Car Foundry and 500 Coast Line. They positively declined to carry the account over night without additional margin, and I was unable to supply it, being unable to locate you."

Mr. Lyons upon returning to his office the following morning called Roden up over the phone, and said: "Mr. Roden, I am very much surprised to receive this letter. I am utterly astonished; what is the meaning of

it?" His reply was: "Mr. Lyons, I did not do it. New York did it. I am just as sorry as you are." Mr. Lyons then said to Roden: "Mr. Roden, I promised to send you \$5,000 up this morning, and I am going to do it. I am going to send it right this minute. I am living up to my contract. You made a direct contract with me, and I am living up to my contract, and I expect you to live up to yours." That check was sent. There is no reason to believe that it could not and would not have been sent the day before if it had been insisted upon.

But it is said, if it had been sent the day before, the course of the market during the day had still reduced the margin below 10 per cent., and that the cash, if paid the day before, would certainly have been as good as the promise to pay the following day; all of which is very true, if that were a complete statement of the contract or agreement or arrangement of July 26th, and just there comes in the importance of the difference which exists in the accounts of what took place between Mr. Roden and Mr. Lyons. According to Mr. Lyons (and his view seems to have been accepted by the jury), there was an unconditional promise to wait until the next day, the effect of which was to relieve Lyons of all apprehension during the intermediate period. It was in accordance with the course of dealing which had theretofore prevailed between the parties, and he went to his home in the full security that he would have nothing to apprehend until the following day.

The instructions are predicated upon facts which the evidence tends to establish. They present familiar principles of the law of waiver and of equitable estoppel, and we shall content ourselves by saying that the law covering the case was properly put before the jury.

So much for the defendant in error's right to recover.

The next question which arises is as to the measure of damages.

[7] Plaintiffs in error contend that it was the duty of the defendant in error, if he was injured and had sustained damage by reason of the conduct of plaintiffs in error, to minimize the damage and to diminish the plaintiffs in error's loss by reasonable diligence upon his part; that is to say, that Lyons ought at once to have repurchased the stock, and that he is only entitled to recover the difference between the price it brought when sold by Miller & Co. and what it would have cost him to recover his position by a repurchase of the stock at a subsequent day.

Lyons promptly notified Miller & Co. that he considered he had been wronged by them, that he demanded restoration to the position which he occupied by a repurchase by them of the stock which they had sold. They were the wrongdoers, and not Lyons. Surely it was as incumbent upon them in their own

interest to diminish the loss occasioned by their wrongful act, which they could have done had they promptly acceded to Lyons' demand, as it was upon Lyons to diminish the consequences of their wrongful act by himself going into the market and buying back an equivalent amount of the stocks which they had sold.

[8] When the question as to the measure of damages was considered by the circuit court, the contention was made by plaintiffs in error that it was for the court to determine at what day the price of stocks was to be ascertained and adopted by the jury, and, on the other hand, it was contended by the defendant in error that it was for the jury to determine that question. The court decided the contention in accordance with the views of plaintiffs in error, and determined that the price of the stocks on the 16th of August, 1910, just 21 days after the sale, was the proper time at which to ascertain the price of the stocks in order to determine the quantum of damages, with the result that the jury found a verdict for the plaintiff for the amount already stated.

We know of no case in the reports of this court which throws any light upon this question, but it has frequently been before the courts of New York.

In the cases of *Romaine v. Van Allen*, 26 N. Y. 309, and *Markham v. Jordan*, 41 N. Y. 235, it was laid down as a rule, and a recovery was permitted which gave the plaintiff the highest price of the stock between conversion and the trial, which principle, if adopted in this case, would have resulted in a very much larger verdict than that which was given.

In *Baker v. Drake*, 66 N. Y. 518, 23 Am. Rep. 80, however, those cases were overruled, and it was said: "The advance in the market price of the stock from the sale up to a reasonable time to replace it, after the plaintiff received notice of the sale, would afford a complete indemnity."

Lyons, thinking with reason that he who had committed the wrong should right it, demanded, as we have seen, on the 27th of July that Miller & Co. should repurchase the stocks which they had sold, and that demand was insisted upon by him, and was never finally rejected by Miller & Co. until he received their letter of August 10th. After Lyons ascertained that Miller & Co. would not yield to his demand, we think he was entitled to a reasonable opportunity to consult counsel, to employ other brokers, and to watch the market for the purpose of determining whether it was advisable to purchase on a particular day, or when the stock reached a particular quotation, and to raise funds if he determined to repurchase.

In the case of *Burnhorn v. Lockwood*, 71 App. Div. 301, 75 N. Y. Supp. 828, the court said: "The respondent resided in the city of New York, and was here at the time. No other facts or circumstances were shown

which aid in the determination of the question. In the absence of evidence of special circumstances showing other elements of necessity for further time, we think it may be stated as a general rule that the customer is entitled to a reasonable opportunity to consult counsel to employ other brokers, and to watch the market for the purpose of determining whether it is advisable to purchase on a particular day or when the stock reaches a particular quotation, and to raise funds if he decides to repurchase." In that case the record showed that the conversion occurred on May 18th, and the court ruled that the plaintiff was entitled to the highest price at which the stock sold prior to June 12th. Thirty days, therefore, was the time allowed in that case.

In *Colt v. Owens*, 90 N. Y. 368, 30 days were allowed as a reasonable time.

In *Randall v. Albany City Bank*, 1 N. Y. St. Rep. 592, it was held that the reasonable time elapsed before the expiration of six months, and that the question depends upon the circumstances of each case.

In *Wright v. Bank of Metropolis*, 110 N. Y. 237, 18 N. E. 79, 1 L. R. A. 289, 6 Am. St. Rep. 356, it was held, upon the facts of that case, that a reasonable time expired July 1st following the 9th day of May of the same year, which was nearly two months.

Every case seems to depend in this respect upon its own facts. Lyons had been dealing with Miller & Co. through a long period, through their accredited agent, Roden. Those dealings, while directly with Roden, appear always to have been communicated to and approved by his principals. By that course of dealing Lyons had been led to believe that a sale would not be made without giving him due notice. A sale was made and he felt himself aggrieved. He immediately demanded reparation, and after a considerable period spent in negotiation his demand was refused. Taking all the circumstances into consideration, we are unable to say that the court erred to the prejudice of plaintiffs in error in fixing upon August 16th as the date at which the value of the stocks was to be estimated in order to give to Lyons that indemnity to which he was entitled.

We shall conclude this branch of the case by citing *Gallagher v. Jones*, 129 U. S. 193, 9 Sup. Ct. 335, 32 L. Ed. 658. Speaking of the unlawful conversion of stocks and the time at which their value should be ascertained in order to give the party injured a satisfactory indemnity for the wrong done him, Mr. Justice Bradley, delivering the opinion of the court, said: "Perhaps more transactions of this kind arise in the state of New York than in all other parts of the country. The rule of highest intermediate value up to the time of trial formerly prevailed in that state, and may be found laid down in *Romaine v. Van Allen*, 26 N. Y. 309, and *Markham v. Jandon*, 41 N. Y. 235, and

other cases, although the rigid application of the rule was deprecated by the New York Superior Court in an able opinion of Judge Duer, in *Suydam v. Jenkins*, 3 Sandf. (N. Y.) 614. The hardship which arose from estimating the damages by the highest price up to the time of trial, which might be years after the transaction occurred, was often so great that the Court of Appeals of New York was constrained to introduce a material modification in the form of the rule, and to hold the true and just measure of damages in these cases to be the highest intermediate value of the stock between the time of its conversion and a reasonable time after the owner has received notice of it to enable him to replace the stock. This modification of the rule was very ably enforced in an opinion of the Court of Appeals delivered by Judge Rapallo in the case of *Baker v. Drake*, 53 N. Y. 211 [13 Am. Rep. 507], which was subsequently followed in the same case in 66 N. Y. 518 [23 Am. Rep. 80], and in *Gruman v. Smith*, 81 N. Y. 25; *Colt v. Owens*, 90 N. Y. 368, and *Wright v. Bank of Metropolis*, 110 N. Y. 237 [18 N. E. 79, 1 L. R. A. 289, 6 Am. St. Rep. 356]."

In that case (*Galigher v. Jones*) it appears that the stock was sold on the 27th and 29th of November, 1878, at \$1.25 per share; "that in December the stock sold as high as \$2 per share; in January the highest price was \$3.10; in February the highest price was \$5.50. The referee allowed the defendant the highest price in January, namely, \$3.10 per share, being an advance of \$1.85 above what the plaintiff sold the stock for, which for the whole 600 shares amounted to \$1,110. The reason assigned by the referee for not allowing the defendant the highest price in February (namely, \$5.50 per share) was that before that time the defendant had reasonable time, after receiving notice of the sale of his stock by the plaintiff, to replace it by the purchase of new stock, if he desired so to do; and he allowed him the highest price which the stock reached within that reasonable time. In this conclusion we think the referee was correct, and, as to this item, we see no error in the result." It appears, therefore, that in that case the court approved a delay of more than two months.

Upon the whole case we are of opinion that the case was properly submitted to the jury, that the facts warranted the verdict, that there is no error in the judgment, and that it should be affirmed.

**Affirmed.**

(113 Va. 385)

**SEEFRIED et al. v. CLARKE et al.**  
(Supreme Court of Appeals of Virginia. March 14, 1912.)

**1. PARTITION (§ 17\*)—ACTION—SCOPE OF REMEDY.**

Under Code 1904, § 2562, providing that the court in the exercise of its jurisdiction in

partition may take cognizance of all questions of law affecting the legal title that may arise in any proceeding, as well between tenants in common, joint tenants, and copartners as others, there may be determined, in such a suit, the validity of a deed which must be avoided that there may be a partition, and the invalidity of which is asserted on the ground of mental incapacity of the deceased grantor and that it was in violation of a trust on which he held the legal title.

[Ed. Note.—For other cases, see *Partition*, Cent. Dig. §§ 53-59; Dec. Dig. § 17.\*]

**2. EQUITY (§ 148\*)—MULTIFARIOUSNESS.**

A bill is not multifarious because seeking to avoid a deed on one of two grounds: That the grantor was mentally incompetent, or that the deed was in violation of a trust on which the grantor held the legal title.

[Ed. Note.—For other cases, see *Equity*, Cent. Dig. §§ 341-367; Dec. Dig. § 148.\*]

**3. WILLS (§ 675\*)—PRECATORY TRUSTS.**

A will giving to testatrix's husband all her property, "with one simple request, that the said estate be divided with my children \* \* \* as his better judgment may direct," creates a precatory trust, which, while giving some discretion, is not executed, but breached, by a conveyance of the greater part of the property to one of the children, with no provision for the others.

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. §§ 1587-1589; Dec. Dig. § 675.\*]

**Appeal from Circuit Court, Henrico County.**

Suit by Ida H. Clarke against Florence C. Seefried and others. From the decree, Florence C. Seefried and certain other defendants appeal. **Affirmed.**

John A. Lamb and Jno. B. Minor, for appellants. John B. Gayle, C. R. Sands, and McGuire, Riely & Bryan, for appellees.

**KEITH, P.** Mary Carter, of the county of Henrico, left a will by which she appointed her husband, Thomas J. Carter, her executor, and by the second clause bequeathed to him, "his heirs, administrators, or assigns, all of my estate, real and personal, with one simple request, that the said estate be divided with my children or its equivalents, as his better judgment may direct."

This will was admitted to record, and Thomas J. Carter took possession under it of the entire estate. On the 15th day of April, 1907, he made a deed by which he conveyed to Florence Seefried, one of his daughters, a portion of the real estate which had been devised to him by the will of his wife, and after his death his daughter Mrs. Clarke filed her bill, in which she made all of the other children of Thomas J. Carter, including Florence Seefried, parties defendant, averring that the deed from her father to Florence Seefried was executed at a time when the grantor's mind had become greatly impaired, that he was subject to hallucinations, and that he was totally incapable of making a valid deed or contract of any kind. The bill prays a partition of the real estate of which he died seised, in kind, if such partition may be had, and, if it cannot be done with due regard to the rights of all par-

ties, that it may be sold and the proceeds divided among the parties entitled thereto. There was an amended bill in order to introduce an additional party, and, for the purpose of setting forth as an additional ground of relief, that under the terms of the will of Mary J. Carter a trust in said tract of land was created for the benefit of the plaintiff and her sisters; that the execution of the trust was imposed, by the terms of the will, on Thomas J. Carter, who had no right, power, or authority to dispose of the same in any manner other than that specified in the will, namely, by its division between the children of Mary J. Carter; and that, for these reasons, the deed of April 15, 1907, from Thomas J. Carter to Florence C. Seefried, was a violation of the trust created by the will, and therefore null and void; and that, since Carter not only neglected and refused to perform the trust imposed upon him by said will, but committed an express breach of the same, the complainant and her sisters are entitled to have the trust enforced for their benefit by a court of equity, and the land divided among all the children of Mary J. Carter, the testatrix.

There was a second amended bill, the only object of which was to introduce an additional party.

These bills were demurred to upon several grounds, viz.: (1) Because the court was without jurisdiction to hear the case; (2) because the interpretation placed by the bill upon the will of Mrs. Carter, the mother of Florence Seefried, is not correct; (3) because the plaintiff attempts, by bill in chancery, to try the title to real estate; and (4) because, if the plaintiff has any remedy, it is by an action of ejectment.

[1] The plaintiff and the defendants all deduce their title from the will of Mary J. Carter. The object of the bill is the partition of certain real estate, among those entitled. To the accomplishment of this object it was necessary to remove the deed by which Thomas J. Carter had conveyed the greater portion of the real estate in controversy to his daughter, Florence Seefried. To accomplish this object the bill states two propositions, either one of which, if well founded, is fatal to that deed and to the rights of those claiming under it. The first proposition is that the deed is invalid because the grantor was mentally incapable of executing such a deed; and, secondly, that by force of the trust created by the will of Mary J. Carter her husband and devisee, Thomas J. Carter, had no power to execute such a deed.

It will be observed that the object of the bill is one over which a court of equity has undoubted jurisdiction; that its sole purpose, its sole object, is to secure a partition of real estate among the parties in interest. This right, if the bill be true, may be established, and this point may be reached, by one of two routes, either of which accom-

plishes the result, and, if the allegations of the bill are true (and upon demurrer they are taken to be true), the deed which is the subject of attack is of no effect for both reasons.

Section 2562 of Code 1904 declares that tenants in common, joint tenants, and coparceners shall be compellable to make partition; and in the last clause it is provided that "any court, having general equity jurisdiction of the county or corporation wherein the estate, or any part thereof, is, shall have jurisdiction in cases of partition, and in the exercise of such jurisdiction may take cognizance of all questions of law affecting the legal title that may arise in any proceedings, as well between tenants in common, joint tenants, and coparceners as others." *Davis v. Tebbs*, 81 Va. 800; *Fry v. Payne*, 82 Va. 759, 1 S. E. 197; *Bradley v. Zehmer*, 82 Va. 685; *Pillow v. S. W. V. Imp. Co.*, 92 Va. 144, 23 S. E. 32, 53 Am. St. Rep. 804; *Laurel Creek Coal & Coke Co. v. Browning*, 99 Va. 535, 39 S. E. 156; *Moon v. Highland, etc., Co.*, 104 Va. 551, 52 S. E. 209; *Hagan v. Taylor*, 110 Va. 9, 65 S. E. 487.

With respect to this statute it may be said that the Legislature has manifested a purpose to broaden and extend the jurisdiction of courts in partition suits, and that, whenever a question has arisen in a partition suit which the statute was held to be not broad enough to embrace, the Legislature has promptly met the situation by an amendment, the latest of which is that of 1903. As the act stood before that date, and as it is found in the Acts of 1897-98, at page 488, the language of the last clause was that a court of equity "shall have jurisdiction in cases of partition, and in the exercise of such jurisdiction may take cognizance of all questions of law affecting the legal title that may arise in any proceedings;" but, it having been suggested that this only conferred jurisdiction to pass upon questions arising between tenants in common, joint tenants, and coparceners, the act of 1903 was passed (Acts 1902-3-4, p. 836), which adds, immediately after "proceedings" in the conclusion of the statute, the words "as well between tenants in common, joint tenants, and coparceners as others."

We shall not undertake either an inclusive or an exclusive demarcation of the lines of jurisdiction under this very broad grant of power. We have no doubt that it is sufficient to comprehend the case before us.

[2] The cases upon the subject of multifariousness in bills are very numerous. We shall refer to only a few of them.

In *Snyder v. Grandstaff*, 96 Va. 473, 31 S. E. 647, 70 Am. St. Rep. 863, it is said: "A bill is not rendered multifarious by presenting alternative views, or different aspects of the same facts. There must be distinct collocations of distinct and different facts, each presenting different rights, and calling for different relief, to render a bill multifarious."

In *Hill v. Hill*, 79 Va. 592, it is said that "a bill is usually deemed multifarious for containing different causes of suit against same persons when these two things concur, to wit, the different causes must be wholly distinct, and each cause must be sufficient as stated to sustain a bill"—citing *Huff v. Thrash*, 75 Va. 550. "But there is no general rule applicable to all cases. *Segar v. Parish*, 61 Va. 679. And where the causes, though distinct, are not absolutely independent of each other, and it will be more convenient to dispose of them in one suit, the objection for multifariousness will not prevail."

If the plaintiff in this suit, for instance, had filed a bill asking for partition, making the proper parties, and alleging her right to partition upon the ground that the deed from her father to Florence Seefried was void because the will under which he took the devise had created a trust in favor of all his children, and had filed another bill asking partition of the identical property among the same beneficiaries, and attacking the same deed, because the grantor was mentally incompetent to make a deed, the court, had the matter been called to its attention, would not have allowed the defendants to be harassed and subjected to costs in two suits between the same parties and having the same object in view, but would have required them to be heard together for convenience and economy in the administration of justice.

In *School Board v. Farish*, 92 Va. 160, 23 S. E. 222, it is said that courts, in dealing with the question of multifariousness, "look particularly to convenience in the administration of justice; and, if this is accomplished by the mode of proceeding adopted, the objection of multifariousness will not lie, unless the course pursued is so injurious to one party as to make it inequitable to accomplish the general convenience at his expense. So that, when we look to see if a bill is multifarious, the first question to be determined is, Does the bill propose to reach the end aimed at in a convenient way for all concerned? And, if the mode adopted does accomplish the end of convenience, then the question arises, Is any one hurt by it, or so injured as to make it unjust for the suit to be maintained in that form?"

In *Spooner v. Hilbish*, 92 Va. 333, 23 S. E. 751, the same principle is announced. See *Campbell v. Mackey*, 1 My. & Cr. 603; *Nulton v. Isaacs*, 71 Va. 726; *Almond v. Wilson*, 75 Va. 623.

We think the demurrer to the bill was properly overruled.

[3] Does the will of Mary J. Carter create a trust for the benefit of all of her children?

The clause to be construed reads as follows: "I will and bequeath to my said husband, his heirs, executors, administrators, or assigns, all of my estate, real and personal, with one simple request, that the said estate be divided with my children or its equivalents, as his better judgment may direct."

In the construction of wills the object is to ascertain the meaning of the testator. A will is but the legal declaration of a person's mind, his intent, his wish, his will, as to the disposition of his property after his death. That will may be expressed in terms of command, of recommendation, of entreaty, of request; and if from the language used the court can ascertain the will of the testator, if the suggestion, or the recommendation, or the wish, be certain, and if the beneficiaries of the wish be also certain, the courts will give effect to it.

In this case the testatrix makes what she terms a "simple request, that the said estate be divided with my children or its equivalents, as his better judgment may direct." There is no question here about who are the beneficiaries; there is no question as to what estate the language used operates upon. The word "request" is fit and suitable to express the will of the testatrix, and its force is not diminished, but is rather emphasized, by the use of the word "simple." It means *direct, clear*. Webster. It is as though she had said, "I make this direct request."

Nor do we think that by the use of the terms, "as his better judgment may direct," that the testatrix meant to clothe her husband with an arbitrary discretion with respect to the division of her estate. If in the execution of the duty imposed upon him he had divided the property unequally, the question might well have been raised as to the measure and extent of the discretion reposed in him; but that case is not before us.

The doctrine of precatory trusts is recognized in our decisions, though the subject has not been very frequently considered.

In *Harrison v. Harrison*, 43 Va. 1, 44 Am. Dec. 365, the testator said: "In the utmost confidence in my beloved wife, I leave to her all my worldly goods, to sell or keep for distribution amongst our dear children, as she may think proper. My whole estate, real and personal, are left in fee simple to her, only requesting her to make an equal distribution amongst our heirs; and desiring her to do for some of my faithful servants, whatever she may think will most conduce to their welfare, without regard to the interest of my heirs." It was held that the widow was invested, subject to the payment of testator's debts, with the legal title to the whole estate, real and personal; that she took the beneficial interest in the estate for life; that the children of the marriage took a vested remainder in fee in the estate, to commence in possession at the widow's death, or earlier at her election; and that precatory words in a will are sufficient to create a trust, where the subject and the object are certain. *Roney v. Roney*, 34 Va. 13.

Bispham's Principles of Equity, treating of this subject, at page 85 says: "From the

decisions upon this subject, and from the principles upon which the general law of trusts is based, certain rules may be derived by which the construction of instruments containing precatory expressions is to be governed. The question in all cases is whether a trust was or was not intended to be created, or, in other words, whether the testator designed to leave the application or non-application of the subject-matter of the bequest to the designated object entirely to the discretion of the donee, or whether his meaning was that his language should be deemed imperative, and that such discretion should be excluded. This is usually considered by the best authorities to depend upon three things: First, upon the general terms of the will; secondly, upon the certainty of the subject-matter; and, thirdly, upon certainty of the object."

In the case before us no light is to be derived from the consideration of the context. Without doubt the first clause of the will vests a fee-simple estate in the devisee, but that fact is a very general concomitant of precatory trusts. As we have already seen, the subject-matter and the objects of the trust are beyond cavil and dispute.

Continuing, the same author says: "Precatory expressions ought, prima facie, to be considered as imperative and to exclude discretion; the wish of a testator, no matter how expressed, if expressed clearly, should be regarded as a command. This is the opinion of Lord Redesdale in *Carry v. Carry*, 2 Scho. & Lef. 189, and, although the dicta in some subsequent cases would seem to be in favor of giving a less decided effect to words of recommendation or request, yet it is conceived that the above statement of the rule is justified by the best considered decisions both in England and in this country. It is seldom, indeed, that expressions of this nature are found standing alone, and not strengthened, or qualified, or controlled by the context, but, when they do stand alone, they ought to be considered as imposing an obligation, and not merely as constituting a request which the person to whom it is addressed is at liberty to disregard. The reason is obvious. A will, in its very nature, is the disposition which the testator desires to have made of his estate after his death. All expressions in it indicative of his wish or will are commands." 3 Pom. Eq. Jur. (3d Ed.) 1905.

The subject of precatory trusts was fully considered by the Supreme Court of the United States in *Colton v. Colton*, 127 U. S. 300, 8 Sup. Ct. 1164, 32 L. Ed. 138. A great number of cases of English courts and of state courts were cited by counsel and considered by the court. The testator, by will, gave to his wife all of his estate, real and personal, and then added: "I recommend to her the care and protection of my mother and sister, and request her to make such gift and pro-

vision for them as in her judgment will be best." No one can read that will and the will under consideration without being impressed with the strong likeness between them. There is the gift of the entire estate to his wife, whom he recommends and requests to make such gift and provision for his mother and sister as in her judgment will be best. The language is certainly not more imperative than in the will of Mrs. Carter, and the concluding language of the clauses in each will is equally strong to sustain the argument in favor of an unrestricted discretion. Mr. Justice Matthews, speaking for the court, said: "The entire estate bequeathed to his widow is affected by this request. Is that request equivalent to a command, or is it a mere solicitation, which after his death she may reject and disregard without violating the terms of his will and the conditions upon which she accepted her estate under it? \* \* \* Undoubtedly he gives to her some discretion on the subject; the gift and provision which he requests for his mother and sister is to be such as in her judgment will be best. It is to be such as will be best for them, having regard to all the circumstances, both of their necessities and the amount and sufficiency of the estate; and this proportion, which is to constitute what shall be best, is to be determined by the widow in the exercise of her judgment. It is her judgment that is to be called into exercise, and this excludes caprice, whim, and every merely arbitrary award; but whatever the judgment may be, and whatever discretion is involved in its exercise, it operates only upon the nature, form, character, and amount of the gift and provision intended for them. The fact of a gift and provision is presupposed and stands on its own ground. Her judgment is not invoked as to that. The only ambiguity, in respect to whether there shall be a gift and provision or not, resides in the single word 'request.' Does that mean a wish of the testator which he intended to be fulfilled out of the means which he had furnished to make it effectual; or does it mean a posthumous petition which the testator understood himself as addressing to the favor and good will of his sole legatee?" Discussing this phase of the subject, the court goes on to say: "It is an error to suppose that the word 'request' necessarily imports an option to refuse, and excludes the idea of obedience as a corresponding duty. If a testator requests his executor to pay a given sum to a particular person, the legacy would be complete and recoverable. According to its context and manifest use, an expression of desire or wish will often be equivalent to a positive direction, where that is the evident purpose and meaning of the testator; as where a testator desired that all of his just debts, and those of a firm for which he was not liable, should be paid as soon as con-

venient after his decease, it was construed to operate as a legacy in favor of the creditors of the latter. *Burt v. Herron*, 66 Pa. 400. And, in such a case as the present, it would be but natural for the testator to suppose that a request, which, in its terms, implied no alternative, addressed to his widow and principal legatee, would be understood and obeyed as strictly as though it were couched in the language of direction and command. In such a case, according to the phrase of Lord Loughborough in *Malim v. Kelghley*, 2 Ves. Jr. 333, 529, 'the mode is only civility.'

The court then considers the objection that the trust sought to be established by the will in that case was incapable of being executed by reason of uncertainty as to the form and extent of the provision intended, and because it involved the exercise of discretionary power on the part of the trustee which a court of equity has no rightful authority to control, and quotes with approval from *Lewin on Trusts* (4th Eng. Ed.) §§ 2, 402, 403, where it is said that "it is quite true that where the manner of executing a trust is left to the discretion of trustees, and they are willing to act, and there is no mala fides, the court will not ordinarily control their discretion as to the way in which they exercise the power, so that, if a fund be applicable to the maintenance of children at the discretion of trustees, the court will not take upon itself, in the first instance, to regulate the maintenance, but will leave it to the trustees. But the court will interfere wherever the exercise of the discretion by the trustees is infected with fraud or misbehavior, or they decline to undertake the duty of exercising the discretion, or generally where the discretion is mischievously and erroneously exercised, as if a trustee be authorized to lay out money upon government, or real or personal security, and the trust fund is outstanding upon any hazardous security."

In *Costabadie v. Costabadie*, 6 Hare, 410, Vice Chancellor Wigram, on this subject, said: "If the gift be subject to the discretion of another person, so long as that person exercises a sound and honest discretion, I am not aware of any principle or any authority upon which the court should deprive the party of that discretionary power. Where a proper and honest discretion is exercised, the legatee takes all that the testator gave or intended that he should have; that is, so much as in the honest and reasonable exercise of that discretion he is entitled to. That is the measure of the legacy."

"But it is always for the court eventually to say, when called upon, whether the discretion has been either exercised at all, or exercised honestly, and in good faith." *Colton v. Colton*, supra.

Summing up the whole discussion on the point, the Supreme Court in *Colton v. Col-*

ton, supra, concludes: "If the trustee refuses altogether to exercise the discretion with which he is invested, the trust must not on that account be defeated, unless by its terms it is made dependent upon the will of the trustee himself."

In this case the trustee died, not only without executing the trust, but after committing a breach of the trust by conveying the greater part of the trust estate to one of the beneficiaries, and leaving the others almost wholly unprovided for.

We shall not enter into a discussion of what the testatrix meant by saying that the estate was to be divided "with" her children, and how far that expression differs from a trust to be divided by the trustee "among" his children. The husband is dead intestate. If he had divided the estate ~~with~~ his children and died intestate, his share would have been divisible among all his children. If, as we have before said, he had undertaken to execute the trust by an unequal division among his children, a somewhat different case would have been presented; but, upon the facts of the case in judgment, we are of opinion that a trust was created by the will of Mary J. Carter for the equal benefit of all her children, and, as the decree of the circuit court appealed from reaches that conclusion, we are of opinion that it should be affirmed.

Affirmed.

(113 Va. 337)

REAL ESTATE TRUST & INS. CO., Inc.,  
et al. v. GWYN.

(Supreme Court of Appeals of Virginia.  
March 14, 1912.)

1. CARRIERS (§ 340\*)—ELEVATORS—NEGLIGENCE—LAST CLEAR CHANCE.

Where one attempting to leave a descending elevator which failed to stop was struck on the head by the top of the car and almost instantly thereafter caught between it and the floor sill and killed, the doctrine of the last clear chance had no application.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. § 1354; Dec. Dig. § 340.\*]

2. CARRIERS (§ 321\*)—ELEVATORS—ACTION FOR CAUSING DEATH—INSTRUCTION—WORDS AND PHRASES—"ERROR IN EXTREMIS."

In an action to recover for the death of one killed by being caught between the top of a descending elevator and a floor sill, where there was evidence that the decedent put one foot through the partly opened elevator door and upon the floor sill without the elevator being stopped, there was no warrant for an instruction upon the doctrine of "error in extremis" which presupposes that the party who invokes it is himself free from fault in creating the emergency.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 1247, 1326-1337, 1343; Dec. Dig. § 321.\*]

Error to Law and Chancery Court of City of Norfolk.

Action by Helen C. Gwyn, administratrix, against the Real Estate Trust & Insurance Company, Incorporated, and others. From



a judgment for plaintiff, defendants bring error. Reversed and remanded for new trial.

The following instructions were given for plaintiff:

"(1) If the jury believe from the evidence that Walter B. Gwyn while a passenger on the elevator in question and in the exercise of reasonable care on his part was killed by reason of the negligence of the employé who was running the elevator, as charged in the declaration, then they must find for the plaintiff against such of the defendants as they may believe from the evidence were engaged as lessees in the actual operation of the building and the elevator in question.

"(2) If the jury believe from the evidence that the elevator in question after it had stopped at the third floor of the Dickson building, and while its switch handle was in the stop position, began to descend without any action on the part of the elevator boy, they are instructed that such an occurrence raised a prima facie presumption of negligence on the part of such of the defendants as were engaged as lessees in the actual operation of the building and elevator.

"(3) The court instructs the jury that such of the defendants as they may believe from the evidence were engaged as lessees in the actual operation of the building and elevator in question owed the duty to Walter B. Gwyn to exercise reasonable care to prevent injuring him by defects or faults in said elevator, its appurtenances, or the manner of its operation, and if the jury believe from the evidence that by reason of the breach of said duty said Walter B. Gwyn was killed as averred in the declaration, they should find for the plaintiff against those defendants; unless the jury should believe from the evidence that Walter B. Gwyn was himself guilty of negligence which contributed to his death.

"(4) The court instructs the jury that, so far as the defense of contributory negligence is concerned, the burden of proving such contributory negligence rests upon the defendants, unless such contributory negligence was disclosed by the plaintiff's evidence or could be fairly inferred from the circumstances.

"(5) Even if the jury should believe from the evidence that Walter B. Gwyn was himself guilty of negligence in attempting to leave the elevator, such negligence on his part will not bar the plaintiff in this suit, if the jury believe from the evidence that after such negligence of Walter B. Gwyn such of the defendants as they may believe from the evidence were engaged as lessees in the actual operation of the elevator, through their servants or employés, by the exercise of reasonable care, could have saved his life.

"(6) If the jury find for the plaintiff, they may award such damages as to them may from the evidence seem fair and just, not exceeding \$10,000, and they may direct in what proportion the damages shall be distributed to the widow and children of Walter B. Gwyn, deceased.

"(7) If the jury find that the plaintiff is entitled to recover, they may find against those defendants who were, at the time of the accident, the lessees of the Dickson building and engaged in the actual operation of the said building by themselves or through their agents."

The following instructions were refused to defendants:

"(1) The court instructs the jury to find a verdict in favor of the defendants R. A. Wainwright and Charles McI. Tunstall, no evidence of any negligence on their part having been introduced.

"(2) The court instructs the jury to find a verdict for the defendants the Real Estate Trust & Insurance Company, Incorporated, Robert A. Wainwright, and Charles McI. Tunstall, no evidence of any negligence on their part having been introduced.

"(3) The court instructs the jury that if they believe from the evidence that up to the time when the plaintiff's intestate attempted to leave the elevator there had been no negligence in the operation or maintenance of the elevator in question, and that when the elevator boy saw that the said deceased in attempting to leave the same would be caught and greatly injured, and that in consequence of the excitement of the moment he adopted measures which were injudicious in the result or failed to adopt measures which might have been more effective in preventing the accident, they are instructed that such action of his under the circumstances would not constitute negligence.

"(4) The court instructs the jury that, if they believe from the evidence that when the plaintiff's intestate started to leave the elevator the car was in motion and by so doing was killed, he was guilty of contributory negligence, and the plaintiff cannot recover in this action, and the jury must find for the defendant, even though they may believe that the defendant was guilty of negligence.

"(5) The court instructs the jury that if the plaintiff's intestate attempted to leave the elevator when the door had been only partially opened, and while the elevator was moving and by so doing he was killed, he was guilty of contributory negligence, and the plaintiff is not entitled to recover in this action, and the jury must find for the defendants, even though they may believe that the defendants were guilty of negligence.

"(6) The court further instructs the jury that it was negligence on the part of the

plaintiff's intestate for him to attempt to leave the elevator while the same was in motion, or when the door had been only partially opened, and if he did either, whereby he was killed, he was guilty of contributory negligence, and the jury must find for the defendants, even though they may believe that the defendants were guilty of negligence."

The following instructions, requested by defendants, were given:

"(A) The jury is instructed that the owner of the premises, who operates therein an elevator for the accommodation of the tenants of such premises and others having business therein, is bound only to the exercise of ordinary care to provide reasonably safe equipment and operation, and, if they believe from the evidence that the defendants in this case exercised such care in the equipment and operation of the elevator in question, they will find for the defendants."

"(B) The court instructs the jury that if they believe from the evidence that the Courtney Realty Corporation was, at the time of the accident which resulted in Mr. Gwyn's death, the lessee, of record, of the Dickson building, and that as lessee of the building it assumed control of it, and at the time of the above accident was actually operating the building in pursuance of the assignment of the lease from R. A. Wainwright, Charles McI. Tunstall, and the Real Estate Trust & Insurance Company, Incorporated, to the Courtney Realty Corporation, and that the Real Estate Trust & Insurance Company was only employed and empowered to collect the rents of the building as a regular rental agent, and Wainwright and Tunstall did not control or conduct the building and elevator, then they, the jury, must find for the Real Estate Trust & Insurance Company, Incorporated, and R. A. Wainwright and Charles McI. Tunstall, although they may believe that the same parties are interested in both corporations, and that the same identical interests control both corporations."

The following instructions, requested by defendants were only given as modified, parts omitted by the court being in brackets, and additions by the court being in italics:

"(C) The court instructs the jury that if they believe from the evidence that while the plaintiff's intestate was being carried in the elevator of the Courtney Realty Corporation, in the Dickson building, he signaled the boy in charge to lower the same to the third floor, and while the elevator was being lowered, and before it had stopped, he attempted to step from the elevator while it was in motion, and while attempting to pass out was caught by the frame of the descending elevator and killed, he was guilty of such contributory negligence as will prevent a recovery in this case, and they must find for the defendants, even though they may fur-

ther believe that said defendants were also guilty of negligence, *unless the jury believe from the evidence that, after the plaintiff's intestate started to leave the car while in motion (if they believe he did so), the defendants by the exercise of ordinary care could have prevented his death.*

"(D) The court instructs the jury that if they believe from the evidence that while the plaintiff's intestate was being carried in the elevator of the Dickson building he signaled the boy in charge to lower the same to the third floor, and, while the elevator was being lowered and before it had been stopped and the door [entirely] opened, he attempted to step from the elevator, and while attempting to pass out through the partially opened door was caught by the frame of the descending elevator and killed, he was guilty of such contributory negligence as will prevent a recovery in this case, and they must find for the defendants, even though they may further believe that said defendants were guilty of negligence, *unless they further believe from the evidence that after the plaintiff's intestate started to leave the elevator car while in motion (if they believe he did so) the defendants by the exercise of ordinary care could have prevented his injury.*

"(E) The court instructs the jury that if they believe from the evidence that the deceased was guilty of contributory negligence, and further believe that the negligence of the deceased contributed proximately to his death, then they must find for the defendants. It is not necessary that his negligence should have caused his death in order to defeat this action, but only necessary that it should have proximately contributed towards it. The burden of proving contributory negligence is upon the defendants, unless the same may be inferred from the evidence of the plaintiff, or all the facts and circumstances of the case. *And such contributory negligence would defeat recovery, unless the jury believe from the evidence that after the plaintiff's intestate started to leave the elevator car while in motion (if they believe he did so) the defendants by the exercise of ordinary care could have prevented the injury.*

"(F) You are instructed that the burden of proving the defendant guilty of negligence is on the plaintiff, unless such negligence appears from other evidence in the case; that such negligence must be proved by affirmative evidence, which must show more than a probability of a negligent act; that a verdict cannot be found on mere conjecture, and there must be affirmative and preponderating proof that the injury to the plaintiff's intestate was solely and proximately caused by some negligence of defendants for which they are legally liable. The mere occurrence of an accident raises no presumption of negligence, *unless the accident occurred as set out in instruction No. 2."*

Hughes & Little and Armistead C. Gordon, for plaintiffs in error. Willcox, Cooke & Willcox, Johnston & Tunstall, and Jas. G. Martin, for defendant in error.

WHITTLE, J. This action was brought by Walter B. Gwyn's administratrix against the plaintiffs in error, the Real Estate Trust & Insurance Company, Incorporated, Robert A. Wainwright, Charles McIntosh Tunstall, and the Courtney Realty Corporation, to recover damages for the death of decedent, which was ascribed to the wrongful act of the defendants. To a judgment for the plaintiff for \$10,000, this writ of error was granted.

Gwyn was a lawyer and real estate broker in the city of Norfolk, having an office on the third floor of the Dickson building. On the morning of March 3, 1911, he entered the car of an electric motor-power elevator, in use in the building, on the bottom floor to be carried to the third floor. While attempting to leave the car at the third floor, the elevator descended below the level of the floor, and the hood or top of the car struck him on the head, and, the elevator continuing its downward course, he was caught between the hood and the sill of the floor and killed.

There are two essentially different theories propounded by the evidence as to the manner in which the accident happened. On behalf of the plaintiff, there was evidence tending to show, either that the car was stopped originally in correct position for the egress of passengers when it reached the third floor, or, having been carried past that floor, on the call of "third" by Mr. Gwyn, it descended to the third floor and stopped; that the door was opened to permit him to pass through, and as he was in the act of going out, with one foot in the elevator and one on the third floor, the car slipped, and he was struck on the head by the top or hood of the car, and, the elevator continuing to descend, was caught between the top and the floor and killed. It will be observed that this hypothesis imputes no blame whatever to the deceased, but shows that he was the victim of the alleged negligent operation of the car by the elevator boy.

It was also proved that the spring in the lever box had been broken and removed. That was an auxiliary contrivance which operated automatically, and was intended to carry the switch handle to the stop position and stop the elevator. There was, however, evidence to the effect that the absence of the spring did not interfere with the control of the elevator, and that it had been removed three or four months prior to the accident. Some expert witnesses expressed the opinion that the elevator could be operated with greater safety without the spring than with it; that the spring was liable to create a short circuit and cause the car to

slip; so that the user or nonuser of the spring was a matter of business judgment and expediency within the competency of those charged with the management of that department.

In *Arminius Chemical Company v. White's Adm'x*, 112 Va. —, 71 S. E. 687, the skips in a vertical mining shaft were controlled both by hand brakes and air; and it was held that, in an emergency, the company was not liable for the action of the operator in exercising the right of selection between the two appliances, either of which was shown to be reasonably safe.

The competing theory of the accident, presented by the evidence of the defendants, is that the ascending car had passed the third floor and was approaching the fourth floor, when a passenger said "fourth," whereupon Mr. Gwyn called "third," and the elevator boy reversed his lever and started down; that, before they gained the level of the third floor, the boy reached down and with his right hand swung the door partially open; that "the elevator never stopped moving at all," and, while thus slowly descending, Mr. Gwyn put his left foot out on the sill of the floor, and was holding to the sides of the door when the elevator passed from beneath his right foot, leaving him thus suspended, and while in that position he was struck on the head by the top of the descending car and caught between it and the floor sill and killed.

The plaintiffs in error assign as error the action of the court in giving, refusing, and modifying instructions.

[1] In the light of several recent decisions of this court, we are of opinion that the doctrine of "the last clear chance" (the incorporation of which in a number of the instructions given and amended by the court is made ground of exception) is inapplicable under any view of the evidence in this case. That doctrine is, of course, predicated upon the defendants' theory that Gwyn was guilty of contributory negligence. According to that theory, the contributory negligence of the deceased commenced when he undertook to step off of an elevator while in motion, and through a partially opened door. It is true the car had to descend a distance of approximately five or six feet before he was actually caught between the top of the car and the sill of the floor; but it is also true that the car only had to travel about one foot before he was struck on the back of the head, and the top of the car remained in contact with his head until he was borne down and killed as described by the witnesses. The catastrophe was continuous and practically instantaneous, covering only a few feet in point of distance and a few seconds in point of time. The doctrine of "the last clear chance" presupposes an appreciable difference in time between the earlier negligence of the defendant and the later negli-

gence of the plaintiff. Moreover, it must appear that in contemplation of the entire situation, after the danger of the plaintiff became known to the defendant, or ought to have been discovered by him by the exercise of ordinary care, he negligently failed to do something which he had a *clear chance* to do to avoid the accident. But the doctrine can have no application to a case where the negligence of both plaintiff and defendant is simultaneous and concurrent. *Richmond Traction Co. v. Martin*, 102 Va. 209, 45 S. E. 886; *Consumers' Brewing Co. v. Doyle*, 102 Va. 399, 46 S. E. 390; *Southern Ry. Co. v. Bailey*, 110 Va. 833, 67 S. E. 365, 27 L. R. A. (N. S.) 379; *Roanoke Railway & Elec. Co. v. Carroll*, 112 Va. —, 72 S. E. 125.

[2] Nor does the evidence warrant the application of the doctrine of "error in extremis," which presupposes that the party who invokes it was himself free from fault in creating the emergency.

In the other aspect of the case, we discover no sufficient evidence upon which to predicate liability so far as the defendants Robert A. Wainwright and Charles McIntosh Tunstall are personally concerned. But, under the evidence, the question of the liability of the Real Estate Trust & Insurance Company, Incorporated, and of the Courtney Realty Corporation was properly submitted to the jury upon correct instructions.

For the errors indicated, the judgment must be reversed and the case remanded for a new trial.

Reversed.

(112 Va. 427)

#### WHITE v. HALL et al.†

(Supreme Court of Appeals of Virginia.  
March 14, 1912.)

#### 1. EVIDENCE (§ 385\*)—PAROL EVIDENCE—ADMISSIBILITY.

Parol evidence is inadmissible to vary a written instrument.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1757, 1758; Dec. Dig. § 385.\*]

#### 2. REFORMATION OF INSTRUMENTS (§ 16\*)—GROUNDS.

An instrument, signed by a party without fraud or mistake, and with an understanding of the language and purport of the instrument, cannot be reformed because of a contemporaneous oral promise which has not been kept.

[Ed. Note.—For other cases, see Reformation of Instruments, Cent. Dig. § 68; Dec. Dig. § 16.\*]

#### 3. TRUSTS (§§ 239, 308, 311\*)—OBLIGATION OF TRUSTEE—ACCOUNT.

Land was conveyed to a trustee for the use of a beneficiary. Each contributed a half of the partial payment made, and the balance of the price was paid by the trustee individually. The purchase was made in contemplation of the formation of a corporation of which the parties became stockholders and officers. The corporation, with the knowledge of the beneficiary, took timber from the premises, and during the life of the corporation the beneficiary drew on it for support of himself and family. A third person loaned money to the

corporation, secured by a conveyance of the land executed by the trustee and the beneficiary, the whole of which was paid off by the trustee; the lender reconveying to the trustee. The corporation subsequently became indebted to another creditor, and the trustee and his wife conveyed the land to such creditor. The beneficiary never offered to pay any part of the deferred installments of purchase money; nor did he assert any claim against the trustee for rents and profits, or for timber cut by the corporation. *Held*, that the trustee must render an account and be charged with the receipts from the sale of timber, and with rents and profits, and credited with a half of the cash payment of the partial payment and with the amount of the deferred installments of the purchase price, the amount expended for improvements, and half the amount advanced to pay off the discharged deed of trust.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 408, 428, 430; Dec. Dig. §§ 239, 308, 311.\*]

#### 4. TRUSTS (§ 184\*)—MANAGEMENT OF TRUST ESTATE—PERMANENT IMPROVEMENTS MADE BY TRUSTEE.

A trustee invested with the control of property, and not expressly or impliedly prohibited from incurring expenses for improvements, may make improvements and, on a settlement of his account, receive credit therefor.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 238; Dec. Dig. § 184.\*]

Appeal from Circuit Court, Buckingham County.

Suit by W. E. Hall against H. M. White and others. From a decree granting relief, defendant named appeals. Reversed and remanded.

A. L. Holladay and A. B. Dickinson, for appellant. F. C. Moon, for appellees.

WHITTLE, J. In April, 1902, the appellee, W. E. Hall, filed a bill in equity in the circuit court of Buckingham county against the appellant, H. M. White, in which he asserted the sole beneficial ownership in 438 acres of land situated in that county, the legal title to which was held in the name of H. M. White, trustee for W. E. Hall; that the trustee had managed the land for the plaintiff for a number of years, and was indebted to him for moneys received from the sales of timber cut from the land and for crops grown thereon and rents and profits derived therefrom. The bill prayed that White be required to deliver possession of the land to the plaintiff, and to render an account as trustee.

Subsequently an amended bill was presented, containing other allegations and impleading additional defendants. Answers were filed to both bills, interlocutory decrees were entered, accounts ordered, and voluminous depositions taken.

The litigation culminated in the decree appealed from, which was pronounced by the circuit court at its November term, 1910. The essential features of that decree may be summarized as follows: (a) That by deed of August 12, 1892, James L. Anderson and

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes  
† Rehearing denied.

wife conveyed the land in controversy to H. M. White, trustee for W. E. Hall, who thereby became the sole equitable owner in fee simple; and that White was not entitled to the land, or to any interest therein, by way of resulting trust or otherwise. (b) That the deed of September 27, 1897, from T. C. Leake, Jr., & Co. to H. M. White invested him with no individual estate in the land, and was only intended to operate as a release of the deed of October 24, 1894, from H. M. White, trustee for W. E. Hall, and W. E. Hall to T. C. Leake, Jr., & Co., which, though absolute on its face, was in fact a mortgage to secure a loan of \$1,000 from the firm to H. M. White, and that H. M. White was not entitled to a lien on the land for any payments alleged to have been made by him on account of the purchase money. (c) That H. M. White was not entitled to any allowance for permanent improvements put upon the land, or for taxes or insurance paid thereon by him, except to the extent to which he had already been compensated from the rents and profits. (d) That W. R. Silvey was not entitled, nor his administratrix, to any allowance for improvements put upon the land by him, but was chargeable with rents and profits since the land was turned over to him on May 31, 1903, down to and including the year 1908; also with the value of all timber, ties, etc., cut from the land and sold by him, to be applied as credits on his debt of \$1,500 established by the decree. It was therefore decreed that Emily E. Hall, daughter and sole heir of W. E. Hall, who had died pending the litigation, was the equitable owner of the land, subject only to the widow's dower, and to the Silvey debt of \$1,500, reduced by sundry items of credit, to which reference was made, to \$1,096.98, with interest from January 1, 1908. (e) That by reason of the deed of September 27, 1897, from T. C. Leake, Jr., & Co. to H. M. White, and the conveyance, or mortgage, of January 1, 1898, from H. M. White and wife to Silvey, W. E. Hall had suffered loss to the extent of \$1,500, with interest. Therefore a personal decree was rendered in favor of W. E. Hall's administrator against H. M. White for the amount of the Silvey debt and interest. (f) Possession of the land was decreed to Emily E. Hall, the widow consenting to a commutation of her dower. (g) The land was decreed to be sold and the proceeds charged with the commuted dower of the widow and the Silvey debt. (h) The sheriff was directed to withdraw \$101.87, with interest (rents collected from the land and deposited in bank to the credit of the suit), and also to collect unpaid rents for the year 1910, and, after paying the unpaid costs of the suit, to pay the residue to the attorney for the plaintiffs. (j) And, finally, costs were decreed against H. M. White. From that decree, White alone appealed.

[1] We are of opinion, with respect to the initial matter in controversy, namely, the ownership of the land, that the letter of the deed from James L. Anderson and wife to H. M. White, trustee for W. E. Hall, must prevail, upon the settled general principle that parol evidence will not be received to vary or alter the terms of a written instrument. *Towner v. Lucas*, 54 Va. 705; *Catt v. Oliver*, 98 Va. 580, 38 S. E. 980. The deed, which was written by an attorney by the direction and in the presence of H. M. White and W. E. Hall, recites that, in consideration of \$2,200, of which sum \$734 was paid in cash, and \$1,466, the residue of the purchase money, was payable at one and two years, in equal installments bearing interest from June 1, 1892, secured by a contemporaneous trust deed upon the land, the grantors convey the same to H. M. White, trustee, "for the sole use and benefit of W. E. Hall," with absolute power of sale in the trustee and beneficiary acting jointly.

[2] No grounds are suggested for the reformation of the deed, and the rule is that, "where there is no fraud or mistake in the preparation of an instrument, and it appears that the party signing understood its language and purport, it cannot be reformed on the faith of a contemporaneous oral promise which was not kept." 34 Cyc. 922, and notes.

[3] We are furthermore of opinion that the evidence establishes the following material facts: (1) That H. M. White and W. E. Hall, each with his own means, contributed one-half of the cash payment on the land; (2) that the deferred installments of purchase money, aggregating \$1,466, principal, with interest from June 1, 1892, were paid by H. M. White individually; (3) that at the date of the purchase of the land the organization of the White-Hall Company was in contemplation of the parties, and it was chartered in December, 1892; that the company, in addition to its preferred stock, issued 25 shares of common stock, of the par value of \$100 per share; that W. E. Hall became vice president and owned 5 shares of the common stock; that H. M. White was general manager and secretary and treasurer, and owned originally 5 shares of the common stock, but subsequently acquired a majority of the stock by purchase from other stockholders. The company was chiefly a lumber corporation, but also engaged in the mercantile and grocery business. It continued in operation until the year 1903, when it failed. (4) During the life of the company, W. E. Hall drew largely upon it for supplies for the support of himself and family; and in that way ran up an account of over \$3,000. (5) At the date of the purchase, the land in dispute was chiefly valuable for its timber, and shortly after the incorporation of the White-Hall Company, with the knowledge and acquiescence of W. E. Hall, that company was permitted to take timber, ties, and bark from the land for its

own purposes. The principal part of this cutting was done during the years, 1893, 1894, and 1895. (6) On October 24, 1894, T. C. Leake, Jr., & Co., loaned, for the use of the White-Hall Company, \$1,000, to secure which H. M. White, trustee, and W. E. Hall conveyed the land to that firm by deed of bargain and sale. H. M. White and W. E. Hall were equally responsible for this loan; but the whole amount was paid by H. M. White, and on September 27, 1897, the firm, by deed reciting a consideration of \$50, conveyed the land to him. The true consideration, however, was the return of the \$1,000 borrowed, with interest. (7) The White-Hall Company was indebted to W. R. Silvey in a large amount, and on October 8, 1901, H. M. White and wife conveyed the land to Silvey; the deed reciting a consideration of \$1,000. (8) From the date of the purchase of the land from James L. Anderson, on August 12, 1892, until the commencement of this litigation in 1902, W. E. Hall neither paid nor offered to pay any part of the deferred installments of purchase money; nor did he assert any claim against White, either with respect to the land or the rents and profits, or for timber, ties, and bark cut therefrom by the White-Hall Company, or demand of White an accounting as trustee or otherwise. (9) The land cost James L. Anderson \$1 per acre, and he sold it in 1892 for \$5 per acre. As remarked, it was originally chiefly valuable for the timber. After the bulk of that had been cut, with the tacit consent of W. E. Hall, the land was lying out in an uncultivated condition, unfenced and unimproved, with the exception of two dilapidated and abandoned negro cabins, and was wholly unproductive for agricultural purposes. In these circumstances, H. M. White took possession of the land and, by intelligent management and industry and the expenditure of large sums of money in labor and fertilizers, gradually, from year to year, transformed this wild land into a well-equipped, profitable farm. In addition to that, he expended \$200 in fencing, and erected outhouses and dwelling houses at a cost of over \$2,000. By these means, this property, which was of trifling value, is now estimated to be worth over \$6,000.

For years these transactions were conducted by H. M. White with full knowledge on the part of W. E. Hall, who made no remonstrance, offered no suggestion or assistance, either in money, labor, or otherwise, and asserted absolutely no claim to the farm or its issues until the institution of this suit in 1902. Then for the first time, by advice of counsel, upon an initial expenditure of one-half of the cash payment (\$367), he demanded the entire estate, in its improved condition, and an accounting by his trustee for rents and profits and for the value of timber cut from the land.

We are of opinion that an account should

be stated between H. M. White, trustee, and the estate of his cestui que trust, W. E. Hall, in which settlement the trustee should be allowed credits, as follows: By one-half of the cash payment of the purchase money of the land, \$367, with interest from August 12, 1892; by amount of the deferred installments of the purchase money, \$1,466, with interest from June 1, 1892; by amount expended for fencing, \$200, with interest from January 9, 1899; by amount for permanent improvements, \$2,029.02, with interest from June 1, 1898 (average date); and by one-half of the \$1,000 loan paid T. C. Leake, Jr., & Co., \$500, with interest from January 31, 1895.

On the other hand, the trustee should be charged with the following amounts: With receipts from the sale of lumber, ties, and bark, \$325, with interest from June 1, 1898; with estimated rents and profits of the land, \$1,200, with interest from average date of receipt; and with the W. R. Silvey debt, \$1,500, with interest from January 1, 1898.

[4] With respect to the allowance to the trustee of the amount expended in permanent improvements, the general doctrine is stated by Judge Freeman, in a note to *Johnson v. Leman*, 131 Ill. 609, 23 N. E. 435, 7 L. R. A. 656, 19 Am. St. Rep. 71, as follows: "In addition to what has already been incidentally said, it may be stated as a well-established doctrine, universally applied, that a trustee has a right to make advances or necessary repairs or improvements for the benefit of the trust estate, against which he has a lien for reimbursement for such advances, or costs and expenses, which he may enforce before he can be compelled to surrender the estate, unless prohibited, either expressly or by necessary implication, from incurring such expenses by the terms of the instrument creating the trust. \* \* \* Trustees invested with general powers of control and management are not bound to strict limitations. They are justified in making ordinary repairs and improvements, and insuring the property, and are allowed to hold the estate until reimbursed; nor does the right of reimbursement depend upon the knowledge or consent of the cestui que trust."

So, in 2 Pom. Eq. Jur. § 1085, the learned author says it is the law, both in England and in this country, that a trustee will be allowed "all payments expressly authorized by the instrument of trust, all reasonable expenses in carrying out the directions of the trust, and, in the absence of any such directions, all expenses reasonably necessary for the security, protection, and preservation of the trust property, or for the prevention of a failure of the trust. \* \* \* Where a trustee properly advances money for any of the above-mentioned objects, so that he is entitled to reimbursement, he also has a lien as security for the claim, either upon the corpus of the trust property or upon the

income," according as the advancement is for the benefit of the life tenant, or for both the life tenant and remainderman. Hill on Trustees, 647, and notes; 2 Perry, Trusts (6th Ed.) § 913, and notes; 28 Am. & Eng. Ency. of Law (2d Ed.) 1029, 1030, and notes; Shirkey v. Kirby, 110 Va. 455, 66 S. E. 40, 135 Am. St. Rep. 949.

The \$101.87, referred to in paragraph (h) of the decree, should be applied to the payment of costs.

The land must be sold to meet the liens and charges established thereon by this decision, including the commuted dower of the widow of W. E. Hall in the surplus of the purchase money after deducting the amount of payments made by H. M. White on the original purchase, with interest, which amounts constitute a paramount charge to the dower right of the widow in the land. If there should be a balance of purchase money after satisfying the enumerated demands upon the same, with costs of suit, such balance shall be decreed to Emily E. Hall.

Upon these considerations, it follows that the decree of the circuit court must be reversed, and the case remanded for further proceedings to be had therein, not in conflict with the views expressed in this opinion.

Reversed.

(113 Va. 239)

DOUGLAS LAND CO. v. T. W. THAYER CO.  
(Supreme Court of Appeals of Virginia. March 14, 1912.)

# 1. JUDGMENT (§ 743\*)—ESTOPPEL.

A judgment for plaintiff in trespass *quare clausum fregit* by cutting timber, in which the title of both parties to the land was put in issue under a plea of not guilty, could be set up in the amended bill in an injunction suit brought by plaintiff, pending the trespass action, to restrain subsequent trespasses, as conclusively estopping defendant from asserting title in that suit; the titles of the parties remaining the same when the two actions were brought.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1253, 1275-1277; Dec. Dig. § 743.\*]

# 2. TRESPASS (§ 43\*)—TRESPASS TO LAND—GENERAL ISSUE.

Under the general issue of not guilty in trespass *quare clausum fregit*, evidence of title is admissible.

[Ed. Note.—For other cases, see Trespass, Cent. Dig. §§ 102-111; Dec. Dig. § 43.\*]

# 3. COSTS (§ 230\*)—ON APPEAL.

A reversal in part, for error in holding that a judgment for plaintiff in trespass *quare clausum fregit* for cutting timber in which title was in issue was conclusive on the question of title for all purposes in an injunction suit brought by plaintiff pending the trespass action, when it was only conclusive for the purposes of the injunction suit, made defendant a substantially prevailing party on appeal entitling him to costs.

[Ed. Note.—For other cases, see Costs, Cent. Dig. §§ 869-876; Dec. Dig. § 230.\*]

Appeal from Corporation Court of Bristol. Suit by the T. W. Thayer Company against the Douglas Land Company. From a decree for plaintiff, defendant appeals. Reversed in part, and affirmed in part.

See, also, 107 Va. 292, 58 S. E. 1101.

Page, Fulkerson & Widener, J. C. Padgett, and J. I. Hurt, for appellant. White & Penn, for appellee.

PER CURIAM. The appellee brought an action of trespass *quare clausum fregit* against the appellant, and pending that action, the defendant continuing its alleged trespasses by cutting timber from the land in dispute, the plaintiff sued out an injunction. In the action of trespass the defendant pleaded the general issue; but it affirmatively appears that the titles of both parties were distinctly put in issue, and that the only litigated question in the case was the title to the land upon which the alleged trespass was committed. There was a verdict and judgment for the plaintiff for the value of the timber cut before action at law was brought.

[1] Nothing was done in the chancery cause pending the trial of the action at law except the filing of the answer of the defendant. The pleadings in that cause again put in issue the respective titles of the parties. After verdict and judgment in the action at law, an amended and supplemental bill was filed in the chancery cause, in which the record in the action at law, including the judgment, was exhibited and relied on by the plaintiff as matter of estoppel. The chancery court held that, the title to the land having been put in issue and decided against the defendant, it was estopped by the judgment in the action of trespass from further asserting title to the land in dispute, and a commissioner in chancery was directed to inquire and report the value of the timber cut from the land pending the action of trespass. From that decree this appeal was taken.

The court is of opinion that the proceeding in chancery, invoked originally for injunctive relief to prevent the further cutting of timber pending the action of trespass, was a substituted remedy for a second action of trespass for the recovery of the value of the timber thus cut.

The court is further of opinion that, it clearly appearing from the record in the action at law that the only question litigated in that action was the title to the land upon which the timber was cut, and that at the time of the second cutting the rights of the parties were identical with their rights at the time of the first cutting, no new title having been acquired by the defendant between the first and second cuttings of timber, the judgment in the action of trespass was

conclusive of the question of the title to the land, so far as the plaintiff's right was concerned, to recover the value of or damages for the timber cut pending the action at law and claimed in the chancery cause. And this is true although no plea of *liberum tenementum*, and only the plea of not guilty, was filed in the cause.

[2] For, as said by Mr. Minor: "The general issue of 'not guilty' in trespass amounts plainly in its terms to a denial of the trespasses alleged, and no more. But, it will be observed, that such denial, in case of trespass on land or on chattels, may logically involve as well the title, or at least the right of the plaintiff to the possession of the property, as the fact of defendant's committing the acts complained of." 4 Minor's Inst. (3d Ed.) p. 776; Andrews' Stephens' Pl. 281, 282; Stephens' Pl. (Tyler's Ed.) 174; 1 Chit. Pl. (5th Am. Ed.) 437; 2 Tucker's Com. 193.

In such an action, under the general issue, evidence of the title of the parties was plainly admissible. *Callison v. Hedrick*, 56 Va. 244, 248, and cases cited.

In accordance with this principle, Judge Freeman, in 1 Freeman on Judgments, § 311, pp. 561, 562, says: While "the title cannot in some states be regarded as in issue except upon a special plea of soil or freehold, or some other equivalent pleading, but when such plea is interposed, or when without special plea the rules of practice in the state permit the title to be received in evidence and to be considered by the court or jury," (as is the case in this state), "and it is in fact received, considered, and made the basis of a verdict and judgment, then that is as conclusively settled as if it had been drawn in question and decided in some other action." See, also, authorities cited.

And in section 310 the same author says: "It seems to be generally, if not universally, conceded that where one has maintained trespass *quare clausum fregit* against another, and afterward sues for a subsequent trespass, the former recovery is conclusive with reference to the title set up to the premises at the time of such recovery, and the defendant can offer in evidence no title not acquired by him since the previous suit."

Mr. Black, in his work on Judgments (section 657), says: "The trial of an action of trespass may turn upon the question of title, and if either of the parties puts his title in issue and it is tried and passed upon, the verdict and judgment in that suit will be conclusive evidence in favor of (or against) such title, at least in a subsequent action of trespass."

Whether or not, if this were an action of ejectment for the recovery of the land upon which the timber was cut, the judgment in the action of trespass would be conclusive of the title between the parties, it is unnecessary to consider in this case as we view

it, and we therefore express no opinion upon that question. But to hold, upon the facts disclosed by this record, that the appellee, before it can recover the value of or damages for the timber cut pending the action of trespass, in the chancery cause, must go through another trial and litigate again the title to the land, because the plea in the action at law was "not guilty," instead of "*liberum tenementum*," would be clearly sacrificing, as it seems to us, substance to form, since everything that could be proved under the latter plea could be proved, and was in fact proved, under the former, and the question of title as fully and fairly investigated, and the minds of the court and jury brought to bear upon it as completely, as if the plea of *liberum tenementum* had been filed.

[3] It follows from what has been said that the court is of opinion that the decree appealed from is without error, in so far as it holds that the judgment in the action of trespass is conclusive of the title to the lands so far as the recovery of the value of or damages for the timber cut pending that action is concerned; but that the court erred in going further and holding that the judgment at law was conclusive of the title to the land for purposes other than those involved in this (the injunction) case. To that extent the decree appealed from must be reversed, and in other respects affirmed, with costs to the appellant as the party substantially prevailing, since its appeal was necessary to obtain relief from that error in the decree.

Reversed in part and affirmed in part.

KEITH, P., and CARDWELL, J. (concurring in the result). The T. W. Thayer Company, on October 17, 1905, presented its original bill for an injunction to the judge of the circuit court of Washington county, who declined to act; whereupon, on the 18th day of October, 1905, said bill was presented to the judge of the corporation court of the city of Bristol, who granted the injunction.

The bill alleged that the complainant was the owner of certain lands described in the bill, and in the possession thereof, and that there was another claim of title asserted by the defendant, the Douglas Land Company, to said lands; that W. W. Hurt, general superintendent of the Douglas Land Company and of the Laurel River Lumber Company, caused the woods foreman of the logging crew of said companies to cut and break down the wire which had been stretched along the boundary of complainant, and to cut and remove a large amount of the choicest timber from complainant's property; that complainant notified the employees of said companies to cease trespassing upon the said property; that said employees desisted for a short time, but not a great while afterwards, under directions of said Hurt, general superintendent of both companies,



again went upon the land in question and cut and removed timber for about one week; that from some cause said employes then ceased cutting the timber and did not cut any more until within a few days prior to the filing of said bill, when they again commenced, and at the time of the filing of the bill they were "engaged in cutting and removing timber therefrom as rapidly as possible."

(It is perhaps well to note here that, in the argument of the case under review, the trespass within a few days prior to the filing of said original bill is termed "the second trespass," and all cutting and removing of timber prior to that time is termed "the first trespass.")

The prayer of the original bill was for an injunction enjoining and restraining the cutting and removing of any timber from the lands in question, and any other trespass on the lands, until the further order of the court in the cause.

On February 15, 1910, the complainant, T. W. Thayer Company, filed in the cause an amended and supplemental bill against the same defendants, viz., Douglas Land Company, W. W. Hurt, and Laurel River Lumber Company, which read along with the original bill contained the allegations that in January, 1905, the Douglas Land Company and the Laurel River Lumber Company broke down the fences of complainant, entered upon its boundary of land, destroyed a dwelling house, and began to cut and remove the choicest standing timber; that as soon as complainant was advised of this trespass, it protested against the same; that upon said protest the defendants ceased trespassing; that in May following the complainant instituted its action at law in the circuit court of Washington county against said Douglas Land Company and Laurel River Lumber Company and others to recover damages for said trespass and for the timber cut and removed. (This action at law, *quare clausum fregit*, was for "the first trespass.")

The amended and supplemental bill alleged, further, that during the pendency of the said action at law, and before the trial of the same, to wit, in October, 1905, the Douglas Land Company and the Laurel River Lumber Company again entered upon the land in controversy and began to cut and remove choice timber. It was, as it would seem, because of this alleged trespass—designated in the record as "the second trespass"—that the T. W. Thayer Company filed its original bill in October, 1905.

The amended and supplemental bill further alleged that at the February term of the circuit court of Washington county the said action at law was tried on its merits, and resulted in a verdict and judgment for the complainant for \$1,750; that a writ of error and supersedeas were granted by the Supreme Court of Appeals, and upon a hearing thereof the judgment of the circuit court

was reversed, the verdict set aside, and the case remanded for a new trial; that the second trial of the action at law was had on the merits in said circuit court at its April term, 1909, and again resulted in a verdict and judgment for the complainant for the sum of \$1,750; that a writ of error was again applied for upon the transcript of the record of said second trial, but the same was refused by the Supreme Court of Appeals; whereupon the judgment rendered on the second trial at law, with interest and costs, was paid by the Douglas Land Company, but the said company and other defendants declined to make any settlement of damages resulting from the second cutting of timber ("the second trespass"), and further declined to agree to any order in the chancery cause for an accounting.

In its amended and supplemental bill the complainant takes the position "that its right to an account in this suit for the value of the timber cut is *res adjudicata* since the determination of the action at law," because the issues presented in said action are identical in every feature with the issues presented in this chancery suit, and the prayer of this bill (after naming the defendants) is that "the injunction heretofore granted be perpetuated; that an account be ordered to ascertain the timber cut on the land aforesaid, and the value thereof, together with any damage that has been sustained by the complainant by the cutting and removing from said land of its choicest timbers"; and for general relief.

It appears that throughout this litigation the Douglas Land Company has been considered the responsible party for the alleged trespasses, and, accordingly, the said company appeared on May 5, 1910, and filed its demurrer to both the original and amended bills, which demurrer was overruled, and thereupon said defendant company filed its answer to said bills, in which, among other things, it is denied that complainant's right to an account in this suit is *res adjudicata*, and certain allegations are made in the answer, but we do not deem them of sufficient importance to set out in this opinion. At the hearing of the cause on the 6th day of July, 1910, before the corporation court of the city of Bristol, to which court the cause has been removed from the circuit court of Washington county, the corporation court of Bristol entered the decree from which this appeal was allowed, overruling the demurrer to the original and amended bills, and adjudging that the title to the tract of land, on which the alleged trespass in the cutting and removing of timber was committed, was drawn in question in the said action of trespass *quare clausum fregit* between the parties to this suit, and was in said action finally adjudicated to be in the complainant and not in the defendant the Douglas Land Company; that the defendants were estopped to set up the title averred in the answer of the Doug-

las Land Company; that the injunction theretofore granted be made perpetual; and that an account be taken of the kind, quantity, and value of the timber cut in the bill and proceedings mentioned. And a commissioner was designated to take and report such an account.

The ruling of the corporation court on the demurrer is assigned as error in the petition for this appeal; but the assignment was not argued in this court, and will be taken as having been abandoned. Therefore the sole question for decision may be stated as follows: Is a judgment in an action of trespass *quare clausum fregit*, the general issue alone being the plea, *res adjudicata* as to future actions of trespass *quare clausum fregit* between the same parties, for trespass committed on the same land, if the defendant puts title in evidence; or, does a judgment for the plaintiff in an action of trespass *quare clausum fregit* forever estop the defendant from asserting title to the land upon which the trespass is committed, when the general issue is the plea and the defendant introduces title in evidence?

The question has been very ably and elaborately argued for both parties, and numerous authorities are cited, all of which it would be impossible to review in an opinion of reasonable length; but both parties agree that in Virginia, as a general rule, ejectment is the common, if not the only, mode of trying title to land. In some of the states of the Union a form of action known as "trespass to try title" has been, by statute, substituted for the action of ejectment. It is in form an action of trespass *quare clausum fregit*, with the additional element of notice to the effect that the action is brought to try title to the lands in controversy, as well as for the recovery of damages. We have no such action provided for by statute in Virginia. On the contrary, our statutes recognize alone ejectment as the action by which to try title to land, and require that when the right of the plaintiff to the premises or any part thereof is proved, the verdict, if for a part of the land only, shall specify such part particularly as the same is proved, and with the same certainty of description as is required in the declaration. Code 1904, § 2746.

In those jurisdictions where trespass to try title is authorized by statute and used, "the verdict must explicitly locate the boundaries," and the judgment is in the form of recovery of damages; but the successful plaintiff is entitled to a writ *habere facias possessionem*. *Andrews' Stephens' Pl.* (2d Ed.) 120-122. The same author, at page 130, says that in an action of trespass *quare clausum fregit* title may come in question, but it is not essential that it should.

A judgment in an action of trespass *quare clausum fregit* is not conclusive as to the title to the close, nor as to the right of possession thereof at a time subsequent to the

alleged trespass. 1 Chitty, Pl. 195, and authorities cited in note U.

The same author, at page 535, says: "The plea of *liberum tenementum* must be specially pleaded to put the title in issue." And "in all actions of trespass, whether to the person, personal or real property, matters in discharge or in confession and avoidance of the action, must be specially pleaded."

In other words, trespass is an injury to the possession, and in an action to recover damages for such an injury, if the defendant, as a matter in discharge or in confession and avoidance of the action, wishes to rely on a claim of title to the land upon which the trespass was committed superior to that in the plaintiff, this must be specially pleaded, since the key note to the action is possession. *Cooley on Torts*, 312.

In this case, as is frequently the case in like actions, evidence was introduced as to title; but a point is in issue in a suit in such a sense that it will be concluded by the judgment therein only when an issue concerning it is directly tendered and accepted by the pleadings in the case, and a judgment is not conclusive on any point in question which from the nature of the case, the form of the action, or character of pleadings could not have been adjudicated. 23 Cyc. 1302, 1317.

The contention that although title in this case was put in issue only by the evidence, yet, under the broad rule of *res adjudicata* in Virginia, the result must be regarded as the same, for "it might have been put in," is without merit, for if that view could be sustained, in every action of trespass *quare clausum fregit* in Virginia, title is tried, whether the parties so intended or not. When it is said in the law books that a judgment is conclusive not only upon the questions actually concluded and determined, but upon all matters which under the issues might have been litigated and decided in that suit, it is only meant that such would be the rule in a case where the prior judgment is offered as a bar to a second suit upon the same cause of action, not where the subject-matter of the two controversies is different.

Trespass cannot be supported, unless at the time the injury was committed the plaintiff was in actual possession, and, for injuries which disturb or impair the enjoyment of it without diverting the possession, an action of trespass *quare clausum fregit* will lie, and the right of possession in the plaintiff is necessarily involved, but not the title to the freehold. *Cooke v. Thornton*, 27 Va. 8; *Dickinson v. Mankin*, 61 W. Va. 429, 56 S. E. 824; *Andrews' Stephens' Pl.* supra, 129, 130; *Cooke v. Thornton*, 27 Va. 9.

This subject is fully discussed and the authorities reviewed by Lord Ellenborough in *Outram v. Morewood*, 3 East, 345, the opinion emphasizing the principle that *liberum tenementum*, or some like plea of title, must

be pleaded in order to decide title in an action of trespass; in other words, in order for a verdict and judgment for plaintiff, in an action of trespass, to be an estoppel which prevents the defendant from afterwards asserting title to the land upon which the trespass was committed, title must have been distinctly put in issue *by the pleadings* in the action of trespass. This is a case of long standing, having been decided in 1803; but the cogent reasoning of the opinion applies fully to this case.

See, also, *Johnson v. Morse*, 11 Allen (Mass.) 540, where it was held that "the judgment in the former action was conclusive in all that was adjudged in it, which was the right of possession and not the *seisin*."

In *Thurman v. Leach*, 116 S. W. 300, the Court of Appeals of Kentucky (February 17, 1909) held that when in an action for trespass on land the defendant denies title of plaintiff, but does not plead *liberum tenementum*, and recovers, the judgment shows that the plaintiff had no title on which to recover, but does not adjudge title to be in the defendant, and hence is not a bar, as between defendant's and plaintiff's successors, as to whether the latter subsequently committed a trespass against the former's title.

The cases of *Rodgers v. Ratcliff*, 48 N. C. 225, and *Stokes v. Fraley*, 50 N. C. 377, and a number of other cases that we could cite, go to the extent of holding that in an action of trespass *quare clausum fregit*, though the pleas of the general issue and *liberum tenementum* were entered, a general finding for the defendant was not a bar to plaintiff's right to recover in a second action for trespass on the same land.

We are, however, not called upon to determine in this case whether or not, had the plea of *liberum tenementum* been entered in the action at law, the judgment would bar appellant from setting up title in itself as a defense against the second trespass charged in this action.

There is, undoubtedly, very respectable authority for the view, contended for by the learned counsel for appellee, that the general issue of "not guilty" in a case of trespass on land or on chattels may logically involve as well the title, or at least the right of the plaintiff to possession of the property, as the fact of defendant's committing the acts complained of; but we do not understand the authorities cited in support of that proposition as going to the extent that a judgment in such a case would be conclusive of title in a subsequent action in which the subject-matter is different.

Black, in his work on Judgments, rather holds to the view that the estoppel covers the point which was actually litigated, but in his second volume (2d Ed.) § 657, it is said: "According to the doctrine of a majority of the cases, it is necessary, in order to make a judgment in trespass conclusive of

title, that the title should have been expressly put in issue by the plea of *liberum tenementum*, or some other equivalent plea; it is not sufficient that it came in controversy under the general issue."

As to what is meant by "matter in issue," the same learned author says, in effect, that the authorities are in conflict—hopelessly so. But is not that question set at rest in Virginia by the decisions of this court in *Hutchinson v. Kellam* and *Lymbrick v. Seldon*, 17 Va. 202; *Skipwith v. Young*, 19 Va. 276; *Clark v. Brown*, 49 Va. 549; and *Umbarger v. Watts*, 66 Va. 177? While those cases are not directly in point here, they are quite convincing that title to land is not in issue in an action of trespass *quare clausum fregit* in the sense that a judgment in the case for the plaintiff will be an estoppel of the defendant in future actions of trespass upon the same land, unless title be put in the issue by the pleadings in the prior action, and not by the course and nature of the evidence merely.

The rulings in the cases of *Greathouse v. Sapp*, 26 W. Va. 87, and *Dickinson v. Mankin*, 61 W. Va. 429, 56 S. E. 824, follow the Virginia cases just cited in holding that, in an action of trespass *quare clausum fregit*, title to the freehold is not brought in issue by the plea of "not guilty," nor by the introduction of evidence under that issue as to title. It is very true that in those cases the question of jurisdiction alone was determined; that question being determinable upon whether or not the matter in controversy was equal in value, exclusive of costs, to the minimum sum necessary to the court's jurisdiction, or whether title to a freehold or franchise was involved. The precise point decided was that title or boundaries of land must be directly the subject of controversy (1 Va. & W. Va. Dig. 490), and the reasoning of the opinions in the several cases applies very fully to the case in judgment.

In *Skipwith v. Young*, *supra*, the action was trespass on the case, occasioned by the erection of a mill and dam by the defendant, and it appeared from the pleadings in the case that the right of the defendant to erect the mill was drawn in question. There was a verdict for the plaintiff for one penny and costs, and the question decided by this court was whether or not it had jurisdiction to review the judgment, a majority of the court holding that there was no jurisdiction, Coulter, J., taking the opposite view and filing a dissenting opinion; but it is readily to be seen from the opinions that there was no difference of opinion between the majority of the court and Judge Coulter on the question we have under consideration, for in the latter's opinion he laid down the proposition that a judgment in an action of trespass *quare clausum fregit* would not conclude title either by way of bar or estoppel, his opinion saying: "But it is said the cases of *Hutchinson v. Kellam* and *Lymbrick v. Seldon*, if ad-

hered to, must govern this case; there being no substantial difference. Those cases I understand were mere possessory cases in trespass *quare clausum fregit*, in which, from the pleadings, the verdict and judgment would not have concluded the party either by way of bar or estoppel in a writ of right or any other superior action, but at most would have been evidence in such future action. \* \* \* Whatever, therefore, may be the law as to trespass *quare clausum fregit*, where the pleadings do not put the freehold in controversy, and which therefore would decide nothing as to it, and in which at most the verdict would only be evidence in another action, I think there is fair ground for our jurisdiction in this case."

The case of *Clark v. Dower*, 67 W. Va. 298, 68 S. E. 869, decided by the Supreme Court of West Virginia June 11, 1910, reaffirms expressly *Greathouse v. Sapp and Dickinson v. Mankin*, *supra*, and holds with those cases, and other older cases decided by this court, that the action of trespass *quare clausum fregit* is only one for invasion of present possession, not title; that "trespass cannot be employed as a substitute for ejectment"; adding: "Such is the law in the Virginias, whatever it is elsewhere."

The law in this state when this case was decided below, and now is, that this court is without jurisdiction in a civil case unless the matter in controversy be equal in value, exclusive of costs, to \$300, or "unless there be drawn in question a freehold or the title or bounds of land." Code 1904, § 3455. It would therefore seem to us wholly illogical to hold that if the damages had been less than \$300 in the first action of trespass, instead of more than \$300, appellant's title to the land in controversy would have been decided without the right of appeal to this court, yet the judgment in the first action may in this second action of trespass *quare clausum fregit* against appellant by the appellee for a second trespass on the same land be set up by the latter to conclude title either by way of bar or estoppel.

The cases decided by this court to which we have referred and the weight of authority outside of this jurisdiction, establish the law to be that a suit *quare clausum fregit* does not, on the general issue of not guilty, determine title; that to accomplish that result there must be tendered by the defendant and issue joined thereon by the plaintiff a special plea of *liberum tenementum*. The defendant in such a case is not obliged to enlarge the plaintiff's case by pleading specially and thus imparting to the judgment an additional force and effect; he has the right to join issue upon the case presented by the plaintiff, and to confine his evidence to that issue, and it cannot as a matter of law be assumed that he brought forward all his evidence which

might have been accessible to him to meet an issue not presented by the case made by the plaintiff in his declaration, and could only under our practice have been brought into the issue by the filing of a special plea by the defendant, which, as in the case at bar, he did not do and was under no obligation to do.

The value of land depends upon its possession. If the Douglas Land Company can be subjected to an unending series of actions *quare clausum fregit*, to which it is estopped to make any defense, it has been deprived of the enjoyment of its property and has lost that which gives it value.

In the beginning, ejectment was a merely possessory action. By statutory enactment from time to time, culminating in section 2756 of the Code, the judgment in such actions is made conclusive of the title and right to possession. No such quality is attributed by our statute law to any other action. It is expressly declared by section 2721 that judgments in unlawful entry and detainer shall not bar ejectment. The statute law with great minuteness guards and regulates the rights of all parties to an action of ejectment. The declaration must state the interest claimed by the plaintiff, and must describe the land, and the verdict must respond to the averments of the declaration, so that the verdict and judgment become a muniment of title. This has been the result of a long process of litigation and statutory enactment; but the opinion of the majority of the court takes a common-law action of trespass *quare clausum fregit*, and gives it in substance the effect of a judgment in ejectment, for the mere title to land is worthless if another has established a right to trespass upon it at will; and this is what the estoppel maintained by the majority of the court accomplishes.

We respectfully submit that it is not in accordance with the common law—that law which prevails in this state by express statutory adoption (section 2 of the Code)—and has never been altered or amended with respect to its application to the case before us in any manner.

But, says the opinion of the court, "In the action of trespass the defendant pleaded the general issue, but it affirmatively appears that the titles of both parties were distinctly put in issue."

In this statement we cannot agree. There was no plea but "not guilty," and if anything can be established by authority it is that at common law in an action of trespass *quare clausum fregit* a plea of not guilty does not put the title in issue. Evidence was introduced touching the title but the title was never put "in issue." If the introduction of evidence at the trial of an action *quare clausum fregit* puts the title in issue, then this court has been, for the greater part of a century, guilty of gross injustice in every

case in which it has refused a writ of error because the recovery was for a sum less than that necessary to give this court jurisdiction; for if the title is "in issue" when evidence in support or denial of title is introduced, then this court has jurisdiction, by virtue of the express terms of the Constitution, and it was a miscarriage of justice to deny it. To hold that the introduction of evidence puts the title in issue must, we think, lead to great confusion. In the case before us, the evidence was preserved and made a part of the record by bill of exception; but that added nothing to the effect and force of the judgment. If the introduction of evidence puts the title in issue, then in every case in which evidence has been introduced the title has been put in issue, and that fact may be proved before another jury by way of estoppel in a subsequent action of trespass, which, in our judgment, would result in dire confusion.

Upon reason and authority we deduce the principle that a judgment for plaintiff in an action of trespass *quare clausum fregit* does not estop the defendant from afterwards asserting title to the land upon which the trespass was committed even though the defendant put the title in evidence where the only plea in the action of trespass is "not guilty."

For the foregoing reasons we can concur only in the opinion of the majority of the court in so far as it reverses the decree of the lower court.

(113 Va. 376)

### SOUTHERN RY. CO. v. CHILDREY.

(Supreme Court of Appeals of Virginia. March 14, 1912.)

#### 1. MASTER AND SERVANT (§ 293\*)—RAILROADS—SAFE APPLIANCE—DUTY TO PROVIDE.

In an action against a railway company for injury to a brakeman, it was error to instruct that the company was bound to use ordinary care to furnish sound and safe brakes and appliances, since it was the company's duty merely to use ordinary care to provide reasonably sound and safe brakes and appliances.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1148-1161; Dec. Dig. § 293.\*]

#### 2. MASTER AND SERVANT (§ 296\*)—RAILROADS—INJURY TO BRAKEMAN—DEFECTIVE APPLIANCES—INSTRUCTIONS—INSPECTION.

In an action for injury to a railway brakeman caused by a defective appliance, an instruction that if defendant company maintained inspectors of appliances plaintiff could assume that the duty had been properly performed, etc., was erroneous as ignoring his duty to make an inspection under a rule of the company.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1180-1194; Dec. Dig. § 296.\*]

#### 3. MASTER AND SERVANT (§ 295\*)—RAILROADS—DEFECTIVE APPLIANCES—INSPECTION—DUTY OF EMPLOYÉ.

Maintenance by a railroad company of special inspectors of appliances does not relieve a brakeman of his duty, under a rule of the company, to make a reasonable inspection for

open and obvious defects in brakes used by him.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 710-722; Dec. Dig. § 235.\*]

#### 4. MASTER AND SERVANT (§ 296\*)—RAILROADS—INJURY TO BRAKEMAN—INSTRUCTIONS.

In an action for injury to a railway brakeman caused by a defective brake, it was proper to refuse to instruct that he was bound to acquaint himself with the dangers incident to his work, that the law presumes he knew such dangers as were open, obvious, and usually attendant upon his employment, and that if he knew or might have known of the dangers and avoided the injury to himself by using ordinary care he could not recover.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1180-1194; Dec. Dig. § 296.\*]

#### 5. MASTER AND SERVANT (§ 125\*)—KNOWLEDGE OF DANGERS—IMPUTATION TO EMPLOYER.

Previous knowledge of a coemployé of an injured person of a defective condition is not imputable to the employer, the employer being negligent only in not knowing of a defect not known to an officer or agent for whose negligence the employer would be responsible.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 243-251; Dec. Dig. § 125.\*]

Error to Hustings Court of Richmond.

Action by J. T. Childrey against the Southern Railway Company. Judgment for plaintiff, and defendant brings error. Reversed and remanded.

The following are the instructions given:

"(1) The court instructs the jury that it was the personal duty of the defendant company to exercise ordinary care and diligence to furnish to and provide for the plaintiff sound and safe brakes and appliances with which to operate and brake the car in question, and to this end it was equally the duty of the defendant to exercise ordinary care to inspect and examine the brakes and appliances from time to time to discover and repair defects in them, and that these duties could not be assigned or delegated by the defendant to any of its employes so as to relieve the defendant of liability; and if the jury believe from the evidence that the said brake was in a defective or unsafe condition, and that the defendant knew, or by the exercise of ordinary care could have known, that the said brake which it provided for the use of the plaintiff on the car in question was defective or unsafe, and that it did not exercise ordinary care to discover or repair the same and the plaintiff was thereby injured without negligence on his part, then the defendant is liable for such injury and they will find for the plaintiff.

"(2) The court instructs the jury that the law presumes that the plaintiff exercised due and proper care at the time he was injured, and the burden of proving his contributory negligence is upon the defendant, unless such contributory negligence appears from the plaintiff's evidence.

"(3) The court instructs the jury that the plaintiff had the right to assume at the time he received the injuries in question that the defendant had furnished him with a reasonably safe brake for him to discharge his duties as brakeman for the defendant.

"(4) The court instructs the jury that if they believe from the evidence that the brake was in an unsafe, dangerous, or defective condition, and that the defendant knew, or by the exercise of ordinary care could have known, of its unsafe, dangerous, or defective condition in time to have notified or warned the plaintiff of said unsafe, dangerous, or defective condition and to have prevented him from using said brake, and that the defendant failed to do so, and that the plaintiff, by reason of the unsafe, dangerous, or defective condition of said brake, was injured while in the exercise of ordinary care on his part, then they must find for the plaintiff.

"(5) The court instructs the jury that a careful inspection means such inspection as a man of ordinary care and caution would make under the circumstances to discover the alleged defect in the brake, and that ordinary care and caution means such care and caution as are reasonably proportioned to the dangers to be avoided.

"(6) The court instructs the jury that under rule 661 of the Southern Railway Company, in evidence before them, it was the duty of the plaintiff, Childrey, to make such reasonable inspection for open and obvious defects in the brake on the train upon which he was working on the day of the accident, as his other duties, the time afforded him, and the other circumstances under which he was placed afforded him for the purpose, would permit. And, if the jury believe from the evidence that he failed or neglected to do so, and that the injury received by him was in consequence of such failure, then he cannot recover in this case, and they must find for the defendant. And, if the jury shall further believe from the evidence that the defendant company maintained a force of men, separate from the brakeman in its employ, whose special duty it was to inspect cars and trains made up, and see that they were in proper and reasonably safe condition for service before submitted to the trainmen (of whom the plaintiff was one) for use; and that, in accordance with such system, the car on which the plaintiff was injured underwent or should have undergone inspection by this force of men before the plaintiff was called upon or required to use it, then the jury are instructed that the defendant company, notwithstanding its said rule 661, assumed towards the plaintiff the duty of inspecting said car. That accordingly the plaintiff had the right to assume that this duty had been properly performed, when called upon to use the brake in question; and, if his injury resulted from the

failure of the defendant company's inspectors to properly perform that duty, he is entitled to recover, unless the jury shall further believe that the plaintiff's own failure to inspect said brake amounted, under all the circumstances of the case, to want of ordinary care and caution for his own safety.

"(7) The court instructs the jury that the burden is upon the plaintiff to prove that the injury which he sustained was occasioned by some act of negligence on the part of the defendant company, as charged in the declaration, and that the evidence must show more than a mere probability of negligence. It is not sufficient that the evidence is consistent equally with the existence or non-existence of negligence. There must be affirmative and preponderating proof of the defendant's negligence, and if the jury believe from the evidence that it is just as probable that the plaintiff's injury was occasioned by some cause for which the defendant company was not responsible, as from some cause for which it was responsible, then they must find for the defendant.

"(8) The court instructs the jury that it is their duty to try this case without being influenced by sympathy from the mere fact that the plaintiff was injured and has suffered, as the jury, as much as the court, are under the solemn obligation of an oath to decide according to the law and the facts, and without negligence by the defendant it cannot be held pecuniarily liable, and even if the jury believe from the evidence that the defendant has been negligent, if they further believe from the evidence that the plaintiff was also guilty of negligence and that his negligence contributed to any extent to his injury he cannot recover against the defendant.

"(9) The court instructs the jury that the defendant company was not a guarantor of the safety of the plaintiff, but was required to exercise ordinary care to furnish and maintain such appliances as are reasonably safe and adequate for the work to be performed, that the plaintiff was required to use ordinary care to avoid injury, and that, to entitle the plaintiff to recover in this case, the burden of proof is on him to show, first, that the brake or appliances used in connection therewith were defective and that such defect was the proximate cause of the injury; second, that the company knew or ought to have known they were defective in the exercise of ordinary care; and, third, that the plaintiff could not have, in the exercise of ordinary care, avoided the accident which resulted in his injury.

"(10) The court further instructs the jury that in assessing the amount of damages, if any, to which the plaintiff is entitled, they may take into consideration the extent of the injuries, the amount of physical and mental pain and suffering, and loss of time, and

the physical incapacity and the permanency or duration of the injury done to the plaintiff and all facts and circumstances which tend to show the extent of the injury done and damages sustained, if any, by the plaintiff, and award to him such sum as they think sufficient to cover such damages, and injury, if any, not exceeding in any case the sum of \$10,000, the amount sued for."

The following instructions were refused to defendant:

"(A) The court instructs the jury that it was the plaintiff's duty to acquaint himself with the dangers incident to the work about which he was employed, and the law presumes that the plaintiff knew such dangers or perils as were open, obvious, and usually attendant upon the service as brakeman in which he was engaged, and if the jury believe from the evidence that the plaintiff knew or might have known of the dangers and avoided the injury to himself, by the exercise of ordinary care, they must find for the defendant.

"(B) The court instructs the jury that, where by the terms of the employment a brakeman is charged with the duty of inspecting the appliances which he is using, he cannot recover for injury sustained because of defects in such machinery or appliances if he neglects his duty in that regard, and if the defects are such as are discoverable by proper inspection.

"(C) The court instructs the jury that the knowledge of a fellow brakeman is not knowledge of the company, but the burden is upon the plaintiff to show that such knowledge of the brakeman was brought home to the company by a report or otherwise to the conductor in charge of the train, or other competent authority charged with the duty of having the defect remedied, and, unless the jury believe from the evidence that the knowledge was so brought home to the company and the opportunity then given for remedying the defect by proper repair, they must find for the defendant.

"(D) The court instructs the jury that, under the rules of the Southern Railway Company in evidence before it, it was the duty of the plaintiff to make such reasonable inspection of the brakes as would discover open and obvious defects, and report the same to the conductor, and, if plaintiff failed to do so, he cannot recover for an injury resulting from such defect in the brake."

Munford, Hunton, Williams & Anderson, for plaintiff in error. Montague & Montague and O'Flaherty & Fulton, for defendant in error.

KEITH, P. Childrey, a brakeman of the Southern Railway Company, sustained an injury for which he sued and recovered a judgment. During the progress of the trial, exceptions were reserved to rulings of the court upon instructions and upon a motion to set

aside the verdict as contrary to the law and the evidence, which are before us for review.

[1] Instruction No. 1, given at the instance of the defendant in error, is substantially identical with an instruction approved by this court in *Norfolk & Western Ry. Co. v. Ampey*, 93 Va. 108, 25 S. E. 226, but is in conflict with every decision of this court touching upon the question from that time down to the most recent case of *Southern Ry. Co. v. Foster*, 111 Va. 763, 69 S. E. 972, 4 Va. App. 607. The situation calls for an explanation.

Referring to the record in *Norfolk & Western Ry. Co. v. Ampey*, supra, it will be found that in the petition for a writ of error the following language is used with reference to this instruction: "The proposition of law laid down in this instruction, while sound in the abstract, is not applicable to the case at bar." When the court, speaking through Judge Riely, came to deal with this instruction in its opinion, it used the following language: "The first instruction given by the court announced the proposition that it was the duty of the defendant company to provide safe and suitable machinery and appliances, and to furnish competent and vigilant servants in the conduct of its business, and that the plaintiff had the right to presume that it had done so. It is conceded that the instruction correctly propounds the law. It is equally clear that it directly applied to the issue made by the pleadings. It was not therefore liable to the objection that it announced merely an abstract principle of law."

So it plainly appears that the question, which we are now to consider as to the propriety of the instruction, was not brought to the attention of the court nor passed upon by it in the *Ampey* Case, which was decided April 23, 1896, and makes no reference to the case of *Bertha Zinc Co. v. Martin's Adm'r*, reported in 93 Va. at page 791, 22 S. E. at page 869, 70 L. R. A. 999, but which was decided September 19, 1895.

In *Bertha Zinc Company v. Martin*, the duty owed by the master to the servant was the controlling feature and was the subject of very careful consideration. Judge Buchanan, speaking for the court, reached the conclusion that it is the duty of the master to exercise ordinary care, that is, such care as reasonable and prudent men use under like circumstances, in providing safe and suitable appliances for the use of the servant, and that the degree of care required in such cases is to be ascertained by the general usages of the business.

The real point in controversy in *Norfolk & Western Ry. Co. v. Ampey*, and the point upon which the case turned was whether or not the conductor was to be considered a fellow servant of the brakeman who was injured, or stood to him in the relation of vice principal, and it was held that under the facts of that case the conductor was not a fellow servant.

In the case of *McDonald v. Norfolk & Western R. Co.*, 95 Va. 98, 27 S. E. 821, which was decided in July, 1897, and in which Judge Riely also delivered the opinion, the first paragraph declares that: "It is a general principle of the law of master and servant that the master shall use ordinary care and diligence to provide reasonably safe and suitable machinery and appliances for the use of the servant, and the master will be held liable for an injury to the servant which results from the omission to exercise such care and diligence"—citing among other authorities for the proposition *N. & W. R. Co. v. Ampey*, and *Bertha Zinc Co. v. Martin*.

Counsel for defendant in error insist that there is no difference in substance between the exercise of ordinary care in providing sound and safe brakes and appliances, and ordinary care to provide reasonably sound and safe brakes and appliances; that the word "ordinary" measures the degree of care, and the repetition of the word "ordinary" by "reasonably," its equivalent, is a futile requirement. We cannot concur in this view. If it be the duty of the employer to furnish sound and safe brakes and appliances, then he is required, if it can be done, to furnish appliances which are absolutely safe, which is a very different thing from requiring him to furnish appliances which are reasonably safe. If it be his duty to furnish appliances which are absolutely safe, and no effort is made to do that, but the employer contents himself with making a reasonable effort to supply reasonably safe appliances, he has beyond doubt fallen short of the duty imposed upon him by law; and this view is maintained by very numerous decisions of this and other courts. See *Bertha Zinc Co. v. Martin*, supra, where it is said: "The instruction given on this point declares it to be the master's duty to provide, not reasonably safe, sound, and suitable appliances and instrumentalities for the use of the servant, but it implies that they must be absolutely safe, sound, and suitable." *McDonald v. N. & W. R. Co.*, supra; *Riverside Cotton Mills v. Green*, 98 Va. 60, 34 S. E. 963; *Southern Ry. Co. v. Mauzy*, 98 Va. 692, 37 S. E. 285; *N. & W. Ry. Co. v. Cromer*, 99 Va. 763, 40 S. E. 54; *A. & D. Ry. Co. v. West*, 101 Va. 13, 42 S. E. 914; *Partlett v. Dunn*, 102 Va. 459, 46 S. E. 467; *Wood v. Southern Ry. Co.*, 104 Va. 650, 52 S. E. 371.

The most recent case on the subject is *Southern Ry. Co. v. Foster*, 111 Va. 763, 69 S. E. 972, in which Judge Buchanan, speaking for the court, says: "Instruction No. 2 was objected to and is erroneous in this that it imposed a higher degree of care on the master than is imposed by law. It is his duty to exercise ordinary care to provide, not safe and suitable appliances and instrumentalities, but reasonably safe and suitable appliances and instrumentalities for the use of his servant."

Nor is this court alone upon this proposition. We shall refer to but one decision from other courts, but that is the unanimous decision of the Supreme Court of the United States in which Mr. Justice Lamar says: "Neither individuals nor corporations are bound, as employers, to insure the absolute safety of the machinery or mechanical appliances which they provide for the use of their employes. Nor are they bound to supply the best and safest or newest of those appliances for the purpose of securing the safety of those who are thus employed. They are, however, bound to use all reasonable care and prudence for the safety of those in their service, by providing them with machinery reasonably safe and suitable for the use of the latter. If the employer or master fails in this duty of precaution and care, he is responsible for any injury which may happen through a defect of machinery which was, or ought to have been, known to him, and was unknown to the employé or servant. But if the employé knew of the defect in the machinery from which the injury happened, and yet remained in the service and continued to use the machinery without giving any notice thereof to the employer, he must be deemed to have assumed the risk of all danger reasonably to be apprehended from such use, and is entitled to no recovery. And, further, if the employé himself has been wanting in such reasonable care and prudence as would have prevented the happening of the accident, he is guilty of contributory negligence, and the employer is thereby absolved from responsibility for the injury, although it was occasioned by the defect of the machinery, through the negligence of the employer."

"The state decisions in harmony with the principles laid down by this court on this subject are too numerous for citation." *Washington & Georgetown R. Co. v. McDade*, 135 U. S. 554, 10 Sup. Ct. 1044, 34 L. Ed. 235.

We are of opinion that the court erred in giving instruction No. 1.

[2] Instruction No. 3 tells the jury that the plaintiff had the right to assume at the time he received the injuries in question that the defendant had furnished him with a reasonably safe brake for him to discharge his duties as brakeman for the defendant. This instruction ignores the rule by which the brakeman himself was required to inspect the brake before using it, but of this we shall have more to say when we come to discuss instruction No. 6.

Instruction No. 4 seems to be liable to the same objection.

[3] The first paragraph of instruction No. 6 correctly states the law, but the second paragraph ignores and disregards the duty of the brakeman to make inspection of the brakes, which he is required to use. The inspection required of him is, of course, not



so thorough as that which should be made by those whose special duty it is to make inspection, and who have time and opportunity and a greater familiarity with their duties in this respect than a brakeman has, but it was the duty of the brakeman to look out for open and obvious defects in the brakes on the train upon which he was working on the day of the accident, and it was none the less his personal duty to make such reasonable inspection because the railroad company employed a force of men separate from the brakemen in its employ whose special duty it was to inspect cars and trains and see that they were in proper and reasonable condition for service. The operation of railroads involves great danger to life and property; the utmost care and caution cannot wholly obviate the dangers incident to the service; but railroad companies are held to the very highest degree of duty with respect to passengers and property committed to their care, and are liable for any accident against which human foresight can guard. Their duty to their employes is to use reasonable care for their protection, and, in order to meet the obligations imposed upon them by law, they adopt rules for the government of their employes and prescribing and regulating the performance of their respective duties. They have a trained corps of inspectors, but in order to secure additional safety they require every employe, brakemen included, to consider and observe with that degree of care that may be consistent with the discharge of their other duties the condition of the machinery and instrumentalities connected with their particular duties.

These views are illustrated and enforced in the following cases:

In *Browder v. Southern Ry. Co.*, 107 Va. 14, 57 S. E. 574, it is said: "Where by the terms of employment the servant is charged with the duty of inspecting the machinery and appliances which he is using, or with the duty of both inspecting and repairing them, he cannot recover for injury sustained because of defects in such machinery and appliances, if he neglects his duty in that regard and if the defects are discoverable by proper inspection." *Bowers v. Bristol, etc., Co.*, 100 Va. 533, 42 S. E. 296.

In *Terre Haute, etc., R. Co. v. Pruitt*, 25 Ind. App. 227, 57 N. E. 949, it was held that: "Where, under a rule furnished by a railroad company to its brakeman, he was required to examine and ascertain that the handrails on cars were in proper condition for use, it was error in an action by him for injuries caused by an insecure handrail to instruct the jury that he had a right to presume that the railroad had used reasonable care to furnish reasonably safe appliances, since such rule was reasonable and constituted an element of the contract of

hiring, disregard of which precluded recovery unless obedience thereto would have augmented the danger or been impracticable."

In *Alabama Great Southern R. Co. v. Carroll*, 84 Fed. 772, 28 C. C. A. 207, it was held that a brakeman having access to the reasonable rules of a railroad company, requiring him to inspect links and drawheads of cars making up a train upon which he is employed, cannot recover for injury resulting from a defective link discoverable by proper inspection. *Beall v. P. C. & St. L. Ry. Co.*, 88 W. Va. 525, 18 S. E. 729.

In *Illinois Cent. R. Co. v. Jewell*, 46 Ill. 99, 92 Am. Dec. 240, it is said: "Where the printed rules of a railroad company required each conductor before moving a train to inform himself of the condition of the cars composing it, and the conductor failed to do so and was injured by reason of defective brakes, it was held that he could not recover."

In *Memphis & Charleston R. Co. v. Graham*, 94 Ala. 555, 10 South. 286, the court said: "It cannot be expected of car conductors or brakemen to make the same careful examinations and to be able to discover defects to the same extent as that expected or required of the employer or master or person intrusted generally with this duty for the public safety or safety of employes, but the character of the general duties to be performed by the conductors and brakemen is such that they necessarily become more or less familiar with the appliances and machinery constantly in their use and under their supervision, and know to some extent when they are not in proper condition for safe use. To the extent of their information and the opportunities afforded to make such examination, consistently with other duties and the circumstances attending, they should observe and obey the rule."

[4] Of the instructions "A," "B," "C," and "D," asked for by plaintiff in error, the first was properly refused. It follows from what we have already said that instruction "B" should have been given; and the same is true of instruction "D."

[5] With respect to instruction "C," the law is stated by Labatt at section 149 as follows, and a great number of cases in support of it are cited in the note: "The knowledge of an employe who was a mere coservant of the injured person is not chargeable to the master. In other words, the master will not be regarded as negligent in not knowing of a defect which is not known to any officer or agent for whose negligence the master would be responsible."

The case must therefore be reversed for errors in the instructions, and, if upon the next trial there be sufficient evidence before the court, the jury should be instructed in accordance with the views expressed in this opinion.

We do not deem it proper or necessary to discuss the motion for a new trial upon the ground that the verdict was contrary to the evidence, as the case must be reversed and remanded.

Reversed.

CARDWELL, J., absent.

(113 Va. 303)

**CITY OF NORFOLK v. NORFOLK COUNTY WATER CO.**

(Supreme Court of Appeals of Virginia.  
March 14, 1912.)

1. EQUITY (§ 249\*)—DEMURRER—ADMISSIONS.  
Exceptions to an answer, having the effect of a demurrer, admitted all the relevant and properly pleaded allegations thereof as true.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 521; Dec. Dig. § 249.\*]

2. MUNICIPAL CORPORATIONS (§ 271\*)—WATER SUPPLY—DUTY TO FURNISH.

A city is under an obligation to furnish its citizens, so far as possible, with an adequate water supply, both for public health and safety.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 726; Dec. Dig. § 271.\*]

3. MUNICIPAL CORPORATIONS (§ 57\*)—POWERS.

A municipal corporation cannot be deprived of its public powers by implications or presumptions; it being essential that any restrictions thereon be clearly shown.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 144, 148; Dec. Dig. § 57.\*]

4. WATERS AND WATER COURSES (§ 192\*)—PROPERTY CONVEYED.

A deed by a real estate company, which platted land and reserved to itself the fee in the streets with the right to lay water pipes therein, which conveyed to plaintiff water company "a right of way" on and under the streets for the purpose of maintaining water pipes and covenanted that grantor would not thereafter vest in any other person or corporation the right to maintain water pipes in the streets, did not give plaintiff the exclusive right to maintain water pipes in the streets, as grantor had a right to itself thereafter lay water pipes in the streets.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 279; Dec. Dig. § 192.\*]

5. WATERS AND WATER COURSES (§ 183\*)—WATER SUPPLY—RIGHT TO LAY PIPES—ANNEXED TERRITORY.

A real estate company platted a tract near Norfolk City, reserving to itself the fee in the streets with the right to lay water pipes, and afterwards conveyed to a water company the right to lay water pipes under the streets, covenanting not to convey to another the right to do so. Acts 1901-02, c. 179, annexed such territory, designated therein as "Park Place," as a part of the city; but section 15 provided that nothing in the act should affect any easements theretofore granted in the streets of the annexed territory, and that the city should not acquire any water mains then laid in the territory, except by condemnation. In 1903 the real estate company conveyed to the city all its rights reserved in the plat, by a deed which dedicated all of the streets to the public, "save only as to such easements and rights in said

streets as the grantor may have conveyed to others." Held, that neither under section 15 nor under the deed to the city could the water company claim the exclusive right to lay pipes under the streets of the annexed tract, so that the city could lay water mains thereunder, and the fact that it might become a competitor of plaintiff was immaterial.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 277, 278; Dec. Dig. § 183.\*]

6. MUNICIPAL CORPORATIONS (§ 29\*)—CONSTRUCTION—LIBERAL CONSTRUCTION—ANNEXATION STATUTES.

Statutes annexing territory to a city are to be construed liberally in favor of the public; all presumptions being against the granting of exclusive rights in favor of private persons against the city.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 66-75; Dec. Dig. § 29.\*]

Appeal from Circuit Court of City of Norfolk.

Suit by the Norfolk County Water Company against the City of Norfolk. From a decree for complainant, defendant appeals. Reversed.

J. D. Hank, Jr., and Thos. H. Willcox, for appellant. Pender & Way, for appellee.

HARRISON, J. This appeal involves the right of the city of Norfolk to lay and maintain water pipes and to install fire hydrants in Thirty-Seventh street of the Seventh ward of that city.

[1] The case was heard upon the bill of the Norfolk County Water Company, the answer thereto of the city of Norfolk, the exhibits filed with each and exceptions taken by the complainant to the answer of the city. These exceptions had the effect of a demurrer to other pleadings and admitted as true all the statements and allegations of the answer which were relevant and properly pleaded. Upon the hearing the circuit court sustained the exceptions, struck out the answer, and, in accordance with the prayer of the bill, perpetually enjoined the defendant from laying and constructing water pipes or mains, and from installing fire hydrants in Thirty-Seventh street of the Seventh ward of the city. From that decree the city of Norfolk has appealed.

The material facts established by the pleadings are that the Kensington Company, a corporation engaged in the real estate business, owned a tract of 100 acres of land near the city of Norfolk which it had laid off into blocks, lots, streets, and alleys according to the specifications of a plat which it had recorded in the clerk's office of Norfolk county. On the face of this map the Kensington Company reserved to itself the fee in all of the streets designated thereon, together with the right to lay railroad tracks, sewer, gas, and water pipes, to erect telegraph and electric light poles and wires, and for such other reasonable purposes as to it might seem necessary.

It further appears that the Kensington Company, with a view to furnishing purchasers of its lots with water, by deed of January 4, 1900, conveyed to the appellee water company the right to go upon and under certain of its streets for the purpose of laying, constructing, and maintaining water pipes. This deed contains a covenant that the grantor will not at any time thereafter convey or otherwise vest in any other person or corporation the right to lay and maintain water pipes in the streets mentioned. In little more than two years after this deed was made and recorded, this property of the Kensington Company, together with other suburban territory, was, by an act of the Legislature approved March 14, 1902, annexed to and made part of the city of Norfolk, and designated by the act as the "Park Place" or Seventh ward of that city. Acts 1901-02, p. 171.

This annexation act, among other things, provides that nothing therein contained shall be construed as affecting any easements theretofore granted in the streets of the annexed territory, and that the city of Norfolk shall not acquire any water mains now laid in such territory except in the manner prescribed by law for acquiring private property for the use of the city; and if the city shall not have the right to lay its water, gas, sewer, or other pipes in any streets in the annexed territory, it may condemn such right without condemning the fee in the streets.

It further appears that in June, 1902, the local board of improvement of the Seventh ward, for the purpose of furnishing fire protection to the citizens of that ward, entered into a contract with the appellee, by which it was agreed that the appellee would furnish 30 or more fire hydrants, in consideration of an annual payment by the city of \$45 for each hydrant, to be located at the points designated in the contract. The appellee failed to keep and perform this contract, and has removed the hydrants established in pursuance thereof because it could not supply sufficient water pressure to make them of any value as a protection against fire.

It further appears that, by deed of April 29, 1903, the Kensington Company conveyed to the city of Norfolk all of the reservations, already mentioned as reserved on its plat, and by the same deed fully dedicated all of the streets designated on such plat to the public, "save only, as to such easements and rights in said streets as the grantor may have conveyed to others."

The contention of the Norfolk County Water Company is that it has the exclusive right to lay and maintain water pipes in Thirty-Seventh street, which is one of those embraced in the territory known as Kensington, and that to allow the city of Norfolk to lay water pipes in that street would result in the taking of its property without due process of law. In support of this con-

tention, reliance is placed upon the terms of the grant and covenant contained in the deed under which appellee holds, the terms of the annexation act, and the saving clause in the deed of the Kensington Company conveying to the city of Norfolk its reservations.

[2] The city of Norfolk is vested, under the law, with large governmental powers, vitally affecting the public interests, which it cannot fail to exercise for the promotion of the safety and welfare of its citizens. One of the paramount obligations of such a municipality is to furnish its citizens (as far as possible) with a sufficient supply of water, not only for the public health, but for the public safety as well, in order to afford the means of extinguishing fires and preventing conflagrations.

[3] A municipal corporation, when exerting its functions for the public good, cannot be shorn of its powers by implications or presumptions. If, in particular circumstances, it is sought to restrict the exercise of its public powers, the right to do so must be manifested in clear and unmistakable terms.

The city of Norfolk does not derive its rights in the premises from any individual or corporation. Such rights as it possesses have come to it under and by virtue of the annexation act, which made Kensington and other territory its Seventh ward.

[4] It is clear that the granting clause of the deed under which appellee holds does not confer upon it an exclusive right to lay and maintain water pipes in Thirty-Seventh street; the grant is merely of "a right of way" on and under the streets for the purpose of laying and maintaining water pipes. Nor does the covenant in such deed vest in the appellee the exclusive right to lay and maintain the pipes in question. The Kensington Company covenanted that it would not convey the same privilege to any other person or corporation; but this was by no means an agreement that it would never construct and maintain in its streets water pipes of its own. So far as any inhibition in this covenant is concerned, the Kensington Company had thereafter the same right, in itself, to lay water pipes in its streets that it had before the covenant was made. The appellees did not therefore have the exclusive right claimed, but enjoyed a privilege that, to say the least, was equally shared with its grantor.

[5, 6] The claim that the language of section 15 of the annexation act justifies the contention that appellee has the exclusive right to lay water pipes in Thirty-Seventh street cannot be sustained. It is well settled that such acts are to be liberally construed in favor of the public. The restraint contended for is upon a governmental agency and cannot be presumed or readily implied. The presumptions are all against the Legislature granting exclusive rights and

against the imposition of limitations upon the powers of government. *Water Company v. Knoxville*, 200 U. S. 22, 28 Sup. Ct. 224, 50 L. Ed. 353. It requires, however, no strict construction to hold that the act in question does not confer upon the appellee the exclusive right claimed by it. The Legislature recognized that, at the time of the annexation, certain rights in the matter of laying pipes in the streets had already been acquired, and the only purpose of section 15 of the act was to protect such rights by providing, as it did, that the city of Norfolk should not affect or acquire them except by purchase or condemnation proceedings. In other words, that if the city desired to own or use such pipes, it must acquire them in the manner prescribed by law for acquiring private property for the use of the city. There has been no attempt to use or interfere with the easement claimed by appellee, nor to acquire any water mains laid by others. The city is merely attempting to discharge the unquestioned public duty of laying a water main in one of its streets for the purpose of furnishing the citizens of its Seventh ward with protection against fire. Nor does the saving clause in the deed from the Kensington Company to the city of Norfolk furnish any ground in support of the exclusive right claimed by the appellee. The city of Norfolk does not claim the right to lay water mains in Thirty-Seventh street by virtue of this deed, but claims such right under the act which had, before the deed was executed, made the territory through which the street ran a part of such city. This deed was manifestly intended to convey to the city any rights in its streets which the Kensington Company had not theretofore parted with, and to avoid any future effect of the reservations of rights on the plat in favor of the Kensington Company, by having that company convey them to the city. The language of the deed that the grantor fully dedicates the streets to the public, "save only" as to such easements and rights in them as the grantor had before conveyed to others, was plainly not intended to vest in the appellee the exclusive right to lay water pipes in the streets.

It is admitted by the pleadings that appellee does not furnish and is unable to furnish the citizens of the Seventh ward of the city of Norfolk with protection against fire, and yet it is argued that to permit the city to lay its own pipes in Thirty-Seventh street, connected with the city water supply, for the purpose of furnishing fire protection, would be to force appellee into competition with the city, and thereby destroy the valuable business it had built up by the expenditure of large sums of money. The record does not disclose how far, if at all, the city will compete with appellee by furnishing its citizens with fire protection,

which appellee confesses its inability to furnish. If, however, the laying of pipes for furnishing fire protection were to eventuate in the city's becoming a damaging competitor of appellee, such a consideration could not control or affect the legal rights of the parties. *Water Company v. Knoxville*, supra.

Upon the whole case we are of opinion that the Norfolk County Water Company does not possess the exclusive right to lay water pipes in Thirty-Seventh street of the Seventh ward of the city of Norfolk, and that therefore the exercise by the city of Norfolk of its right to lay water pipes in such street for the purpose of furnishing its citizens with fire protection is not an invasion of any legal right of the appellee, and is therefore not a taking of its property without due process of law.

The decree complained of must be reversed, and this court will enter such decree as the circuit court ought to have entered, dismissing the plaintiff's bill.

Reversed.

CARDWELL, J., absent.

(113 Va. 363)

**SCOTTISH UNION & NAT. INS. CO. v. VIRGINIA SHIRT CO.**

(Supreme Court of Appeals of Virginia.  
March 14, 1912.)

**1. INSURANCE (§ 335\*)—FIRE INSURANCE—IRON-SAFE CLAUSE—VALIDITY.**

An iron-safe clause in a fire policy requiring itemized inventories, and a set of books presenting a complete record of business transacted, is valid, and a substantial compliance therewith so as to furnish a means of ascertaining the amount of the loss is essential to a recovery.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 853; Dec. Dig. § 835.\*]

**2. INSURANCE (§ 335\*)—FIRE INSURANCE—NONCOMPLIANCE WITH IRON-SAFE CLAUSE.**

To vitiate a fire policy for noncompliance with an iron-safe clause, it is not essential that a noncompliance was with intent of insured to perpetrate a fraud, but a failure to reasonably comply with the clause defeats a recovery.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 853; Dec. Dig. § 835.\*]

**3. INSURANCE (§ 335\*)—FIRE INSURANCE—IRON-SAFE CLAUSE—COMPLIANCE.**

Insured in a fire policy containing an iron-safe clause conducted a large shirt and overall manufacturing business. The itemized inventory required by the clause did not show the quantity or kind of piece goods on hand or the different kinds of garments on hand, but showed garments, goods, and supplies on hand of a specified value. The items in the inventory fixed the number of overalls and coats and their value. There was a difference between the cost of coats and overalls. It also contained items of piece goods aggregating a specified number of yards, but insured could not tell where any of the goods came from, nor when received at the factory, nor which were denims and which drills. The books kept by insured did not show the amount, quality,

or value of goods on hand at the time of a fire, and they were not kept in the iron safe. *Held*, that insured failed to substantially comply with the clause, defeating a recovery on the policy.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 853; Dec. Dig. § 335.\*]

**4. APPEAL AND ERROR (§ 1175\*)—DISPOSITION OF CASE ON APPEAL.**

Where the trial court erroneously overruled a demurrer to the evidence when it should have rendered judgment for demurrant, the court on writ of error will reverse the judgment, and enter a proper judgment.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4573-4587; Dec. Dig. § 1175.\*]

**Error to Corporation Court of Fredericksburg.**

Action by the Virginia Shirt Company against the Scottish Union & National Insurance Company. There was a judgment for plaintiff, and defendant brings error. Reversed and rendered.

Phlegar & Powell and A. T. Embrey, for plaintiff in error. Carter & Carter and St. Geo. R. Fitzhugh, for defendant in error.

**CARDWELL, J.** The defendant in error (who will be spoken of hereafter in this opinion as the plaintiff) brought this action against plaintiff in error (spoken of hereafter as the defendant) to recover the amount of an insurance policy upon the plaintiff's "stock of goods and materials, consisting chiefly of cotton fabric goods known as denim, in entire bales, part bales, cut into parts or made into garments; also thread, buttons, and trimmings, and such other goods and materials not more hazardous usual to the shirt and overall manufacturing business while contained in their one story store, tin roof, brick building, situated \* \* \* in Fredericksburg, Va. \* \* \*"

This policy of insurance was for \$2,500, and there was \$32,500 of other and concurrent insurance on said property. The factory and insured personal property were destroyed by fire about 5 o'clock a. m. December 9, 1909, the origin of the fire being mysterious, it having originated in a room remote from any fire, and when no one was in the building. The plaintiff made claim that its loss by the fire was as follows:

Piece goods of the value of.....	\$52,605 45
616 doz. overalls and coats, selling value .....	3,853 46
<b>Total .....</b>	<b>\$56,458 91</b>
Subsequently deducted for goods returned .....	350 00
<b>Net amount of loss as claimed</b>	<b>\$56,108 91</b>

Upon the trial of this cause, and after the evidence had gone to the jury, the defendant company demurred thereto, in which demurrer the plaintiff joined, and the court overruled the demurrer to the evidence, and entered judgment for the demurree for the amount (\$1,740.99) ascertained as the damages by the verdict of the jury, subject to

the ruling of the court upon the demurrer, to which judgment this writ of error was awarded.

There are quite a number of assignments of error in the petition for the writ of error, but, in the view we take of the case, it is only necessary to consider the one relating to the ruling of the trial court on the demurrer to the evidence.

The defenses relied on were, first, those arising under the iron-safe clause of the policy; and, second, because there was false swearing as to the amount of goods or stock on hand December 26, 1908, when the last inventory was taken, and at the time of the fire, and as to what the inventory of December 26, 1908, included, and how it was taken.

Omitting, as unnecessary, a discussion of the evidence relied on as supporting the defense of false swearing as to amount of goods or stock on hand when the inventory of December 26, 1908, was taken, etc., we are brought to the question whether or not the judgment of the trial court upon the demurrer to the evidence on the first-named ground of defense was erroneous.

The policy sued on is the second annual renewal of the original policy, which was taken out in 1907, and the iron-safe clause it contains is the standard iron-safe clause and the same in all respects as that construed by this court in *Phoenix Ins. Co. v. Sherman*, 110 Va. 435, 66 S. E. 81. Among other things it required the insured (1) to take a complete itemized inventory of stock on hand at least once in each year; (2) to keep a set of books which shall clearly and plainly present a complete record of the business transacted, including all purchases, sales, and shipments, both for cash and credit, from date of inventory; (3) to keep such books secure from fire which would destroy the insured property; and (4) to produce them in case of a loss by fire. By its terms the failure to perform said conditions made the policy null and void, and no action could be maintained thereon. It appears, therefore, that the plaintiff was under contract obligations to the defendant from the date of the first policy in 1907 to take, preserve, and produce complete, itemized inventories, and such a set of books as would clearly and plainly present a complete record of the business transacted."

It further appears that the first inventory, taken on January 1, 1907, did not show the quantity or kind of piece goods on hand, or itemize the different kinds of garments on hand, that a new set of books was opened with this inventory as the starting point, and that the first inventory was the foundation of all subsequent inventories, accounts, and statements of assets. The second inventory, taken December 31, 1907, by which the books were balanced for the year, also did not itemize the garments, distinguish the kinds, or quality, nor did it so designate

the cloth, trimmings, etc., on hand that they could be identified or traced. A third inventory was taken on December 26, 1908 (about one year before the fire), and shows garments, goods, and supplies on hand \$50,763.73, upon which the plaintiff relies as a compliance with the first paragraph of the iron-safe clause, and which Brown, general manager and superintendent of the plaintiff, who testified as a witness in its behalf, says showed the goods and the value thereof on hand when the inventory was taken. The first item in this inventory is "175 dozen overalls and coats, \$650, \$1,137.50," and is followed by 14 other items, differing only in numbers and value of the goods per dozen included in the several items. Next follows an item, "11 Job \$3.25, \$35.75," and later 10 items of "piece goods" aggregating 337,965 yards, which make up a total valuation of \$26,795.51. With respect to the item "175 dozen overalls and coats" and all items of overalls and coats on the inventory, Brown stated that the valuations named were the selling prices; that there was some difference between the costs of coats and overalls; that the coats required less goods than the overalls, and he could not tell how many garments in each item of the inventory were overalls or how many were coats. These garments it appears were not sold in suits of coat and overalls, so that to list "coats and overalls," without designating the number of each, was far from being in itself satisfactory as an "itemized inventory."

With respect to the 10 items of "piece goods" contained in the inventory and aggregating 337,965 yards, Brown testified that he could not tell where any of these goods came from, nor when received at the factory, nor which were denims and which drills; that there were both denims and drills, which statement was only qualified by the witness saying he hardly thought there were any drills—if any, a very few.

At an interview between Brown and a representative of the insurance company February 1, 1910, with respect to the inventory of December, 1908, a part of which was read to him, Brown admitted that he could not tell how many garments of certain named kinds were included, because all were set down at one price; that he did not think any one else could look at and interpret that inventory; that he could not tell what kind of overalls the first line referred to; that he "could not tell from that statement to save his life"; and as a witness in this case, when on cross-examination his attention was called to his admissions on the occasion just referred to, he said, "I say it yet," which was in effect to confirm his admission that neither he who had taken the inventory and made the entries therein, nor any one else could interpret it.

To follow further in detail the evidence given by Brown relied on to explain the inventory of December, 1908, would serve but

to disclose the unsatisfactory character of the interpretation he attempted to give to the inventory, and that thousands of dollars worth of goods claimed to have been in the factory at and shortly prior to the time of the fire were not included in the inventory, while others were lumped in without discrimination between the character or value of the goods embraced in the several items, such as "overalls and coats," different garments not sold as suits, costing different prices, requiring different qualities of goods, some most probably made of a certain kind or quality of goods and some of another, "piece goods" aggregating hundreds of thousands of yards in a factory using denims, drills and khaki, cottons and shorting, without a line to indicate the kinds of "piece goods" embraced in the several items, "11 Job \$3.25, \$35.75," and "6,681 yds. cottons 4 1/2, \$300.64."

Whether or not the plaintiff has shown a compliance with its obligation to keep and produce such a set of books as would "clearly and plainly present a complete record of the business it transacted," the facts appearing are that there were kept, until the fire, (1) a receiving book, on which were entered the numbers of bales and cases, and the bale, case, and invoice numbers and kind of every article of merchandise from which the consignors could be ascertained, and from which the invoices were checked and marked "O. K.," which book was not kept in the iron safe and was burned with the goods; (2) what the witness Brown called a "pass book," but which with the cutting tickets that were filed in "book form," was in fact the "manufacturing book," and, if preserved, would have shown the real amount of goods in the factory. With respect to this "pass book" and the "cutting tickets," Brown testifies that they were a record of the number of yards of goods that were cut up; that keeping them was the only way he could arrive at the quantity of merchandise he was using monthly; that they showed the number of yards used at each cutting, and it appeared from one of these tickets, which was preserved by Brown and produced, that they also showed the number of garments cut, their sizes, and the quantity of cloth required for each style of goods. All of those tickets, except two, as well as the "pass book," were burned with the goods. In the "pass book," according to Brown's testimony, there was entered the number of yards, kind, and prices of all the goods received in the factory, and the amount of each kind used, that the amounts used were carried into that book monthly from the "cutting tickets," that this was done so that he (Brown) could see how much goods he had on hand of each kind; and it clearly appears that no other book contained the information to which Brown adverted. It also appears from Brown's testimony that this "pass book," which he admits was not kept

in the safe, would have furnished valuable information as to the quantity, character, etc., of the goods in the factory at the time of the fire, which information the defendant was entitled to have forthcoming under its contract with the assured.

It further appears from the evidence that, not only were the books kept by the plaintiff of a loose and unbusiness-like character, but they and all other data which would have served to give an intelligent understanding of the amount, quality, value, etc., of the insured goods on hand at the time of the fire were not kept in the iron safe, but laid around loosely and in such a way that those in charge of these books and other data were bound to know that their destruction in case of fire was inevitable. In the circumstances existing after the fire, the chief, if not the only, source of information as to what goods were on hand and lost by the fire is through the witness Brown, who has to testify from memory only as to what goods were on hand, their character, value, etc. True there were other books kept—a journal, ledger, and salesbook—but they do not serve to relieve the situation, for according to Brown's evidence the "pass book," which he says was his private book, for his private information, which was destroyed, was essential to an intelligent understanding of the books that were kept by the regular bookkeeper. That "pass book" furnished a check on the monthly statements of the value of goods used, which Brown furnished to the bookkeeper to be entered on the books, and without it the yardage, character, quality, and value of the goods destroyed, could not be ascertained with any degree of certainty.

A. D. Tapscott a witness for the plaintiff and who was its bookkeeper, testified to the effect that the books he kept and statements made by him were from memoranda or statements furnished him by Brown, the general manager; that he had nothing to do with orders for the goods; that he knew nothing of goods coming in, and had nothing to do with them until the bills were turned over to him by Mr. Brown, when he entered them on the books the same day. Brown says that usually he did not turn the bills over until he had cut the goods into garments. Tapscott further says there was nothing by which to verify Brown's statements; that there was no cash account, no account of any purchases until the bills were delivered to him as stated. Brown testified that he had purchased in one bill \$40,000 worth of goods in the spring of 1909, which were being delivered up to the time of the fire; but no information was furnished as to whether or not those goods, or any of them, or which of them were in the building at the time of the fire.

J. A. McKenna, an expert bookkeeper and accountant, was employed by the defendant after the fire to examine and report on the

books of the plaintiff which were not destroyed by the fire, and testifying in this case for the defendant, says, in effect, that there was nothing in the books in the way of accounts or memoranda which would enable him to verify the quantity of goods, as to yardage or pieces, which were taken in the inventory, and that there were no data on the inventory which would enable him to verify whether the goods were on that instrument, because the piece goods, as they were called, were without designation as to the kind, or description as to manufacture, or who was the manufacturer of the goods. He further said that neither the inventories nor the books showed the number of overalls and coats that were manufactured during the year 1908, nor the number of yards used in the manufacture of overalls and coats. He further testified that he could not from the books make a calculation of the amount of spool cotton, or cotton goods on hand, because there was no record which showed the amount of consumption, and therefore he had to estimate it, and that he could not tell the cost of overalls claimed to be on hand at the time of the fire.

Without going further in detail into what was testified by this witness, it is sufficient to say that, upon a careful examination of the books, inventories, and invoices for the purpose of getting information as to what was in the factory at the time of the fire, it was impossible for him to ascertain from them the information desired, nor could he verify the quantity of goods manufactured in 1907, 1908, or 1909; and with respect to Brown's statements as to the value of the piece goods and material manufactured he says that they were not drawn from the books, but were nevertheless made the basis of book entries by Tapscott, the bookkeeper, and that there were not book entries corresponding with the items on Brown's statements of "made and shipped" goods or garments. It is very true that the plaintiff showed by duplicate invoices the amount of goods purchased from January 1, 1907, to the date of the fire, and showed from its books how many dozen overalls and coats together, not separately, had been sold, but it did not show the number of yards and costs of goods used, or even the number of yards and value of goods in the house. The books which would have given this and other valuable information were destroyed, while those preserved gave no information in this respect. It is true that whatever defects were found in the books preserved and examined by McKenna were not due to the bookkeeper's fault, but to statements furnished by Brown on the back of such statements. The effect of all this is that no means were provided by the plaintiff by which it could be intelligently ascertained what business the plaintiff had transacted, or, with any degree of accuracy, what goods it had on hand at the time of the fire.

[1] The authorities uniformly sustain the

validity of the iron-safe clause in an insurance policy, on the ground that its provisions, requiring itemized inventories and a set of books, "clearly and plainly presenting a complete record of business transacted," provide check upon fraud, and by a compliance therewith a means of ascertaining with reasonable certainty the amount of goods on hand would be forthcoming. This iron-safe clause is a reasonable stipulation in the contract, fair alike to the insured as well as to the insurer, and, if a loss by fire occurs and the insured is unable to show, at least, a substantial compliance with the requirements of his contract, he has no just cause to complain of his inability to reap its intended benefits.

In this case the defendant's proportion of the loss sustained by the plaintiff was one-fourteenth, the policy containing the usual three-fourths value clause and a permit to have additional concurrent insurance, and the verdict of the jury indicates very strongly that they were of opinion that the whole amount the plaintiff was entitled to recover of all the companies whose policies it held was \$24,373.86, and that the value of the goods destroyed was but \$32,498.48, instead of \$56,108.91, as claimed by the plaintiff.

[2] To vitiate the policy by a noncompliance with the terms of the iron-safe clause, it is not essential, as it seems to be contended for the plaintiff, that the noncompliance was with the intent to perpetrate a fraud, for to say that the iron-safe clause shall operate only where there is other proof of fraud would be to deny the force of the clause, as the fraud would of itself vitiate the contract. The true rule deducible from the authorities is that which this court has adopted, and which requires not a strict or literal, but a reasonable, compliance with the terms of the contract.

[3] The iron-safe clause required the preservation of the books which were kept, the object of this requirement being, as we have observed, to provide a means for ascertaining with reasonable certainty what goods were destroyed, and in this case two books, which, with a proper account of purchases, would have given this information, were left exposed to the fire and destroyed along with the insured property. The plaintiff was conducting a large shirt and overall manufacturing business, and, without such a compliance with the requirements of the policy as furnished a complete record of the business transacted, distinguishing between the kinds of goods used, the kinds of garments manufactured, the quality of goods used in making them, the sales and shipments of the manufactured garments, as well as the purchases of material actually made, the goods converted into the garments sold and shipped, there is no room for a difference of opinion among reasonably fair-minded men that there has not been a substantial compliance on the part of the plaintiff with the obligations imposed

upon it by its policy. The evidence very plainly discloses that the inventory relied on was not such an itemized and complete inventory of the insured goods as it was, by the terms of the policy, required to take, keep, and produce, and that such books as were not destroyed by the fire (which were also relied on by the plaintiff) fall far short of the requirement in the policy to keep and produce such a set of books as would "clearly and plainly present a complete record of the business transacted."

The inventory is no more satisfactory as "a complete itemized inventory of the stock or goods" than that relied on by the insured in *Phoenix Insurance Co. v. Sherman*, supra, which was held to be insufficient; nor are the books kept and produced more satisfactory than those relied on in that case.

Among the authorities cited by the learned counsel for the plaintiff are the cases of *Prudential F. Ins. Co. v. Alley*, 104 Va. 366, 51 S. E. 812, and *N. B. Ins. Co. v. Edmundson*, 104 Va. 487, 52 S. E. 350. With respect to those cases it need only be said, as was said in *Prudential F. Ins. Co. v. Sherman*, supra, that they do not apply to the facts of the case under consideration. In this case, as in the last-named case, the insured has not, as required by the terms of its policy, provided the means by which the insurer could know, with reasonable certainty, the character and value of the insured goods destroyed by the fire.

The case of *Conn. F. Ins. Co. v. Jeary*, 60 Neb. 338, 83 N. W. 78, 51 L. R. A. 698, is also cited for the plaintiff. In that case a recovery upon the policy was sustained upon the ground (not in accordance with the weight of authority) that to work a forfeiture all the conditions of the policy must be broken and not a particular one of them.

In *Arnold v. Indemnity Ins. Co.*, 152 N. C. 232, 67 S. E. 574, the policy sued on covered articles in which the insured was dealing as a proprietor of a livery stable business, and the court merely holds that a description and itemized valuation of the principal articles in which the insured was dealing, "such as 3 rubber tire buggies, \$98, \$294; 6 top buggies, \$46.85, \$281.10; 3 open buggies, \$96, \$288," etc., was a substantial compliance with the iron-safe clause, and that "the fact that one item was listed, harness, robes, collars, and horse blankets, \$1,250.00, which in itself was not a compliance with the clause, would not affect the validity of the whole inventory so as to authorize a forfeiture, especially where there was no question of the bona fide character of the loss."

In *McNutt v. Va. F. Ins. Co. (Tenn.)* 45 S. W. 61, the insured supplied all deficiencies in the books he honestly endeavored to keep, and this was held, and rightly, to be a substantial compliance with the iron-safe clause of the policy.

To the same effect only is *Aetna Ins. Co. v. Fitze*, 34 Tex. Civ. App. 214, 78 S. W.



370, also cited for the plaintiff in this case.

Nor do the cases of Merchants' Nat. Ins. Co. v. Dunbar, 88 Ill. App. 582, and Mallin v. Mer. Tenn. Mu. Ins. Co., 105 Mo. App. 625, 80 S. W. 56, sustain the plaintiff's contentions in this case. In the first-named of those cases the insured forgot to put a small book in the safe, containing part of an invoice, but, as the stock of goods insured and destroyed by the fire had been seen only 18 days before the fire by an agent of the insurer, it was held that the neglect to put the "small book" in the safe, so that it could be produced, did not forfeit the insured's right to recover on the policy.

The syllabus of the second-named case is as follows: "A failure to comply literally with a requirement in a fire insurance policy that insured shall keep a set of books, presenting a complete record of business transactions, does not work a forfeiture of the policy; but its purpose is accomplished when insured produces data from which the amount and value of the goods in stock at the time of the fire can be reasonably estimated." That is not the case we have upon the record before us.

The case of Phoenix Ins. Co. v. Angel (Ky.) 38 S. W. 1067, also cited for the plaintiff here, made a ruling sustained neither upon reason nor authority that, as there was no consideration for the agreement to preserve evidence of the extent and value of the goods lost by the fire, the agreement was void.

[4] We are of opinion that upon the demurrer to the evidence in this case the judgment should have been for the demurrant, the defendant. Therefore the judgment of the trial court is reversed, and this court will enter the judgment that it should have entered.

Reversed.

(70 W. Va. 415)

EFFLER v. BURNS et al.

(Supreme Court of Appeals of West Virginia.  
Feb. 27, 1912.)

(Syllabus by the Court.)

HUSBAND AND WIFE (§ 49½\*)—GIFT BY HUSBAND TO WIFE—PRESUMPTION—TRUST.

Where a husband voluntarily transfers property to the wife, it will be presumed the transfer was a gift. A trust in favor of the husband will not be presumed. That can only be established by clear evidence.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 249-255; Dec. Dig. § 49½\*]

Appeal from Circuit Court, McDowell County.

Bill in equity by Barbara Effler against B. B. Burns and others. From a decree for defendants, plaintiff appeals. Reversed.

M. O. Litz, for appellant.

ROBINSON, J. In the year 1900, John Effler conveyed several tracts of land to B. B. Burns. The grantor's wife, Barbara Eff-

ler, joined in the conveyance. It seems that Burns was to hold title and to convey to other parties as Effler should direct. The reason for such an arrangement does not appear. Burns, at the direction of Effler, executed a title bond to Barbara Effler, the wife, giving her equitable title to two of the tracts. The bond recites a consideration of thirty-five hundred dollars cash and five hundred dollars represented by a note. The note, payable to Burns, was afterwards endorsed by him as paid, and returned to Barbara Effler.

Notwithstanding the title bond for the sale of the land made to Barbara Effler, Burns subsequently contracted to sell the same land to another. He says Effler directed him to do so. This later contract was assigned so that it came to the Tug Ridge Coal and Land Company.

With matters thus in relation to the two tracts of land, Effler died, leaving widow and heirs. The coal and land company evidently had notice of the equitable right of Barbara Effler, though the title bond in her favor was not recorded; for she joined in a conveyance of the land made by Burns and wife to that company. The coal and land company paid the purchase money to Burns, the holder of the legal title who conveyed to it. Burns has paid the money into court. He claims no right therein.

The question to be settled from the proceedings and proofs is whether the money belongs to Barbara Effler, or to the estate of John Effler to be distributed under the statute of descents and distributions. The court below decided that it belonged to the latter and entered a decree accordingly. Barbara Effler complains by this appeal.

Manifestly the decree is wrong. The case does not involve rights of creditors. No attack has been made in behalf of creditors on the transfer of the land to the wife. That Barbara Effler was the beneficial owner of the land at the time she joined in the conveyance to the coal and land company is absolutely clear. Then why does not the money received for the land belong to her?

It is claimed for the heirs that the sale to Barbara Effler by title bond was based on no consideration. We may as well assume that to be true. But the evidence does not prove it so. The title bond and the paid note evidence a consideration. By no means does the evidence in the case decisively overthrow what they show. Still a consideration is not essential to a validity of the transaction. A husband may validly transfer property to the wife without money consideration, except as to creditors. The transaction was merely a transfer of the land from Effler to his wife, through Burns as a trustee. The papers prove it and so does the testimony of Burns. No evidence establishes a resulting trust in favor of the husband. Though we assume it was a gift, still, under the circumstances present-

ed, it is valid. The heirs can claim no more than their ancestor, the husband, could. It suffices to cite the following well known rule: "When a conveyance of property is made by a husband to his wife directly, or through a third person, or where he purchases property with his own means and causes title thereto to be taken in his wife's name, the presumption is, not of a resulting trust, but that the purchase and conveyance were intended as a gift or advancement for his wife, and if the husband asserts that in fact a resulting trust was intended the burden is upon him to establish that fact by clear evidence." 6 Enc. Ev. 830.

The decree will be reversed. A proper decree will be entered here, giving to Barbara Effler the money arising from the land.

(70 W. Va. 428)

**CLARK v. CLARK et al.**

(Supreme Court of Appeals of West Virginia  
Feb. 27, 1912.)

*(Syllabus by the Court.)*

**1. GUARDIAN AND WARD (§ 127\*)—GUARDIAN AD LITEM — ACCOUNTING AND SETTLEMENT BY ADMINISTRATOR.**

In a suit by an administrator to settle his accounts and charge the land of infant heirs with an overpayment on debts of the decedent, the court allows their guardian to file a petition contesting the administrator's demands, and makes him a defendant with leave to make defense. There is no reversible error in this. It is equivalent to appointing the guardian as guardian ad litem.

[Ed. Note.—For other cases, see Guardian and Ward, Cent. Dig. § 433; Dec. Dig. § 127.\*]

**2. EQUITY (§ 406\*)—COMMISSIONER—REPORT—NOTICE.**

When a commissioner in chancery has completed a report, he must notify counsel of its completion; but the statute does not say any length of time of notice before filing the report after completion.

[Ed. Note.—For other cases, see Equity, Dec. Dig. § 406.\*]

**3. APPEAL AND ERROR (§ 177\*)—PRESENTATION OF QUESTIONS IN LOWER COURT—REPORT OF COMMISSIONER IN CHANCERY.**

When an attorney has been notified of the completion of a report, and makes exceptions to it after its return, it cannot be specified as error in the appellate court that the time of notice was too short before filing the report, when no application for further time to the court below was made.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 177.\*]

**4. PLEADING (§ 36\*)—CONCLUSIVENESS ON PLEADER.**

A direct, specific admission of a fact in a pleading is binding and conclusive on the party making it.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 81-86; Dec. Dig. § 36.\*]

Appeal from Circuit Court, Randolph County.

Bill in equity by George O. Clark, administrator, against George O. Clark and others. From a decree for defendants, plaintiff appeals. Affirmed.

Claude W. Maxwell, for appellant. H. Roy Waugh and Samuel T. Spears, for appellees.

**BRANNON, P.** George O. Clark was appointed administrator of the personal estate of his deceased wife, Alcinda Clark. She died leaving personal and real estate. She left six children. Three of them were of tender years, when she died in 1904. One, Orda, was then five years old, and Alcinda and Carrie, twins, mere babies a few days old. George O. Clark brought a suit against his children in the circuit court of Randolph county asking the court to cause a settlement of his accounts as administrator to be made, and alleging that he had paid many debts of his dead wife in excess of her personal estate, leaving her estate in debt to him in the sum of \$2,272.16, and praying that her land be sold therefor. H. B. Morgan was appointed guardian for three of the infants, Orda, Alcinda, and Carrie Clark, and he as guardian presented a petition in Clark's suit, asking to be made a defendant in order that he might contest the claim made by Clark of indebtedness against his wife's estate, and that the petition be treated as his answer. That petition denied such indebtedness. The court allowed the petition to be filed and ordered that Morgan as guardian be made defendant and allowed to defend the case. The court assigned a guardian ad litem for all the infants, and he filed their formal answer, making no allegations, but placing the rights of the infants under the care of the court. The court referred the case to a commissioner in chancery to report what personal estate Alcinda Clark owned at her death, and what disposition thereof the administrator had made, and how much, if any, personal estate was in his hands as administrator available for payment of debts, and to settle the accounts of George O. Clark as administrator, and to report and specify what debts Alcinda Clark owed at the time of her death, and what real estate she left. The contesting parties, George O. Clark and the guardian, Morgan, appeared before the commissioner, and a hearing was had, and the commissioner reported, upon all the evidence before him, and his report found a balance due from the administrator to the estate of \$772.47. Clark filed exceptions to this report. The court overruled the exceptions and confirmed the report, and decreed that George O. Clark had in his hands as administrator \$772.47, and decreed that Clark pay that sum to the estate, and pay to Morgan as guardian for Orda A. Clark, Alcinda Clark, and Carrie Clark their proportionate share of \$772.47, and gave Morgan leave to sue execution therefor, and further decreed that George O. Clark pay the remainder of the fund going to the other infants to the general receiver

of the court. From this decree George O. Clark appealed.

[1] The first point made against the decree is the action of the court in overruling Clark's demurrer to the petition of guardian Morgan. The claim is that a guardian cannot bring suit to recover the personal estate of his ward from his administrator, citing *Burdett v. Cain*, 8 W. Va. 282, holding that a guardian cannot sue to recover the distributive share of his ward in the personal estate of his ancestor, but that the suit must be in the name of the infant by his next friend. The same principle is stated in *McMullen v. Blecker*, 64 W. Va. 88, 60 S. E. 1098, 131 Am. St. Rep. 894, holding that a guardian cannot maintain a suit for partition or intervene therein to secure royalty oil under an oil lease as the share therein of his ward. But in the later case of *Suter v. Suter*, 68 W. Va. 690, 70 S. E. 705, it was held that a guardian may maintain a suit for partition in behalf of his ward. In the last case it was distinguished from the *McMullen* Case, which was said to be under a contract. Under the latest case, Morgan as guardian could, in my opinion, maintain a suit against Clark to have a settlement of his accounts as administrator and recover the share of his wards. But we do not have to go so far in this case. Morgan is not really bringing an original suit. Clark brought the suit to settle his accounts and charge the lands of the wards with debts, and their guardian simply asked the court to let him defend their interest, to produce evidence to resist the claim of indebtedness against the estate of his wards. The guardian ad litem made no defense, and ought not a court of equity listen to the suggestion of the guardian in defense of his wards? He is not an intruder, but has an interest, from his office, in the litigation. Morgan was made a defendant. "Persons are not improper defendants who are so connected with the case as to be directly interested in obtaining or resisting the specific relief asked in the bill." *Zell Guano Co. v. Heatherly*, 38 W. Va. 410, 18 S. E. 611; *Hogg's Eq. vol. 1*, p. 41. In *Minor's Institutes*, as cited to us, it is stated that, "if an infant fully defended by his testamentary or regularly appointed guardian, the acquiescence of the court is equivalent to the appointment of such person as guardian ad litem." In *Durrett v. Davis*, 24 Grat. 302, an answer for an infant was filed by his guardian, purporting to be by his guardian ad litem; but the opinions, statements, and responses as those of the guardian were given. It was held to have the same effect as if filed by the guardian in proper person. The court thought it sufficient though filed by the guardian. In *Beverly v. Miller*, 6 Munf. 99, it was held that in a suit against an infant, if it was defended by his regular guardian, and his answer was received on his behalf by the court, the infant was bound

as if the guardian had been appointed a guardian ad litem. I suggest that it was the duty of the court to protect the interest of the infant, and it would commit no error in allowing the guardian to come to its aid by presenting matter of defense to enable the court to preserve the rights of children. By receiving this petition and acting on it the court in effect appointed the guardian as guardian ad litem. But this is immaterial. Suppose Morgan had not filed his petition. The commissioner was directed to ascertain and report, and no one can say that when Morgan produced a witness he could not be heard by the commissioner. He made no defense but this. What if there were two guardians ad litem? We must not yield to technicality, but look to substance and further the ends of justice.

[2] One exception to the commissioner's report was "because the report was not made up within 10 days before the 18th day of May, 1909." Under this exception complaint is made that the report was made, not within 10 days before its completion, but that it did not remain in the commissioner's office 10 days for examination. The report was completed May 6th. On the 19th the commissioner certifies that "the foregoing report was retained by me after completion, previous to filing the same, 10 days for examination; that notice was given of completion of the same, as required by law." So it seems that it was retained the 10 days in the commissioner's office after completion. No evidence shows it was not so retained.

[3] An affidavit of the plaintiff's attorney was filed stating that no notice was given him of the completion of said report until May 18, 1909. We have thus the commissioner's certificate that notice was given. The statute does say that notice of completion of the report shall be given the attorneys; but I do not think that it requires 10 days' notice before filing. If the party has notice before the hearing, he knows of the report. But in answer to this point we say that the object of such notice is to let the attorney know of the completion of the report, and that in this case the attorney filed exceptions on May 20th. Thus he had the benefit of notice and actually made exceptions. If the time was too short, all he had to do was to ask the court further time to make exceptions, when it was proposed to hear the case. It does not appear that such application was made. The case was not heard till May 26th. No complaint of shortness of notice was made.

Complaint is made in this court that, when Clark was examined before the commissioner at the close of his deposition, it is stated that the "further taking of these depositions is continued to a future date to be agreed upon." The affidavit of said attorney says that Clark had been ever since waiting to be examined, but that no notification of his further examination was given

him, and that the report was wrongly filed without such notification. This should have been brought to the attention of the court, if Clark had any further evidence to be presented to the commissioner. No exception was indorsed on the report for that cause, no continuance asked, no affidavit from Clark that he had any further evidence. Notice that it is not stated or claimed that notice was to be given to Clark by the defendants. The depositions were continued until the time to be agreed on. If Clark had other evidence, it was his duty to notify the other party, or at least to appear again before the commissioner. He had given his deposition on the 2d of April. He had plenty of time to go again before the commissioner. But in addition an affidavit of the attorney for the defense states that the defense did not ask for Clark to be held for further cross-examination until he could consult the grandfather of the children, nor did any other person do so for Morgan, or make any request, and that there was no understanding that Clark was to be notified to appear for such examination, and that no agreement of any kind was made to this effect; that the taking of depositions at that time was held open only for the purpose to let Clark get witnesses to prove his claims against the estate; and that there was no understanding or agreement to continue the depositions except to permit Clark to get in his evidence. Now, if in fact the case was continued to let the defense further cross-examine Clark, and the defense could waive that, and Clark could not complain of it, and if the postponement was to let Clark produce further evidence, it was his duty to do so without notice and not wait more than one month without doing so, though he knew the matter was pending before the commissioner open for his appearance. Furthermore, the commissioner, after due notice, took up the case on January 18, 1908. The proceeding before the commissioner went on for four months before completion. And Clark actually appeared and gave a deposition more than a month before the completion of the report. How can he say that he was denied opportunity to present his evidence? What proof had he of his claim against the estate does not appear.

[4] Clark excepted to the commissioner's report because it charged him with having received as administrator personal estate amounting to \$1,000 in the face of proof that he received only \$300. Clark in his bill admits that there came to his hands to be administered property of the value of "about \$1,000." "In favor of the defendant the admissions of the bill are always taken to be true." 1 Barton's Chy. Prac. 421. "An admission made during the course of judicial proceedings, whether it be direct or by inference from the position taken, the relief sought, or defense set up, will stop the one who makes it from subsequently asserting

any claim inconsistent therewith." 4 Am. & Eng. Dec. in Equity, 304. This is a judicial admission, which, unlike others, is conclusive. 1 Ency. of Evidence, 613. But who should know better than Clark? He had everything in his hands. If injustice is done him, who is to blame? He had no legal appraisal made, furnished no inventory or account of the property. He now says that this admission is mistaken, but does not prove it. He furnished no specification to the commissioner. He files a list of the property, specifying three cows, a note on Simmons, and household goods, each a lump sum, total \$300. This is no inventory. It is signed and sworn by three men; but it is not pretended that they were lawful appraisers acting under any authority. They do not so sign. And the oral evidence shows that this list is false, as that evidence proves other personal property to about \$700, and shows more of value not specified.

Error is assigned for the refusal of the commissioner to allow the payment of a note of \$281 given by Clark and wife to Shanahan. Clark said, "We owed that debt," meaning himself and wife. Shanahan, the creditor, swears that Clark was principal, his wife surety.

As to the rejection of the Sigafosse debt of \$114.68: It was proven to be the debt of the husband.

It is proper to add as to this commissioner's report that there was full hearing on evidence, and great force is attributed to it in an appellate court, and it stands unless clearly wrong. We think this report one clearly right. *Stewart v. Stewart*, 40 W. Va. 65, 20 S. E. 862.

Complaint is made by counsel that Morgan was allowed to defend, and that the money of his wards was decreed to be paid him as guardian. This is not assigned as error, and I need not discuss it. But it is said that Clark, the father, was, as natural guardian, the real guardian. A prompt answer is that the Code gives the guardian appointed by court or will the custody of his estate, the natural guardian, father or mother, custody of the person of the ward. Code 1906, c. 82, § 7. We need not cite other law to show that a natural guardian has no right to hold the infant's property. *McDodrill v. Pardee L. Co.*, 40 W. Va. 564, 21 S. E. 878. The counsel says Morgan is no guardian, as Clark had the preference of appointment. The statute gives him no preference, and there is the record of Morgan's appointment by a county court. So it was proper to decree to Morgan his wards' money as guardian.

It is complained in brief of counsel, but not assigned as error, that the shares of the other infants was put into the hands of the receiver. Now, this case was one winding up and closing the estate. Had these three children had a guardian, it would have been proper to decree their shares to him. Should

It have been left in the hands of Clark as administrator? Not in view of the facts clearly shown in the record. He sought to sell his children's land for numerous fictitious debts rejected by the commissioner. He owed Shanahan \$281, and induced his wife to make to Shanahan three notes, one for that debt, two other utterly fictitious, those two calling for \$1,200. Not a cent's consideration, as Clark admitted under oath to the extent of \$1,213. He finally disclaimed any right under them before the commissioner in this case. A deed of trust given by him and his wife for \$1,500 for those notes, to cover up his property, it seems, from creditors. Shanahan, though somehow a party to this transaction, relented, and refused to claim these two false notes, and gave them up to Clark with the injunction to destroy them. But later, in ex parte settlement not before us, Clark claimed those notes against the estate. I see no error in putting this money in the hands of the receiver, as the decree closed the estate, even if bad conduct and fictitious claims by Clark were not shown, as the court ought to exercise its discretion in selecting a mode of conserving the property of the infants. But surely it is not error when we see those bad features rendering Clark an unfit trustee.

What right had he, in a legal point of view, to retain the money? The court's disposition of the money cannot hurt him.

I have said too much about a plain case; but counsel has demanded that we go over the points.

Decree affirmed.

(70 W. Va. 422)

WHITTEN v. WHITTEN et al.

(Supreme Court of Appeals of West Virginia.  
Feb. 27, 1912.)

(Syllabus by the Court.)

TRUSTS (§ 86\*) — RESULTING TRUST—PRESUMPTIONS.

Money of a wife, invested in land in the husband's name, is presumptively a gift, and, in the absence of facts and circumstances rebutting the presumption, such as violation of a prior or contemporaneous agreement to take the title in the wife's name, ignorance of its having been taken in the husband's name, subsequent expenditure of the wife's money in improvements thereon, an effort on her part to obtain the title after discovery of its condition, control of the property as her own against the husband, or the like, there is no resulting trust in her favor.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 128; Dec. Dig. § 86.\*]

Appeal from Circuit Court, Monroe County.

Bill in equity by L. A. Whitten against Thomas G. Whitten and others. From a decree for defendants, plaintiff appeals. Reversed, cross-petition dismissed, and cause remanded.

J. H. Crosier and R. L. Clark, for appellant. Rowan & Meadows, for appellees Stull.

POFFENBARGER, J. Sufficiency of the evidence to establish a resulting trust in favor of the devisees of a deceased widow against the heirs of the deceased husband is challenged by this appeal from a decree in a partition suit in favor of the former.

At the time of his death, in 1890, John G. Whitten held the legal title to a tract of land, containing 57 acres, on which he resided, and a small adjacent tract. In 1882, a commissioner of the circuit court of Monroe county conveyed to him and Thos. G. Whitten, his brother, as assignees of H. M. Lockridge, a purchaser at a judicial sale, a tract of 159 acres and 32 poles, out of which the latter, under a voluntary partition, conveyed to the former the 57-acre tract. In 1886, the other small tract was conveyed to John G. He died in 1890, leaving his wife, Sally A., surviving, who resided on the 57-acre tract until her death, in 1907, leaving a will, bequeathing and devising all of her property, "both personal and real," to Geo. Stull and Cora M. Stull, his wife, subject to the payment of her debts. This suit was brought by a collateral heir of John G. Whitten, his brother, L. A. Whitten, against numerous other heirs, for partition of the land, and the Stulls were made parties to it on their petition, claiming title to all of it by virtue of the will, upon the theory of equitable title in the testatrix by reason of alleged payment of all the purchase money out of money belonging to her, and the court upheld and enforced their claim as to the 57 acres by the decree appealed from.

Three witnesses swear the deceased husband had admitted payment for the land with his wife's money, and her title to it, and his duty to convey it to her. Two of them say \$250 of the purchase money came from her father's estate, one of whom further says he was present when Shannon Baker, her brother, paid it either to John G. Whitten or Lockridge. Another says he married into the family, and knows the purchase money came from her father's estate, but details no dates, amounts, or circumstances. Two of them mention an additional sum of \$35, put in on the original transaction with the \$250, which she had saved from the proceeds of sales of farm products. By way of rebuttal, two witnesses say John Baker, the wife's father, died only 10 years before the date of their testimony, 15 years or more after the date of the first purchase. Four witnesses testify to the wife's admissions of title in the husband's heirs, and her inability to sell or dispose of the land, or obtain more than the use of it during her life, but not to any denial of payment of purchase money out of her funds, or admission of payment otherwise. As to the total amount of purchase money, there is no evidence; but the petition, treated as a cross-bill, contains an undenied allegation that it was \$400, which, under the rule, is taken as true.

Failing to observe the effect of the relation of husband and wife upon the transaction, relied upon as having vested equitable title in Mrs. Whitten, the decree seems to treat it as one between strangers, in which proof of payment of money alone establishes a resulting trust in favor of him who paid the money; the legal title having been conveyed to another. The marital relation of the parties introduces an exception, not always mentioned, however, in dealing with cases in which it is a factor. The rule as stated in *Skaggs v. Mann*, 46 W. Va. 209, 33 S. E. 110, is somewhat broader than the authority cited for it (*Berry v. Wiedman*, 40 W. Va. 36, 20 S. E. 817, 52 Am. St. Rep. 886), which, though placing the burden upon the husband to prove the money invested was a gift, says the fact is "prima facie established by proof of her knowledge and consent." This qualification is unnoticed in the quotation of the rule in *Skaggs v. Mann*. *Cresap v. Cresap*, 54 W. Va. 581, 48 S. E. 582, observes it. *Deck v. Tabler*, 41 W. Va. 332, 23 S. E. 721, 56 Am. St. Rep. 837, *McClintock v. Loiseau*, 31 W. Va. 865, 8 S. E. 612, 2 L. R. A. 816, and *Lockhard v. Beckley*, 10 W. Va. 87, go further, declaring a presumption of gift without proof of knowledge and consent on the part of the wife whose money has been so invested in the name of the husband, which must be rebutted by proof of her ignorance of the fact, or her objection to the form of the conveyance, or some other fact inconsistent with the presumption.

This subject is more thoroughly considered in *McGinnis v. Curry*, 13 W. Va. 29, than in any other of our decisions. There the deed was taken in the husband's name with the approbation of the wife, but Judge Green clearly expresses the opinion that the result ought to have been the same in the absence of proof of that fact. In other words, he thought the burden was upon the wife to negative the presumption of a gift. We read: "It is equally well settled that such a resulting trust will not arise, where the party who advanced the purchase money bears certain close relations to the party in whose name the deed is taken. If a father advances the purchase money, for instance, and the deed is taken in the name of a wife or child. *Shaw et al. v. Read*, 47 Pa. 96. So, too, if a grandparent advances the purchase money, and the deed be taken in the name of a grandchild, even though the father be not dead, the presumption would be that it was intended as a gift, and no remitting trust would arise. This is a legitimate inference from the English cases. See *Ebrun v. Duncer*, 2 Ch. Ca. 26; *Lloyd v. Read*, 1 Wms. 607; *Kilpin v. Kilpin*, Moo. & R. 520. In these and other instances, in which the law presumes that the person advancing the money intended it as a gift to the person in whose name the deed is made, this presumption is one of fact and not of law, and may be rebutted by evidence or

circumstances. The presumption, that the advancement of the purchase money was intended as a gift, is not confined to the case where the person making the advancement was under legal obligations to support the other party. A grandparent is under no such obligation to support a grandchild, especially when its father is living; and yet the more recent English cases, above cited, assume that a gift would be presumed in such a case, where a deed is taken in the name of the grandchild, and the purchase money advanced by the grandparent."

The following from Schouler's *Dom. Rel.* § 119, agrees with this view: "So, too, land or other property bought by the husband with his wife's money, but in his own name, and without any agreement that the purchase shall be to her separate use, or the title taken in her name, will not, as a rule, as presumptions have ruled hitherto, be treated as her separate property." Wells' *Separate Property of Married Women*, § 212, conforms, saying: "Something depends on the form of the conveyance, and more still probably on the intent of the transaction. Where her money pays for the land, and the deed is taken in the name of the husband and wife jointly, and their heirs and assigns, and there is no evidence of an intention on her part to create a trust, the legal inference is that she thereby conferred an interest on her husband, such as the deed expresses; and no trust by operation of law will arise for herself or her heirs." So does Bishop's *Law of Married Women*, § 118, quoting the following with approval: "The authorities simply show that the same facts which would raise a resulting trust as between strangers do not necessarily do so as between parent and child, or husband and wife; the presumption in such cases being, until rebutted, that an advancement or provision was intended, but this presumption being liable to rebuttal. There is, therefore, no uniform and unbending rule. The question resolves itself into one of intent; and each case, subject to those general prima facie presumptions, must depend upon its individual facts."

However the rule may have been stated from time to time, the fact is that, in every case in which this court has upheld and enforced a claim to a resulting trust in favor of a wife as against the heirs of her husband, she has clearly rebutted the presumption of a gift. In *Skaggs v. Mann* a prior or contemporaneous agreement to take the deed in the wife's name and her ignorance of the breach of that agreement were shown. In *Berry v. Wiedman* the chief value of the property was in the improvements made by the wife, at her own cost, subsequent to the purchase of the land. Her uniform claim of ownership and recognized control of the property, during her husband's life, were also shown. In *Cresap v. Cresap* the allegations treated as sufficient on de-

murrer were substantially that the property had been conveyed to the husband without the knowledge or consent of the wife, and that, on discovery of the fact, she had repeatedly demanded a conveyance to her, which was promised, but never executed. An equally strong case on the facts was shown in *Standard Mercantile Co. v. Ellis*, 48 W. Va. 309, 87 S. E. 593. We quote: "The proof appears to plainly establish that the property was paid for with the wife's money, and was to be deeded to her, but that the title bond, without her knowledge or consent, and apparently without his knowledge, was taken in his name. When she discovered this she sent the title bond by her son to have a deed for the property made to herself." This conduct of the wife clearly negated the presumption.

The presumption of a gift under such circumstances accords with general legal principles. Ordinarily services rendered by one of two persons, standing in close relationship by blood or marriage to the other, is in law gratuitous, unless an express agreement to compensate, or facts from which it arises by inference, is shown. In the absence of a contrary agreement, express or shown by circumstances importing it, property passing from one of such persons to the other is ordinarily deemed a gift. Money of the husband invested in the name of the wife is always *prima facie* a gift. Why should not the money of a wife invested in the name of the husband be so regarded? By the weight of authority, here as elsewhere, it is, as we have shown.

Proof of Mrs. Whitten's ignorance of the character of the conveyance and of violation of any prior or contemporaneous agreement is wholly lacking. She furnished only a part of the money. Knowing the title was in her husband's name before his death, she made no demand for it and died leaving it in his heirs, and her will makes no specific reference to it. Moreover, she died believing she had no title to it. There is no proof of any improvements of the property at her expense. So the facts and circumstances, considered as a whole, confirm rather than repel the natural presumption of a gift.

Record title in the heirs ought to be overcome by clear and explicit evidence, if at all. *Prima facie*, they are the owners of the property. Ordinarily written evidence of title to land is required. Title resting on oral evidence is recognized in a few instances, but in all such cases clear and full proof is required. *Smith v. Turley*, 32 W. Va. 14, 9 S. E. 46. In neither character nor quantity does the evidence here measure up to this requirement.

Our conclusion is to reverse the decree, dismiss the petition of George Stull and Cora M. Stull, treated as a cross-bill, and remand the cause for further proceedings.

(70 W. Va. 417)

## CARR v. SUTTON et al.

(Supreme Court of Appeals of West Virginia.  
Feb. 27, 1912.)

## (Syllabus by the Court.)

## 1. INDEMNITY (§ 4\*)—TO BAIL—VALIDITY.

A bond to indemnify bail on a criminal recognizance is not void as against public policy.

[Ed. Note.—For other cases, see *Indemnity*, Dec. Dig. § 4.\*]

## 2. BAIL (§ 80\*)—CRIMINAL PROSECUTIONS—RIGHTS OF SURETIES.

Where the obligation of bail is assumed the surety becomes in law the jailer of his principal, the custody of him being but a continuance of the original imprisonment, the surety being subrogated to all the rights and means which the state possesses to make his control effective.

[Ed. Note.—For other cases, see *Bail*, Cent. Dig. §§ 328-334; Dec. Dig. § 80.\*]

## 3. BAIL (§ 80\*)—CRIMINAL PROSECUTIONS—ARREST OF PRINCIPAL.

Even without bail piece, which he may have by statute, the bail may exercise his right at common law to arrest his principal at any time for the purpose of surrendering him, as an incident to his engagement.

[Ed. Note.—For other cases, see *Bail*, Cent. Dig. §§ 328-334; Dec. Dig. § 80.\*]

## 4. PRINCIPAL AND SURETY (§ 126\*)—TO SURETY—RELEASE OF INDEMNITOR.

Where bail in disregard of his duty, and when required by a surety on a bond of indemnity taken by him, negligently fails to arrest and deliver his principal into custody and negligently allows him to escape and be and remain a fugitive from justice, such surety will be discharged, and may on that ground defend any action on his bond by the bail against him.

[Ed. Note.—For other cases, see *Principal and Surety*, Cent. Dig. §§ 329-351; Dec. Dig. § 126.\*]

Appeal from Circuit Court, Harrison County.

Bill in equity by William H. Carr against James E. Sutton and others. From a decree for plaintiff, defendants Myers appeal. Reversed and dismissed.

Davis & Davis and E. B. Templeman, for appellants. Edward G. Smith, for appellee.

MILLER, J. The decree of October 26, 1909, appealed from, among other things, adjudged the defendant Sutton indebted to the State of West Virginia upon his bail bond, on which plaintiff Carr was surety, in the sum of \$2,619.85, with interest and costs; and that the defendant, Rezin C. Davis, and the appellants, Jesse Meade Myers, and Harvey G. Myers, who with said James E. Sutton, as principal, and Alverta M. Sutton, not served with process, signed as sureties the bond to Carr, sued on, to indemnify him as bail for Sutton, should pay to the State of West Virginia, said debt and costs in exoneration of Carr.

From said decree appellants, Jesse Meade Myers and Harvey G. Myers, have appealed.

In their answers to the bill, among other defenses interposed and relied on here are these: First, that said bond of indemnity

given to Carr, is void as against public policy; Second, that it is void, because the name of R. C. Davis, who signed the original bond, referred to as the burned bond, was forged to the duplicate bond, taken and delivered to Carr, and appellants thereby discharged; Third, that plaintiff, Carr, though notified and required by his indemnitors, before and after the indictment, to do so, had negligently, willfully and wrongfully failed, in discharge of his recognizance of bail, to arrest Sutton and deliver him into the custody of the law, but on the contrary had allowed him to escape and be and remain a fugitive from justice. Wherefore and by reason whereof appellants had been thereby discharged as sureties from any and all liability to Carr. And they prayed for relief accordingly.

[1] As to the first point. The bond of indemnity here involved is the identical bond we had before us, in *Carr v. Davis*, 64 W. Va. 522, 63 S. E. 326, 16 L. R. A. (N. S.) 58, 16 Ann. Cas. 1031. The point was made in that case that the bond was void on principles of public policy, and ought not to be enforced, for the relief of the bail. The proposition was there denied. That decision having been by a divided court, we are strongly urged by counsel in this case to reconsider it, but the court standing as it did then is not disposed to do so, and is of opinion to overrule the point.

We are likewise of opinion to overrule the point, that the name Rezin Davis on the duplicate bond is a forgery. Davis was adjudged in the former case and has been in this to be liable on the bond; he has not appealed, and appellants have in no way been prejudiced. Moreover, on conflicting evidence the court below ruled against appellants on the question of fact. Certified copies of two decrees in other suits against Davis, lodged here, though not a part of the record, show that real estate of Davis has been sold to satisfy his liability to Carr. Of course we could not look to those decrees if the fact was material, but we do not regard it so.

The last point, that appellants have been discharged by the wrongful and willful negligence of Carr, presents a serious question. It will prove enlightening to first inquire what are the rights, duties and obligations of the bail, with respect to the person of him who, standing charged with crime, is committed to him as bail. By statute, section 7, chapter 156, Code 1906, if the accused be let to bail, the recognizance shall be for his appearance before the court, having recognizance of the case. The condition of the recognizance, signed by Sutton and Carr, involved here, was conditioned that Sutton should appear on the first day of the next term of the circuit court of Harrison County, to answer any indictment that might be preferred against him for the offense charged,

and not to depart thence without leave of the court. The record shows that the next term of that court began on the 11th day of December, 1906, and that an indictment was returned against Sutton, by the grand jury, December 13, the third day of the term. The recognizance of Carr, therefore, bound him to have Sutton before the court on the first day of the term, and to not allow him to depart therefrom without leave of the court, a very high obligation imposed by law, which he voluntarily assumed, on becoming bail, and to which he could not be negligent or indifferent.

[2] But while the obligation of Carr thus assumed was great, his power over Sutton, given by section 8, chapter 156, Code 1906, as well as by the common law, was also great. By said section 8 he was entitled at any time on application to the clerk to a bail piece, authorizing him or his agent, at any time, and at any place, within or without the state, and without further process, to arrest Sutton so delivered to bail and commit him to jail. 3 Am. & Eng. Ency. Law, 708, and cases cited from numerous states.

Moreover, the law is, that when the obligation of bail is assumed the surety becomes in law the jailer of his principal, and his custody of him is but a continuance of the original imprisonment, and though he cannot actually confine him he is subrogated to all the other rights and means which the State possesses, to make his control of him effective. 3 Am. & Eng. Ency. Law, 708, citing *Reese v. United States*, 9 Wall. 13, 19 L. Ed. 541; *United States v. Ryder*, 110 U. S. 729, 4 Sup. Ct. 196, 28 L. Ed. 808; *State v. Lingerfelt*, 109 N. C. 775, 14 S. E. 75, 14 L. R. A. 605. See also 5 Cyc. 126. [3] The statute giving the surety right to bail piece is but cumulative of his common-law remedy, for without process he has the right to arrest his principal for the purpose of surrendering him as an incident to his engagement. 3 Am. & Eng. Ency. Law, supra, citing note 3; *Taylor v. Taintor*, 16 Wall. 371, 21 L. Ed. 287; *State v. Cunningham*, 10 La. Ann. 393; *State v. Reiss*, 12 La. Ann. 166; *State v. Lingerfelt*, supra; *Com. v. Brickett*, 8 Pick. (Mass.) 188; *Nicolls v. Ingersoll*, 7 Johns. (N. Y.) 145.

In letting a prisoner to bail the object of the state is to secure the presence of the prisoner to answer the judgment of the court, and not the money that may be recovered upon a defaulted recognizance. And so according to the authorities cited, the powers given the bail over his principal are very great to enable him to perform his onerous duties and obligations to the state, which he has voluntarily assumed.

It was mainly because of this onerous duty and obligation imposed by law upon bail, that the judges concurring in the opinion of the court in *Carr v. Davis*, supra, were persuaded to hold a bond of indem-



nity given bail not void as against public policy. Their notion was that by taking the bond bail could not, without endangering his security, neglect or become indifferent to the obligations of his own bond. In my individual opinion the correctness of that decision can rightly be predicated upon no other theory.

Has plaintiff then by his negligence or indifference discharged appellants from liability on this bond? We hold that he has. We think the general rule applicable in other cases, where a creditor neglects his duty or refuses to proceed when required by a surety should be applied in cases of sureties on a bond to indemnify bail. Our decisions affirming the general rule hold that where a creditor does any act injurious to the surety, or inconsistent with his rights, or if he omits to do any act when required by the surety which his duty imposes on him, and the omission proves injurious to the surety, the latter will be discharged, and that he may set up such conduct as a defense to any suit brought against him, if not at law, at all events in equity. 1 Story, Eq. Jur. § 325; Leonard v. County Court, 25 W. Va. 45; 13 Dig. Va. & W. Va. Rep. 22-24.

Without detailing the evidence it shows conclusively to our minds, that at the time appellants signed the bond Carr was notified by them to keep a close surveillance over Sutton, and if he observed any disposition to escape, to at once arrest him and deliver him to jail; and that if an indictment should be returned against Sutton, he should immediately deliver him into the custody of the officers. Carr knew and had been warned of the dangers to himself and appellants. He does not pretend that he procured Sutton's appearance on the first day of the term, or on the day of the indictment, or at any time. His own evidence, in our opinion convicts him of having been at Clarksburg, where the court was in session, the day after the indictment and that he there dined with Sutton, and had him in his absolute power and control, but made no attempt to secure his delivery into custody; but on the contrary allowed him to escape. He does pretend that after Sutton failed to meet him at the office of Sutton's attorney, he made some effort to find him, going to several places, but apparently did not go to Sutton's house; applied for no bail piece, but with the utmost indifference left the State on business and did not return for several days. The evidence though conflicting tends also to show that he was with Sutton in Clarksburg, on December 18, or 19; and that he was within reach of him in Parkersburg, when he was seen by his attorney a short time afterwards. The evidence tends to show also that he made some feeble efforts to locate Sutton afterward, but his conduct was indifferent, not up to

his duty and obligation to the appellant; far from it.

Because of Carr's neglect to discharge the obligation of his own bond, we think appellants are entitled to be discharged from theirs, and our opinion is to reverse the decree below in so far as it affects appellants, and as to them to dismiss the bill, with costs in this court and in the court below, and it will be so ordered.

BRANNON, P., absent.

(137 Ga. 730)

TRAIN et al. v. EMERSON.

(Supreme Court of Georgia. March 2, 1912.)

(Syllabus by the Court.)

1. PLEADING (§ 54\*)—PETITION—REFERENCE FROM ONE COUNT TO ANOTHER.

As a general rule, separate counts in a petition are to be treated as if they set out separate causes of action. Allegations from one count cannot be imported into another, either for the purpose of sustaining or destroying it, unless the pleading, though in form containing two counts, in substance and in fact contains but one.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 118; Dec. Dig. § 54.\*]

2. PLEADING (§ 204\*)—DEMURRER—DEMURRER TO PLEADING GOOD IN PART.

Where a petition contains two counts, one setting forth a cause of action against the indorser upon a promissory note, and another setting forth a cause of action against him based upon an alleged arbitration and award, if one of such counts is insufficient, it will not work a dismissal of the entire petition on general demurrer.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 488-490; Dec. Dig. § 204.\*]

3. PRINCIPAL AND SURETY (§ 200\*)—REMEDIES OF SURETIES—CONTRIBUTION—PLEADING.

In the case now under consideration, the first count in the petition was in favor of three persons, alleging themselves to be sureties on a promissory note, against a fourth person, who was alleged also to be a surety. It was also alleged that the maker was unable to pay the note, and the plaintiffs paid the amount due on the face of the note, and took it up; that the maker was and is insolvent; that at the time the note became due they called on the cosurety to pay his pro rata share, which he failed and refused to do; and that the defendant was indebted to the plaintiffs to the extent of one-fourth of the amount so paid, with interest. This count was not subject to general demurrer.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. §§ 641-650; Dec. Dig. § 200.\*]

4. ARBITRATION AND AWARD (§ 85\*)—ACTION ON AWARD—PLEADING.

The second count was based upon an award. The submission and award, which were set out, showed an agreement that such award should be returned to the superior court and made the judgment thereof, as provided by the statute. It did not disclose whether this had been done, or, if not, why not, or any reason why it was sought to enforce it as a common-law award, rather than in the statutory manner. It is not competent to enforce an award both as a statutory and a common-law award. This count was accordingly de-

fective. But, although the second count was demurrable as it stood, it was error to dismiss the petition as a whole.

[Ed. Note.—For other cases, see Arbitration and Award, Cent. Dig. §§ 484-503; Dec. Dig. § 85.\*]

**5. ARBITRATION AND AWARD (§ 85\*)—ACTION ON AWARD—PLEADING.**

The plea set up that the parties had made the same submission to arbitration, and the arbitrators had made the same award, which the plaintiffs had set out in the second count of their petition, and pleaded that this was an adjudication of the cause of action between the parties. The award could not have been treated as an adjudication binding on one party, and not on the other. If it were a final adjudication under the statutory provisions, it should be enforceable in favor of the plaintiff as such. If it were a good common-law award, it would be binding as such on both parties, and suit could be predicated thereon by the plaintiff. The defendant attacks the count of the plaintiffs' petition which is based on such an award, and at the same time pleads the same award as an adjudication. The plea is defective, for the same reason that the count of the plaintiffs' petition is so. Having shown that the submission contemplated proceedings under the statute, and having failed to show, either that there were such proceedings as authorized the pleading of the award as a final judgment or adjudication in accordance with the statutory procedure, or that there were not such proceedings under the statute, and that the award could be treated as a good common-law award, the plea was demurrable.

[Ed. Note.—For other cases, see Arbitration and Award, Cent. Dig. §§ 484-503; Dec. Dig. § 85.\*]

Error from Superior Court, Chatham County; W. G. Charlton, Judge.

Action by W. F. Train and others against O. A. Emerson. Judgment for defendant, and plaintiffs bring error. Reversed.

O'Byrne, Hartridge & Wright, for plaintiffs in error. F. P. McIntire, for defendant in error.

ATKINSON, J. Judgment reversed. All the Justices concur, except HILL, J., not presiding.

(187 Ga. 322)

**MURRAY et al. v. McGUIRE.**

**McGUIRE v. MURRAY et al.**

(Supreme Court of Georgia. March 14, 1912.)

*(Syllabus by the Court.)*

**1. SECOND NEW TRIAL.**

Under the facts of this case, the court did not err in granting a second new trial.

**2. REVIEW ON APPEAL.**

Upon considering the assignments of error in the cross-bill of exceptions, the court is of the opinion that none of them show error requiring the grant of a new trial.

Error from Superior Court, Glynn County; C. B. Conyers, Judge.

Action by L. A. Murray and others against J. J. McGuire. From the judgment, Murray and others bring error, and McGuire assigns cross-error. Affirmed on both bills of exceptions.

F. H. Harris and D. W. Krauss, for plaintiffs in error. Courtland Symmes and Jos. W. Bennet, for defendant in error.

**PER CURIAM.** Judgment affirmed, on both bills of exceptions. All the Justices concur, except

BECK, and HILL, JJ., who dissent from the ruling made in the first headnote. Gregory v. Granite R. Co. 132 Ga. 587 (4), 64 S. E. 686; Dethrage v. Rome, 125 Ga. 802, 54 S. E. 654; Veal v. Robinson, 76 Ga. 838. See, also, Cleveland v. Central R. Co., 73 Ga. 793; Cook v. W. & A. R. Co., 72 Ga. 48; Central R. Co. v. Ople, 58 Ga. 346; Turner v. Rome St. R. Co., 81 Ga. 336, 6 S. E. 690; Veal v. Veal, 45 Ga. 511, 512; Seaboard Air Line Ry. v. Randolph, 136 Ga. 505, 507, 71 S. E. 887.

(187 Ga. 312)

**BALE, Sol. Gen., v. ATLANTIC ICE & COAL CORPORATION.**

(Supreme Court of Georgia. March 13, 1912.)

*(Syllabus by the Court.)*

**PUBLIC NUISANCE.**

The evidence was not such as to require a finding by the trial judge that the defendant was committing a public nuisance, and there was no abuse of discretion in refusing to grant the injunction prayed for.

Error from Superior Court, Floyd County; Jno. W. Maddox, Judge.

Action by John W. Bale, Solicitor General, against the Atlantic Ice & Coal Corporation. Judgment for defendant, and plaintiff brings error. Affirmed.

John W. Bale and Denny & Wright, for plaintiff in error. Max Meyerhardt, Maddox & Doyal, and Payne & Jones, for defendant in error.

HILL, J. Judgment affirmed. All the Justices concur.

(187 Ga. 791)

**WILLIAMS v. WILLIAMS.**

(Supreme Court of Georgia. March 13, 1912.)

*(Syllabus by the Court.)*

**1. DIVORCE (§ 214\*)—APPLICATION FOR ALIMONY—SERVICE OF RULE.**

Where a petition was brought for divorce and permanent alimony, and pending this action the plaintiff filed an application for temporary alimony, and obtained a rule nisi thereon requiring the defendant to show cause why the application should not be granted, it was unnecessary to embody in such application a prayer for ordinary process, and have the same served on the defendant as in the case of an original suit. Nipper v. Nipper, 129 Ga. 450 (3), 59 S. E. 226.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 626-631; Dec. Dig. § 214.\*]

**2. ALIMONY.**

Under the evidence in this case, the trial judge did not abuse his discretion in granting alimony and attorney's fees.

Error from Superior Court, Miller County; W. C. Worrell, Judge.

Action by Florence Williams against Mac Williams. Decree for complainant, and defendant brings error. Affirmed.

W. I. Geer, for plaintiff in error. P. D. Rich, for defendant in error.

HILL, J. Judgment affirmed. All the Justices concur.

(137 Ga. 784)

TRICE v. STATE.

(Supreme Court of Georgia. March 13, 1912.)

(Syllabus by the Court.)

HOMICIDE (§ 250\*)—EVIDENCE.

No error of law is complained of, and the evidence is amply sufficient to support the verdict.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 515-517; Dec. Dig. § 250.\*]

Error from Superior Court, Elbert County; D. W. Meadow, Judge.

Tom Trice was convicted of murder, and brings error. Affirmed.

T. Donnelly Bennett and Geo. C. Grogan, for plaintiff in error. Thos. J. Brown, Sol. Gen., and T. S. Felder, Atty. Gen., for the State.

HILL, J. Tom Trice was indicted for the murder of Henry Clark, and was tried and convicted, with the recommendation that his punishment be imprisonment in the penitentiary for life. A motion for a new trial having been overruled by the court, he excepted. The defendant does not complain that any error of law was committed in the trial of his case. His sole contention is that the verdict of the jury, finding him guilty of murder, is unauthorized by the evidence, and that the evidence for the state, as a whole, would only authorize a verdict for manslaughter.

The evidence for the state, on which a verdict of guilty of murder was asked, showed that the defendant and the deceased were both employes of an oil mill and worked as part of the night shift. After the night's work was done, the deceased, the defendant, and two or three of the other employes, who were eyewitnesses to the tragedy, were all in the bathroom bathing. Will Carter, for the state (who is corroborated in every material respect by L. M. Cade), testified as follows: "I saw a difficulty between Tom Trice and Henry Clark. They got to arguing about the oil mill business, and the argument got up about L. M. Cade. Clark said L. M. Cade could run the presses better than he could clean them, and Trice said, 'You had better wish you were as good an oil man as L. M.

Cade.' He was talking to Henry Clark. Henry bathing; myself and Tom had on his clothes. I was in a tub of water, fixing to take a bath myself, and Henry was in the tub by me, and L. M. Cade was next to Henry Clark. He did not go on duty. He worked Thursday, and did not work Thursday night. Wright Rucker was in his cupboard; he had finished bathing, and had on his clothes. Well, Henry Clark was naked, and started up the aisle about 4 feet wide, and Tom was standing about middle way, 10 or 15 feet, to where Henry had to get his clothes, and they were still arguing, and Clark had to pass Tom, and Tom was standing to one side, and just as Clark turned to get by Tom, Tom had his knife in his hand, and as he passed he struck at him, and he run out the door, and Clark run out behind him. From the bath tub to the door you go out, I suppose, is about 25 or 35 feet, or something like that. When Henry got out of the tub, I suppose Tom Trice was about 7 or 8 or 10 feet up the aisle from Henry. Tom Trice had been down there ever since half past 5 o'clock. When Henry went down there to the bathroom, Tom Trice had his clothes on then, and had a knife in his hand, like he had been cutting him a chew of tobacco. I do not know what he had been doing in there all of that time. When Tom cut old man Henry was when Henry went to pass him. I reckon this was 15 feet from the door. Henry's clothes were right at the door, about the same distance, and it was about 15 feet to where his clothes were. There was blood on that floor. Tom cut old man Henry with a pocket knife. Old man Henry did not have anything in his hand at the time. I know, because he had just got out of the tub by me, and I did not see a thing. I know, if he had had anything, I could have seen it. When Tom cut him, he cut him right across the left breast. I did not see but one cut, and then he broke and run out, and Clark behind." The evidence further showed that the deceased was badly cut across the bowels from one side to the other. "He was cut, you might say, half in two," according to one witness.

We have examined the evidence carefully; and, while there is evidence to show that the deceased had a pair of brass knucks on his hand when found dead, perfectly nude, shortly after the homicide, and that the defendant had a wound on his head, made by some sharp, or semisharp instrument, yet we are of the opinion that the evidence is amply sufficient to support the verdict of guilty of murder, and that the court did not err in overruling the motion for a new trial.

Judgment affirmed. All the Justices concur.

(137 Ga. 708)

**HANSEN v. OWENS et al.**(Supreme Court of Georgia. Feb. 28, 1912.  
Rehearing Denied Feb. 29, 1912.)*(Syllabus by the Court.)***ADVERSE POSSESSION (§§ 46, 116\*)—CONTINUITY OF POSSESSION—TRIAL—INSTRUCTIONS.**

In order to support a claim of prescription, possession must be continuous. While temporary vacancy, resulting from change of tenants or the like, may not necessarily destroy the continuity, it was error to charge broadly as follows: "I charge you that if you find from the evidence that the land in dispute was turpented for any given period of time, and then the turpentine ceased, and that under the rules of law given you in charge there was no other possession for a period of several years, and that after the expiration of several years the land was again taken in possession under the same title, or by any one claiming under the same title, then I charge you that you could not tack the possession thus separated, so as to treat them as one continuous possession, unless you find from the evidence such acts with reference to the land committed by the one claiming the land, or any one holding under the claimant of the land, as would indicate to your minds that such possession had not been abandoned."

[Ed. Note.—For other cases, see *Adverse Possession*, Cent. Dig. §§ 232-254, 66; Dec. Dig. §§ 46, 116.\*]

Error from Superior Court, Ben Hill County; U. V. Whipple, Judge.

Action by John S. Owens and another against F. J. Hansen. Judgment for plaintiffs, and defendant brings error. Reversed.

Haygood & Cutts, for plaintiff in error. Edgar Latham and L. Kennedy, for defendants in error.

**BECK, J.** John S. Owens and Edgar Latham brought against F. J. Hansen an action for the recovery of land. On the trial of the suit the plaintiffs relied both upon written title and upon prescriptive title, contending, in support of their claim of prescription, that the grantor in their deed of conveyance, and those under whom their grantor held possession, had been in open, notorious, and continuous possession for the statutory period. The grand jury returned a verdict for the plaintiffs. The defendant made a motion for a new trial, which was overruled.

The charge quoted in the headnote was excepted to upon the ground, among others, that it was "erroneous, in that it permitted the jury to connect two distinct acts of possession separated by a period of several years, merely because of possible absence of intention to abandon the possession, and thus allowed the jury to find in favor of plaintiffs' alleged prescriptive title without actual possession of seven years, but merely because of the absence of the intention to abandon the land during that time." The exception points out error in the charge which requires a reversal of the judgment denying a new trial. Under this charge the

jury would have been authorized to find that they might tack two separate periods of possession, which in the aggregate would be equal to the period of time necessary for the ripening of the prescriptive title, although the alleged predecessors in title of the plaintiffs, and upon whose possession the latter base their claim of prescription, were not actually in possession of the land in the interval between the two periods of possession, if, during that interval, they did any act which negated the intention to abandon the property. Clearly this was error. Suppose the alleged predecessors in title of plaintiffs, during the interval of time elapsing between the two periods of possession, although not in possession of the land by themselves or by a tenant holding under them, had returned the land for taxes and had frequently asserted that they claimed title to the land? The paying of the taxes and the constant assertion by word of their title would be evidence that they had not abandoned the property, and would show an intention upon their part of returning to possession of the land. But clearly such acts and sayings would not be the equivalent of open, notorious, and adverse possession of the land, all of which are essential elements of prescriptive title.

Other portions of the charge contain the infirmity which we have pointed out in the excerpt from the charge quoted above. Save in this respect, the exceptions to the charge and the rulings of the court present no valid grounds for reversal of the judgment denying a new trial.

Judgment reversed. All the Justices concur, except HILL, J., not presiding.

(187 Ga. 720)

**GEORGIA RY. & ELECTRIC CO. v. COCKE.**

(Supreme Court of Georgia. March 2, 1912.)

*(Syllabus by the Court.)***1. EVIDENCE (§ 471\*)—OPERATION—ACTIONS FOR INJURIES—EVIDENCE.**

On the trial of an action against a railway company for personal injuries, the court properly excluded evidence, offered by the defendant, that "she [the plaintiff] was not paying a great deal of attention to where she was going." This was merely the expression of the opinion of the witness. The ruling excluding it on objection thereto will be sustained, though no specific ground of objection was made to its admission.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 2149-2185; Dec. Dig. § 471.\*]

**2. TRIAL (§ 236\*)—INSTRUCTIONS—REQUISITES—CREDIBILITY OF WITNESSES.**

The court gave this instruction: "The jury should reconcile conflicting evidence whenever possible, so as to make all the witnesses speak the truth and impute perjury to no one. If this cannot be done, the jury may believe the witness, or those witnesses, who have the best opportunity to know the facts and the least inducement to swear falsely, if the testimony is otherwise acceptable to you

under the instructions which I have given you." Error was assigned upon the last sentence of this instruction. In the same connection, and immediately preceding this instruction, the court had fully and correctly charged the jury as to matters they might consider in determining the credibility of witnesses. By the expression, "if the testimony is otherwise acceptable to you," the court doubtless meant if the jury should be satisfied of the credibility of the witness, and it is probable that the jury so understood the instruction. While wanting in accuracy, we do not think the instruction was calculated to mislead the jury. The last and qualifying clause of the instruction differentiates it from the charge held to be erroneous in *L. & N. R. Co. v. Rogers*, 136 Ga. 874 (3), 71 S. E. 1102.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 531-533; Dec. Dig. § 236.\*]

### 3. TRIAL (§ 236\*)—INSTRUCTIONS—REQUISITES—IMPEACHMENT OF WITNESS.

Another instruction excepted to was as follows: "A witness may be impeached by proof of contradictory statements, previously made, as to matters material to his testimony and to the case. If an attempt has been made to impeach any witness on that ground, it would be your duty to look to the testimony, and see whether any witness has been successfully impeached. You will see whether any witness has made, on the stand, a statement which was contradictory to any statement previously made, and whether that statement was material to his testimony and to the case, and you will determine whether the impeachment has been successful, and if it has been successful, and it is on a material point, it would be your duty to disregard the statement of the witness on the stand which is in conflict with previous statements made, and the credibility or weight to be given to the balance of the testimony of a witness is for the jury to determine." The portion of the instruction excepted to is: "It would be your duty to disregard the statement of the witness on the stand which is in conflict with previous statements made." In *Purvis v. Atlanta Northern Ry. Co.*, 136 Ga. 852 (2), 72 S. E. 843, it was held that an instruction substantially the same as that here excepted to "was confusing, and if it be construed, as it very probably was construed, by the jury, as requiring them to find that, as between sworn testimony and previous contradictory statements, the sworn testimony was false, and therefore to be rejected, the rule submitted for the guidance of the jury was not sound." The only witness whom it was sought to impeach in the present case by proof of previous contradictory statements was one who testified in behalf of the defendant below, against whom the verdict was rendered, and the erroneous instruction herein dealt with was calculated to harm the defendant and therefore, because of it, the judgment of the court refusing a new trial is reversed.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 531-533; Dec. Dig. § 236.\*]

### 4. MOTION FOR NEW TRIAL—REVERSAL NOT REQUIRED.

There is nothing in any of the other grounds of the motion for a new trial which requires a reversal.

Error from Superior Court, Fulton County; J. L. Pendleton, Judge.

Action by V. H. Cocke against the Georgia Railway & Electric Company. Judgment for plaintiff, and defendant brings error. Reversed.

Colquitt & Conyers, for plaintiff in error. R. R. Arnold and Westmoreland Bros., for defendant in error.

FISH, O. J. Judgment reversed. All the Justices concur, except HILL, J., not presiding.

(137 Ga. 615)

### SHEPPARD v. BRIDGES et al.

(Supreme Court of Georgia. Feb. 17, 1912.)

(Syllabus by the Court.)

#### 1. CONTRACTS (§ 187\*)—PARTIES—PROMISE FOR BENEFIT OF THIRD PERSON.

Where one person, for a valuable consideration, agrees with another to pay the debts of the latter, under former decisions of this court this alone does not authorize a creditor of the promisee to bring an action at law against the promisor to recover the debt.

(a) It has not been decided that where a debtor conveys his property to another, and as part of the transaction the purchaser agrees to assume and pay the debts of the vendor, the creditor has no remedy in an equitable proceeding, with proper pleadings and parties.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 798-807; Dec. Dig. § 187.\*]

#### 2. PARTNERSHIP (§ 239\*)—RETIREMENT AND ADMISSION OF PARTNERS—LIABILITIES OF FIRM.

Where a member of a firm retired, and a new firm was formed, consisting of his late partner and another, and the new firm agreed to pay to the retiring partner for his interest a certain amount of money, and to assume and pay the debts of the old firm, as between the retiring partner and the new firm he was a creditor for the amount of the unpaid purchase money, and also sustained the relation of a surety in respect of the debts which they had assumed and agreed to pay.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 487, 488, 495-499; Dec. Dig. § 239.\*]

#### 3. PARTNERSHIP (§ 242\*)—RETIREMENT AND ADMISSION OF PARTNERS—LIABILITIES OF FIRM.

If a member of a firm retires, and the remaining partner, or a firm composed of him and another, purchases the interest of the retiring partner and assumes to pay the debts of the old firm, a creditor of the old firm may, in an equitable action to which both the retiring partner and the members of the new firm are parties, enforce the payment of the debt due to him.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 500-508; Dec. Dig. § 242.\*]

#### 4. ACTION (§ 50\*)—PLEADING (§ 64\*)—PARTNERSHIP (§ 322\*)—DISSOLUTION—PROCEEDINGS—INTERVENTION—MISJOINDER—MULTIFARIOUSNESS.

A member of a firm retired, and the succeeding firm agreed to pay to him a certain amount of money and to assume all the debts of the old firm, and thereafter the new firm took in another partner. This partner later filed an equitable petition to wind up the affairs of the last firm and have properly distributed a fund arising from a fire insurance policy on the firm property, and alleged that his copartners were insolvent. The partner who had retired from the original firm filed an intervention, alleging that the purchase money for his interest had never been paid; that he had been compelled to pay some of the debts which had been assumed by the firm to which

he sold; that the firm last formed had taken over the assets of the second firm, and assumed to pay all debts of both the preceding firms; that the partner who filed the petition was seeking to set up claims as a creditor, and had destroyed the evidence of indebtedness by him to the former firms; and that the other partners were insolvent, and the intervenor could only hope to be paid from the fund before the court and by compelling the plaintiff to account with him. He prayed equitable relief. *Held*, that it was error to strike such intervention on the ground that it did not show that the intervenor was entitled to equitable relief, or that there was a misjoinder of parties or causes of action.

(a) The intervention was not demurrable for multifariousness.

[Ed. Note.—For other cases, see Action, Cent. Dig. §§ 511-547; Dec. Dig. § 50; Partnership, Cent. Dig. §§ 746-752; Dec. Dig. § 322; Pleading, Dec. Dig. § 64.\*]

Error from Superior Court, Early County; W. C. Worrill, Judge.

Action by C. W. Bridges, against G. W. Sheppard and others. Judgment for plaintiff, and defendant Sheppard brings error. Reversed.

C. W. Bridges filed an equitable petition against the law firm of Calhoun & Rambo, its individual members, and McL. Parr and L. W. Parr, which contained, in substance, the following allegations: Prior to November, 1908, a partnership existed between George W. Sheppard and McL. Parr, under the firm name of Sheppard & Parr. On or about November 9, 1908, Sheppard sold his interest in the firm to L. W. Parr, and the partnership became known as Parr & Parr; the new firm assuming the debts of Sheppard & Parr. The firm of Parr & Parr sold a one-third interest in the business to the plaintiff, and a new firm was formed, known as Parr, Bridges & Co. Insurance policies were taken in the name of the new firm for \$6,000. The stock was thereafter consumed by fire, and the insurance claims turned over to Calhoun & Rambo for collection. They effected a compromise for \$3,000, and thereafter held the fund so collected as agents and attorneys for Parr, Bridges & Co., and as a trust fund for the payment of the creditors of that firm. All the members of that firm directed said attorneys to pay out of said fund all its outstanding indebtedness, but said attorneys failed and refused to do so, or to account to petitioner or his copartners for any part of said insurance fund; their only excuse being that they had been served with a garnishment at the instance of a creditor of the firm of Parr & Parr. Calhoun & Rambo made answer to said garnishment that they had no money or effects in their hands belonging to the firm of Parr & Parr. On account of the refusal of said attorneys to pay the debts of Parr, Bridges & Co. out of said insurance fund, its creditors began to bring suit against the firm on their claims. Two of said creditors obtained judgments, and had *fi. fas.* issued

thereon and levied on petitioner's property. Petitioner urged Calhoun & Rambo to pay off said *fi. fas.*; but, notwithstanding the fund in their hands belonging to Parr, Bridges & Co. was largely in excess of the amount of the two judgments and the claim in the garnishment case referred to above, said attorneys refused to do so, and without legal excuse retained said fund in their hands. On this account petitioner was forced to pay off the two *fi. fas.*, with costs, in order to prevent a sale of his property, and he had the *fi. fas.* transferred to him. He is entitled to have them paid out of said insurance fund, which constitutes the only assets of the firm of Parr, Bridges & Co. The other two members of the firm of Parr, Bridges & Co. are insolvent. Petitioner is informed that other creditors of that firm have reduced their claims to judgment, and that his property will be subjected to levy and sale thereunder, and he, as the only solvent member of the firm, will be put to great expense and loss unless said creditors are paid out of said insurance fund. By mutual consent of its members, the firm of Parr, Bridges & Co. has gone out of business, and nothing remains but to wind up its affairs with its creditors. McL. Parr and L. W. Parr have no further practical concern with the affairs of the firm, and decline to join petitioner in this suit to compel Calhoun & Rambo to account to the partnership for the insurance money received by them, or to share in the expense of the litigation. Calhoun & Rambo openly declare that they will not pay out the insurance money held by them in payment of the debts of Parr, Bridges & Co.; but it is their avowed purpose to use said fund to subserve the interests of George W. Sheppard, whom they represent as attorneys in an endeavor to collect his demand against the Parrs for the unpaid balance of the purchase price of the stock of goods sold by him to the firm of Parr & Parr, and in the matter of the assumption by that firm of the debts of Sheppard & Parr. Petitioner charges, on information and belief, that said attorneys have entered into an agreement, to be immediately carried out, whereby they will turn over to said Sheppard the whole of said insurance fund now in their hands, in order that he may apply it to the debts of Sheppard & Parr, and thus defeat petitioner's right to contribution from his copartners out of said fund, which belongs to Parr, Bridges & Co. After the suspension of the firm of Parr, Bridges & Co., McL. Parr turned over to said attorneys all the notes, accounts, and choses in action belonging to that firm, for collection, and said attorneys refuse to pay any of the proceeds thereof in extinguishment of the debts of said partnership, as directed by its members to do, or to pay over the proceeds to the partnership, but are

holding the same for the benefit of Sheppard, and threaten to turn over the same to him in part settlement of his demand against the Parrs. There has been no final accounting between petitioner and his copartners. The petitioner asked that Calhoun & Rambo, and its members, be enjoined from paying over to Sheppard, or any one else, and from making any disposition of, any of the insurance fund in their hands, or any of said choses in action turned over to them for collection; for the appointment of a receiver to take charge of said insurance fund, and all other assets of Parr, Bridges & Co., and to wind up its affairs; for an accounting between petitioner and his copartners, and a decree that he be reimbursed, out of the insurance fund belonging to said partnership, the amounts paid by him in settlement of its judgment debts; that Calhoun & Rambo be held liable to him for the damages he has suffered by reason of their wrongful refusal to pay off said *fi. fas.*, and for reasonable attorney's fees and expenses of the litigation; "that the court will permit all creditors of Parr, Bridges & Co., who are at interest, to intervene in this suit and set up their rights, and will render final decree, winding up the affairs of said partnership, and making just and final distribution of all of its assets amongst all persons entitled to share therein;" for general relief; and for process.

Calhoun & Rambo filed an answer, in which, after admitting and denying by number certain paragraphs of the petition, they averred: They had been employed by McL. Parr, representing the firm of Parr, Bridges & Co., to wind up the affairs of the partnership, collect all debts due it, and dispose of the funds so collected in payment of its outstanding indebtedness. With the consent of the firm they settled the claims on the insurance policies turned over to them for \$3,000, \$2,000 of which they received; the remaining \$1,000 being paid by the insurance company to J. W. Calhoun, to whom it was payable, jointly with the assured, under a mortgage clause attached to the policy. One of the policies was issued to Parr, Bridges & Co., and the remaining three to Sheppard & Parr and transferred to Parr, Bridges & Co. They also collected \$331.02 on the notes and accounts due the last-named firm. They were instructed by McL. Parr, at the time of their employment, to pay out the first funds collected on the indebtedness of the old firm of Sheppard & Parr. They were also informed that C. W. Bridges was indebted to the firm of Parr & Parr in the sum of \$1,200 or \$1,250 for the interest in the business he had purchased, besides owing that firm and the firm of Sheppard & Parr open accounts, the amount of which is unknown, for the reason that the leaf of the ledger containing said account has been torn from the book. There were debts outstanding against all three firms. Parr & Parr assumed

the debts of Sheppard & Parr, as evidenced by a written instrument turned over by George W. Parr to respondents for collection. Parr, Bridges & Co., as a part of the consideration of the purchase price of the business of Parr & Parr, had assumed the debts of the latter firm, including the debts due by the old firm of Sheppard & Parr, which had been assumed by Parr & Parr. They itemized amounts paid by them, under the direction of McL. Parr as the representative of Parr, Bridges & Co., amounting to \$1,552.43, the bulk of which was paid in settlement of obligations of the firm of Sheppard & Parr, and the remainder in fees to themselves for services, and averred that they had on hand a balance of \$778.59. They were instructed to pay this balance on the debts of Parr, Bridges & Co.; but the same was held up, not only by the garnishment referred to in the original petition (in which their answer had been traversed), but by other garnishments, and these garnishments represented sums sufficient to exhaust the funds in their hands. They have always been ready to account for the funds in their hands, but the time for so doing has not arrived, there being various matters still in their hands, connected with their employment, which were undisposed of. They prayed that the plaintiff be required to come to an accounting with respect to any sum he might be due to the firms of Sheppard & Parr, Parr & Parr, and Parr, Bridges & Co., and that he be required to pay over the amount of such indebtedness before he be held entitled to any of the funds in their hands.

On May 12, 1910, George W. Sheppard was allowed to file an intervention, wherein he set up the following: He was the real party at interest and claimed the right to have the funds in the hands of Calhoun & Rambo paid over to him. He was a member of the firm of Sheppard & Parr, and sold out to Parr & Parr, they executing to him an instrument in which they promised to pay him \$500 on January 1, 1909, in which instrument he retained title to the stock of merchandise in the store; and this debt was unpaid. Subsequently Bridges bought an interest in the business from Parr & Parr, and gave them his note for \$1,250, upon which he is still indebted to that firm; although the intervenor is informed that Bridges in some manner procured and destroyed the note. Bridges was indebted to the firm of Sheppard & Parr and to the firm of Parr & Parr on open account, but obtained possession of the ledger containing the account and tore therefrom the page or pages containing the account, for the purpose of defeating its collection. When Bridges bought an interest in the firm of Parr & Parr, "It was agreed between them, as a part of the consideration of said purchase, that the new firm of Parr, Bridges & Co. should assume and pay off all of the outstanding indebtedness of Parr & Parr, including the indebtedness of the origi-

nal firm of Sheppard & Parr." Intervener has been compelled to pay out \$828 upon the old debts of Sheppard & Parr to prevent the sale of his property under execution, and there are now other levies on his property, which he is preparing to satisfy by the payment of a sum aggregating \$500. Both the Parrs are insolvent, and he can only expect to be reimbursed the amounts paid out by him and collect the balance still due him upon the purchase price of his interest in the said business from the funds in the hands of Calhoun & Rambo, and by compelling Bridges to account to him for the amount he is due to the two Parrs. "Petitioner adopts as a part of the petition so much of the answer of Calhoun & Rambo in said case as relates to him and his right to have said fund in their hands, and also the allegations in reference to the insurance policies and their collection." The prayers are that petitioner be allowed to intervene; that Bridges be required to come to an accounting in reference to his indebtedness to Parr & Parr; that intervener have a decree directing Calhoun & Rambo to pay over to him the fund in their hands; that Bridges pay to intervener a sufficiency of his indebtedness to reimburse intervener the amounts he expended on the debts of Sheppard & Parr, and the amount still due him by Parr & Parr for the balance of the purchase price of his interest in the business.

At the October term, 1910, Bridges moved to dismiss the intervention filed by Sheppard, on the following grounds: "(1) Said order [the order of the court allowing the intervention filed] is not binding on plaintiff; the same being an *ex parte* order, passed without notice to him or citation to show cause why the intervention should not be allowed, and plaintiff has never had his day in court. (2) The petition for intervention shows on its face that there is no privity of law or of contract between plaintiff and said Sheppard, or between Sheppard and the firm of Parr, Bridges & Co., and that said intervener has no cause of action against said partnership or petitioner, and is not entitled to any of the relief sought. (3) Said intervention brings about a misjoinder of parties, in that George W. Sheppard is not a proper party to any of the controversies between plaintiff and any of the defendants named in his petition. (4) Said intervention brings about a misjoinder of causes of action, in that the complaints of the said Sheppard cannot be legally joined with the cause of action declared on by plaintiff, or with any of the defenses set up by Calhoun & Rambo. (5) Said intervention renders said suit multifarious, in that plaintiff has no concern with the cause of action which Sheppard alleges against Parr & Parr, nor are Calhoun & Rambo in any way interested therein; and it is not the right of the intervener to use plaintiff's suit as the means of asserting any individual claims which said Sheppard may

have against any of the defendants named in plaintiff's petition. (6) It affirmatively appears from said intervention that said Sheppard is not a creditor of the firm of Parr, Bridges & Co. in any legal sense, and that he has no legal or equitable lien on or interest in the fund in controversy. (7) Neither plaintiff nor the firm of Parr, Bridges & Co. is alleged to be insolvent, and said intervener does not make it appear that he is without a complete and adequate remedy at law to assert whatever rights he may have in the premises."

The court passed an order sustaining the foregoing motion and dismissing the intervention, to which order Sheppard excepted.

P. D. Rich and A. E. Thornton, for plaintiff in error. Donalson & Donalson, for defendants in error.

LUMPKIN, J. [1] We will first consider a leading question presented on authorities outside of this state, and then with more special reference to our own statutes and decisions. Two general rules have grown up on the subject of the enforcement of a contract by a person for whose benefit it was made, though he was not a party to it, known, respectively, as the English and American rule. In England some of the earlier decisions looked in the direction of allowing a suit by a beneficiary for a breach, under certain special circumstances. The later decisions in that country deny the existence of such a right of action, though it is held that, if the contract is of a character which constitutes the promisor a trustee for the third person, such person may enforce his rights in equity. Of course, if there is, by agreement of all parties, a novation, or substitution of one debtor for another, the case is different. In America, the courts of a few states follow the English rule more or less closely. But the great weight of authority is to the effect that if the promise is made for the purpose of conferring a benefit on a person, though he be not a party to the contract, or furnish the consideration for the promise, he can bring suit upon it. In the application of the rule to particular facts, and the determination of whether certain cases fall within or without it, there is much conflict, not only in the decisions of the courts of different states, but frequently in those of the same state. Some of this confusion has arisen from a failure to consider carefully what is meant by the rule, and the foundations of the liability declared by it. Nor have the courts always kept clearly in view the difference between several questions: (1) Has there been a novation or substitution of one debtor for another by agreement? (2) If one person conveys property to another, and the latter agrees to assume and pay the debts of the former, do the creditors acquire any right or interest enforceable either at law or in equity? (3) As to partnerships, if one



member of a firm retires, and the remaining member, or a new firm formed by him and another, purchases the assets and assumes the debts of the old firm, as among themselves the assuming partner or firm ranks as principal, and the retiring partner as surety. How far can they affect former creditors by this arrangement, by notice to them? Or must a creditor not only have notice, but also assent? And if he can be affected by notice, can he not assent for his own benefit, if he so desires?

The benefit which is referred to as giving a right of action by a beneficiary, under the American rule, must not be an indirect or incidental one; but the contract, properly construed, must exhibit an intent to confer a benefit on the third party. Whether particular contracts were primarily for the benefit of the parties thereto, or whether they were intended to confer a benefit on third persons, though also operating for the benefit of immediate parties, has given rise to many decisions. In New York, which was the leading state in establishing the American rule, it was said that it was not every contract for the benefit of a third person which could be enforced by him, but that two things must concur—the intent to benefit the third party, and the owing of some obligation by the promisee to the third party. When this combination occurs, it has been considered sufficient to create a right or interest in the beneficiary, which has sometimes been analogized to a trust, sometimes called an equity, and sometimes treated under other legal heads. In a full and valuable note to *Baxter v. Camp*, 71 Am. St. Rep. 169, 175 et seq., both rules are discussed, and the modification of them in different jurisdictions. On page 187 (referring to the American rule), it is said: "The rule has been variously stated as resting upon: (1) A trust relationship; (2) the equitable right of subrogation; (3) agency; (4) privity of contract by substitution; and (5) the broad equity of the transaction." The equity and justice underlying the rule is emphasized, where a debtor conveys his property subject to the payment of his debts, and as part of the consideration receives a promise to pay his creditors. Where acceptance by the creditor of the promise of the purchaser has been held to be required, express acceptance has not been deemed necessary; but it has been said that this could be shown by circumstances. And in some states the bringing of a suit has been deemed sufficient. *Motley v. Manufacturers' Ins. Co.*, 29 Me. 337, 50 Am. Dec. 591; *Copeland v. Summers*, 138 Ind. 219, 35 N. E. 514, 37 N. E. 971. It has also been urged that it should not be assumed that the seller had a purpose to defraud his creditors, or to place his property beyond their reach, or to escape payment, but that it should rather be inferred that such a contract contemplated a direct benefit to them by furnish-

ing to the buyer assets and requiring a promise to pay debts. It is generally held in America that the creditor has a right of action at law; but in some jurisdictions, and under some circumstances, the remedy in equity, or by equitable proceedings, has been held to be more complete. Agreements to indemnify the seller against loss or against creditors might perhaps be different.

[2] In cases where a person in business takes in a partner, or one member of a firm sells his interest to a third party, and the new firm takes the assets and assumes and agrees to pay the existing debts of the old one, there is an additional reason in certain jurisdictions for holding that such creditors may have a right of action, at law or in equity, against the new firm. In 1836 the case of *Oakley v. Pasheller*, 4 Cl. & F. 207, was decided by the House of Lords. That decision was quite generally supposed to have held, in effect, that if a firm dissolves, and one of the partners (or he and a new partner) takes the assets and assumes the liabilities, the retiring partner, or new firm, thereafter occupies the position of a surety, not only as between the partners themselves, but as to creditors of the old firm to whom notice of such contract has been brought; that such a creditor with knowledge is required to treat the retiring partner as a surety; and that if he extends the time for the payment of his debt, without the knowledge or consent of the retiring partner, the latter will be released. Subsequently in *Swire v. Redman*, L. R. 1 Q. B. 536, the former decision was explained by Cockburn, C. J., who said that the House of Lords did not intend to rule as stated above, but that in the case of *Oakley v. Pasheller*, supra, there were facts tending to show consent by the creditor to the arrangement between the parties. Many courts, however, did not think that the decision of the House of Lords was founded on any assent by the creditors; and such decision furnished a basis for the rule as to affecting a creditor who has notice. In an exhaustive note to *Dean v. Collins*, 9 L. R. A. (N. S.) 49 et seq., after discussing the ruling in the majority of the cases that an assumption of partnership liability is a promise made for the benefit of the partnership creditors, of which such a creditor is at liberty to take advantage, and which he may enforce against the assuming partner or partners, and after referring to the difference in the decisions as to whether a retiring or indemnified partner occupies the position of a surety, not only as to the succeeding partner or firm assuming the debts of the old firm, but also as to a creditor with notice, the annotator says: "So another difference of opinion, running largely along the same lines, appears with reference to the right of a partnership creditor to take advantage of an assumption of part-

nership debts. Generally speaking, but with some exceptions, the courts which regard assent by the creditor as necessary to make an assumption effectual as against the original rights of the creditors and the original liabilities of the retiring or indemnified partner hold that the creditor cannot proceed against the assuming debtor alone on his assumption without joining his codebtors, unless he assented to, or became a party to, the assumption."

Let us now consider the decisions and codified law in this state. In *Bell v. McGrady*, 32 Ga. 257, a firm engaged in a livery stable business purchased a horse and buggy, giving therefor a promissory note, which was transferred for value by the payee to another person. A short time thereafter the firm sold all of its property, including its stables, business, horses, buggies, books of account, and other appurtenances (among the property sold being the horse and buggy for which the note was given), and the purchaser agreed in writing to pay all the debts and liabilities of the firm. The holder of the note filed a bill in equity against the members of the partnership and the purchaser. He alleged that the prime consideration of the purchase by the person who bought the property of the firm was his agreement to pay their debts; that the purchaser did pay to the complainant a small amount of the note; that the written agreement was inaccessible to the complainant, and he believed it had been destroyed by the purchaser; that the firm and its members were insolvent; that one of them had absconded; that the purchaser refused to pay the balance due on the note, notwithstanding he had collected from the credits of the firm more than enough for that purpose. The bill prayed for discovery, and that the purchaser from the firm be compelled to pay to the complainant the principal and interest due on the note. At the trial a motion was made on behalf of the defendant to dismiss the bill, for want of equity, and because the complainant had an adequate remedy at law. The trial judge dismissed the case. This court reversed the judgment. It was held that the purchaser of the assets of the firm, by virtue of his agreement with them, stood in the position of a trustee to pay their debts, and that it was proper for the creditor to go into equity to enforce this agreement. In *Dallas v. Heard*, 32 Ga. 604, a married woman and her children were interested in certain property. They entered into an agreement by which it was stipulated that such property (except certain specified articles) should be "all sold, and that the proceeds of the sale, and the negroes (after payment of all debts for which said property is legally bound) be divided among said children, in consideration of which the children should each pay to the said Lucinda [the woman] annually the one-sixth part of

\$350 during her natural life." Under this agreement the property was sold and a division made. A short time thereafter the woman died insolvent, leaving no estate of any kind, and no administrator was appointed. A creditor of the woman, who held a note made before the date of the agreement, filed a bill in equity against the children, alleging that the debt was a charge upon the estate of the woman, and that, as the children had the property, each should pay a proper proportion of the debt. On demurrer the bill was dismissed. This court reversed the judgment, holding that the question as to whether the plaintiff, who was not a party to the agreement, could enforce it in equity, was no longer an open one, after the decision in *Bell v. McGrady*, supra. It was also held that, the original debtor having died leaving no property, and no administration having been granted, this was a sufficient excuse for not making her, or a representative of her estate, a party to the bill. The decisions in these two cases have never been reversed or formally modified, though in some decisions the cases under consideration were distinguished from those cited above. If there should be an irreconcilable conflict between them and some later decision, without any overruling or changing of the earlier decisions, under our statute the older decision would stand. Civil Code 1910, § 6207.

In *Empire State Ins. Co. v. Collins*, 54 Ga. 376, a domestic fire insurance company issued a policy. Afterward another domestic insurance company, whose principal office was in a different county, purchased from the insuring company its business and assets, and assumed the payment of its indebtedness due or to become due on its policies. No contract was made by the purchasing company with the holder of the policy, and nothing occurred to establish any relation between them, or to give the person assured any claim on the second company, except such equitable rights as he might have growing out of the contract between the two corporations. After a loss by fire, the assured brought an action at law against both companies in a county where the original insurer had no office or agent. It was held, under the statute as it then stood in relation to venue, that suit could not be brought against the insuring company in that county, and, this being so, that the action at law could not be sustained separately against the purchasing company, as there was no such privity or relation between it and the assured as would entitle him to such action against that company on the contract made between the two companies. In the opinion it was said: "No contract was made between the plaintiff and the Home Company [the purchasing company], no premium had been received by it from him, and the only claim he had on that company was the equitable right growing out of its contract

with the company which issued its policy. It is true he might enforce this agreement by bill (32 Ga. 257; *Id.* 32 Ga. 604), or at law, with proper pleadings. But, to have asserted it against the Home Company, it would have been necessary to have made the Empire Company a party, and had it legally served." Here is a distinct recognition of the equitable right of the assured. In *Bracken & Ellsworth v. Dillon*, 64 Ga. 243, 37 Am. Rep. 70, it was sought to bind an incoming partner for the debts and liabilities of a former firm, which had been succeeded in business by an individual and for the debts of this individual, who had been succeeded by another firm, against which the suit was brought. It was held that the plaintiffs must show some agreement on the part of the incoming partner, upon a sufficient consideration, to assume such liabilities and pay such debts, before he could be bound, through the new firm, to pay the old indebtedness. This decision accords with the general rule that one cannot be made liable for a debt which he neither incurred nor agreed to pay. The mere entrance of a new partner into a firm does not render him liable for pre-existing debts. But this does not affect the question of what legal or equitable rights pre-existing creditors may have, if the new partner, in acquiring an interest in the firm, agrees that the new firm will assume the debts of the old. Some of the language in the opinion in that case may be broad; but there is no ruling that, in case of such an assumption, pre-existing creditors would have no rights, legal or equitable. In *Morris v. Marqueeze & Varney*, 74 Ga. 86, the ruling was repeated. It has since been codified. Civil Code 1910, § 3174.

In connection with the expression, "on sufficient consideration," it is to be noted that in this state a consideration does not have to move from the person to whom the promise is made. In Civil Code 1910, § 4249, it is declared: "If there be a valid consideration for the promise, it matters not from whom it is moved, the promisee may sustain his action, though a stranger to the consideration." If the creditors may not technically be designated as promisees, the principle is recognized that a person may enforce a contract, though he did not furnish the consideration. Besides, the obligation of the original firm to pay its creditors, and the fact that the assets subject to the debts are transferred, and as a part of the transaction the obligation is assumed by the new firm, must not be overlooked. In *Gunter v. Mooney*, 72 Ga. 205, a woman and another entered into a written agreement, whereby the other party was to take the son of the woman, feed and clothe him, and give him a common school education, and a horse, bridle, and saddle when he became 21 years of age. After becoming of age, the son brought suit against the third

party, alleging a breach of covenant, in that the defendant failed to give him a common school education. It was held that he was not a party or privy to the contract, but a mere stranger, and could not maintain an action of covenant upon it. It will be seen that this involved no transfer of assets subject to debts, no assumption of pre-existing debts, and no question of partnership. In fact, there was no legal duty on the part of the parent to furnish a common school education, and no assumption of the performance of such a duty by the other contracting party.

In *Pfeiffer & Co. v. Hunt*, 75 Ga. 513, a surviving partner of a firm sold the entire partnership property, and as a part of the consideration the purchaser agreed to assume all the liabilities of the firm, and also to pay a certain sum of money. A person who held a promissory note, executed, not by the firm, but by one of the partners as principal and the other as surety, brought suit on the note against the purchaser of the partnership assets, alleging that the note was for merchandise sold to the firm while in business. It was held that there was no privity between the holder of such a note and the purchaser of the firm property; that there was no agreement to pay the holder of such note, which was not a partnership debt, but an individual debt of one partner on which the other was surety, and that the petition was demurrable. An offer was made to amend the petition by setting out the written contract, whereby it was alleged that the purchaser undertook and obligated himself to pay all indebtedness of the business conducted by the former partners, and that the promissory note held by the plaintiff was one of the liabilities of the business, which the defendant agreed to pay. It was held that this amendment was properly refused. It was said in the opinion that in its original form the suit was "against a party that it was sought to substitute for the principal debtor and his security. The amendment offered to charge the defendant as having undertaken to pay the debt, which the plaintiff alleged was due to him from the firm of *Truitt & Hunt*." It was added that there was nothing in the original pleadings to amend by, and that, had there been enough upon which to ingraft an amendment, the one offered sought to introduce a new and distinct cause of action. It will be seen that this did not hold that the creditor would have had no rights, as against the purchaser, upon an action properly brought.

In *Austell v. Humphries*, 99 Ga. 408, 27 S. E. 736, S., being indebted to H., agreed with him in parol that H. should, to the extent of the indebtedness, have "an interest" in certain promissory notes which S. held on a third person. Subsequently S. delivered these notes to A. for use by the latter in raising money, with an understanding that

H. was to be paid out of their proceeds; but there was no contract or agreement of any kind between A. and H. A. raised money on the notes, but did not pay any portion of the same to H., though he afterwards promised H. in parol to pay H. the debt due him by S. It was held that H. had no such title to the notes in question as would have authorized him to bring an action against S. for any of the notes or their proceeds. It was said that the suit was upon an express contract, and no contract between H. and A. was shown. It was further held that the promise made by A. to H., after receiving and realizing on the notes, that he would pay H., was without legal consideration, and did not furnish a ground for recovery. Here again the question arose upon a suit which was considered to be one at law based on an express contract. There was also no question of partnership, and no transfer of firm assets with an assumption of firm debts. *Spears v. Scott*, 111 Ga. 745, 36 S. E. 950, depends on special facts; but, in so far as it throws light on the question, it seems to recognize the equity of a mortgage creditor whose debt a purchaser of land agreed to pay.

In *Hawkins v. Central Ry. Co.*, 119 Ga. 159, 46 S. E. 82, one railroad company sold to another its property and vendible franchises, in consideration of a sum of money and an agreement by the purchaser to pay the vendor's "current liabilities." It was held that one who had been injured by reason of the negligence of the vendor company could not maintain a suit therefor against the vendee. After referring to the two lines of decisions, the opinion said that the court was relieved from deciding between these divergent authorities, in view of the common-law principles codified in two sections. One was the section already quoted, which declares that, if there be a valid consideration for the promise, it matters not from whom it moved, and that the promisee may sustain his action, though a stranger to the consideration. Civil Code 1910, § 4249. The other was the section which declares: "As a general rule, the action on a contract, whether express or implied, must be brought in the name of the party in whom the legal interest in such contract is vested, and against the party who made it in person or by agent." Civil Code 1910, § 5516. It may be doubted whether these sections have the full effect seemingly attributed to them. Declaring that a promisee may enforce the promise, although he did not furnish the consideration, does not seem to exclude persons who may have interests from protecting them by appropriate action; and the statement that "as a general rule" the action must be brought in a certain way would seem to imply the existence of exceptions to such general rule, rather than its universality. But, however that may be, this decision and others estab-

lish the rule that, where a vendee agrees to pay the debts of the vendor, the creditors of the latter cannot in this state sue the vendee at law, upon the contract. It has since been followed in *Guthrie v. Atlantic Coast Line R. Co.*, 119 Ga. 663, 46 S. E. 824.

[3] It does not, however, settle the question of when there may be equitable rights in creditors, which may be protected by equitable proceedings and with proper parties. Nor does it deal with the status of retiring or incoming partners and the assumption of the debts of the former firm by the latter. In an illustrative way, it was said in the opinion: "Thus, if property is put in the hands of an assignee or trustee, to be sold and the proceeds applied to the payment of creditors, the latter may sue in equity to enforce the agreement for their benefit. *Bell v. McGrady*, 32 Ga. 257; *Dallas v. Heard*, 32 Ga. 604 (2)." But in fact such was not the exact agreement made in those cases, especially not in the case of *Bell v. McGrady*, as will appear from what is said in a former part of this opinion. In *Sears v. Scott*, supra, a somewhat similar reference was made to those cases, when it was said: "In *Bell v. McGrady*, 32 Ga. 257, and *Dallas v. Heard*, Id. 604, wherein the contracts sued upon were construed to constitute the promisor trustee for the benefit of the third person, it was held that the latter might sue thereon in equity." Neither in the case of *Hawkins* nor in that of *Sears* was mention made of what was held, in the two earlier cases cited, to be sufficient to create "a trust," or enforceable equitable right, in favor of creditors of a vendor, especially where the original debtor was insolvent. If it be suggested that garnishment is the remedy of the creditor, it may be asked, how can a creditor garnish a promise to pay his own debt? Suppose that all or a large part of the consideration for the sale of a debtor's property was the promise by the vendee to pay the vendor's debts; what would be the status of the creditors?

[4] From what has been said, it will be seen that in this state the creditor of the vendor cannot bring an action at law against the vendee assuming to pay debts, but, in a proper case, may resort to equitable proceedings in the superior court, which can give both legal and equitable relief. This meets one objection which has been raised to the rule allowing the creditor to sue directly—that both the debtor, who is the direct promisee, and the creditor might have a right of action against the promisor. If all parties are before the court on equitable proceedings, full justice can be done, and the rights of all protected. A somewhat similar ruling was made as to a partial assignment of a chose in action. It was held that the assignee could not sue the debtor at law, but might bring an equitable proceeding, wherein the rights of all parties

could be determined. *Rivers v. Wright*, 117 Ga. 81, 43 S. E. 499.

We now turn to the doctrine, as it exists in this state, of the effect of a dissolution of a firm, or sale by one partner to a third person, and the assumption of the debts by the continuing partner or firm, as creating the relation of principal and surety. In *Preston v. Garrard*, 120 Ga. 689, 48 S. E. 118, 102 Am. St. Rep. 124, 1 Ann. Cas. 724, the subject was carefully considered, the decision in *Oakley v. Pasheller*, 4 Cl. & F. 207, supra, and the later explanation of it by Coburn, C. J., were mentioned, and a review of the decisions in this state made. Upon the whole, it was declared that this court had followed what was understood to have been ruled in the *Oakley Case*, and that it was the fixed rule here that "a creditor of the partnership, who has notice of the dissolution and the agreement by the continuing partner to assume the debts, is bound to accord to the retiring partner all the rights of a surety," and may so act as to work the discharge of the retiring partner from liability, as a surety might be discharged. This rule cannot be confined to a case where one partner retires, and the remaining partner assumes the debts. In the parent case cited above, a partner died. A new firm was formed by the remaining partner and another, which purchased the interest of the decedent, and the new firm agreed with the executor to assume and pay the liabilities of the old firm. See, also, *Arnold v. Nichols*, 64 N. Y. 118.

It is submitted that it would be most extraordinary if the courts should hold that partners, by means of a sale of the interest of one to another, or to a new firm, and an agreement by the latter to assume the debts of the old firm, could affect a creditor having notice, place on the latter the duty of respecting the rights of the retiring partner as a surety, whose principal is the partner or firm assuming the debts, and yet declare that the creditor cannot elect to treat the partner or firm so assuming the debt as the principal. An arrangement of the character named, to which the creditor is not a party and does not assent, does not of itself destroy his right to sue his original debtors. But if it compels him to recognize a status for the benefit of such debtors, or one of them, is he debarred from the privilege of recognizing it for his own benefit? By Civil Code 1910, § 3216, it is declared that "the rights of creditors shall be favored by the courts, and every remedy and facility afforded them to detect, defeat, and annul any effort to defraud them of their just rights." And in section 3217 it is said: "Courts of equity should assist creditors in reaching equitable assets in every case where to refuse interference would jeopard the collection of their debts." If not a violation of the letter

of these sections, it would certainly not accord with their spirit and purpose to hold that a firm of debtors could shift their assets at will, and impose on their creditors duties by mere notice, but could prevent a creditor from accepting for his benefit the status which they had thrust upon him for their own. Such is not the law.

In the present case Bridges sought to have a court exercising equitable jurisdiction to wind up the affairs of Parr, Bridges & Co., and to "make just and final distribution of all its assets amongst all persons entitled to share therein." But he objected to Sheppard's intervening and claiming the right to "share therein," or attacking the claims of Bridges, and seeking equitable relief. The complainant opened the door of a court of equity and invited entrance, but he objected to Sheppard as an unwelcome intervenor. Sheppard claims to stand as a retiring partner of Sheppard & Parr, with the rights of a surety against Parr & Parr, who were succeeded by Parr, Bridges & Co., which firm assumed the debts of the former firms, but have not paid them, and he alleges that he has had to pay some of the debts of Sheppard & Parr. He alleges, also, that the purchase money for his interest in the firm of Sheppard & Parr has never been paid; that he retained title to it until payment; that he thus stands as a creditor; that the fund before the court arose in part from insurance policies transferred by him; that Bridges has never paid for his interest, has destroyed evidence of indebtedness by him to the former firms, and is seeking to secure for himself the funds of the firm available for payment of the debts. Under his allegations he is entitled to intervene and seek relief. None of the grounds of the demurrer were meritorious, and they should have been overruled.

We do not pass on questions of priority of claims, as they are not before us, but only upon the right to file and urge an intervention.

Judgment reversed. All the Justices concur, except HILL, J., not presiding.

(137 Ga. 655)

THROWER v. LOGAN et al.

(Supreme Court of Georgia. Feb. 27, 1912.)

(Syllabus by the Court.)

VENDOR AND PURCHASER (§ 129\*)—PERFORMANCE OF CONTRACT—TITLE OF VENDOR.

Where a contract for the sale of land, signed by one party as vendor and by another called the purchaser, contained a stipulation that "this agreement is made subject to right of purchaser to investigate titles to the property, and to decline to perform if title of the vendor be legally insufficient and they fail to perfect the same within a reasonable time," and, after fixing times of payment by installment, provided further that cash payment was to be made "when vendors comply with their obligation to make satisfactory showing as

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

to title," and where, in a suit against the purchaser for a breach of such contract, it appears that the vendors had only an option given by the real owner of the property, and that the vendors did not acquire title to the property during the life of the option, such vendors cannot maintain the suit for a breach of the contract, although it is alleged that the purchaser refused absolutely to comply with the contract and renounced his obligation under the same before the expiration of the option.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 238-244, 249; Dec. Dig. § 129.\*]

Error from Superior Court, Fulton County; J. T. Pendleton, Judge.

Action by James L. Logan and others against M. L. Thrower. Judgment for plaintiffs, and defendant brings error. Reversed.

The petition of James L. Logan, E. G. Black, and E. Rivers against M. L. Thrower sets forth the following facts: M. Haralson, Sr., secured a written option to purchase from J. Aldredge, the owner, a piece of real estate on Peters street, in the city of Atlanta, for the price of \$50,000. Haralson then entered into a written contract with petitioners, whereby the latter, in consideration of their negotiating a sale of the property and bearing all expenses incident thereto, were to have two-thirds of the gross profits arising from such sale as they might make of the property within the life of the option. E. Rivers Realty Company, acting as agents for Logan, Black, and Rivers, negotiated a sale of the property to M. L. Thrower for the price of \$65,000. This sales contract, after reciting that it is between "M. L. Thrower (as purchaser) and E. Rivers Realty Co., agents (as vendors)," contained the following stipulations: "This agreement is made subject to right of purchaser to investigate titles to the property, and to decline to perform if title of the vendors be legally insufficient and they fail to perfect the same within a reasonable time. \* \* \* Cash payment to be made when vendors comply with their obligation to make satisfactory showing as to title." E. Rivers Realty Company tendered to Thrower a complete abstract of title to the property, in order that he might have the title investigated, and later caused to be tendered to him a bond for title, properly executed by Aldredge, the owner, and also promissory notes covering the deferred payments, all in accordance with the terms of their contract of sale made with Thrower; but Thrower declined to receive the bond for title, or to execute the promissory notes, and "said Thrower, about the time said bond for title from James Aldredge was tendered to him, before the date and subsequent thereto, but before the expiration of said option, repudiated said sale and refused to carry out said contract, without reason." Thrower was fully advised, at the time he executed the contract for the purchase of the property, of the ex-

istence of the option referred to, was advised that E. Rivers Realty Company were acting as agents for petitioners, and that petitioners' right to said property rested upon their contract with Haralson. Haralson's option to purchase the property for \$50,000 expired about four months after Thrower is alleged to have repudiated the sale to himself. The option having expired, petitioners seek to recover as damages from Thrower two-thirds of \$15,000, the gross profits which would have been realized on the transaction by a consummation of the sale to Thrower; this to be credited with two-thirds of the \$500 earnest money paid by Thrower at the time he executed the contract, the other one-third having been paid over to Haralson in accordance with the terms of petitioners' contract with him, as above set forth. Thrower filed a general demurrer to the petition, which was overruled, and he excepted.

McDaniel, Alston & Black and Robt. C. & Philip H. Alston, for plaintiff in error. Anderson, Felder, Rountree & Wilson, for defendants in error.

BECK, J. (after stating the facts as above). Pretermittting any discussion of the question whether or not the word "agents" is not mere descriptio personæ, and whether, therefore, E. Rivers Realty Company were not the only persons who could sue for a breach of the sales contract by Thrower and the other party thereto, notwithstanding the allegations in the petition that E. Rivers Realty Company were in fact the agents of the plaintiffs and that this was known to Thrower, and conceding that the plaintiffs would have the same right to bring suit for a breach of this contract that their alleged agents, E. Rivers Realty Company, would have had, we are of the opinion that the general demurrer to the petition should have been sustained. The written contract as it stands is plain, unambiguous, and complete. Under that contract the defendant had the right to decline performance "if title of the vendor be legally insufficient and they fail to perfect the same within a reasonable time." According to the showing in the petition, the plaintiffs never had a legally sufficient title. They had no title. They had an interest in an option, merely. And while it may be true that, owing to the commercial standing of the plaintiffs, they would in all probability have secured for Thrower a perfectly good title made through the true owner, it is also true that, under the contract as it is written, Thrower, the defendant, contracted for a title coming through the vendors named in this paper, constituting the contract. It might be that if the plaintiffs, while they did not have title at the time of the execution of this contract, had within a reasonable time acquired a sufficient title to the property in controversy, they would have

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

been in position to exact performance upon the part of Thrower. But they did not put themselves in that position at any time. They never had, up to the time of the expiration of the option, anything more than the legal right, upon compliance with their obligations under the option, to maintain an action for specific performance against the real owner of the property, in case he should refuse to convey, whereby they might acquire title. A tender of a bond for title from the real owner of the property was not the equivalent of a tender of a bond for title from the vendors named in the contract, coupled with the showing that they had title to the property. See, in this connection, *Wells Fargo & Co. v. Page*, 48 Or. 74, 82 Pac. 856, 3 L. R. A. (N. S.) 103, and the cases cited in the note. Suppose that, on the day when it is alleged that Thrower refused to perform his part of the contract, instead of refusing, he had made a tender of the purchase money in accordance with the contract; would the plaintiffs have been able to perform? Clearly not. We do not overlook the fact that they alleged ability to perform, and that we are dealing with a refusal to sustain a demurrer to the petition. But the allegation of ability to perform, in the light of the entire petition, is nothing more than a conclusion of the pleader, and is to be construed in connection with other allegations in the petition showing that they were holders of an option given by the owner of the property; for we cannot overlook the other distinct allegation in the petition showing that title and ownership was in Aldredge. Evidently the allegation in the petition that plaintiffs were able to perform—that is, make title—means merely that they were in position to enforce their rights under the option above referred to. But their rights under this option, however clear, were not the equivalent of title actually acquired. We do not think that the petition, construed as a whole, shows that the plaintiffs were able to perform, and that if Thrower, instead of refusing to perform, had offered to do so, the plaintiffs could have complied with their obligation. And that being true, the refusal of the defendant to perform, and the declaration upon his part that he would not perform, gave the plaintiffs no right of action against him; and the petition should have been dismissed upon general demurrer.

Judgment reversed. All the Justices concur, except HILL, J., not presiding.

(137 Ga. 710)

HOWELL, et al. v. WILSON et al.  
(Supreme Court of Georgia. Feb. 29, 1912.)

(Syllabus by the Court.)

1. QUIETING TITLE (§ 7\*)—RIGHTS OF COUNTERPARTY—CLOUD ON TITLE.

Where a person negotiating for the sale of land caused the title to be investigated, and re-

fused to buy because the trustee and others specifically named in a trust deed and others, some of whom might take in remainder under such deed, the same being the deed through which the proposed seller claimed by grant from the trustee, orally proclaimed that only an estate for the life of one of the persons designated in the trust deed as a cestui que trust passed by the trustee's conveyance, and upon the death of such life tenant the fee would vest in other persons contemplated in the trust deed, the tenants in remainder being indeterminate until the death of the life tenant, held, the fact that the negotiating purchaser refused to buy merely because such questions were so raised and urged did not entitle the proposed seller, before the death of the life tenant, to proceed against the trustee and the life tenant and possible contingent remaindermen contemplated by the trust deed to quiet his title and remove the alleged claim as a cloud upon it.

[Ed. Note.—For other cases, see *Quieting Title*, Cent. Dig. §§ 14-33; Dec. Dig. § 7.\*]

2. APPEAL AND ERROR (§ 843\*)—REVIEW—QUESTIONS CONSIDERED.

The ruling announced in the preceding headnote controls the case, and it is unnecessary to deal with other assignments of error made in the bill of exceptions.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3331-3342; Dec. Dig. § 843.\*]

Error from Superior Court, Fulton County; Geo. L. Bell, Judge.

Action by H. L. Wilson and others against L. I. Howell and others. Judgment for plaintiffs, and defendants bring error. Reversed.

Henry L. Wilson, Jack J. Spalding, W. T. Ashford, and Mrs. Susan W. Allgood brought suit against Mrs. Lizzie Ida Howell, Mrs. Eleanor Howell Gunby, Clark Howell, Sr., trustee, Edgar Roberts, and Louise Roberts. The substance of the petition, so far as is now material, was as follows:

In 1866 N. E. Gardner executed and delivered to C. W. Dill, as trustee, the following conveyance: "This indenture, made and entered into this the 4th day of July in the year of our Lord one thousand eight hundred and sixty-six, between Nathaniel E. Gardner, of the county and state aforesaid, of the one part, and Charles W. Dill, of the same place, trustee for Eliza Ida Gardner and Mary Ellen Gardner, children of the said Nathaniel E. Gardner, all of the said county, of the other part, witnesseth that whereas, the said Nathaniel E. Gardner, being free from debt and being desirous of securing to his said daughters, Lizzie Ida Gardner and Mary Ellen Gardner, and their children by any future husband, a maintenance, support, and education, and being seised and possessed of the estate hereinafter mentioned, being acquired by purchase: Now, therefore, said Nathaniel E. Gardner, for and in consideration of the natural love and affection that he has and bears to his said daughters, Lizzie Ida and Mary Ellen, and for the purpose of providing a support, maintenance, and education for them, and also in consideration of the sum of \$10 to him paid, the said Nathaniel E. Gardner, in hand paid at and before

the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, hath granted, bargained, sold, and conveyed, and doth by these presents grant, bargain, sell, and convey, unto said Charles W. Dill, trustee as aforesaid, and to such other trustee or trustees as may hereafter be appointed in the place and stead of the said C. W. Dill, or his successors, trustees for the said Lizzie Ida and Mary Ellen or their children, the following named property, to wit: [Omitting description of the property.] To have and to hold the said named property to the said Charles W. Dill, trustee, as aforesaid, with all the rights, members, and appurtenances thereof, together with all the improvements now being made thereon and such improvements as I may choose hereafter to make thereon, and to such other trustees as may hereafter be appointed for the said Eliza Ida Gardner and the said Mary Ellen Gardner, in trust for their sole and separate use, benefit, and behoof, for and during their natural lives, and at their deaths, or the death of either of my said daughters, to be equally divided, share and share alike, among the children; but in case that either of my said daughters should depart this life leaving no child or children, or the issue of a child or children, in life at her death, then and in that event the said property to go to and vest in the other daughter, or in case of her death her child or children, or issue of child or children, if there should be any living, but if my other daughter should be dead without child or children, or the issue of child or children, living, then to go to and vest in any other child or children that I may have living, share and share alike. I hereby further direct that my two daughters shall own said property in common during their minority, or until one or the other of them shall marry; but when they shall attain the age of 21, or either the one or the other of them shall marry, I direct that said property shall be divided equally between them by three competent disinterested men, who shall be elected by their trustee for that purpose, who shall enter upon and make a fair estimate of said property, not only in relation to its permanent value, but also in relation to its average proceeds and profits, and when so estimated the property shall be described on a separate list of said appraisers and folded carefully and put in a hat, and my daughters shall draw for the same, the oldest being entitled to draw, and the estate of my daughters shall thus be made separate; and I hereby further direct that Charles W. Dill, trustee as aforesaid, shall advance to my daughters, if necessary, the whole of the income or profits of the property aforesaid, that he shall educate them in good style, and furnish them means and facilities to qualify and sustain them in the best society, and that neither of them shall be accountable to the other for any part of the proceeds of said estate, but they shall each use said proceeds

as their circumstances may require until said division shall be made, when their estate shall become individual and separate; but before said estate shall be divided, if there should be an accumulation of means sufficient to buy a piece of property of any considerable value, then I direct that said proceeds shall be invested in property of substantial value which will afford a fair and reasonable profit, with prospect of permanent increase, which property shall be subject to the same division, limitation, and restrictions as the estate hereinbefore and hereinafter set forth. I hereby further direct and require that no part or portion of the corpus of said estate shall ever be sold until the life estate is ended, for any purpose whatever, unless it should become less profitable than ordinary investments, or my daughters shall desire to change their residence to some other locality, or for some other like good and substantial reason; but if such reason should ever exist, the fund shall be reinvested, and before said sale shall be made I hereby direct that full and satisfactory reasons shall be given and clear and sufficient proof be made to the chancellor granting said order that such necessity exists, and that the proceeds of the same when made shall be reinvested in like property, or property as substantial in permanent value and as productive in its yield of profits. I herein again direct that said property, at the death of either of my said daughters, shall vest in and become absolute fee-simple estate in their child or children, or the issue of their child or children; but if either or both of them should die without leaving child or children, or the issue of child or children, living at the time of their death, then said property shall be subject to the limitations and restraints hereinbefore set forth."

In 1872 Dill, as trustee, procured an order at chambers from the judge of the superior court of Fulton county to sell the land conveyed to him as trustee, or so much of it as was necessary to satisfy certain judgments which had been rendered against him as trustee on debts against the grantor existing prior to the execution of the deed, to pay taxes due by the trust estate, and to pay for certain necessary repairs made upon the trust property. At a public sale made in pursuance of such order the plaintiff Henry L. Wilson purchased certain portions of the land conveyed in the trust deed. Another person bought some of the land so sold, and subsequently conveyed it to Wilson. There were other purchasers of different parcels of the land at such sale, under whom Spalding, Ashford, and Mrs. Allgood respectively hold under mesne conveyances. Dill resigned the trust in 1874, and Clark Howell, Jr. (now Sr.), who had married Lizzie Ida Gardner, one of the cestuis que trustent, was appointed in his stead, and accepted. Mary E. Gardner, the other cestui que trust, died in childhood, prior to the resignation of Dill.



Mrs. Howell is still in life. In 1878 Howell, as trustee, obtained an order from the judge of the superior court of Fulton county to sell at private sale other portions of the land of the trust estate to Westmoreland, as trustee, and in pursuance of such order a sale was consummated by a deed from Howell, as trustee, to Westmoreland, as trustee, executed and delivered in September, 1878. The parcels of land conveyed to Westmoreland are now respectively owned by Spalding, Ashford, and Mrs. Allgood, except small parts since sold by them under warranty deed. The proceedings to obtain this last order and the order itself were by inadvertence never entered on the minutes of the court, or otherwise recorded, and the original papers have all been lost. Mrs. Howell has only one living child now, Mrs. Gunby; her other child having died in infancy. N. E. Gardner had another child, Mary E. Gardner, born about 10 years after the execution of the trust deed, who married and subsequently died, leaving as her only heirs at law the defendants Edgar Roberts and Louise Roberts. The plaintiffs alleged that they have severally been in adverse possession of the portions of the land respectively held by them under conveyances made by Dill and Howell as trustees, and under mesne conveyances from other purchasers at the sale made by such trustees, for more than seven years, and therefore they not only have title by lawful conveyance, but also have good prescriptive title to the land so held by them; that one of the plaintiffs, Henry L. Wilson, shortly before this suit was brought, endeavored to sell a part of the land so held by him, but defendants raised certain questions as to the sufficiency of Wilson's title, saying that there was a question as to whether the title acquired by Wilson and his coplaintiffs under the sales made by the trustees was only an estate for the life of Mrs. Howell, and at her death, under the conveyance by Nathaniel E. Gardner to Dill, as trustee, the fee would vest in Mrs. Gunby or her children, if they survived Mrs. Howell, and, if they did not survive her, then it would vest in the defendants Edgar and Louise Roberts, children of Mary E. Gardner Roberts, or their descendants, and on account of such questions the proposed purchasers declined to buy; and that "said questions so raised constitute a cloud upon the title of" petitioners.

The prayers were: (a) That the plaintiffs be decreed severally to have good fee-simple title superior to all claims of defendants, jointly or severally; (b) that the trust deed be construed to convey the property in fee simple to the trustee for the uses and trusts therein specified; (c) that it be decreed that Dill, as trustee, and Howell, his successor, have always represented the fee-simple estate, but plaintiffs' title to their respective properties by prescription was good as against the trustees as representing the fee-

simple estate; (d) that it be decreed that upon the death of Mary E. Gardner the interest of Mrs. Howell became a fee-simple interest, and that she has at all times since represented such interest, and that as to the interest so represented by her the plaintiffs be decreed to have a good prescriptive title; (e) that it be decreed that the sales by the respective trustees were valid and under proper orders of court, etc., and that certain deeds set forth in the petition were executed in pursuance of the orders of court, and that the deeds operated to convey the fee-simple title as fully as it was owned and held by N. E. Gardner at the time of executing the trust deed; and, lastly, that process issue, and that plaintiffs have all other and further relief in law and equity to which they might be entitled under the facts of the case.

All of the defendants demurred to the petition, generally and specially. The demurrers were overruled. After the evidence was submitted, the court directed a verdict in favor of the plaintiffs. The defendants excepted to both rulings just stated.

Dorsey, Brewster, Howell & Hayman, for plaintiffs in error. Alex C. King and E. M. & G. F. Mitchell, for defendants in error.

ATKINSON, J. [1] In behalf of Wilson and others (plaintiffs in the trial court, defendants in error here), counsel contend that the facts alleged in the petition authorized the plaintiffs to maintain an action: (a) For removal of a cloud from title; (b) for injunction against interference with the enjoyment of their respective properties; (c) to perfect and complete the means by which the right, estate, and interest of the plaintiffs to their real property may be approved and secured, and to remove all obstacles to its enjoyment. We fail to see that the facts alleged would authorize a court of equity to afford any such relief, and conclude that the court erred in refusing to dismiss the petition on general demurrer. The plaintiffs assert no interest, except such as is traceable to the trust deed, and do not allege that the defendants assert any, except such as is founded on the same instrument. It is true that, in addition to record title traceable to the trust deed, the plaintiffs assert in severalty titles by prescription by reason of possession under separate conveyances to them executed by the respective trustees and other intermediate conveyances; but, in order to show that prescription was operative against the defendants during the period of adverse possession, the terms of the trust deed were relied upon as showing that the fee was always vested, in the one instance, in the trustee, or, in the other instance, in Mrs. Howell, subject to be divested by the happening of a subsequent event, and that in either event suit should have been instituted before the expiration of the prescriptive period, had it been desired to question

the effect of the conveyances by the trustees or the right of the plaintiffs to titles by prescription. The plaintiffs were in peaceable possession, and it was not alleged that the defendants had themselves entered or otherwise committed a trespass upon the property which would authorize the plaintiffs to sue either in ejectment or for any waste or other wrong to the property; but the objects of the suit was to construe the trust deed in a particular way and to establish and declare the several titles of the plaintiffs, thereby concluding the defendants from setting up any claim to it in the future. It is not alleged that the defendants had ever done anything tending to disturb the possession or enjoyment of the property of the plaintiffs; but the complaint is that recently, while the plaintiff Wilson was negotiating a sale of part of the property purchased by him, the defendants raised certain questions as to the title held by Wilson, the same being common to the other plaintiffs, the question so raised being of such character as to constitute a cloud upon the titles of all the plaintiffs.

The questions so raised and claimed to constitute a cloud upon the title of plaintiffs were: (a) That Dill, as trustee, was not seised of the property in fee simple, and a sale by Dill, under the orders of the court, did not operate to convey the fee-simple title, but at most only an estate for life of Mrs. Howell; that the remainder estate was contingent, and, the remaindermen being not then determinable, the sale by the trustee did not extinguish the estates of possible remaindermen under the deed; (b) that certain of the deeds executed by Dill, as trustee, do not show that they were made under order of the court authorizing them, and that all evidence thereof rests in parol, and would in a short time be lost. There was no effort to cancel as a cloud on title any particular document which was being exhibited by defendants, and could be none, because any possible claim of interest by defendants was under the trust deed, the same instrument upon which plaintiffs' titles were founded. Hence the claim of defendants at most could have amounted to no more than oral assertions of title. Equity will not interfere to silence such oral assertions of title, made in that manner, on the ground that they amounted to a cloud upon title; nor, the plaintiffs being in possession, would it assume jurisdiction to decide in these the status of plaintiffs' title with reference to such questions before the death of the life tenant, when those who would take in remainder were not determinable, and possibly not in existence.

The case of *Waters v. Lewis*, 106 Ga. 758, 32 S. E. 854, was one in which the judgment was reversed because the court refused to dismiss the petition on general demurrer. The plaintiff alleged that she was the owner of certain property, of which she was then

in possession, but to which defendant had asserted an oral claim. After reciting the history of her own title, and the claim of the defendant, it was further alleged that the latter claim was fraudulent and without foundation, and operated to cause a cloud upon the plaintiff's title, and had been and was being vexatiously and injuriously used against plaintiff by defendant, who had instituted both civil and criminal proceedings against plaintiff; that the witnesses within whose knowledge the facts relied upon to sustain plaintiff's title were of great age, and their evidence was likely to be lost by death of the witnesses; and that plaintiff could not immediately and effectively protect herself and maintain her rights by any course of proceeding open to her, except by resort to a court of equity. The prayers were that the defendant and all persons claiming under him be enjoined from entering upon the land or asserting a claim to it, and that a decree be granted declaring the claim of defendant fraudulent and void. It was held that the mere claim to or assertion of ownership in the property is not such a cloud upon property as can be removed by equitable proceedings, and that under the allegations there was no ground for equitable relief by injunction. This ruling has been approved in the cases of *Weyman v. City of Atlanta*, 122 Ga. 539, 50 S. E. 492, and in *Mayor, etc., of Gainesville v. Dean*, 124 Ga. 750, 53 S. E. 183. To the same effect, see *Devine v. City of Los Angeles*, 202 U. S. 313, 26 Sup. Ct. 652, 50 L. Ed. 1046; *Sulphur Mines Co. v. Boswell*, 94 Va. 480, 27 S. E. 24; *Newman v. Newman* (Tex. Civ. App.) 86 S. W. 635. In the latter case it is said: "Where the bill discloses no more than an unquiet and unfounded apprehension as to the validity of his title, and a false and clamorous assertion of a hostile title in the defendant, equity will not interfere to quiet the one or silence the other."

The case of *Miles v. Strong*, 62 Conn. 95, 25 Atl. 459, was a bill to remove a cloud upon title. The facts alleged were: Selah Strong by his will devised to Earnest Strong Miles, his grandson, certain real estate, subject to the provision: "The foregoing devises to the said Earnest Strong Miles are subject to the charges aforesaid to him and his heirs, forever: Provided, however, that if he, the said Earnest Strong Miles, shall die before he attains his majority, or without leaving lawful issue surviving him, and without having disposed of all the lands by his will devised to him either by deed or by will, then and in either of these events, it is my will that all said lands herein devised to the said Earnest Strong Miles and not by him disposed of shall descend to and be distributed among my heirs at law, and those who legally represent them." The land was properly set out and distributed to him in 1882, and the estate fully administered and settled. The land distributed to Earnest Strong Miles

was subject to the provisions of the will as set out above. In 1890, after he became 21 years old, and after the charges had ceased to exist, he conveyed to his father in trust for himself most of the land. Subsequently, in order to secure any benefit or profit from the land, it was necessary to sell a portion of it, and the trustee contracted to sell a portion thereof to one Mrs. Smith. But before the purchase had been consummated, some of the heirs of Selah Strong, Mrs. Smith learned, were asserting a claim to the land under the will, and she declined to purchase the land. A demurrer was filed and overruled, and the case was appealed. The claims which the heirs at law of Selah Strong made, and were alleged to constitute a cloud on the title of the plaintiffs, were: "After this bargain [to sell the land to Mrs. Smith] was made, the defendants claimed, and since have claimed, that the will and distribution give them some interest in the land, and that any deed of the same from the plaintiffs, or either of them, would only convey the same subject to such interest of the defendants. This claim of the defendants came to the knowledge of Mrs. Smith and the plaintiffs; but the exact claim or nature of the interest or title of the defendants, as claimed by them, was not made known to the plaintiffs or Mrs. Smith. In consequence of this claim of the defendants, Mrs. Smith refused to complete the purchase and accept a deed of the premises, and the plaintiffs lost the sale thereof." In the course of the opinion the court said: "The principal question is \* \* \* whether, upon the facts stated, the plaintiffs were entitled to judgment. \* \* \* The claim of the defendant is in fact based upon the will. \* \* \* It will be observed all parties claim under the will. \* \* \* They all assert the genuineness and validity of the will. \* \* \* Whether the plaintiffs have the absolute title which they claim, or whether the defendants have the contingent interest which they assert, depends upon the construction of the will. If any cloud whatever exists upon the plaintiffs' title, it exists solely because of the will, and not because of the record of distribution, or of the oral claim and assertions made by the defendants. These are based upon and derive all their force and effect from the will, and without that they would clearly constitute no cloud upon the plaintiffs' title which a court of equity would ordinarily remove. It is the will, then, and the will alone, that casts a cloud upon the title, if such a cloud exists; and whether or not such cloud exists depends solely upon the construction of the will. \* \* \* If the construction contended for by the defendants is the correct one, then the claim made by them does not constitute a cloud upon the plaintiffs' title, because on that supposition the claim is a valid one. On the other hand, if the plaintiffs are right in the construction, then there is no cloud which a court of equity will relieve

against; for on that supposition the will itself shows on its face, and without the aid of extrinsic evidence, that the claim of the defendants has no foundation, and in such cases the general rule certainly is that a court of equity will not interfere to remove such a cloud. *Munson v. Munson*, 28 Conn. 582 [73 Am. Dec. 693]; *Alden v. Trubee*, 44 Conn. 455; *Cornish v. Frees*, 74 Wis. 490, 43 N. W. 507."

Clearly there was no sufficient allegation to authorize the court to assume jurisdiction for the purpose of declaring that the "questions raised" in the manner alleged constituted a cloud upon title, or to authorize the grant of injunction. But the plaintiffs contended further that equity will interpose for the purpose of construing the deed and settling the question of title by decreeing the fee to be vested in the plaintiffs. On the contrary, it is contended that equity will not interfere for such purpose; the defendants not being in possession, and not having made any effort to disturb that of the plaintiffs, or instituted any legal proceedings to question the validity of plaintiffs' title. In Georgia there is no statute expressly conferring equity jurisdiction in such cases, and in the absence of statute equity will not, as a general rule, assume jurisdiction to afford such relief under the conditions alleged. *Cross v. Del Valle*, 1 Wall. 5, 17 L. Ed. 515; *May v. May*, 167 U. S. 310, 17 Sup. Ct. 824, 42 L. Ed. 179; *Mansfield v. Mansfield*, 203 Ill. 92, 67 N. E. 497; *Torrey v. Torrey*, 55 N. J. Eq. 410, 36 Atl. 1084; *Frank v. Frank*, 88 Ark. 1, 113 S. W. 640, 19 L. R. A. (N. S.) 176, 129 Am. St. Rep. 73; *Hart v. Darter*, 107 Va. 310, 58 S. E. 590, 15 L. R. A. (N. S.) 590, 13 Ann. Cas. 1; *Heptinstall v. Newsome*, 146 N. C. 503, 60 S. E. 416. In the case of *Miles v. Strong*, 62 Conn. 95, 25 Atl. 459, referring to the contentions of counsel, it was said: "Their claim is that they are entitled to ask for the construction of this will for the purpose of settling a dispute about a legal title to land. We think this cannot be done. \* \* \* Every dispute between parties relating to the legal title of real estate, arising under wills, deeds, or other written instruments of title, would furnish a pretext to obtain a construction of the instrument in a proceeding of this kind. We have no statute, as many states, governing this matter, and we know of no practice under which such a result can be obtained in a proceeding like this."

[2] 2. The assignment of error upon the refusal of the judge to dismiss the petition on general demurrer having presented the controlling question upon which the trial court is reversed, it is unnecessary to deal with the questions as to the misjoinder of parties, and other grounds of special demurrer, and the direction of a verdict.

Judgment reversed. All the Justices concur, except LUMPKIN, J., disqualified, and HILL, J., not presiding.

(137 Ga. 326)

**DANIEL v. PERSONS.**

(Supreme Court of Georgia. March 14, 1912.)

*(Syllabus by the Court.)***CRIMINAL LAW (§ 1001\*)—PUNISHMENT—SUSPENSION OF SENTENCE.**

There is no law of force in this state which confers upon a judge any power or authority to suspend the execution of a sentence imposed in a criminal case, except as an incident to a review of the judgment; and where a sentence, to which no exception is taken, directed that the person convicted pay the costs of prosecution, and in addition thereto that he be confined in the chain gang on the public works of the county, or elsewhere as the proper authorities may direct, for the full term of 12 months, to be computed from the date of his delivery to the chain gang, "provided, however, that this sentence to be confined upon the chain gang be and the same is hereby suspended indefinitely during the good behavior of the defendant, the court reserving the right to have said sentence executed whenever in the discretion of the court it ought to be," held, that the portion of the sentence last quoted, purporting to suspend so much of the same as directed that the defendant be confined in the chain gang, is of no force, and consequently should be ignored, and the sentence executed as if it did not appear therein, and that one upon whom such a sentence has been imposed cannot, though more than 12 months may have elapsed from the date of the sentence, be held to have served out the term therein mentioned, when in point of fact he has never been placed in the chain gang, especially so when the sentence itself declares that the imprisonment in the chain gang "be computed from the date of his delivery to such chain gang."

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2554-2559; Dec. Dig. § 1001.\*]

**Certified Question from Court of Appeals.**

Habeas corpus proceedings by Ike Daniel against W. F. Persons. From a judgment refusing the writ, defendant brings error. Heard on questions certified by the Court of Appeals. Answered.

Doyle Campbell, for plaintiff. W. S. Florence, for defendant.

**FISH, C. J.** The Court of Appeals has certified to this court the following question:

"In the above-stated case the Court of Appeals desires the instruction of the Supreme Court on the following question of law, a decision of which is necessary to the proper adjudication of said case:

"On November 13, 1907, Ike Daniel entered a plea of guilty, in the city court of Monticello, to the offense of carrying concealed weapons, and thereupon the court imposed the following sentence: 'It is ordered and adjudged by the court that the defendant do pay into this court the sum of no dollars and the costs of this prosecution, and in addition thereto that he be confined in the chain gang on the public works of said county, or elsewhere the proper authorities may direct, for the full term of twelve months,

to be computed from the date of his delivery to said chain gang. And it is further ordered that the defendant be taken from the bar of this court to the common jail of said county, there to be kept in close custody until he shall be demanded by the authorities of said chain gang, in default of the payment of said fine and costs: Provided, however, that this sentence to be confined upon the chain gang be and the same is hereby suspended indefinitely during the good behavior of the defendant; the court reserving the right to have said sentence executed whenever in the discretion of the court it ought to be.' The accused paid the costs of the prosecution as required, and was discharged. On May 13, 1911, the judge of the city court of Monticello, who had imposed the foregoing sentence, passed the following order: 'It appearing that this defendant has not served the sentence on the chain gang passed by this court November 13, 1907, and that his behavior has not been good, it is therefore considered, ordered, and adjudged by the court that the sheriff proceed to execute said sentence, and that said Ike Daniel be confined in the chain gang on the public works of said county, or elsewhere the proper authorities may direct, for the full term of twelve months, to be computed from the date of his delivery to said chain gang.' In compliance with the last above order Ike Daniel was arrested by the sheriff. He sued for a writ of habeas corpus, and, after hearing, his application was refused, and he was remanded to the custody of the sheriff.

"Under the facts stated, was the custody of the sheriff legal, or should the accused have been discharged? on habeas corpus? In this connection the Court of Appeals calls to the attention of the Supreme Court the decisions in the cases of *Neal v. State*, 104 Ga. 509, 30 S. E. 858, 42 L. R. A. 190, 69 Am. St. Rep. 175, *Gordon v. Johnson*, 126 Ga. 584, 55 S. E. 489, and *O'Dwyer v. Kelly*, 133 Ga. 824, 67 S. E. 106, where there is apparent conflict in the decisions on the question raised in the present record and on which instructions are requested."

In *Neal v. State*, 104 Ga. 509, 30 S. E. 858, 42 L. R. A. 190, 69 Am. St. Rep. 175, it was held: "(1) There is no law of force in this state which confers upon a judge any power or authority to suspend the execution of a sentence imposed in a criminal case, except as an incident to a review of the judgment; and therefore a sentence to which no exception is taken, directing, among other things, that the accused do work in a chain gang for a term of six months, cannot lawfully be qualified by adding thereto the words: 'Sentence of six months suspended until further order of the court.' Such words in such a sentence are of no force, and consequently

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

should be ignored, and the sentence executed just as if they did not appear therein. (2) One upon whom such a sentence has been imposed cannot, though more than six months may have elapsed from the date of the sentence, be held to have served out the term therein mentioned, when in point of fact he has never been placed in a chain gang; more especially when the sentence itself declares, 'that this sentence begin and be counted from the time of the reception of said defendant in the chain gang under this sentence and judgment.' (3) It follows, from the foregoing, that this court will not set aside an order directing the execution of a sentence framed as above indicated, although such order was passed more than six months after the imposition of the original sentence, and though the accused was not called upon to show cause why such an order should not be made." The facts of that case were: That on March 8, 1897, in the superior court of Gordon county, Neal was found guilty of the offense of adultery and fornication. On the same day the court sentenced him as follows: "Whereupon it is considered, sentenced, and adjudged by the court that J. M. Neal do pay within three days a fine of \$300 and all costs of this prosecution, and work in the chain gang six months, and then be discharged, or, in default of such payment, that said defendant do work in the chain gang on the public works or on such other works as the county authorities may employ the chain gang, for and during the full term of twelve months, and then be discharged; and it is further ordered that this sentence begin and be counted from the time of the reception of said defendant in the chain gang under this sentence and judgment. The defendant may be discharged at any time on the payment of said fine and costs. Sentence of six months suspended until further order of the court." On March 12, 1898, at the February term of the court, the following order was passed by the judge: "Whereas, at the February term, 1897, of this court, J. M. Neal pleaded guilty to the offense of adultery and fornication, and was sentenced by the court to pay a fine of \$300 and all cost, and to work in the chain gang for and during the term of six months, and the said sentence of six months was suspended till the farther order of the court: It is therefore, upon sufficient cause being shown to the court, ordered that the sheriff of said county and his lawful deputies arrest said J. M. Neal, and that six months sentence in the chain gang be enforced." Neal excepted to this order, and upon a review thereof the rulings in the above-quoted headnotes were made. After fully discussing the question presented and citing numerous authorities, it was said in the opinion: "The sentence imposed by the court below was not lawfully qualified by the addition thereto of the words: 'Sentence

of six months suspended until further order of the court.' Such words in such a sentence are of no legal force, and consequently should be ignored, and the sentence executed just as if they did not appear therein."

In *Gordon v. Johnson*, 126 Ga. 584, 55 S. E. 489, the facts were as follows: The mayor pro tem. of the city of Cordele, sitting as recorder, found an accused person guilty of violating a municipal ordinance, and sentenced him to be confined in the chain gang for 6 months, and, if there should be no chain gang to which he could be delivered, to be confined in the guardhouse for 60 days, with direction, however, that the defendant could be released on payment of \$500. The sentence further ordered and directed that, upon the payment of \$100, the other \$400 should be suspended during good behavior. The defendant paid \$100 and was released from imprisonment. Subsequently, by direction of the recorder, who, from evidence heard in another case, thought that the defendant was not behaving well, the city marshal arrested the defendant and held him for the purpose of requiring the payment of the additional \$400, or of reincarcerating him as provided in the original sentence. It was held: "(1) Construing the entire sentence together, it gave a right to the defendant to be released upon the payment of \$100. (2) The recorder had no authority to suspend the payment of \$400, and, after the payment of the \$100 by the defendant and his discharge from custody, at some later time, when he thought the defendant was not behaving properly, to direct his rearrest, and that he be put to work upon the chain gang or imprisoned, as provided in the original sentence, unless he should pay the additional \$400. (3) Where, after paying the \$100 provided in the sentence, the accused was released, and was afterwards rearrested as indicated in the preceding note, such custody was unlawful, and he was entitled to be discharged by writ of habeas corpus." There is nothing in the decision rendered in that case that is conflicting with what was held in *Neal's Case*, supra. On the contrary, *Neal's Case* was cited and the doctrine thereof approved; for it was said in the opinion: "Indeed, it has been held that a judge of the superior court has no authority to suspend the execution of a sentence imposed in a criminal case, except as incidental to a review of the judgment. *Neal v. State*, 104 Ga. 509, 30 S. E. 858, 42 L. R. A. 190, 69 Am. St. Rep. 175. The facts of this case illustrate clearly why such a proceeding cannot be upheld."

In *Gordon v. Johnson*, supra, it appeared that the recorder had the power to sentence the person convicted in the alternative, to work on the public works or to pay a fixed fine. If the prisoner paid the fine, he was entitled to be discharged absolutely, not conditionally. The sentence declared that the

defendant should be confined in the chain gang or guardhouse for a fixed time, with direction that he should be released on payment of \$500. Later in the same sentence it was directed that he should be released upon payment of \$100, and the other \$400 was suspended during good behavior. This court held that the result of such sentence was to send the defendant to the chain gang or guardhouse for the fixed time, with the right to be discharged upon the payment of \$100, that this right to be discharged was absolute, and that the recorder had no power to increase the fine afterwards, or hold an additional sum over the defendant in terrorism. When he adjudged that the defendant should be discharged from imprisonment upon payment of a certain amount, the effect of the sentence, taken as a whole, was that that ended the liability of the defendant to endure imprisonment. In other words, the legal effect of the sentence as a whole was to substitute \$100 in place of \$500 as the alternative, the payment of which would relieve him from enduring confinement in jail or in the chain gang. The effort on the part of the recorder to reserve the right to increase the fine later or to remit a part of it for the present, subject to return to the original fine at the will of the recorder, was wholly beyond his authority. When the lesser alternative fine was paid the punishment was at an end. The doctrine announced in *Neal's Case* was applied in *O'Dwyer v. Kelly*, 133 Ga. 824, 67 S. E. 106, and followed in *Wall v. Jones*, 135 Ga. 425, 69 S. E. 548, and in *Roberts v. Wansley*, 137 Ga. 439, 73 S. E. 654. The only difference in the facts of the last three cases, just above cited, and the facts in *Neal's Case*, supra, and the case at bar, is that in the former three cases the suspension of the sentence was not a part of the written sentence, but was made orally by the judge, either at the time the written sentence was imposed or subsequently, while in *Neal's Case* and the case at bar the qualifying clause purporting to suspend the sentence was included in the written sentence.

All the cases referred to and previously decided by this court are in harmony; and applying the doctrine announced in each of them to the facts of the case at bar, the custody of the sheriff was legal, and the accused should not have been discharged on habeas corpus. All the Justices concur.

(137 Ga. 726)

**CALLAHAN v. WESTERN & A. R. CO. et al.**  
(Supreme Court of Georgia. March 2, 1912.)

*(Syllabus by the Court.)*

**RAILROADS (§ 297\*)—OPERATION—ACCIDENTS TO TRAINS—ACTIONS—PLEADING.**

The plaintiff's petition stated a case against the Southern Railway Company, sufficient as against a general demurrer; and under the evidence introduced upon the trial of

the case against the other defendant, the Western & Atlantic Railroad Company, the question of the liability of the latter defendant was one for the jury, under the evidence and proper instructions from the court, adjusted to the issues made.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 944-953; Dec. Dig. § 297.\*]

Error from Superior Court, Fulton County; Geo. L. Bell, Judge.

Action by W. M. Callahan against the Western & Atlantic Railroad Company and another. Judgment for defendants, and plaintiff brings error. Reversed.

W. M. Callahan filed suit against the Western & Atlantic Railroad Company and the Southern Railway Company, and alleged as follows: While in the employment of the Western & Atlantic Railroad Company in capacity of conductor of a yard engine, the plaintiff's engine was pushing, at the rate of 6 or 8 miles an hour, a train of about 25 cars eastward along the south-bound main line of the Georgia Railroad, in the city of Atlanta, for delivery to the lessees of that railroad. When his train reached a point between Moore and Bell streets, a switch engine of the Southern Railway Company was discovered on the same track, about 12 or 15 car lengths ahead and approaching the plaintiff's train. He and one Crawley, a fellow trainman, were on top of the car nearest the Southern Railway switch engine; this being the proper place for the plaintiff to be in the discharge of his duty as yard conductor in charge of the train. The plaintiff and Crawley both signaled the engineer of plaintiff's train to stop. This signal should have been received by another train hand next to the engine, but he negligently failed to receive and transmit the signal to the engineer; and finally the fireman of the plaintiff's train took the signal, and transferred it to the engineer, who, suddenly and without warning, applied his brakes with such violence as to break the train in two, and the section of the train on which the plaintiff was riding continued on its way toward the Southern Railway switch engine. "Quite an emergency was upon the plaintiff and his fellow trainman on these 6 or 8 cars to stop them, and they accordingly both made a dash for the brake at the end of the car upon which they were, for the purpose of applying it. Plaintiff's fellow trainman reached the brake first, and plaintiff, in the emergency, at once turned and went to the other end of the car, towards the Southern engine, for the purpose of signaling said Southern engine to stop, in order to avoid a collision. Just as plaintiff reached a point at the edge of the car, the headlight from the Southern Railway engine blinded him, and in the darkness, and not being able to see, he stood unbalanced and insecure upon the edge of the car. Being thus

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

so close to the edge of the car and unbalanced, and also moved by the emergency of the impending collision with the Southern switch engine, the plaintiff jumped from the car, and in striking parts of the car and the ground below was greatly and permanently injured." The train hand between the plaintiff and the engine was negligent in not transferring the signal, and in not keeping a proper lookout. Both the engineer and fireman were negligent in not keeping a proper lookout, and in not seeing the signals given by plaintiff and Crawley. The engineer was negligent in applying his brake so suddenly and violently as to break the train in two. The crew of the Southern Railway switch engine were negligent on being on the east-bound main line of the Georgia Railroad, when said engine was going west, they being upon the wrong track, and were further negligent in not stopping the switch engine, and in continuing to move the same in the face of the approaching train of plaintiff "until within about 6 feet of plaintiff's train."

At the trial term the court, on general demurrer, dismissed the action as to the Southern Railway Company. The case proceeded to trial against the Western & Atlantic Railroad Company. The plaintiff testified: "I occupied the head car going to the Georgia road. The car was 25 or more cars away from the engine. I was not in the rear. I was on the front car from the engine. I was shoving them. The engine was pushing instead of pulling them. We push all deliveries to the Georgia road. The engine was behind. I was on the front car. That was the car nearest to the Southern engine that I saw. The top of that car was my place. It was my duty to see everything going along the railroad, and see that I didn't get in no trouble. I was in charge of the train. They had to report to me. This obstruction, or whatever it was, when I first saw it, was about 15 or 16 car lengths or more. It was on the same track that I was on, the Southern. It was a Southern engine. When I saw it, I commenced waving my hand down; gave my men signal to transfer to the engineer. I gave them a stop signal first; what we call a slow stop signal. That was the regular signal that I gave. The proper signal to give in the case of emergency is a washout signal. A washout signal is to stop at once. The signal was communicated to the back man [brakeman], or to the fireman, if he could see it. I direct the signals necessary to get around from point to point. Seeing that there was going to be trouble, I gave the stop signal that way [indicating]. And, seeing we were going to get closer, I gave this here [indicating]. That is a washout or stop at once; dead stop. It is just the same as shooting a torpedo. I transferred that signal to the brakeman on the train, and the brakeman transferred it to the next

engine, and the engineer was to take it from the man next to the engine, if he was where the engineer could see him. The engineer got this one from the fireman. As to the distance I had traversed in the time while I was giving these signals, I had traveled, I suppose, 8 or 9 cars. As to how close I was on the Southern Railroad engine, it was a safe distance to stop, providing it hadn't broke loose then. When I gave the signal, 6 or 8 cars broke loose, probably toward the Southern engine. The knuckle in the end of the car broke out. After those cars broke loose, they were running at the same speed as before they broke. I was on the car next to the Southern engine. I ran to get the brakes. I discovered myself right at the end of the car, with my head falling toward the Southern engine, and to keep from falling, with my head toward the engine, I made a jump." At the conclusion of the evidence introduced by the plaintiff, the court granted a nonsuit.

R. R. Arnold and Hill & Wright, for plaintiff in error. Tye, Peeples & Jordan and McDaniel, Alston & Black, for defendants in error.

BECK, J. (after stating the facts as above). 1. The petition stated a cause of action against the Southern Railway Company, sufficient to withstand an oral motion to dismiss in the nature of a general demurrer. No special demurrer was filed, so far as appears from the record, requiring the plaintiff to show specifically whether he actually jumped or fell from the car upon which he was standing, and which was the leading car in the string of cars that was being pushed by the Western & Atlantic Railroad Company's locomotive; but the allegations of the petition show that the plaintiff's last position upon the car, when he jumped or fell therefrom, was one of peril, and an emergency requiring quick and prompt action on his part had been brought about by the negligence on the part of the employes of the Southern Railway Company and the negligence of the coemployes of the plaintiff upon the latter's train. The Southern Railway engine was wrongfully on the track upon which it was approaching the plaintiff's train. The trainman on the plaintiff's train, according to the allegations of the petition, was negligent in not receiving the signals which the plaintiff first gave, and in failing to transmit those signals to the engineer; and the engineer of this train, who finally received the signals, was negligent in too suddenly and violently applying brakes, which resulted in a break of the plaintiff's train, and in consequence of which the car upon which plaintiff was standing, and others, moved on towards the approaching engine of the Southern Railway Company. If the allegations are true, the motion of the car upon which

plaintiff was standing, towards the approaching locomotive, was the result of negligence, and the approaching of the locomotive of the Southern Railway Company under the circumstances was wrongful and negligent. Thus the concurring negligence of the employes of the Southern Railway Company, who were operating the locomotive, and the negligence of the trainman and the engineer that caused the breaking of the plaintiff's train, brought a moving locomotive and cars disconnected from the control of their locomotive to a point where collision was apparently imminent. The petition sets forth facts showing an emergency; and if, acting under necessity brought about by this apparent emergency, the plaintiff, being in a position of apparent peril, jumped from the car, or jumped because, as it is alleged, he became "unbalanced" on the edge of the car, it cannot be said that the negligence of the employes operating the approaching locomotive was not the proximate cause of the plaintiff's injury received in falling or jumping from the car. The fact that the negligence of others contributed to the existence of the emergency did not have the effect of relieving the Southern Railway Company of the consequences of the negligence of its employes. Consequently it was error for the court to dismiss the case, upon general demurrer, as to the Southern Railway Company.

2. After a careful consideration of the entire evidence, we are of the opinion that the question of the liability of the Western & Atlantic Railroad Company was one for decision by the jury, under the evidence and proper instructions from the court upon the issues involved, and that it was error to grant a nonsuit.

Judgment reversed. All the Justices concur, except HILL, J., not presiding.

(137 Ga. 721)

SPRUELL et al. v. MITCHELL et al.  
(Supreme Court of Georgia. March 2, 1912.)

(Syllabus by the Court.)

1. SUFFICIENCY OF PLEADINGS.

Under the allegations of the petition, the judge did not err in dismissing the action on general demurrer.

(Additional Syllabus by Editorial Staff.)

2. WILLS (§ 261\*)—SETTING ASIDE PROBATE—LACHES.

Inexcusable delay of 10 years bars a suit to set aside a decree probating a will by a court having jurisdiction.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 607; Dec. Dig. § 261.\*]

Error from Superior Court, Fulton County; Geo. L. Bell, Judge.

Action by T. E. Spruell and another against J. N. Mitchell and others. Judg-

ment for defendants, and plaintiffs bring error. Affirmed.

Thomas E. Spruell and Joseph S. Power, who were nominated as executors of the will of Stephen Spruell, Jr., made application to probate it in solemn form. The testator had a wife, one son (the above-named executor, T. E. Spruell), and seven daughters, one of whom was Mary A. Cox, and the will disposed of real and personal property. The entire estate was bequeathed to the testator's wife for life, and "at her death then to be equally divided among my eight children, except my daughter M. A. Cox. I will and bequeath to her five dollars, and the other seven, namely [naming them], to be divided among them seven." When the will was propounded, all of the legatees, who were the only heirs at law of the testator, having previously attained majority, and none of them laboring under any legal disability, were made parties to the proceeding, and served. One of the daughters, Mary A. Cox, filed a caveat, alleging extreme old age and mental weakness of the testator, imbecility of mind and body, and want of memory, so that he was not capable of making a will; also that the will was unequal and inequitable and unjust in its provisions, and that the testator had been induced to make it so by reason of undue influence exercised over him by other members of the family, tending to prejudice him against her, thereby inducing the testator to execute the will while laboring under the false impression that the caveatrix was his enemy, etc. Upon the trial of the caveat before the ordinary, a judgment was rendered admitting the will to record. An appeal was entered to the superior court, where, on the trial, the following verdict was rendered on October 18, 1900: "We, the jury, find that the will offered is the true and lawful last will and testament of Stephen Spruell, deceased, and that the same is properly set up, established, and admitted to probate in solemn form as such, except as follows: We find that the item of said will bequeathing five dollars to Margaret Cox, and excluding her from participation in any further distribution of said estate, is not the will and wish of said deceased, but that the said Margaret Cox is entitled, as a legatee, to an equal share of the estate of said deceased, with each of the other children of the deceased, legatees under said will, subject to the life estate, bequeathed to the widow of said deceased, and that she stands, with reference to said estate and under said will, on equal terms with the other children, legatees as aforesaid." Upon this verdict the court entered the following judgment of the same date: "Whereupon it is ordered, adjudged, and decreed by the court that the will of Stephen Spruell be and the same is hereby



set up, established, and probated in solemn form as the last will and testament of said Stephen Spruell, deceased, except that the item bequeathing five dollars to Margaret Cox is set aside as not being the will and wish of said deceased, and that the said Margaret Cox is declared to be a legatee of a share of said estate equal to the share of each of the other legatees, children of the deceased, subject to the life estate of the widow of said deceased. It is further adjudged that the officers of the court have judgment against Thos. E. Spruell and Jos. S. Power, executors of the will of Stephen Spruell, for ——— dollars ——— cents, costs. Ordered, further, that certified copies of this writ of judgment be transmitted with the will to the ordinary of this county, to be entered of record with said will."

Neither of the nominated executors ever qualified, but they caused the property to be appraised, and individually paid taxes on it. After the judgment above mentioned, rendered on appeal, some of the daughters of the testator died, leaving children. The life tenant died in March, 1910. During the years 1909 and 1910 some of the daughters of the testator, tenants in remainder, and heirs of daughters who had died since judgment upon the caveat to the will, sold to Arnold Broyles, J. N. Mitchell, C. L. De Foor, and D. C. Lyle their several undivided interests in the lands devised by the will. After these sales the nominated executors, in April, 1910, filed application to the ordinary for leave to sell the real estate left by the testator. Broyles and the other purchasers filed caveats, objecting to the sale on specified grounds; and the case so made was appealed to the superior court by consent, and was never tried. Mary A. Cox had in the meantime died intestate, and Courtland S. Winn was appointed administrator upon her estate. He intervened in the case so pending on appeal, and urged objections to the sale. Before the death of the testator, M. M. Cox, the husband of Mary A. Cox, had instituted suit against the testator, who pleaded a counterclaim for a larger amount than that alleged against him, which was never tried. In June, 1910, T. E. Spruell and J. S. Power, the nominated executors, filed a petition in their own behalf, as executors, and in behalf of some of the minor children of legatees who had died after the rendition of the verdict and decree establishing the will, against other legatees in life, and against Winn as administrator of Mary A. Cox, deceased, and Broyles and the other purchasers mentioned. The petition as amended alleged what has been stated, and the following: The verdict and decree were obtained by fraud of the attorney who represented the propounders. The appraisers were at the courthouse for the purpose of trying the case, when negotiations were entered into between their counsel and counsel for Mary

A. Cox, the caveatrix, and her husband. What was said between counsel and the parties when conferring was not heard by the propounders, but their counsel represented to them that the opposite parties would agree to dismiss the appeal if the children of the testator would make "them equal with the balance of the children of said estate." The propounders informed their attorney, now deceased, that they were willing to do so, if the other children were willing, but that the will was not to be molested. They were also told that the suit on the part of Cox, the husband of the caveatrix, instituted against the testator during his lifetime, would be dismissed, and the will would stand as probated in the ordinary's court. They did not authorize, directly or indirectly, their attorney to consent to the verdict which was rendered, as hereinbefore expressed, and they had no authority to do so. It was contended that under the circumstances, if the verdict had been consented to, it was contrary to law and public policy, and, under the terms of the will, could not be rendered by agreement; the effect of it being to destroy, rather than set up, the will. Though present in court at the trial, propounders did not know until recently the substance of the verdict and decree. The legatees and purchasers from them assert undivided interests in different proportions, some asserting a seventh interest and others an eighth, thus bringing about confusion as to how the estate should be divided. The persons at interest, either as legatees or representatives of legatees, are numerous, live in different states, and the residences of some of them are not known, and, owing to the character of their respective claims, and in order to avoid a multiplicity of suits, it is necessary that the interests of all parties be declared in one decree, and that direction be given the executors touching the distribution of the estate. The relief prayed for was: (a) That the verdict and decree setting up and establishing the will be declared null and void, and that a trial be had on the case appealed, as if no verdict had been rendered; (b) in the event that the verdict and decree establishing the will be not set aside, that the title and interest of the various parties be ascertained and adjudicated; (c) in the event it should be found that the verdict and decree establishing the will is valid, that petitioners be allowed to qualify as executors of the estate and sell the property as such; (d) for process and general relief. The petition was dismissed on general demurrer, and the plaintiffs excepted.

Alonzo Field, for plaintiffs in error. W. H. Terrell, F. A. Quillian; and Paul L. Lindsay, for defendants in error.

ATKINSON, J. The correctness of the ruling depends upon the right of the plain-

tiffs, 10 years after the rendition of the verdict and decree, to have them set aside on the ground of attack urged against them. It is alleged, in the first place, that the verdict is void, because it was not authorized by the pleadings, and was against public policy. The case was brought to the superior court by appeal, and the petition for probate filed by the propounders and the caveat filed by the objector constituted the pleadings. The grounds of caveat, considered in connection with the petition to probate the will, were sufficient to raise issues upon which an entire intestacy or an intestacy merely as to Mrs. Cox might be declared. The verdict, therefore, was not subject to the objection that it was void in its entirety, on the ground that there were no pleadings to authorize it. Nor was it void on the ground that the court was without jurisdiction, or that it was violative of public policy. All the legatees and heirs and the propounders, now plaintiffs, were before the court and laboring under no legal disability, and, there being issues which might defeat the will in whole or in part, agreed with the caveatrix on terms which saved the will in part or set it aside in part. The fact that the verdict also purported to give effect to what all the other parties agreed the caveatrix should take would not destroy it, certainly not in so far as it affected the parties to the case or their privies in estate.

[1, 2] It is urged that there was no consent for such verdict and decree by the parties, but that they were obtained by fraud and collusion between the caveatrix and the attorney for the propounders of the will. It is alleged that the propounders were present at the trial, and it is not entirely clear how or why they did not have full knowledge of the verdict and decree. It is not to be presumed that they were clandestinely rendered by the court. The plaintiffs at least knew that a verdict and decree had been rendered, and it was inexcusable laches for them to wait a period of 10 years before instituting equitable proceedings to set it aside or have it declared void. While the petition referred to a number of matters, so far as the plaintiffs are concerned they depended upon upsetting the verdict and decree to which reference has been made; and the judge did not err in dismissing the petition on general demurrer.

Judgment affirmed. All the Justices concur, except LUMPKIN, J., disqualified, and HILL, J., not presiding.

(137 Ga. 732)

**MCDONALD v. RIMES et al.**  
(Supreme Court of Georgia. March 2, 1912.)

(Syllabus by the Court.)

**1. JUDGMENT (§ 17\*)—PROCESS TO SUSTAIN.**

In a suit by attachment for purchase money, where the defendant has voluntarily

appeared and pleaded to the merits of the case, the plaintiff is entitled to proceed for a verdict and general judgment, even though the attachment be subject to dismissal. *Cowart v. Caldwell*, 134 Ga. 544, 68 S. E. 500, 30 L. R. A. (N. S.) 720, and citations. Accordingly, even if the grounds of attachment be insufficient, that would not be cause for dismissing the declaration; the defendant having appeared and demurred generally and specially to it.

[Ed. Note.—For other cases, see *Judgment*, Cent. Dig. §§ 25-33, 157, 422; Dec. Dig. § 17.\*]

**2. VENDOR AND PURCHASER (§ 312\*)—CONTRACTS (§ 214\*)—INSTALLMENTS—MATURITY—ACTION FOR PRICE.**

A suit upon a contract for purchase money due by installments may be maintained for the amount of such installments as were due at the institution of the suit, but not for installments to become due. Accordingly, where a suit was instituted on a contract for the entire purchase price of personal property and real estate, which has been sold for one gross amount, payable in installments at different times, it was error to dismiss the entire petition on general demurrer, where one of the installments sued for was alleged to be due.

(a) A stipulation in a contract, making provision for the hastening of the maturity of the entire purchase price, has no application to the first installment.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. § 917; Dec. Dig. § 312.\* *Contracts*, Cent. Dig. §§ 980-995; Dec. Dig. § 214.\*]

Error from Superior Court, Liberty County; P. E. Seabrook, Judge.

Action by C. J. McDonald against H. P. Rimes and others. Judgment for defendants, and plaintiff brings error. Reversed.

The bill of exceptions recites that C. J. McDonald sued out against H. P., T. T., and R. D. Rimes an attachment for purchase money, returnable to the superior court, and at the first term filed his declaration in attachment, which was amended, and afterward was dismissed on general demurrer. Error is assigned on the judgment. The declaration as amended alleged, in substance, the following: On or about July 25, 1909, the plaintiff by written contract agreed to sell to defendants a described storehouse and fixtures and certain personal property therein contained, for a stated sum, a part of which was to be paid in cash and the balance at stated intervals, with interest. The plaintiff was to "have the right to remain in said building and use said property free of rent until January 1, 1910, and then remove therefrom or pay rent thereafter to the defendants," at a specified rental, "until possession of said property was demanded by said defendants." In the event of failure to meet any of the payments when due, the entire amount was to fall due immediately. The contract was in possession of the defendants, and the plaintiff was unable to exhibit a copy. In pursuance of the contract the plaintiff on July 26, 1909, made and delivered to the defendants a bill of sale to all the personal property and a warranty deed to the real estate; but the defendants failed and refused to make the cash payment which is

"now due" or "to give the notes" for the balance of the purchase price. The prayer was for a judgment for the entire purchase price and that the property be sold to pay it.

Way & Burkhalter and S. B. Brewton, for plaintiff in error. P. W. Meldrim, for defendants in error.

ATKINSON, J. [1] 1. The ruling announced in the first headnote does not require elaboration.

[2] 2. The demurrer admits the truth of the allegations. So considered, the terms of sale were stated, which included, among others, the right of the vendor to remain in possession free of rent for a specified time, and thereafter at stipulated rent, until vendees should require possession. The contract was entire, and contemplated realty and personality alike, for which one gross amount was to be paid. The payments were to be in installments, due at different times. The vendor executed and delivered to the vendees a bill of sale conveying the personality, and a warranty deed conveying the realty. The contract was, therefore, executed by the vendor. He had done all that he promised to do, and it only remained for the vendees to carry out their promise to pay the purchase price. They refused to do so, even though the deeds had been delivered. One remedy of the vendor was to sue on contract for the stipulated purchase price. Having adopted that remedy, thereby electing to affirm rather than repudiate the contract, and sue for the purchase money which, by the terms of the contract, had been promised him, he must abide all the terms of the contract; for he cannot take both under and against it. One of the provisions was that the vendee should have a stipulated time within which to meet the several installments in which the purchase money was payable. One of these (the cash installment) was due, and the action was maintainable for that, though not for the deferred payments, which were not due. The stipulation made for the hastening of the maturity of the entire debt is to be construed as referring to failure to meet the deferred payments, and not to the cash payment. Had the action been for damages from breach of the contract, in which other things might be considered in estimating the damages, it would be otherwise. The plaintiff having set forth a cause of action for some part of the amount sued for, it was error on general demurrer to dismiss the petition.

Judgment reversed. All the Justices concur (FISH, C. J., and BECK, J., specially), except HILL, J., not presiding.

FISH, C. J., and BECK, J. We concur in the judgment of reversal, but are of the opinion that where a vendor under a written contract sells real and personal property, and the vendee stipulates in the contract that he

will pay the purchase price partly in cash and give his notes for the balance, maturing at different times, bearing interest from the date of the sale, and the vendor executes and delivers to the vendee a warranty deed to the realty and a bill of sale to the personality, there being a further stipulation in the contract that the vendor shall have the right to remain in possession of the property free of rent for a given time, and the purchaser, after accepting the deed and bill of sale, refuses to make the stipulated cash payment and to give his notes for the balance of the purchase price, the vendor, upon such repudiation of his obligations by the vendee, may sue at once for the entire purchase price of the property.

(157 Ga. 776)

ALBANY NAT. BANK v. GEORGIA BANKING CO.

(Supreme Court of Georgia. March 12, 1912.)

(Syllabus by the Court.)

1. CHATTEL MORTGAGES (§ 90\*) — DOCUMENTARY EVIDENCE—AUTHENTICATION—RECORD.

Where it appears, from a comparison of recitals in a chattel mortgage with the certificate entered thereon as to filing for record, that only an unofficial witness attested the mortgage before it was so filed, and attached to the mortgage is an affidavit by the subscribing witness, made before a notary public, proving the execution of the mortgage, but bearing date next after that of the certificate as to the filing of the mortgage for record, and that on the date of such probate the mortgage was actually recorded in the book kept for record of such mortgages in the clerk's office of the superior court, the mortgage so executed and recorded is admissible in evidence.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. §§ 168-173; Dec. Dig. § 90.\*]

2. CHATTEL MORTGAGES (§ 90\*)—DOCUMENTARY EVIDENCE—RECORD OF MORTGAGE—"FILING."

That on the day next following the date of the certificate as to filing of the mortgage for record, as shown by uncontradicted evidence, the clerk permitted the mortgagee to take the mortgage out of the clerk's office to that of a notary public, and procure before such notary the affidavit of the subscribing witness proving the execution of the mortgage, and then return the affidavit and mortgage to the clerk's office for record, would not render the mortgage inadmissible in evidence.

(a) The return of the mortgage to the office of the clerk of the superior court under the circumstances just enumerated would, in effect, amount to "filing" for record.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. §§ 168-173; Dec. Dig. § 90.\*]

For other definitions, see Words and Phrases, vol. 3, pp. 2764-2770.]

3. CHATTEL MORTGAGES (§ 150\*) — LIEN — PRIORITY.

Under Civil Code 1910, §§ 3259, 3320, the lien of such mortgage as against other mortgagees will take effect from the date of the record.

(a) The fact that no certificate of filing for record was entered on the mortgage after it was so returned to the clerk's office, and that

the certificate of filing, which had been entered on it before the affidavit for probate was procured, was not signed by the clerk, but in his absence his name was signed to such certificate of filing by the deputy clerk, would not defeat the lien of the mortgage, or the effect of the subsequent filing and record.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. §§ 246-252; Dec. Dig. § 150.\*]

#### 4. CHATTEL MORTGAGES (§ 150\*)—LIEN—PRIORITY.

Where a chattel mortgage so executed and recorded comes in competition with a senior mortgage, which was not recorded until after the record of the former, the junior mortgage is entitled to priority; it not appearing that the junior mortgagee had notice of the prior unrecorded mortgage. Civil Code 1910, § 3260.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. §§ 246-252; Dec. Dig. § 150.\*]

#### 5. FORMER CASE DISTINGUISHED.

The cases of *Durrence v. Northern National Bank*, 117 Ga. 385, 43 S. E. 726, and *Greenfield v. Stout*, 122 Ga. 303 (2), 50 S. E. 111, differ in their facts from the present case.

#### 6. NO QUESTIONS FOR JURY.

There was no conflict of evidence requiring submission of the case to the jury.

Error from Superior Court, Douglas County; Frank Park, Judge.

Action between the Albany National Bank and the Georgia Banking Company. From the judgment, the Albany National Bank brings error. Affirmed.

Pope & Bennet, for plaintiff in error. R. J. Bacon, for defendant in error.

ATKINSON, J. Judgment affirmed. All the Justices concur.

(137 Ga. 670)

### SOUTHERN RY. CO. v. NICHOLS.

(Supreme Court of Georgia. Feb. 27, 1912.)

#### (Syllabus by the Court.)

#### 1. CARRIERS (§ 345\*)—INJURIES TO PASSENGERS—CONTRIBUTORY NEGLIGENCE—ADMISSIBILITY OF EVIDENCE.

This case was before the Supreme Court on a former occasion, when a new trial was ordered. *Southern Railway Company v. Nichols*, 135 Ga. 11, 68 S. E. 789. On the second trial it was error to permit a witness, over the objection that it was immaterial, to testify, in effect, that at the place of the injury, both before and subsequently to the time of the catastrophe, he had seen other persons get on and off moving trains which were going faster than was the train at the time of the injury. In this connection, see *Metropolitan Street R. Co. v. Johnson*, 91 Ga. 466 (2), 18 S. E. 816.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1400; Dec. Dig. § 345.\*]

#### 2. CARRIERS (§ 321\*)—INJURIES TO PASSENGERS—ACTIONS—INSTRUCTIONS.

The expressions "plenty of time" and "ample time," as employed in the excerpts from the charge excepted to in the eleventh and twelfth grounds of the motion for new trial, were inaccurate. If the plaintiff was entitled to have the defendant give him any time in which to go to the ticket office and window, it

should have been a reasonable time under all of the circumstances.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1247, 1326-1337, 1343; Dec. Dig. § 321.\*]

#### 3. TRIAL (§ 193\*)—INSTRUCTIONS—PROVINCE OF COURT AND JURY.

The pleadings and evidence presented issues as to whether it was proper for the plaintiff to leave the train and to go to the ticket office for his pass, and whether that was the purpose for which he went, upon which the judge could not express an opinion or assume to decide. Accordingly it was erroneous to charge: "If you find from the evidence that the train of the defendant company was stopped at the station in Dalton long enough for the plaintiff to get off and go to the telegraph office and attend to the business in hand, to ascertain whether or not his pass had been delivered, whether it was there for him or not, and long enough to have returned to and gotten aboard the train before the train started, then he cannot recover." Also: "If the train did not stop long enough for that purpose, and when he discovered that the train was moving, he undertook to board the moving train, and exercised ordinary care in doing so, and would have done so, but for the fact that his body came in contact with the trucks, and the defendant company was negligent in leaving the trucks there, or starting the train while the trucks were dangerously near the train, then he cannot recover."

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 436-438; Dec. Dig. § 193.\*]

#### 4. REMARKS OF COURT—INSTRUCTIONS—NO ERROR.

Other assignments of error upon remarks of the court while a witness was being examined, and upon failure to properly state the contentions of the parties, and upon the charge of the court, were insufficient to require the grant of a new trial.

#### 5. APPEAL AND ERROR (§ 843\*)—REVIEW—QUESTIONS CONSIDERED.

Inasmuch as a new trial will be ordered upon the rulings as indicated by the preceding headnotes, no decision will be made as to the sufficiency of the evidence to support a verdict in favor of the plaintiff.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3331-3341; Dec. Dig. § 843.\*]

Error from Superior Court, Whitfield County; A. W. Fite, Judge.

Action by J. E. Nichols against the Southern Railway Company. Judgment for plaintiff, and defendant brings error. Reversed.

McDaniel, Alston & Black and Maddox, McCamy & Shumate, for plaintiff in error. Westmoreland Bros. and W. E. Mann, for defendant in error.

ATKINSON, J. Judgment reversed. All the Justices concur, except HILL, J., not presiding.

(137 Ga. 905)

### CITY OF ATLANTA v. SEABOARD AIR LINE RY.

(Supreme Court of Georgia. March 13, 1912.)

#### (Syllabus by the Court.)

#### 1. FORMER DECISION FOLLOWED.

The main question being the right of a municipality to improve a street abutting on

the railroad property of the defendant in error, and how far the right of way may be subject to local assessments, and to an effort to sell the right of way including the tracks, or that part occupied for public purposes, the principles decided in the case of Georgia Railroad & Banking Company v. Decatur, 137 Ga. 537, 73 S. E. 830, are applicable to the questions made by the record in the present case.

**2. EXECUTION (§ 188\*)—RELIEF AGAINST EXECUTION—FORM OF REMEDY.**

An affidavit of illegality as a remedy lies only in favor of the defendant in execution; and the owner of property cannot file an affidavit of illegality, if the execution is issued against some one else as being the owner of the property levied upon.

(a) In such a case an equitable petition is an available remedy to enjoin the levy and sale, and to have done full and complete justice under the facts of the case.

[Ed. Note.—For other cases, see Execution, Cent. Dig. §§ 560-563; Dec. Dig. § 188.\*]

**3. INJUNCTION (§ 135\*)—RELIEF AGAINST EXECUTION—TEMPORARY INJUNCTION.**

The court did not abuse his discretion, under the facts in this case, in granting a temporary injunction and preserving the status until the final trial.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 304; Dec. Dig. § 135.\*]

Error from Superior Court, Fulton County; J. T. Pendleton, Judge.

Action by Seaboard Air Line Railway against the City of Atlanta. Judgment for plaintiff, and defendant brings error. Affirmed.

J. L. Mayson and W. D. Ellis, Jr., for plaintiff in error. W. G. Loving and Moore & Pomeroy, for defendant in error.

HILL, J. [1] 1. The city of Atlanta made certain improvements on one of its streets, known as De Kalb avenue, and assessed the cost thereof against the abutting property owners. One of these was the Seaboard Air Line Railway. In resistance to the assessment thus made, and to the levy of an execution against it upon a portion of its right of way, and also to the levy of a similar execution against the Georgia Railroad & Banking Company upon the same property, the Seaboard Air Line Railway filed its petition for injunction against the collection of the assessment and the sale of the property so levied upon. On the interlocutory hearing the court granted a temporary injunction, and on this judgment the City of Atlanta assigns error. On the main question as to the right of a municipality to improve a street abutting on railroad property, and as to how far a right of way may be subject to such local assessments, and to an effort to sell the right of way including its tracks, or that part occupied for public purposes, the principles announced in the case of Georgia Railroad, etc., Co. v. Decatur, 137 Ga. 537, 73 S. E. 830, are applicable, and render unnecessary further discussion of these questions.

[2] 2. The second question to be determined is whether the plaintiff in the court below had a complete remedy by affidavit of il-

legality. The amendment to the charter of the city of Atlanta in 1897 provides that the defendant may file an affidavit of illegality to an execution issued to enforce the collection of the amount of assessments made for work either upon streets or sidewalks, under the conditions recited in the act. Acts 1897, pp. 145, 148, § 6. Similar language is employed in Civil Code 1910, § 5805, in reference to illegalities in general filed to executions issued upon judgments, and it is there provided that the defendant may file illegality. Under this Code section it has been held that nobody but the *defendant* in execution can file an affidavit of illegality. A third person cannot interpose an illegality. *Artope v. Barker*, 72 Ga. 186 (2); *State v. Salade*, 111 Ga. 700 (2), 36 S. E. 922. And by a similar construction it is only the *defendant* who can get a complete remedy by affidavit of illegality to an illegal assessment issued by the city of Atlanta. Ordinarily, where an improvement is made on a street, and execution issued against the abutting lot or its owner, such owner can get full relief by affidavit of illegality under the statute; but he cannot file illegality under that statute if the execution is issued against somebody else as being the owner of the property. This does not furnish him an adequate remedy. In this case two executions were levied upon the right of way involved. One was against the Georgia Railroad & Banking Company, and was levied on the right of way as the property of that defendant; the other was against the Seaboard Air Line Railway, and levied on the same right of way as the property of that defendant; and injunction to prevent the sale of the property is sought as against both executions. It is contended by the city attorney that this is really an impersonal execution—an execution in rem; but inasmuch as the lot itself cannot file an affidavit of illegality, and inasmuch as the right to file an illegality to such proceeding is statutory, and only authorizes the defendant whose property it is sought to sell to file an illegality, if he does not come within the statute, then the statute does not afford him an adequate relief. In one instance, the assessment is made, the execution issued, and the levy made against the Georgia Railroad & Banking Company, and levied on the property as the property of that company. The statute would not authorize the Seaboard Air Line Railway to interpose an affidavit of illegality to that execution. Therefore, relatively to that execution, either it must allow the property to be sold for want of a remedy, or it must get a remedy in equity. So that the Seaboard Air Line Railway, if its contention is right that the sale sought to be made is illegal, has a foothold in equity, at least with respect to the execution which was levied against the Georgia Railroad & Banking Company. Apparently the assessments, the executions, and

the levies cover more than the property which is held by the Seaboard Air Line Railway, and lap over into other property of the Georgia Railroad & Banking Company. Furthermore, there are different levies and different proceedings to collect, all of which involve the same questions; and as equity has a clear right to take jurisdiction as to a part, under the allegations of the petition, it will do full justice and determine the same questions which are involved in the whole controversy. Conceding, without deciding, that illegality would furnish a complete remedy as to any part of it, yet where equity furnishes a more adequate right and a more adequate remedy, and there is a basis for going into equity as to a part of it, it will not split the controversy and try one piece in equity, remanding to the legal tribunal the same questions as to some other part to be tried under an affidavit of illegality, but will do full and complete justice and determine the whole situation.

[3] 8. Under the evidence in this case, we cannot say that the trial judge abused his discretion in granting a temporary injunction, preserving the status until the final trial.

Judgment affirmed. All the Justices concur.

(187 Ga. 681)

**KILLEBRUE v. WESTERN & A. R. CO.**  
et al.

(Supreme Court of Georgia. Feb. 28, 1912.)

*(Syllabus by the Court.)*

**1. APPEAL AND ERROR (§ 1068\*)—REVIEW—HARMLESS ERROR—INSTRUCTIONS.**

As, under the law and the evidence, the verdict rendered was demanded, the judgment refusing a new trial will not be reversed on the ground of an erroneous instruction to the jury, or because the court failed to charge on a given subject.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4225-4228, 4230; Dec. Dig. § 1068.\*]

**2. NEW TRIAL (§ 101\*)—GROUNDS—NEWLY DISCOVERED EVIDENCE.**

The ground of the motion for a new trial, based on alleged newly discovered evidence, is not sufficient cause for a new trial, for the reason that the evidence set forth is not newly discovered, as it appears from the affidavit of the movant himself that he knew of the alleged newly discovered evidence before the trial, but did not then know that the defendants had or would introduce the evidence which the movant desired to contradict by the alleged newly discovered evidence, and moreover, it was merely cumulative and impeaching in its character.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 205, 206; Dec. Dig. § 101.\*]

Error from Superior Court, Whitfield County; A. W. Fite, Judge.

Action by J. B. Killebrue against the Western & Atlantic Railroad Company and another. Judgment for defendants, and plaintiff brings error. Affirmed.

Atkinson & Born, for plaintiff in error. Julian McCamy and Tye, Peeples & Jordan, for defendants in error.

FISH, C. J. Judgment affirmed. All the Justices concur, except ATKINSON, J., disqualified, and HILL, J., not presiding.

(187 Ga. 726)

**SEABOARD AIR LINE RY. v. RICHMAN.**  
(Supreme Court of Georgia. March 2, 1912.)

*(Syllabus by the Court.)*

**CHARGE OF COURT—REMARKS OF COUNSEL.**

The charge of the court was not erroneous for any of the reasons assigned in the exceptions thereto. The case was fairly submitted on the real issues. The remarks of counsel which are complained of in the motion for a new trial, and which are assigned as a ground for a new trial, while unauthorized by the evidence and of such a character as to call for a rebuke from the court, were not of such inflammatory or prejudicial nature as to work a reversal of the judgment refusing a new trial.

Error from Superior Court, Fulton County; W. D. Ellis, Judge.

Action by William Richman against the Seaboard Air Line Railway. Judgment for plaintiff, and defendant brings error. Affirmed.

Robt. S. Parker, Brown & Randolph, and Anderson, Felder, Rountree & Wilson, for plaintiff in error. Moore & Pomeroy, for defendant in error.

BECK, J. Judgment affirmed. All the Justices concur, except HILL, J., not presiding.

(187 Ga. 671)

**LANG et al. v. VAUGHN et al.**  
(Supreme Court of Georgia. Feb. 28, 1912.)

*(Syllabus by the Court.)*

**WILLS (§ 767\*)—ADEMPTION OF LEGACIES.**

Where a testator conveys to another specific property devised or bequeathed, and does not afterwards become possessed of the same, and the will contains no provision for such contingency, the devise or legacy is adeemed, and such legal result cannot be obviated by extrinsic evidence tending to show that the testator did not intend it.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1986-1989; Dec. Dig. § 767.\*]

Error from Superior Court, Chatham County; W. G. Charlton, Judge.

Action by M. L. Lang and others against H. T. Vaughn and others. From the judgment, Lang and others bring error. Affirmed.

Miss Mary Tupper executed her will in September, 1905. She was then in possession of a certain improved lot in the city of Savannah. She owned in her own right an undivided half interest in the lot and improvements, and held the other undivided half interest as executrix under the will of her sister, Cornelia T. Lang, the mother of

Mary T. Lang. The will of Cornelia T. Lang was executed in 1884, and in the second item thereof the undivided half interest belonging to Cornelia T. was devised to her daughter, Mary T. Lang; such devisee to hold and enjoy all of the profits as long as she might remain unmarried, with the provision that upon her marriage this undivided half interest belonging to Cornelia T. should be divided equally between her four children, including Mary T., and that, in the event Mary T. should never marry, she should have the power to dispose, by deed or will, of one undivided fourth of this half interest, receiving, however, the rents and profits from the interest so long as she remained single. By the eleventh item of the will of Mary Tupper she devised to Mary T. Lang, "all my interest, to wit, an undivided one-half interest, in that lot on Bay street, Savannah, Georgia, known as lot No. 4 Jekyl Tything, Derby Ward," this being the same lot and the improvements in which Miss Tupper owned an undivided half interest; the other undivided half interest belonging to the estate of her sister, Cornelia T. Lang, and of this Miss Tupper had possession individually and as executrix of Cornelia T. By the twelfth item of her will Miss Tupper made Mary T. Lang, Helen T. Vaughn, Clara B. Vaughn, Isabelle V. Smith, and Cornelia C. Vaughn her residuary legatees. On May 18, 1906, Miss Tupper individually and as executrix of the will of her sister, Cornelia T. Lang, and by virtue of a power of sale in the will of Cornelia T., sold the western half of this lot to the Hibernia Bank for \$5,000. On the 12th day of the same month she invested \$2,400 of the proceeds of such sale in stock of the Georgia State Building & Loan Association, and took a certificate for it, No. 1,428, in her individual name, and at the same time invested a like amount of such proceeds in stock of the same association, and took a certificate, No. 1,429, in her name as executrix of the will of Cornelia T. Lang. The balance of the proceeds of the sale she put in "the 5 per cent. stock of said loan association," and took two passbooks of deposits for the same, one of the books in the name of herself individually for half of such balance, and the other in her name as executrix of the will of Cornelia T. Lang for the other half of the balance of the proceeds of the sale. Miss Tupper died June 12, 1910, not having withdrawn either of such deposits and having made no change in her will.

Under a bill for interpleader, filed by the executor of the will of Miss Tupper, the question was presented whether the sale and conveyance by Miss Tupper to the bank of her undivided half interest in the city lot and the improvements thereon, she not afterwards becoming possessed of the same, and the investment of her of the half interest she owned individually in the proceeds of the sale in corporate stock, was an ademption of the devise of her interest in such

property to Mary T. Lang. The residuary legatees under the will of Miss Tupper contended that the specific devise to Mary T. was adeemed pro tanto by the sale and reinvestment, and that therefore the corporate stock purchased by Miss Tupper with the proceeds of the sale belonging to her individually, the certificate for which was issued in her name individually, went to them under the residuary clause of her will. The contention of Mary T. Lang was that the specific devise to her was not adeemed. By consent the case was tried by Judge Walter G. Charlton without a jury. Evidence was submitted on behalf of Miss Lang, to the effect that Miss Tupper, in January, 1905, consulted her counsel as to the advisability of selling the city lot and reinvestment of the proceeds of the sale. She was advised, as the buildings on it were in a dilapidated condition and practically untenable, and bringing in little or no income, that it would be best to sell and reinvest the proceeds in stock of the Georgia State Building & Loan Association; and her counsel soon thereafter, at her instance, wrote a letter to Mary T. Lang, informing her that Miss Tupper was of the opinion that it was best to sell the property in question and reinvest the proceeds in other property. After the sale the same counsel advised Miss Tupper to invest the proceeds of the sale as she did invest it. It was shown that Mary T. Lang was the niece of Miss Tupper, and that the residuary legatees were close friends of hers, with whom she lived for a number of years prior to her death, and with whom she was living when she died. Other facts appearing upon the trial are set forth in the opinion rendered by Judge Charlton, as follows:

"This proceeding, which is substantially a bill of interpleader, is brought by the executor of the will of Mary Tupper to determine whether a designated sum of money and certain shares of stock shall go under the eleventh item of the will as a specific legacy, or under the twelfth item be turned over to the residuary legatees. The property specifically devised in the eleventh item was sold by the testatrix subsequently to the making of the will. She and her deceased sister had owned the property in common, and she was the executrix of her sister's will. She sold the property in both capacities, took the purchase-money check, and, without cashing it, indorsed it over to the Georgia State Building & Loan Association, in payment of stock in that concern; the balance after payment for such being deposited to her credit on the books of the company. The devisee under the eleventh item is a niece of the testatrix, not in good health, and living West. The residuary legatees are the children of an adopted daughter of the testatrix, with whom the latter lived until the adopted daughter died, since which event she continued to live with the residuary legatees. During the lifetime of

the daughter she paid nominal board; since her death she paid none. In her will all of the interpleaders are remembered. The interesting contention arising is whether or not the sale of the interests in the realty to have passed under the eleventh item adeemed the devise? The residuary legatees urge that the common law prevails in Georgia, and that the language of the Code of 1895 (sections 3332, 3333) is to be construed with reference to it. The specific devisee claims that in Georgia the rule of intention as taken from the civil law prevails, and the devise has not been adeemed, but merely transferred or substituted, and the fair and conclusive deduction is that the intention of the testatrix was not to adeem the devise, but by practically segregating the purchase money, investing the major portion, and even preserving the fractional residue in bank, to preserve the devise in substance. This, it is urged, is also shown by the fact that, having been tenant in common of the realty with the mother of the specific devisee, the testatrix, as executrix, invested the proceeds belonging to that estate in identically the same manner.

"We may eliminate from the discussion the relations between the testatrix and the contending parties. She was apparently on affectionate terms with all of them. In doing this, it seems to me that the question of intention is also practically eliminated. The suggestion is strong that the course pursued by the testatrix in immediately investing the proceeds and depositing the fractional sum would indicate an intention to keep the thing itself distinct, however changed its general aspect. The difficulty about such a conclusion arises from the uncertainty of a deduced intention, as distinguished from intention expressed. This may have been the intention of the testatrix, or it may not. There is no presumption arising from the conduct of the testatrix. She may have known that the common-law rule prevailed, and still have been satisfied to have it so. Or she may have been ignorant that such a rule ever existed, or that any change in the language of her devise was necessary. Who cannot tell with any degree of approximate certainty? Intention is the law of wills in Georgia; but the Georgia authorities on this line are chiefly concerned with the interpretation of wills, not in the ascertainment of modifications of doctrines which involve conduct. If the common-law rule applies, then this devise would be adeemed, unless that rule is subject to modification through intention. If this be a true rendition of the rule in Georgia in its last analysis, then manifestly the intention which is so controlling as to set aside a rule must be clear and explicit, and the conclusion from the evidence showing it must not be susceptible of two constructions. In other words, the conclusion must be ex-

clusive. Even in the construction of legacies, when the courts are enjoined to seek diligently for the intention of the testator, and give effect to the same, there must be consistency with the rules of law, and, notwithstanding the great power to remodel sentences, the intention must at last be clear and unquestionable; and if the clause as it stands may have effect, it is given that effect, however well satisfied the court may be of a different testamentary intention. Code, § 3324. If this be true when the matter under consideration is specifically subjected to the test of intention, how much more imperative is the necessity for clearness of intention where the subject does not involve the construction of language, but the interpretation of conduct. Nor is this at all affected by the fact that intention enters frequently into the question of ademption. For instance, where money bequeathed is paid over during the lifetime of the testator, the intention with which the money is paid over may well determine whether the testator had in mind the legacy, or gift and legacy were distinct matters. Whatever may be deduced from the general language of *Beall v. Blake*, 16 Ga. 119, the Code of Georgia expresses substantially the common-law rule, and in sections 3332 and 3333 expresses the exceptions which may well have been suggested by the indignant protest in that case. The exceptions are (the property having been conveyed to another): (1) Redemption of the property. (2) Abortive conveyance. (3) Exchange for property of like character. (4) Change of investment of a fund. In the last two instances the law deems the intention to substitute merely. Unless some one of these exceptions applies, then the general rule in Georgia, as it was under the common law, is ademption when the specific property is conveyed to another. There is nothing said in any of the sections in regard to the tracing of funds. If there is exchange, it must be for property of like character, and this whether it be swapping or reinvestment. If the legacy is a fund, reinvestment of the fund does not affect the legacy.

"The case at bar comes within none of these declared exceptions. The property was real. It was sold—so far as the testatrix was concerned, destroyed. It was not exchanged, either by act of the parties or by her individual act, for property of like character. On the contrary, the proceeds, having become personal property, remained so until she died. She happened to have put it in a certain stock. She could have spent it, or done anything else with it. She did none of the things the Code recognizes, or the common law recognized, as substitution which would avoid ademption. I do not understand that *Beall v. Blake* undertakes to declare that the common law in regard to the doctrine of ademption was



not law in Georgia at the time it was rendered. The attack was on Lord Thurlow's construction of the common law, which apparently eliminated intention in all events. This was not apparently the common law, as is clearly shown by the excepted instances set out in the opinion in that case. But it would make *Beall v. Blake* as extreme as Lord Thurlow if it were to be held that in every instance intention governs. To do this would be to ignore the positive law of the Code; and that may not be done, even if it conflicts with intention. In the presence of positive law, a testator is not helpless, nor is the disposition of his property taken from him. He could add a codicil, if he saw fit. If he elects to allow the item to stand, and the property to so change as, under the law of Georgia, to bring about ademption, then the legacy or devise is adeemed. I therefore conclude that the devise in the eleventh item has been adeemed, and the property concerned in the interpleader falls within the operation of the residuary clause. Even if I had concluded that the intention of the testatrix might govern the situation, and modify either the common-law rule or the language of the Code, I cannot deduce from the facts presented an intention on the part of the testatrix to avoid ademption. The argument is persuasive, and the relations between the testatrix and the residuary legatees are equally suggestive. That the one was of her blood and not in good health might well influence her mind; that the others resided with her, sustained the most intimate relations with her, and were the companions of her last years, constitute, as we know, demands on the heart, and frequently of more potency than those based upon mere relationship."

A decree was entered in accordance with the opinion. To this decree Mary T. Lang excepted.

Saussy & Saussy, for plaintiffs in error.  
Adams & Adams, for defendants in error.

FISH, C. J. (after stating the facts as above). Counsel for the plaintiff in error contend that "when the testator conveys to another the specific property bequeathed, and does not afterward become possessed of the same," whether such legacy is adeemed depends upon the intention of the testator, and they rely largely upon the case of *Beall v. Blake*, 16 Ga. 119, as authority to sustain such contention. One of the headnotes to that case is as follows: "Whether a specific legacy, if not illegal, has been adeemed or not, depends on whether the testator's intention has been to adeem it." While this language is broad, it must be construed in connection with the facts of the case then under consideration. A testatrix, in one item, bequeathed \$1,000 to a certain legatee, but provided that the legacy should remain in the hands of her executor for

four years for the purpose of defraying therefrom the expenses of any lawsuit which might be commenced within that time, by the relatives of the husband of the testatrix, "for the recovery of any of the property left by him to me; and if such suit should terminate in favor of my estate, then the above legacy, after deducting said expenses, to be paid to [the legatee]—if unfavorable, then the said legacy to be null and void." In another item she bequeathed certain negro slaves and other property to another legatee. Thus on the face of the will the first specific legacy mentioned was made subject to the result of a possible litigation which might be prosecuted by the relatives of the husband of the testatrix. It was expressly coupled with a condition. There was no condition attached to the second specific legacy, and the court held that as to it the intention was to bequeath the property absolutely. After the death of the testatrix the relatives of her husband brought the suit which she had apprehended. Proceedings in equity were had, and a decree was rendered finding and decreeing one half of the estate which had been left by the husband of the testatrix in favor of her legal representatives, and the other half to be divided among the husband's relatives. By agreement of the legatees under the will of the testatrix, this verdict was changed by striking the words "legal representatives of Rebecca Bostwick" (the testatrix), and putting in their place the words "legatees of Rebecca Bostwick." The relatives of the husband agreed to such a division of the property as placed the negroes composing the specific bequest in the share which the executor of the testatrix was to retain. It was held that the verdict and these agreements amounted to agreeing that these negroes might be administered as if the testatrix had had the entire interest in them. It will thus be seen that in the case under discussion the question arose, not from any conduct on the part of the testatrix after making the will, but upon the fact that she bequeathed the entire title in certain negroes as a specific legacy, when in fact she only had a complete title to a half interest in them, and from the further fact that by virtue of the subsequent litigation and agreements the negroes were delivered to her estate to be administered as if she had in fact held a complete title in them. This is an entirely different question from that arising in a case where a testator owns property, but subsequently sells it, or places it out of the power of the executor to deliver the legacy. The opinion in that case discussed at considerable length what was deemed an extreme ruling by Lord Thurlow in *Ashburner v. McGuire*, 2 Bro. O. C. 108, and also a number of other cases tending to show that the rule stated by Lord Thurlow was not absolute and without exceptions.

This decision was rendered in 1854, prior

to the adoption of the Code of 1863. When the law of this state was codified, the codifiers evidently reviewed the entire subject, and sought to lay down both the general rule and the exceptional cases. Of course, a testator may provide in his will for a substitution of one piece of property for another in case of a sale of the former, or that, if property is sold and the fund reinvested, how the reinvestment shall pass, or make like provision. But if he leaves a specific legacy, with no such express provision in the will, and subsequently deals with the property by way of sale or exchange, the law provides what shall be the result. If a testator makes a will containing a specific legacy, and subsequently does certain specified acts, the fact that the law declares what will be the result of those acts, in the absence of any provision in the will on the subject, in no way conflicts with the rule that the intention of the testator controls in construing his will. It no more conflicts with that rule than does the fact that certain words, such as "heirs," "heirs of the body," "heirs male," "fee simple," "fee tail," and others, have a certain legal meaning, and, if a testator employs them in making his will, the legal result of using them follows. The law on this subject, as codified in the Code of 1863, now appears as section 3908 of the Code of 1910, which reads as follows: "A legacy is adeemed or destroyed, wholly or in part, whenever the testator, after making his will during his life, delivers over the property or pays the money bequeathed to the legatee, either expressly or by implication, in lieu of the legacy given; or when the testator conveys to another the specific property bequeathed, and does not afterward become possessed of the same, or otherwise places it out of the power of the executor to deliver over the legacy. If the testator attempts to convey and fails for any cause, the legacy is still valid." And section 3909 reads as follows: "If the testator exchanges the property bequeathed for other of the like character, or merely changes the investment of a fund bequeathed, the law deems the intention to be to substitute the one for the other, and the legacy shall not fail." It will be seen that the general rule that where a testator conveys to another the specific property bequeathed, as stated in section 3908, is coupled in that section with two exceptions: First, where he afterwards becomes possessed of the same; and, second, if he attempts to convey, and fails for any cause, the legacy is still valid. In the next section the subject of substitution is dealt with. Where the testator leaves the question for the law to determine, it is declared that the law deems the intention to be to substitute one piece of property for the other, and that the legacy shall not fail in two cases: First, if the testator exchanges the

property bequeathed for other property of like character; or, second, if he merely changes the investment of a fund bequeathed. The statement that "the law deems the intention to be," etc., shows that if the testator makes no provision in his will on the subject, expressive of his intent in case of a sale or the like, the law declares what it deems is his legal intent, or, in other words, provides what shall be the result in such case. This excludes the idea that in every case what the law deems to be the intent has no force, and that the courts will go afield hunting for an intent expressed in parol or to be gathered from conduct or acts of the testator after the making of the will. In the former of the two sections quoted there are certain cases where parol evidence is admissible. Thus it is stated that if a testator, after making his will, delivers over the property or pays the money bequeathed to the legatee, "either expressly or by implication, in lieu of the legacy given," etc. But this is very different from the question arising under a sale and reinvestment by a testator, after the making of his will.

In the case before us none of the four instances provided in the two cited sections of the Code occurred. After selling the property, the testatrix did not become possessed of it again. She did not attempt to convey it, and fail for any cause to do so. She did not exchange the property bequeathed for other property of like character. She sold real estate and invested a part of the proceeds in personalty. It is immaterial that she thought the personalty would produce a better income than the realty. The obtaining of more income may have been a satisfactory reason moving the testatrix to adeem the legacy, but did not constitute the transaction an exchange of one piece of property for another of like character. Nor did the testatrix bequeath a fund and merely change the investment of it. It was not a bequest of a fund, but a devise of realty. There are no words in the will giving to the legatee, not only the realty, but the proceeds of any sale of it. The sale of real property and the investment of a portion of the proceeds thereof in personal property, standing alone, cannot fall within the provision as to changing the investment of a fund bequeathed. Several of the decisions of this court have been cited as tending to hold a doctrine different from that now announced, viz.: *Smith v. Smith*, 23 Ga. 21; *Reed v. Reed*, 68 Ga. 589; *Clayton v. Akin*, 38 Ga. 333, 95 Am. Dec. 393; *Whitlock v. Vaun*, 38 Ga. 562; *Worrill v. Gill*, 46 Ga. 482. But in each of them it will be found that the legacy which was declared not to be adeemed was either held not to be a specific legacy, or was construed as including, not only land, but proceeds in case of sale, or they were dependent on other

facts which plainly distinguish them from the present case.

Judgment affirmed. All the Justices concur, except ATKINSON, J., disqualified, and HILL, J., not presiding.

(137 Ga. 658)

**COLLIER v. COLLIER et al.**

(Supreme Court of Georgia. Feb. 27, 1912.)

**1. EXECUTORS AND ADMINISTRATORS (§ 152\*)—CANCELLATION OF INSTRUMENTS (§ 37\*)—CONTRACTS WITH LEGATEES—PLEADING.**

An executor may purchase from a legatee who is sui juris his interest in the estate, provided there is no fraud, no concealment, and no advantage taken by the executor of information acquired by him in the character of executor. A petition by a legatee, seeking to set aside a sale by him to executors of his interest in the estate, alleging that, because of his limited education, dissipated habits, and ignorance of real estate values, he did not know the value of the land of the estate, but that the executors did know, and did not disclose the price for which a part of the land had been sold (which would have served as an illustration of the value of the whole), and that he sold his interest therein to the executors for less than half of its then present worth, payable from property and funds of the estate, is not subject to general demurrer.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 621-628; Dec. Dig. § 152; *Deeds*, Cent. Dig. §§ 292, 403; *Cancellation of Instruments*, Cent. Dig. §§ 95, 927; Dec. Dig. § 37.\*]

**2. EXECUTORS AND ADMINISTRATORS (§ 303\*)—CONTRACTS—VALIDITY.**

A contract between a legatee and executors, whereby the legatee receives certain property of the estate in severalty in consideration of his relinquishment of his interest in the estate, is not without consideration; but any disproportion between the value of the property received and the value of the interest relinquished may be considered in passing on the bona fides and fairness of the transaction.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 1229-1242, 1245; Dec. Dig. § 303.\*]

**3. CANCELLATION OF INSTRUMENTS (§ 24\*)—CONDITIONS PRECEDENT—RETURN OF CONSIDERATION.**

A party is not obliged to return that which he will be entitled to retain, as a condition precedent to a cancellation of the contract.

[Ed. Note.—For other cases, see *Cancellation of Instruments*, Cent. Dig. §§ 33-38; Dec. Dig. § 24.\*]

Error from Superior Court, Fulton County; J. T. Pendleton, Judge.

Action by Sanford G. Collier against J. W. Collier and another, executors. Judgment for defendants, and plaintiff brings error. Reversed.

In his petition to vacate a deed of relinquishment of his interest under the will of his father, and an acquittance receipt to the executors of the will, the plaintiff, Sanford G. Collier, alleged as follows:

He is the youngest child of his father, reared on his father's farm near the city of Atlanta, reaching his majority with practically no education. Upon his arrival at the

age of 21 years, he moved to the neighboring city, where he became dissipated and acquired habits and formed social relations that unfitted him for business and rendered him incapable of properly caring for himself in the struggle of life. On March 1, 1906, his father died testate, leaving a will in which the estate was to be equally divided between his wife, plaintiff's mother, his nine living children, and the representative of a deceased child; that is to say, into eleven shares, one share to each legatee. The portion of the estate devised to the testator's wife was given to her to use and enjoy during her life, and if at her death any portion of the same should remain unconsumed or unused by her in her support, it was to be equally divided among the children or their legal representatives. The sixth item of the will was as follows: "I name and appoint as my executors my son George Washington Collier by my first marriage, and my son John Wesley Collier by my second marriage, reposing confidence in them that they will fairly and justly execute my will for the best interest of my wife and all my children. I authorize them to sell all of my property, whether real or personal, either as a whole or in parcels or subdivisions, as they may think best, and as they may judge to be for the best interest of my wife and all of my children. In other words I leave the manner of the sale or disposition of my property to my executors, letting them be the judge of the best manner of disposing of the same so as to best serve the interest of my wife and all of my children." The will was duly probated, and the executors qualified as such at the April term, 1906, of the court of ordinary.

At the time of the death of his father the plaintiff was heavily involved in debt, from which he had no ability to extricate himself, and in his hopelessness there was no prospect for him to do anything towards earning a livelihood or making anything by which to care for his wife and himself. His share of his father's estate was all he could see from which he could possibly secure subsistence. He had no conception of its value. He knew that his father left a body of land (500 acres) besides other property. While he knew where this 500 acres of land was situated, and had lived on it all his life, he did not know anything really of its value; and by reason of his course of life for the past six or seven years since reaching his majority he was totally incapable and incapacitated to estimate values. The executors were his elder brothers, both of whom had considerable experience in business, and were fully acquainted with the estate of his father. Upon their qualification as executors they immediately began to sell portions of the estate, and paid to the plaintiff small amounts on his legacy, aggregating from \$1,000 to \$1,500, which were insufficient to

pay his debts, which were burdening him, and to support his wife and himself. The plaintiff was in great stress and wanted money, and he insisted and kept insisting that he must have money; but the executors replied to his importunities that they were not obliged to divide the estate until it suited them, that under the will no division could be demanded until they in their discretion saw proper to make a division, that they were clothed with full power to control and manage it so long as they thought best, and they refused to make a division. Plaintiff supposed that they had the right to keep the estate together, as they contended. They were acquainted with his condition, and knew his habits; and while they were fully aware of the necessities, which he was incapable of supplying, and believing, perhaps, that he would soon waste and squander whatever they might turn over to him, they determined not to make a division of the estate. He frequently appealed to the executors to turn over to him at least a portion of his legacy; but they would not, and declared that they would not divide the estate or sell it, and would not advance him anything until the estate in their judgment warranted a division, and left him in a position where he had nothing with which to support his wife and himself, and no prospects then to get anything with which to subsist.

In this situation he received from the attorney of the executors a letter, which was attached to the petition, at the instance and request of the executors, looking to a full and complete settlement of the plaintiff's interest of every kind and character in the estate of his father. In the letter it was stated that it was not the wish of the executors that the plaintiff should dispose of his interest in the estate, except in the usual and ordinary way, as the estate would be wound up in due course and process of business, under the terms and power of the will; but as it appeared from conversations with his attorney, agent, and himself that the plaintiff had fully determined to dispose of his interest, the executors submitted three propositions, one of which was that the plaintiff be paid \$14,000 and lot No. 14 in block B be deeded to him in fee simple, \$5,000 of this sum to be paid in cash, and the remainder to be distributed into equal annual payments covering a period of five years, the deferred payments to be evidenced by notes of the estate, payable on or before date of maturity, without interest; that the executors were willing personally to advance the plaintiff's pro rata share of all money on hand, in order to relieve his present necessities, although they did not think it wise under present circumstances to make a full division of all money on hand, as they contemplated expenditures of several thousand dollars in opening up and shaping the property for sale the next spring, and did not think it good policy to divest themselves of money on

hand belonging to the estate, but the rest of the heirs would be willing for them to advance the plaintiff his portion and allow theirs to remain for the present in the treasury of the estate; that the executors had already, within the first year of their operations, sold about \$31,000 worth of land, receiving remarkably good prices therefor, and it would be unwise for the executors to attempt to dump all of the 500 acres of land on a glutted market at one time, especially as the land was not prepared for sale; that large developments were going on in that neighborhood, and the project to extend the car line was in actual progress. Reference was made to item 6 of the will of Wesley G. Collier, as containing the powers and duties imposed upon the executors. It was stated that, in the event the plaintiff accepted either of the propositions, the whole matter would have to be submitted to all the legatees for their unanimous ratification; that one legatee had already expressed himself as being opposed to any settlement with the plaintiff above \$15,000; but that the propositions were submitted with the hope that, if any of them were accepted, all the heirs could be induced to agree.

The plaintiff promptly accepted the proposition set out in the letter from the attorney of the executors, and on the 22d of October, 1907, he went to the office of the attorney of the executors, where the final papers were to be drawn and executed. It required considerable time to prepare the papers, and during their preparation the executors discoursed at length on what a very favorable arrangement the plaintiff was making, and how they really regretted that they had made such a proposition, and one of them manifested a disposition to withdraw it, as he thought what they were paying was more than the plaintiff's interest was worth, and they ought not to consummate it. By the terms of the settlement the plaintiff received \$5,000 in cash, notes aggregating the sum of \$9,000, and a deed to the lot valued at \$3,000, which the executors assured him was more than his legacy under the will would be worth; and, believing and trusting in them, he signed the deed to them as executors, conveying all his right, title, and interest, present and future, in the estate of his father, and also gave to them a receipt reciting that the money, notes, and deed which he received were in full settlement of all his interest, title, and claim in the estate of his father. He negotiated the notes, sold the lot of land for \$2,750, and moved to Florida. His mother died without consuming any of the corpus of her legacy, and the plaintiff demanded of the executors to account to him for his share in the same, which they refused to do; whereupon he instituted a proceeding in the court of ordinary calling upon them for a settlement. He began to suspect their good faith in regard to the transaction in which he was induced by them to transfer

and convey his legacy to them, and release them as executors for his interest in his father's estate. On investigation he found that the estate was worth a great deal more than they had represented it was worth. In fact, they had since actually sold the 500 acres of land, less some portions, for \$375,000. Prior to the transaction with him, they had sold some of the land for as much as \$600 per acre; but he did not know of this sale when he conveyed his interest in the estate. His legacy, at the time of the conveyance to the executors, was worth between \$30,000 and \$40,000—double the amount that was turned over to him.

The executors misled him as to their rights and powers under the will of his father. Their claim was unfounded, as they had no such power and authority as claimed by them, as more than 12 months had expired since the grant of letters testamentary; and, there being no debts due by the estate, the time had arrived when, under the law and provisions of the will, the estate should have been ready for distribution, and the plaintiff had the legal right to demand a partition of the land and assent to his legacy; and, instead of in good faith telling him so, the executors took advantage of his ignorance and led him to believe his legacy was subject to their will, and that they were not bound to deliver it until it suited their pleasure. So misleading him, they took advantage of him and induced him to execute the papers. It is charged that the transaction in which he executed these papers was a fraudulent scheme by which it was sought to secure for the estate the plaintiff's interest; that such conveyance was void, because the executors as such had no authority to enter into the contract; that they had no right to represent any of the heirs of the estate in the purchase of any legacy; that, being executors, they could not purchase from the plaintiff, except at his option to repudiate his sale; that the contracts are not valid and binding, because there is no consideration for either, for at the time of their execution the value of the plaintiff's legacy was worth more than \$17,000, and the money, notes, and land given to the plaintiff were due and owing him out of the estate by the executors, and he got nothing in exchange for what the contract ostensibly conveyed to the estate, and from what the executors are released; that at the time of the execution of the contract he had no title to his legacy, because the executors had not assented to it.

He has not tendered the money, notes, and deed which he received from the executors, because their value was only \$17,000, and his share of the estate is greatly in excess of that sum, and they now owe him as a balance of his legacy \$20,000, or other large sum; but he is willing and now offers to credit the sum of \$17,000 on the value

of his legacy, and to be charged with what he received when he executed the papers, and only seeks to recover the balance of his legacy under the provisions of the will. He prays that the proceeding in the court of ordinary be consolidated with the present case, that the deed and acquittance receipt executed by him to the executors be canceled, and that the executors be required to account to him for his legacy, and that he have a decree fixing the amount due him, after allowing credit for such amounts as he has received upon the legacy.

The petition was dismissed on general demurrer, and the plaintiff excepted.

P. H. Brewster and Lowndes Calhoun, for plaintiff in error. John L. Hopkins & Sons, for defendants in error.

EVANS, P. J. (after stating the facts as above). [1] 1. The action is by a legatee against the executors, to vacate a conveyance to the latter by the former of his interest in the testator's estate. The policy of the law forbids that administrators, executors, or trustees, having duties to perform in reference to property for their *cestui que trust*, should deal with the beneficiaries with respect thereto, except upon the footing of the utmost candor and upon considerations demonstrative of the absence of any undue advantage. An executor cannot purchase property from himself, directly or indirectly, and if he does so the sale will be set aside at the instance of a legatee who is not, in laches, however fair and honest it may have been. *Fleming v. Foran*, 12 Ga. 594. He may, however, purchase the property from a legatee who is *sui juris* and laboring under no disability, where all the circumstances of the transaction are fair and open, and no advantage is taken by him of the legatee by concealment, misrepresentation, or omission to state any important fact, or by the exercise of undue influence, and the legatee understands the nature and effect of his act. But in such a case a court of equity looks upon the transaction with jealous eye, and will not uphold it, unless it appears that the sale is fair, and that there is no fraud, no concealment, and no advantage taken by the executor of information acquired by him in his character as such. *Bryan v. Duncan*, 11 Ga. 67. Professor Pomeroy thus states the principle as deduced from the authorities: "A purchase by a trustee from his *cestui que trust*, even for a fair price and without any undue advantage, or any other transaction between them by which the trustee obtains a benefit, is generally voidable, and will be set aside on behalf of the beneficiary. It is at least voidable upon the mere facts thus stated. There is, however, no imperative rule of equity that a transaction between the parties is necessarily, in every way, voidable. It is

possible for the trustee to overcome the presumption of invalidity. If the trustee can show, by unimpeachable and convincing evidence, that the beneficiary, being *sui juris*, had full information of all the facts concerning the property and the transaction itself, and the person with whom he was dealing, and gave a perfectly free consent, and that the price paid was fair and adequate, and that he made to the beneficiary a perfectly honest and complete disclosure of all the knowledge or information concerning the property possessed by himself, or which he might with reasonable diligence have possessed, and that he has obtained no undue and inequitable advantage, and especially if it appears that the beneficiary acted in the transaction upon the independent information and advice of some intelligent third person, competent to give such advice, then the transaction will be sustained by a court of equity." 2 Pom. Eq. Jur. § 958. The same rule applies where the purchase is made by the executor for the benefit of the estate, as inuring to the other beneficiaries. *Adams v. Cowen*, 177 U. S. 484, 20 Sup. Ct. 668, 44 L. Ed. 851; *Ludington v. Patton*, 111 Wis. 208, 86 N. W. 571; *Taylor v. Taylor*, 8 How. 183, 12 L. Ed. 1040. And this is especially true where the executors are legatees under the will, and will reap their proportionate share of whatever benefit may come from their purchase.

The general object of this rule is to prevent imposition on the part of trustees. The petition alleges, as reason why the transaction was not fair, the gross disproportion between the value of his interest in his father's estate and the value of that which he received from the executors in consideration of his relinquishment of that interest for the benefit of the other legatees, among whom were the executors. He alleges that he had no conception of the value of his father's estate; that his habits of life, his social and financial condition, and his lack of knowledge of real estate values incapacitated him to judge its correct value; that his financial stress was such that he eagerly accepted the value placed thereon by the executors, who were his brothers, and who had considerable experience in business and were fully acquainted with the estate and its value; that the executors represented to him that they had the power, under the will, to withhold his legacy just as long as they desired, and his pressing needs for money were such that he was prepared to accede to anything by which he could get money; that the executors had previously sold some land, which was not nearly as valuable as other portions of the land, for as much as \$600 per acre, and he did not then know of this; and that the actual value of his legacy was more than twice what he received for it. On demurrer, these allegations are to be taken as true, and are sufficient to

cast upon the executors the burden of showing that the transaction was fair, and that they did not withhold any information which they should have given to the plaintiff. On the trial, in a comparison of the value of the plaintiff's interest with what he received under his contract with the executors, the discretion of the executors as to the manner of disposing of the land as provided in the will is to be considered; also, that the plaintiff was not entitled to his remainder interest in the share of his mother until after her death. In determining whether the plaintiff received the substantial equivalent of his legacy, its value is to be estimated under these circumstances, and at its then present worth, and not at the value at which the executors subsequently sold the land; and, should it appear that there was no concealment or misrepresentation by the executors, and the transaction was fair, and the plaintiff received the substantial equivalent of the then present worth of his interest in the estate, the contract of sale should not be rescinded.

[2] 2. One ground upon which the plaintiff relies for the cancellation of his deed and acquittance receipt to the executors is a lack of consideration. It appears from the petition that within the year after the qualification of the executors they had sold off some portions of the land, receiving therefor the sum of \$31,000; but it does not appear how much money was in their hands at the time of the transaction. The bulk of the estate, which was in land, had not been disposed of by the executors, for the reasons explained to the plaintiff in the letter from their attorney. The executors deemed it inopportune to throw the whole bulk of the estate on the market, and the plaintiff was anxious to realize on his legacy. The transaction between the executors, who acted with the approval of all of the other beneficiaries, and the plaintiff involved a relinquishment of the latter's interest in the estate to the executors for the benefit of his colegatees, in consideration that the executors turn over to him certain property of the estate and give to him the notes of the estate. He converted the land conveyed to him by the executors and their notes into money, and thus realized a present enjoyment of what he contracted to receive as the equivalent of his interest in the estate. The transaction is similar to that of a cotenant, who accepts a conveyance in severalty to a part of the joint property, in consideration of his release of his interest in the remainder. Such a transaction is not without consideration, but whether it is fair depends upon the principles discussed in the preceding division of the opinion; and in determining as to that, the court may compare the value of the plaintiff's interest in the estate with the value of what he received.

[3] 3. It is further contended that the

plaintiff cannot maintain the action, because he has not returned the money, notes, and deed which he received from the executors as a consideration for his relinquishment of all interest in the estate of his father. We recognize the general rule to be that, "where one who has received money in consideration of land sold and conveyed seeks to rescind the sale on the ground of fraud, it is incumbent on the seller, before instituting legal proceedings for that purpose, to return, or offer to return, the consideration received." *Bowden v. Achor*, 95 Ga. 245 (14), 22 S. E. 254. Such a rule is particularly applicable in transactions between parties dealing at arm's length, where the consideration wholly proceeded from the purchaser, and the seller had no interest in the same, either equitably or indirectly. But there are exceptions to this rule; as, in the case of an infant who disaffirms his deed upon attaining majority, he is not required to tender the money received in payment of his land as a condition precedent to the rescission of his deed, where it appears that the money has been expended for an education or for food which has been consumed. *Timmerman v. Stanley*, 123 Ga. 850, 51 S. E. 760, 1 L. R. A. (N. S.) 379; *White v. Sikes*, 129 Ga. 508, 59 S. E. 228, 121 Am. St. Rep. 228. The facts of the present case furnish another instance of the inapplicability of the general rule. The executors, in purchasing the legatee's interest, acted in their representative capacity. Their proposal to buy was made as executors. They took the legatee's conveyance to themselves as executors. They contracted to give what the legatees and themselves agreed was a fair value of the legatee's interest in the estate of his father. The legatee was entitled to receive this much in any event, as a bequest or devise from his father. If the estate was of such value at the time of the legatee's conveyance that his legacy was of greater value than what he received from its sale (and the demurrer admits this), and he is entitled to a rescission under the principles already discussed, there would be no necessity to restore or offer to return what he had received as a condition precedent to his right to rescind, because the executors have only paid him in part what was his under his father's will. A party is not obliged to return that which he will be entitled to retain as a condition precedent to a cancellation of a contract. 6 Pom. Eq. Jur. § 688. If the plaintiff has received no more than what was bequeathed to him, his offer to account for the same, in the adjustment of the equities of all parties concerned, sufficiently meets the requirement that he who asks equity must do equity.

Judgment reversed. All the Justices concur, except HILL, J., not presiding.

(137 Ga. 648)

## POTTSTHOMPSON LIQUOR CO. v. CAPITAL CITY TOBACCO CO.

(Supreme Court of Georgia. Feb. 27, 1912.)

(Syllabus by the Court.)

## 1. DISMISSAL AND NONSUIT (§ 68\*)—INVOLUNTARY DISMISSAL—TIME FOR MOTION.

A motion, in the nature of a special demurrer, to dismiss a petition, came too late at the trial term.

[Ed. Note.—For other cases, see Dismissal and Nonsuit, Cent. Dig. § 163; Dec. Dig. § 68.\*]

## 2. LANDLORD AND TENANT (§ 190\*)—RENT—EXPULSION OF TENANT.

To constitute an eviction, which will operate as a suspension of rent, there must be either an actual expulsion of the tenant, or some act of a grave and permanent character, done by the landlord with the intention of depriving the tenant of the enjoyment of the demised premises.

(a) The granting, upon the petition of the landlord, of an order temporarily restraining the tenant from removing his goods beyond the limits of the state, and the appointment of a temporary receiver for all the assets of the tenant, which receiver took possession of the rented storehouse and a stock of goods belonging to the defendant, contained therein, and held possession of both for several weeks, and until, upon the hearing, the restraining order and the appointment of the receiver were rescinded, did not amount to an eviction of the tenant by the landlord; it being alleged in the petition as amended that a portion of the rent was due and unpaid, and that the tenant was insolvent and had declared his intention to repudiate the rent contract. Such proceedings did not show an intention on the part of the landlord to deprive the tenant of the enjoyment of the rented premises.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 765-769; Dec. Dig. § 190.\*]

## 3. LANDLORD AND TENANT (§ 190½\*)—RENT—DISCHARGE FROM LIABILITY—CHANGE IN LAW.

The enactment of the general prohibition law did not of itself have the effect of absolving a tenant from the payment of the agreed rental of a storehouse rented for use in the liquor business.

[Ed. Note.—For other cases, see Landlord and Tenant, Dec. Dig. § 190½.\*]

## 4. SET-OFF AND COUNTERCLAIM (§ 34\*)—SUBJECT-MATTER—CONTRACT OR TORT.

To an action ex contractu damages sounding in tort cannot be pleaded in defense, where neither the insolvency nor the nonresidence of the plaintiff is set up.

[Ed. Note.—For other cases, see Set-Off and Counterclaim, Cent. Dig. §§ 56, 57; Dec. Dig. § 34.\*]

## 5. APPEAL AND ERROR (§ 592\*)—RECORD—BRIEF OF EVIDENCE.

Where there is no attempt to brief the evidence in a case brought to the Supreme Court, questions depending on the evidence will not be decided.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2618, 2620, 3126; Dec. Dig. § 592.\*]

## 6. RULINGS CONTROLLING CASE—REVERSAL NOT REQUIRED.

The rulings above announced are controlling of the case, and none of the assignments of error requires a reversal.

Error from Superior Court, Fulton County; Geo. L. Bell, Judge.

Action by the Capital City Tobacco Company against the Potts-Thompson Liquor Company. Judgment for plaintiff, and defendant brings error. Affirmed.

See, also, 133 Ga. 776, 66 S. E. 1081, 26 L. R. A. (N. S.) 498.

J. J. Goodrum Tobacco Company brought an action against Potts-Thompson Liquor Company, both parties being corporations. Pending the suit the corporate name of the plaintiff was changed to Capital City Tobacco Company. From the petition, and a copy of a lease contract attached thereto, the following facts appear: On July 26, 1906, the defendant leased from J. J. Goodrum Tobacco Company a described storehouse in the city of Atlanta, for the term of five years from October 1, 1906; the defendant agreeing to pay a total rental of \$37,500, the sum of \$625 being payable monthly in advance. The rental was paid up to and including December 1, 1907. The suit was filed June 1, 1908, for the recovery of the rental due January 1st, February 1st, March 1st, and April 1st, and also for damages in a given sum for a breach of the lease contract by defendant in abandoning the premises. There was no denial by defendant that the copy attached as an exhibit to the petition was a true copy of the lease contract signed by Henry Potts, who in doing so undertook to represent defendant; but his authority to do so was denied by defendant. A motion by defendant, made at the trial term, to dismiss the petition, was overruled. At the trial, on motion of plaintiff, the court struck parts of the answer and disallowed amendments offered by defendant to the answer.

The portions of the answer so stricken, and the amendments offered, set up in effect the following: If the lease contract forming the subject of this suit was valid and binding upon the defendant (which is denied), the defendant has been released from all obligation thereunder, by reason of a breach by the plaintiff of the covenant for peaceable possession and quiet enjoyment of the premises for the following reasons: The General Assembly of Georgia, in August, 1907, enacted a law prohibiting the sale or manufacture of intoxicating liquors within the state after January 1, 1908, and making it unlawful to keep such liquors in any place of business. Defendant, in order to meet the requirements of this law, had rented a place of business in Chattanooga, Tenn., and was removing thereto its stock of liquors for the purpose of there continuing its business of selling liquors. Defendant was neither seeking, threatening, nor intending to remove from this state its other assets, which were of the value of some \$40,000, and consisting largely of cash and book accounts; nor was it seeking, threatening, or intending to dispose of certain real property

of large value owned by it in this state. Defendant was solvent, and was in the enjoyment of a valuable good will and a prosperous wholesale and mail-order trade that did not depend upon its location in Atlanta, this state. In this situation the plaintiff, on December 28, 1907, wrongfully and without justification, excuse, or probable cause, wantonly and maliciously procured and caused to be issued against defendant a temporary injunction restraining defendant from carrying out its openly declared purpose of removing its stock of liquors to its new place of business in Chattanooga; and in order to secure the issuance of the injunction the plaintiff wantonly and maliciously represented, in its petition to the court, that defendant was insolvent and was removing all of its assets beyond the limits of this state. At the time plaintiff did not claim that anything was due to it for, accrued rental of the leased premises; in fact, the rental had been paid in advance to January 1, 1908. On January 4, 1908, plaintiff, on similar false and malicious representations as to its solvency and purpose, procured the appointment of a temporary receiver, with direction to take charge of and hold the property and assets of defendant. The receiver, acting under such direction of the court, and at the instance and procurement of the plaintiff, took possession of the property and assets of the defendant within the jurisdiction of the court, and evicted defendant from the possession, use, and enjoyment of the leased premises. The receiver continued in such possession for several weeks, during which time defendant was excluded from the possession, use, and enjoyment of the leased premises, or any part thereof. Upon the hearing the temporary receiver was discharged and the restraining order dissolved, upon the ground that the defendant was not insolvent. This action on the part of the plaintiff amounted to eviction of the defendant from the leased premises, and released defendant from all obligation for the payment of further rent, if such obligation ever existed.

A copy of the petition brought by plaintiff against defendant for an injunction was attached to defendant's answer in this case, the substance of which petition is that the defendant is a tenant of the plaintiff under the contract, a copy of which is attached to the plaintiff's petition in the present case; that the defendant is a Georgia corporation, and has declared its purpose to remove its business to Chattanooga, Tenn., and to take from Georgia all of its assets of every character; and that, if this should be done, defendant will be insolvent in this state, and petitioner would be unable to collect its rents from defendant. The prayer was for injunction and receiver. A temporary restraining order was granted on December 28, 1907. On January 4, 1908, the plaintiff



amended the petition by alleging the insolvency of defendant, and that defendant had failed and refused to pay the installment of rent, \$625, due plaintiff under the contract on January 1, 1908, and that defendant had announced its intention not to abide by the terms of the lease. The appointment of a receiver was prayed for all of the assets of defendant. A temporary receiver was appointed on the day the amendment was made.

The defendant filed exceptions pendente lite to the overruling of its motion to dismiss the petition, as well as to the striking of its answer, and the disallowance of the amendments offered by it. A verdict was rendered against the defendant, and its motion for a new trial was overruled. Error is assigned upon the exceptions pendente lite and upon the refusal to grant a new trial.

Wimbish & Ellis and Edgar Watkins, for plaintiff in error. Moore & Pomeroy and Dorsey, Brewster, Howell & Heyman, for defendant in error.

FISH, C. J. (after stating the facts as above). [1] 1. Upon a former hearing of the case the petition was dismissed on general demurrer, but this ruling of the trial judge was reversed by this court. *Goodrum Tobacco Co. v. Potts-Thompson Liquor Co.*, 133 Ga. 776, 66 S. E. 1081, 28 L. R. A. (N. S.) 498. The written motion made by defendant, during the last trial, to dismiss the petition, was to the following effect: (a) The action was for the recovery of four months' rental and for damages for a breach of the same contract under which the rental was alleged to be due, "such remedies being inconsistent and mutually exclusive;" (b) "that plaintiff in the same suit and in the same count is seeking to recover on its contract, treating the contract as existing and binding, and also seeking to recover for a breach of the same contract, treating said contract as breached and ended;" (c) "that, while plaintiff claims damages for breach of contract, it nowhere sets up any facts showing any basis for measuring the damages;" (d) "that, the market rental value of the property leased not being alleged, plaintiff shows no right of action for any damage;" (e) "that, so far as the plaintiff's suit is brought to recover on the contract, its recovery must be limited to the contract amount due and accrued prior to the filing of this suit." These grounds of the motion did not make it one in the nature of a general demurrer, which could be made on the trial; but they were in the nature of special demurrers, which could be filed only at the appearance term.

[2] 2. The lease contract contained the following stipulations: "This lease [is] for a term of five years, commencing on the 1st day of October, 1906, and terminating

on the last day of September, 1911, for the sum of \$87,500, payable monthly in advance, to wit, \$625; and the said second party agrees to pay the same." "If the monthly rental, as herein specified, is not paid by second party for five days after same is due, first party, at its option, may declare this lease canceled and void, and take possession of said premises; time being expressly of the essence of this agreement." Accordingly the monthly rental was due upon the 1st day of each month, and under the contract the tenant was not entitled to wait until the 5th day of each month to pay the same. There was a month's rent due on January 1, 1908. By exceptions to the striking of portions of the defendant's answer, and the disallowance of the amendment to the answer, the question is presented whether taking possession of the leased premises by a receiver appointed at the instance of the plaintiff, under the circumstances stated, amounted to an eviction by the plaintiff of its tenant, the defendant; and, if so, and the eviction was wrongful, whether the defendant could set up damages flowing therefrom to meet, by way of recoupment, the damages claimed by plaintiff for breach of the lease contract on the part of defendant. It must be conceded, of course, that the employment of legal proceedings for the collection of rentals that are due and unpaid, or for redress of breaches of the contract on the part of the tenant, will not necessarily affect the relation of landlord and tenant, or excuse the tenant from further performance of his obligations according to the contract under which he holds. A distraint for rent past due would not be a violation of the covenant for quiet enjoyment; nor would an action predicated upon a default or a violation of the contract by the tenant have that effect. In other words, it must be true, as a general rule, that a landlord may pursue the same legal remedies against his tenant, without prejudicing himself, as he could use if the relation of landlord and tenant did not exist. In *Upton v. Townsend*, 17 C. B. 51, it was said that the term "eviction" may now be taken to mean this: "Not a mere trespass, and nothing more, but something of a grave and permanent character, done by the landlord with the intention of depriving the tenant of the enjoyment of the demised premises." Practically the same definition of "eviction" was adopted by this court in *Fleming v. King*, 100 Ga. 449, 28 S. E. 239.

In the present case it cannot be said that there was an actual expulsion of the defendant from the rented premises by the plaintiff itself. Was the appointment of a temporary receiver upon the application of the plaintiff, and the taking of possession of the leased premises by him under the order of the court and at the instance of the plaintiff, such an act, under the circum-

stances above set forth, as indicated an intention on the part of the plaintiff to deprive the defendant of the enjoyment of the rented premises? We think not. The evident purpose of the plaintiff in applying for the appointment of a receiver, taking the averments in the answer and offered amendments as true, was to secure its alleged rights and the payment of the rental claimed to be due it by the defendant. It merely sought to preserve the status until such rights could be legally determined. The appointment of the temporary receiver and the taking charge by him of the leased premises, wherein the large stock of liquors owned by the defendant were stored, and where it transacted an extensive wholesale business, must have been with the same end in view. Of course, the receiver could not know that the judge upon the hearing would continue the receivership. He must have known that the removal of such a stock would involve much expense and great hazard of loss from breakage and other causes; and therefore it would seem that he acted prudently in keeping the stock where it was until it should be determined whether a permanent receivership would be granted. If the receiver pursued this course at the instance of the plaintiff, it certainly did not indicate an intention on the latter's part to resume any control of the leased premises and to deprive the defendant of the right to enjoy the same. The taking possession of the leased premises, under the circumstances, should therefore be held not to be an eviction of the defendant by the plaintiff, but merely auxiliary measure frequently incident to the character of cases such as the one in which the receiver was appointed, for the purpose of preserving temporarily the status, and not with an intention on the part of the landlord, the plaintiff, that the tenant, the defendant, should no longer continue to hold the premises. It follows that the trial court did not err in striking that portion of the answer here dealt with, nor in disallowing the amendment. See *Hayner v. Smith*, 63 Ill. 430, 14 Am. Rep. 124; *Morris v. Tillson*, 81 Ill. 607; *Keating v. Springer*, 146 Ill. 481, 34 N. E. 805, 22 L. R. A. 544, 37 Am. St. Rep. 175; *Barrett v. Boddie*, 158 Ill. 479, 42 N. E. 143, 49 Am. St. Rep. 172; *First Nat. Bank v. Adam* (Ill.) 25 N. E. 576; *Bartlett v. Farrington*, 120 Mass. 284; *Skally v. Shute*, 132 Mass. 367; *Hayward v. Ramge*, 33 Neb. 836, 51 N. W. 229.

[3] 3. In this same case (*Goodrum Tobacco Co. v. Potts-Thompson Liquor Co.*, 133 Ga. 776, 66 S. E. 1081, 26 L. R. A. [N. S.] 498) it was held: "Though a lease contract provided 'that the purpose of this lease is for the operation by second party of a general retail liquor business,' the lessee is not absolved from paying the rent agreed to be paid because since the commencement of the

lease the Legislature enacted a law prohibiting the sale of alcoholic, spirituous, malt, or intoxicating liquors, and thus the demised tenement cannot be thereafter used for the conduct of a liquor business, in the absence of a stipulation in the lease contract relieving the tenant from payment of rent accruing after the happening of such contingency." Of course, therefore, the court did not err in striking so much of the answer as sought to set up the same defense as had been previously ruled was not good.

[4] 4. In the amendments disallowed, the defendant set forth damages alleged to have been sustained by it on account of the plaintiff's maliciously filing the petition for injunction and receiver, and falsely and maliciously and without probable cause alleging the insolvency of defendant. Such amendment was properly disallowed, the present action being purely one *ex contractu*, and the damages sought to be pleaded in the amendment, being for an alleged independent tort on the part of the plaintiff against the defendant, could not be set up, in the absence of an allegation of the insolvency or nonresidence of the plaintiff. Civil Code, § 5521; *Harden v. Lang*, 110 Ga. 392, 36 S. E. 100; *Ray v. Anderson*, 119 Ga. 926, 47 S. E. 205.

[5] 5. There was no effort whatever on the part of the plaintiff in error to brief the evidence. The so-called brief of evidence contains all the questions propounded to the various witnesses and their answers thereto, as well as colloquies between counsel and between them and the court, as well as entire copies of documents put in evidence. It follows, under numerous decisions of this court, that the assignments of error dependent for solution upon a consideration of the evidence will not be decided.

[6] 6. The above rulings control the case, and none of the assignments of error is sufficient to require a reversal.

Judgment affirmed. All the Justices concur, except HILL, J., not presiding.

(137 Ga. 769)

#### JOSEY v. STATE.

(Supreme Court of Georgia. March 12, 1912.)

#### (Syllabus by the Court.)

#### 1. HOMICIDE (§ 169\*) — EVIDENCE—ADMISSIBILITY.

On the trial of one charged with the murder of his wife, evidence is admissible which tends to show that for a long period of time prior to the homicide, and until a short time prior thereto, the defendant was cruel to and ill-treated his wife, as tending to show malice and motive, and to rebut the presumed improbability of a husband murdering his wife. 6 Enc. Ev. 717, 718.

(a) In such a case, it is not necessary that all of such acts should be proved by the same witness.

[Ed. Note.—For other cases, see *Homicide*, Cent. Dig. §§ 341-350; Dec. Dig. § 169.\*]

**2. CHARGE NOT ERRONEOUS.**

Considered as a whole, there was no error in the charge complained of in the second division of the opinion.

**3. CRIMINAL LAW (§ 825\*)—TRIAL—INSTRUCTIONS—NECESSITY FOR REQUEST.**

Where one who is charged with the murder of his wife relies upon the defense of misfortune or accident, and the trial judge has correctly given the law in charge to the jury on that subject, it is not error for the court to fail to state the contention of the defendant that he relies upon accident as having caused the homicide, in the absence of a request so to do, especially where it is manifest, from the judge's charge on this subject, what the defense is upon which the defendant relies.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2006; Dec. Dig. § 825.\*]

**4. HOMICIDE (§ 18\*)—INSTRUCTIONS—INTENT.**

It is not error for the court to charge the jury, in a case where one is charged with the murder of his wife, and where the defense is that the homicide was caused by the accidental discharge of the defendant's pistol, that "if you believe that the defendant killed his wife without intending to kill her, but that it was done in the commission of an unlawful act, which in its consequences naturally tends to destroy a human being, then the offense would be murder."

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 24-31; Dec. Dig. § 18.\*]

**5. SUFFICIENCY OF EVIDENCE.**

The evidence supported the verdict.

*(Additional Syllabus by Editorial Staff.)*

**6. HOMICIDE (§§ 218, 208, 221\*)—DYING DECLARATIONS—INSTRUCTIONS—SUFFICIENCY.**

A charge that it is for the court in the first instance to determine whether the preliminary proof is sufficient to admit dying declarations, but that this rule is not binding on the jury, but the jurors must be satisfied that the statements were actually made by deceased, that she made them when she was in the article of death, and was conscious of her condition, that it is not necessary that the person whose statement is sought to be introduced should express herself as believing she is in a dying condition, that the dying declarations made by any person in the article of death, who is conscious of her condition, as to the cause of her death and the person who killed her, are admissible, that the declarations stand on the same plane of solemnity as statements made under oath, and that great caution is necessary in the use of dying declarations, was not erroneous.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 458, 459, 430-437, 463, 464; Dec. Dig. §§ 218, 208, 221.\*]

**7. CRIMINAL LAW (§§ 763, 764\*)—TRIAL—INSTRUCTIONS—WEIGHT OF EVIDENCE.**

An instruction, telling the jury that dying declarations stand on the same place as testimony given under oath, is not objectionable as dealing with the weight of the testimony.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1731-1748, 1752; Dec. Dig. §§ 763, 764.\*]

**8. HOMICIDE (§ 203\*)—EVIDENCE—DYING DECLARATIONS—SENSE OF IMPENDING DEATH.**

To render dying declarations admissible in evidence, it is not necessary to show that the declarant said affirmatively that she was in a dying condition, or used words of similar import; it being sufficient if she was in fact in

a dying condition and the circumstances such as to indicate that she knew this.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 430-437; Dec. Dig. § 203.\*]

**9. HOMICIDE (§ 203\*)—INSTRUCTIONS—DYING DECLARATIONS.**

In an instruction on dying declarations, it is not error to tell the jury that consciousness of the declarant's condition may be inferred from the nature of her wound or other circumstances.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 430-437; Dec. Dig. § 203.\*]

Error from Superior Court, Pike County; R. T. Daniel, Judge.

Virge Josey was convicted of murder, and brings error. Affirmed.

E. C. Armisted, for plaintiff in error. J. W. Wise, Sol. Gen., and T. S. Felder, Atty. Gen., for the State.

HILL, J. [1] 1. Virge Josey was indicted for the murder of his wife, and found guilty by the jury trying him, with the recommendation that he be imprisoned in the penitentiary for life. A motion for a new trial having been overruled by the court, he brings his writ of error here for review. The fourth, fifth, sixth, and seventh grounds of the motion will be considered together, as they involve the same question, namely, the admission by the court of the testimony of certain witnesses tending to show acts of ill treatment and cruelty on the part of the husband toward his wife at different times previous to the homicide, covering a period of about two years, and extending nearly to the time of the homicide; the purpose of the evidence being to show malice and motive, and to rebut the presumed improbability of a husband murdering his wife. It is insisted on the part of the plaintiff in error that this testimony should have been excluded, on the ground that it was not connected with the tragedy. We do not think there is merit in these grounds of the motion for a new trial; nor did the court err in admitting the evidence. This court has repeatedly held that, "when a husband is on trial for the alleged murder of his wife, evidence tending to show a long course of ill treatment and cruelty on his part toward her, continuing until shortly before the homicide, is admissible. Such evidence tends to show malice and motive, and to rebut the presumed improbability of a husband murdering his wife." *Roberts v. State*, 123 Ga. 148 (5), and cases cited on page 157, 51 S. E. 374; *Campbell v. State*, 123 Ga. 533 (2), 51 S. E. 644; *Green v. State*, 125 Ga. 742 (3), 54 S. E. 724.

[2] 2. Objection is made to the charge of the court, as follows: "In regard to dying declarations I charge you this: You are instructed, gentlemen, that it is for the court in the first instance to determine whether the preliminary proof is sufficient to admit dying declarations; but this rule is not bind-

ing upon you, for you must be satisfied that such statements were actually made by the deceased, and that she made them when she was in the article of death, and was conscious of her condition at the time of making such declarations, if they were made. It is not necessary that the person whose statement is sought to be introduced should express herself as believing she is in a dying condition. Consciousness of her condition may be inferred from the nature of the wound, or other circumstances. Dying declarations, made by any person in the article of death, who is conscious of her condition, as to the cause of her death and the person who killed her, are admissible in evidence in the prosecution of the homicide. The admission of such statements is founded on the necessity of the case, and the reason is that, being made in view of impending death and judgment, when the hope of life is extinct, and when the retributions of eternity are at hand, they stand upon the same plane of solemnity as statements made under oath. I charge you, gentlemen, that great caution is necessary in the use of dying declarations. The court has admitted this evidence, leaving you to determine whether the statements were or were not made by the deceased, and also whether the statements, if made by her, if she was at the time in the article of death, and whether she was conscious of her condition. If you believe the deceased made the statements, and you believe that she was at the time in the article of death, in a dying condition, and also believe she was conscious of her condition, then you should consider the statements along with all other evidence in the case. If you do not believe that she was in the article of death, in a dying condition, or if you do not believe that she was conscious of her condition, or if you do not believe that she made the statements, you should not consider them at all."

[6, 7] It is contended that the above charge is erroneous: "(a) Because that part of the charge was too general, too restrictive, and too indefinite to guide the minds of the jury as to what weight should be given the statements that were actually proved on the trial of the case. (b) Because the court informed the jury that consciousness of her condition may be inferred from the nature of the wound, or other circumstances. (c) Because there was no evidence to authorize that part of the charge in which the court instructed the jury in the following words: 'The admission of such statements is founded on the necessity of the case, and the reason is that, being made in view of impending death and judgment, when the hope of life is extinct, and when the retributions of eternity are at hand, they stand upon the same plane of solemnity as statements made under oath.' (d) Because telling the jury dying declarations stand on the same plane as testimony given under oath dealt with the weight of the testimony." Taken as a whole, and

fairly construed, we cannot say that the charge was erroneous. The judge was not instructing the jury as to the weight to be given the dying declarations, but rather as to their admissibility, and while instructing the jury on this subject he said, "They stand on the same plane of solemnity as statements made under oath," and followed that by adding, "I charge you, gentlemen, that great caution is necessary in the use of dying declarations," and also that the statements should be considered along with all the other evidence in the case. The language of the court first quoted above was evidently taken from the case of *Mitchell v. State*, 71 Ga. 182 (2), where similar language is used, and which was taken from *Campbell's Case*, 11 Ga. 374, 375. While it is proper for this court to give its reasons in discussing the admissibility or rejection of testimony, as was done in the *Campbell and Mitchell Cases*, it is not generally desirable for a trial judge to do so, as the jury might be misled thereby in some cases. But, as already stated, the charge of the trial judge excepted to, considered in connection with the context and the entire charge, could not, we think, have misled the jury in this case. It will also be observed that the objection urged in this ground of the motion was to the charge of the court, and not to the admissibility of the testimony. The testimony was admitted without objection, so far as the record discloses.

[8] In order to render dying declarations admissible in evidence, it is not necessary to show that the declarant said affirmatively that she was in a dying condition, or used words of similar import. If she was in fact in a dying condition, and the circumstances were such as to indicate that she had knowledge that this was so, it is proper to allow the declarations to be proved, and instruct the jury to determine for themselves whether or not the statements made by the deceased were "conscious utterances in the apprehension and immediate prospect of death." *Young v. State*, 114 Ga. 849, 40 S. E. 1000; *Perdue v. State*, 135 Ga. 278 (8), 69 S. E. 184; *Washington v. State*, 137 Ga. —, 73 S. E. 512. See, also, *Findlay v. State*, 125 Ga. 579 (1-2), 54 S. E. 106; *Mitchell v. State*, 71 Ga. 128 (2); *Jefferson v. State*, 137 Ga. —, 73 S. E. 499 (3).

[9] It is insisted, further, that the charge quoted is erroneous, because the court told the jury that "consciousness of her condition may be inferred from the nature of the wound, or other circumstances." This portion of the charge is not erroneous under the facts of this case, and comes within the ruling made in the case of *Barnett v. State*, 136 Ga. 65, 70 S. E. 868, where it is held that: "In an instruction on the subject of dying declarations, after charging that, before such declarations may be considered as evidence, the jury must be satisfied that the declaration of the deceased was actually made by

him while in the article of death and conscious of his condition, it was not erroneous to charge, in immediate connection: 'It is not necessary that the person whose statements are sought to be introduced should express himself as believing that he is in a dying condition. Consciousness of his condition may be inferred from the nature of the wound or from other circumstances.' *Anderson v. State*, 122 Ga. 161, 50 S. E. 46." See also, *Jones v. State*, 130 Ga. 274 (2), 60 S. E. 840; *Dumas v. State*, 62 Ga. 58 (2).

[3] 3. Complaint is made that the court erred in "failing to instruct the jury that the defense relied on was accident and misfortune." It is insisted that the court in no part of its charge to the jury stated what the defendant's contention was in this respect. The charge itself shows that the court correctly charged the jury the law on the subject of homicide by accident and misfortune. He charged them that: "If you find in this case that the defendant killed his wife, and that it was an accident—that he didn't intend to kill his wife—that the firing of the pistol was accidental, in which there was no culpable neglect, no evil design, no intention to kill her, you would not be authorized to find him guilty of any offense." It is plainly manifest from this charge what the defense relied upon was, as well as from the defendant's statement. No exception was taken to the charge on this point, nor was a request made for a statement of the defendant's contention that the killing occurred by accident. If more detailed instructions from the court to the jury on this point were desired, a request therefor should have been made. *Williams v. State*, 125 Ga. 235, 54 S. E. 186.

[4] 4. The following charge of the court is assigned as error: "If you believe that the defendant killed his wife without intending to kill her, but that it was done in the commission of an unlawful act, which in its consequences naturally tends to destroy a human being, then the offense would be murder." We think the charge as given was correct. Penal Code 1910, § 67; *Smith v. State*, 124 Ga. 213, 214, 52 S. E. 329; *Hamilton v. State*, 129 Ga. 747, 59 S. E. 803; *Gadsden v. State*, 134 Ga. 785 (2), 68 S. E. 497.

Judgment affirmed. All the Justices concur.

(10 Ga. App. 801)

**MONTGOMERY v. STATE** (No. 3,956.)

(Court of Appeals of Georgia. March 19, 1912.)

(Syllabus by the Court.)

**CRIMINAL LAW (§ 655\*)—TRIAL—EXPRESSION AS TO ACCUSED'S GUILT.**

The fact that the court, in directing a verdict for two of three defendants jointly indicted, stated that he would express no opinion as to the guilt or innocence of the third defendant (the plaintiff in error here) is not sub-

ject to criticism as being expressive of an opinion as to the defendant's guilt, nor prejudicial to his right to a fair trial. The trial was free from error, and the evidence fully authorized the conviction of the offense of voluntary manslaughter.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1520-1523, 1527, 1535; Dec. Dig. § 655.\*]

Error from Superior Court, Colquitt County; W. E. Thomas, Judge.

J. M. Montgomery was convicted of voluntary manslaughter, and brings error. Affirmed.

W. F. Way and W. A. Covington, for plaintiff in error. J. A. Wilkes, Sol. Gen., for the State.

**RUSSELL, J.** Judgment affirmed.

(10 Ga. App. 829)

**BAILEY v. STATE** (No. 4,004.)

(Court of Appeals of Georgia. March 19, 1912.)

(Syllabus by the Court.)

**CRIMINAL LAW (§ 824\*)—INSTRUCTIONS—CIRCUMSTANTIAL EVIDENCE.**

Where the evidence relied upon for a conviction is entirely circumstantial, it is the duty of the trial judge to charge the law fixing the standard of mental conviction in such cases, as laid down by section 1010 of the Penal Code of 1910, whether requested to do so or not. *White v. State*, 4 Ga. App. 72, 60 S. E. 803, and citations.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1996-2004; Dec. Dig. § 824.\*]

Error from City Court of Thomasville; W. E. Thomas, Judge.

Ada Bailey was convicted of crime, and brings error. Reversed.

Theodore Titus, for plaintiff in error. J. A. Wilkes, Sol. Gen., and Snodgrass & Macintyre, for the State.

**HILL, C. J.** Judgment reversed.

(10 Ga. App. 822)

**CONOLY v. STATE** (No. 3,976.)

(Court of Appeals of Georgia. March 19, 1912.)

(Syllabus by the Court.)

**CRIMINAL LAW (§ 770\*)—INSTRUCTIONS.**

The defense of misadventure or accident being directly involved under the evidence, it was error to fail to instruct the jury upon this theory of defense, even without a written request from the accused.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1806; Dec. Dig. § 770.\*]

Error from City Court of Sylvester; J. B. Williamson, Judge.

Floyd Conoly was convicted of assault, and brings error. Reversed.

Tison & Bell, for plaintiff in error. W. E. Wooten, Sol. Gen., and J. H. Tipton, for the State.

**POTTLE, J.** The accused was convicted of assault and battery. The state's main witness described the occurrence thus: "We was there in the house where I was ironing, and we were all talking and going on, and Floyd came there, and was playing. He had some whisky, and told them that if they would take it away from him they could have it. Some took it away from him and ran away, and he ran after them, and he picked up the sugar dish and threw it, and hit me accidentally. He was not mad with me, and I had been living with him and his wife for a long time, and he had never mistreated me, and I was not mad with him, or him with me, and this was purely accidental."

It is doubtful whether the evidence as a whole justified the conviction. The state's witness may have repented, as so frequently happens in this class of cases, and among this character of our citizenry. But, whatever the truth may be, the accused was manifestly entitled to an instruction upon the law of misadventure or accident, and the failure to give him the benefit of this theory of defense demands a new trial.

Judgment reversed.

(10 Ga. App. 777)

**GANNEY v. STATE.** (No. 3,788.)

(Court of Appeals of Georgia. March 19, 1912.)

*(Syllabus by the Court.)*

**FALSE PRETENSES (§§ 14, 49\*)—ELEMENTS OF OFFENSE—SUFFICIENCY OF EVIDENCE.**

The evidence was insufficient to authorize the conviction. The corpus delicti was not established beyond a reasonable doubt. It appears from the evidence that the defendant has never refused to pay for the ax handle. His employer, a witness for the state, knew he was going for the ax handle, and was going to get it from the prosecutor, and consented to his going for it. It further appears that the ax handle was purchased for the benefit of the defendant's employer, who owned the ax in which the handle was put, and is solvent and willing to pay the fair market value for the ax handle, but that the prosecutor has never asked him to pay him for it. Even if the evidence of the defendant's intent to defraud were plain, there is no evidence of loss on the part of the prosecutor, and the conviction of the defendant of cheating and swindling, under section 719 of the Penal Code of 1910, was unauthorized. See *McGee v. State*, 97 Ga. 199, 22 S. E. 589; *Berry v. State*, 97 Ga. 202, 23 S. E. 833; *Drought v. State*, 101 Ga. 544, 28 S. E. 1013; *Busby v. State*, 120 Ga. 858, 48 S. E. 314. It is essential to the legality of a conviction under that section of the Penal Code that the person alleged to have been defrauded and cheated shall have sustained some pecuniary loss.

[Ed. Note.—For other cases, see *False Pretenses*, Cent. Dig. §§ 18, 62; Dec. Dig. §§ 14, 49.\*]

Error from City Court of Dublin; K. J. Hawkins, Judge.

Jim Ganey was convicted of cheating and swindling, and brings error. Reversed.

R. Earl Camp, for plaintiff in error. Geo. B. Davis, Sol., and J. B. Green, for the State.

**RUSSELL, J.** Judgment reversed.

**POTTLE, J.**, not presiding.

(10 Ga. App. 791)

**ENGLISH v. STATE.** (No. 3,939.)

(Court of Appeals of Georgia. March 19, 1912.)

*(Syllabus by the Court.)*

**WEAPONS (§ 15\*)—SHOOTING FIREARMS—"AT"—"INTO."**

One who, while inside of an occupied dwelling, shoots a pistol at a floor thereof, is guilty of shooting "at" or "into" such dwelling, within the meaning of the act approved August 13, 1910 (Acts 1910, p. 137). 1 Words and Phrases, p. 596; *Blackwell v. State*, 30 Tex. App. 418, 17 S. W. 1061.

[Ed. Note.—For other cases, see *Weapons*, Cent. Dig. § 18; Dec. Dig. § 15.\*]

Error from Superior Court, Brooks County; W. E. Thomas, Judge.

George English was convicted of shooting at or into a dwelling, and brings error. Affirmed.

Grover C. Edmondson, for plaintiff in error. J. A. Wilkes, Sol. Gen., for the State.

**POTTLE, J.** Judgment affirmed.

(10 Ga. App. 818)

**WYNNE v. CITY OF ATLANTA.**

(No. 3,971.)

(Court of Appeals of Georgia. March 19, 1912.)

*(Syllabus by the Court.)*

**1. MUNICIPAL CORPORATIONS (§ 639\*)—ORDINANCES—ACCUSATION.**

Unless there is something in the charter to the contrary, it is not necessary that a person accused of a violation of a municipal ordinance shall be furnished with a written accusation or statement of the charge made against him. It is sufficient if he be informed of the charge and be given an opportunity to defend. *Pearson v. Wimlish*, 124 Ga. 710, 52 S. E. 751, 4 Ann. Cas. 501; *Venable v. Atlanta*, 7 Ga. App. 190, 66 S. E. 489.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 281-283, 1406-1409; Dec. Dig. § 639.\*]

**2. INTOXICATING LIQUORS (§ 236\*)—ILLEGAL SALE—EVIDENCE.**

A violation of a municipal ordinance prohibiting the keeping of intoxicating liquors for unlawful sale is shown by proof of possession and sale of such liquors within the limits of the municipality. *Sawyer v. Blakely*, 2 Ga. App. 159, 58 S. E. 399.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. §§ 300-322; Dec. Dig. § 236.\*]

**3. CRIMINAL LAW (§ 59\*)—VIOLATION OF ORDINANCE—PRINCIPALS.**

"All who violate or assist in violating a municipal ordinance, directly or accessorially,

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

are equally guilty as principals." *Stradley v. Atlanta*, 7 Ga. App. 441, 87 S. E. 107.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 71-74, 76-81; Dec. Dig. § 59.\*]

#### 4. CRIMINAL LAW (§ 1011\*)—CERTIORARI.

No error of law having been committed by the recorder, and there being sufficient evidence to support the judgment of conviction, the judge of the superior court did not err in overruling the certiorari.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2569; Dec. Dig. § 1011.\*]

Error from Superior Court, Fulton County; J. T. Pendleton, Judge.

E. L. Wynne was convicted of violation of an ordinance of the City of Atlanta, and brings error. Affirmed.

John A. Boykin, for plaintiff in error. J. L. Mayson and W. D. Ellis, Jr., for defendant in error.

POTTLE, J. Judgment affirmed.

(10 Ga. App. 690)

FULLER v. INMAN.

INMAN v. FULLER.

(Nos. 3,751, 3,752.)

(Court of Appeals of Georgia. March 6, 1912.)

(*Syllabus by the Court.*)

#### 1. DEATH (§ 18\*)—RIGHT OF ACTION—DEATH OF CHILD—"DEPENDENT."

In order for a mother to recover, under the provisions of section 4424 of the Civil Code of 1910, for the tortious homicide of her minor child, it must appear that at the time of the homicide she was "dependent," either wholly or partially, upon the child, and that the child contributed substantially or materially to the mother's support. In such a case the mother may recover, notwithstanding the father of the child is in life, in good health, living with the family, and exercising his parental rights over the child up to the time of the child's death. It is the fact of contribution and dependency which creates the right of action in favor of the mother, and not the legal obligation to contribute to her support; and the contribution may be either in labor or in money.

[Ed. Note.—For other cases, see Death, Cent. Dig. § 20; Dec. Dig. § 18.\*]

For other definitions, see Words and Phrases, vol. 2, pp. 1991-1993.]

#### 2. DEATH (§ 103\*)—ACTIONS FOR CAUSING DEATH—QUESTION FOR JURY—DEPENDENCY OF PLAINTIFF ON DECEDENT.

It cannot be held as a matter of law that a child six years of age, of average capacity and experience, is incapable of contributing substantially or materially to his mother's support, and to such an extent as that her support is either wholly or partially dependent upon such contribution.

[Ed. Note.—For other cases, see Death, Cent. Dig. § 141; Dec. Dig. § 103.\*]

#### 3. DEATH (§ 46\*)—ACTION FOR CAUSING DEATH—PLEADING.

Where a mother sues for the tortious homicide of her minor child, an allegation that the child was at the time of death between six and seven years of age is not subject to special demurrer. In such a case it is immaterial whether the child be six or seven. Nor, in such a case, where it is alleged that the child was run over by an automobile and killed, is an allegation that the child was at a point

"close" to a named crossing subject to special demurrer.

[Ed. Note.—For other cases, see Death, Cent. Dig. §§ 60, 62; Dec. Dig. § 46.\*]

#### 4. NEGLIGENCE (§ 108\*)—ACTIONS—PLEADING.

Where a petition states the facts upon which the claim of negligence is based, a general allegation in the petition, following a statement of the facts relied upon to show negligence, will be construed to have reference to the particular facts pleaded; and, so construed, it is not subject to special demurrer.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 174, 176, 179, 180; Dec. Dig. § 108.\*]

#### 5. DEATH (§ 46\*)—ACTIONS FOR CAUSING DEATH—PLEADING.

In a case of the character mentioned in the preceding headnotes, an allegation that the deceased would have been a useful man to the petitioner and to the community should be stricken, on special demurrer.

[Ed. Note.—For other cases, see Death, Cent. Dig. §§ 60, 62; Dec. Dig. § 46.\*]

#### 6. DEATH (§ 49\*)—ACTIONS FOR CAUSING DEATH—PLEADING.

An allegation in the petition in such a case that the deceased child contributed to the support of the plaintiff, and that she was dependent upon him, is not subject to special demurrer, when the facts upon which this conclusion is based are set forth in the petition. The general averment will be construed to have reference to the special facts pleaded.

[Ed. Note.—For other cases, see Death, Cent. Dig. §§ 66, 69; Dec. Dig. § 49.\*]

#### 7. OVERRULING SPECIAL DEMURRER—NO ERROR.

There was no error in the judgment overruling the special demurrer, of which complaint was made in the cross-bill of exceptions.

(*Additional Syllabus by Editorial Staff.*)

#### 8. PLEADING (§ 8\*)—ALLEGATIONS IN GENERAL—CONCLUSIONS OR MATTERS OF FACT.

Under Acts 1910, p. 92, requiring a person operating an automobile to give reasonable warning of its approach by the use of a bell, horn, gong, or other signal, and to use every reasonable precaution to insure the safety of pedestrians and animals on the roadway, an allegation, in a petition for causing the death of a child by running him down with an automobile, that the driver of the car failed to give any warning by bell, horn, or other signal, was sufficient, being a statement of fact, and not a conclusion.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 12-28½; Dec. Dig. § 8.\*]

#### 9. HIGHWAYS (§ 184\*)—USE FOR TRAVEL—ACTIONS FOR INJURIES—PLEADING.

Under Acts 1910, p. 92, providing that an automobile shall not be operated at a rate of speed greater than is reasonable and proper, having regard to the use and traffic of the highway, and that upon approaching a sharp curve the person operating the machine shall have it under control and operate it at a speed not greater than six miles per hour, allegations, in a petition for causing the death of a minor by an automobile, that the car came around a curve without warning, that it came at great speed, and that the rate of speed was not reasonable or proper, taken together, are not subject to demurrer.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 471-474; Dec. Dig. § 184.\*]

#### 10. MASTER AND SERVANT (§ 329\*)—USE FOR TRAVEL—ACTIONS FOR INJURIES—PLEADING.

In an action for causing the death of a minor child by running him down with an au-

tomobile, averments of the petition that the defendant was chargeable with the conduct of her chauffeur, and that the negligence of the chauffeur was the negligence of the defendant, were surplusage and harmless.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1268, 1269; Dec. Dig. § 329.\*]

**11. PLEADING (§ 8\*)—ALLEGATIONS IN GENERAL—MATTERS OF FACT OR CONCLUSIONS.**

In an action for causing the death of plaintiff's minor child, an averment that the decedent and petitioner were free from fault, and could not have avoided the result of defendant's negligence by ordinary care, is not a conclusion of the pleader, but an allegation of a substantive fact.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 12-28½; Dec. Dig. § 8.\*]

**12. DEATH (§ 52\*)—ACTIONS FOR CAUSING DEATH—PLEADING.**

In an action for causing the death of a child six years of age, an allegation that the decedent's earning capacity would be increased as he grew older is a statement of fact, and is sufficiently definite, and is not subject to special demurrer, where, though there is no direct allegation that the deceased had earning capacity, there are averments from which the conclusion that he did have earning capacity and contributed to plaintiff's support is properly drawn.

[Ed. Note.—For other cases, see Death, Cent. Dig. § 69; Dec. Dig. § 52.\*]

Error from City Court of Atlanta; H. M. Reid, Judge.

Action by Mrs. M. C. Fuller against Miss Jennie Inman. To a judgment for plaintiff, defendant excepts, and plaintiff files a cross-bill of exceptions. Reversed on main bill; affirmed on cross-bill.

Plaintiff brought suit to recover for the alleged wrongful homicide of her son by the defendant. The petition was as follows:

"Georgia, Fulton County. To the City Court of Atlanta: The petition of Mrs. M. C. Fuller shows the following facts:

"(1) The defendant is Miss Jennie Inman.

"(2) Defendant is a resident of said state and county.

"(3) Defendant has damaged petitioner in the sum of \$25,000, by reason of the following facts:

"(4) On or about the 26th of March, 1911, petitioner's son, James Dewey Fuller, was killed by the motor vehicle of defendant.

"(5) At said time petitioner's son was on the Howell's Mill road, a public road in said county.

"(6) He was at a point close to a crossing known as 'Woodward's Post Office,' or 'Brooked,' same being about a mile beyond the waterworks reservoir.

"(7) There was on the roadside at the time a wagon headed north.

"(8) The wagon was standing still, and the driver thereof was sitting in the same.

"(9) The deceased was standing behind the wagon. A young man of the neighborhood was standing on the side of the wagon toward the middle of the road.

"(10) This was at a point about 80 yards

south of the crossing above referred to, and just a few feet north of a point where another street or road ran into the Howell's Mill road.

"(11) At the crossing referred to as 'Woodward's Post Office,' or 'Brooked,' were several stores and a blacksmith shop, and it was a populous country cross-road.

"(12) On the street which ran into the Howell's Mill road, right at the place of the killing, were a number of houses, and the place was a populous country cross-roads settlement. Just north of 'Woodward's Post Office,' or 'Brooked,' referred to, the road curved sharply to the east.

"(13) The deceased could not see the motor vehicle coming, because of the wagon.

"(14) The wagon was a top wagon and a milk wagon.

"(15) The motor vehicle of the defendant came around the curve without any warning by bell, horn, or other signal of any sort. The motor vehicle crossed the crossing known as 'Woodward's Post Office,' or 'Brooked,' without any warning by bell, horn, or other signal of any sort.

"(16) The motor vehicle passed the group of stores without any warning by bell, horn, or other signal of any sort.

"(17) The motor vehicle approached the wagon and the other street, and struck the deceased, without any warning by bell, horn, or other signal of any sort.

"(18) It came at a great rate of speed.

"(19) Petitioner charges the rate of speed was not reasonable, having regard to the traffic use of the highway, and that the same endangered life and limb of those upon the highway.

"(20) Said machine approached both of the crossings herein referred to at a greater rate of speed than six miles an hour, and the defendant approached the deceased and the wagon and the two men by it without giving any warning of any sort by the use of bell, horn, or other signal of any sort.

"(21) Petitioner further shows the entire action of the defendant herein was negligent.

"(22) The motor vehicle was being operated and run by an employé of the defendant.

"(23) The defendant herself was at the time in the vehicle.

"(24) The defendant was chargeable with the action and conduct of the chauffeur. The negligence of the chauffeur was the negligence of the defendant.

"(25) The deceased was free from all fault or negligence, and could not have avoided the result of defendant's negligence by the use of ordinary care.

"(26) Petitioner was free from all fault or negligence, and could not have avoided the result of defendant's negligence by the use of ordinary care.

"(27) The deceased was between six and

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes



seven years of age, and was a strong, well-grown boy for his age.

"(28) Deceased lived with petitioner and her husband and seven of her children. The deceased was the youngest child, and all the older children were either at work or going to school.

"(29) The deceased ran on errands, helped split kindling, bring in wood, helped with the cows, and generally waited on petitioner, and helped in the household work, doing all of those innumerable little things to be done in the house which a child can do as effectively or more than a grown person. The deceased contributed to petitioner's support, and she was dependent on him.

"(30) As the deceased grew up, approached and reached manhood, his earning capacity would have been increased, and he would have been valuable and useful to petitioner and the community.

"(31) Petitioner sues for the full financial value of the life of the deceased.

"Wherefore," etc.

The defendant demurred generally and specially. The court struck paragraphs 1, 5, 8, and 19 of the petition, sustained the general demurrer, and overruled all other grounds of special demurrer. The plaintiff excepted to the judgment striking certain paragraphs of the petition and dismissing it, and the defendant excepted to the refusal to sustain the other grounds of special demurrer. The judgment sustaining the general demurrer was placed upon the ground that the plaintiff's deceased child could not be said to have contributed materially and substantially to the plaintiff's support, within the meaning of the law authorizing a mother to recover for the homicide of a child. Counsel for the defendant seek to sustain the judgment upon this ground, and also upon the contention that a mother has no right of action for the homicide of her minor child while her husband, its father, is alive and in good health and exercising parental rights over the child up to the time of the child's death.

Burton Smith, for plaintiff in error.  
Smith, Hammond & Smith, for defendant in error.

POTTLE, J. [1] 1. It was a settled doctrine of the common law that no one could maintain a civil action for damages on account of the death of a human being. To remedy this hardship, Lord Campbell, in 1846, introduced in the British Parliament an act to authorize the recovery of damages in cases of the wrongful homicide of a person. This act, which is known in history as "Lord Campbell's Act," is the basis for statutes which have been adopted in practically all the states of the American Union. The first act passed on the subject in Georgia was the act approved February 23, 1850, which provided, in substance, that in all cases where death should result under circum-

stances where, if death had not ensued, the person injured would have had a right of action, the legal representative of the deceased should have an action at law against the person committing the act from which death resulted, one-half of the recovery to be paid to the wife and children, or the husband, of the deceased, if any, in the event the estate was insolvent. Cobb's Digest, p. 476, § 83. In 1856 an act was passed, applicable only to railroad companies, which provided that if a person should be killed by the negligence of a railroad company, or any of its officers or agents, by the running of its cars or engines, a right of action to recover damages for the homicide would vest in the widow, if any, and if no widow, in the legal representative. Acts 1855-56, p. 155. These statutes were codified in section 2913 of the Code of 1861, which is in the following language: "A widow, or, if no widow, a child or children, may recover for the homicide of the husband or parent; and if suit be brought by the widow or children, and the former, or one of the latter, dies pending the action, the same shall survive in the first case to the children, and in the latter case to the surviving child or children." This law was incorporated, in the same language, in section 2971 of the Code of 1878. In 1878 the law was amended so as to provide that there might be a recovery, in any case comprehended by the statute, for the full value of the life of the deceased, as shown by the evidence, and that, when recovery was by the widow, she should hold the amount recovered subject to the law of descents, just as if it had been personal property descending to the widow and children from the decedent. There was a further amendment, to the effect that no recovery under the act should be subject to any debt or liability of the deceased husband or parent. Acts 1878-79, p. 59. The law, with the amendment of 1878, appeared in section 2971 of the Code of 1882.

It was not until 1887 that the law permitted a parent to recover for the negligent homicide of a child, or the husband to recover for the homicide of his wife. In that year the section of the Code of 1882 above referred to was amended so as to provide: "The husband may recover for the homicide of his wife, and if she leaves child or children surviving, said husband and children shall sue jointly, and not separately, with the right to recover the full value of the life of the deceased, as shown by the evidence, and with the right of survivorship as to said suit if either die pending the action. A mother, or, if no mother, a father, may recover for the homicide of a child, minor or sui juris, upon whom she or he is dependent, or who contributes to his or her support, unless said child leave a wife, husband, or child. Said mother or father shall be entitled to recover the full value of the life of said child. The word 'homicide,' used in this

section, shall be held to include all cases where the death of a human being results from a crime or from criminal or other negligence." Acts 1887, p. 45. The law as amended by the act of 1887 now appears in section 4424 of the Civil Code of 1910. Under this law the parent can recover for the homicide of a child only when the parent is dependent upon the child and the child contributes to the parent's support. The language of the statute is that recovery may be had either when the parent is dependent or when the child contributes to the parent's support; but it is settled by the decisions of the Supreme Court that, in order to authorize a recovery, there must have been both dependency and contribution to the parent's support. *Clay v. Central R. & B. Co.*, 84 Ga. 345, 10 S. E. 987; *Augusta R. Co. v. McDade*, 105 Ga. 134 (7), 31 S. E. 420; *Smith v. Hatcher*, 102 Ga. 158, 29 S. E. 162.

The question presented under the contention of counsel for the defendant is whether or not, when the father is in life, living with the family as its head, contributing to its support and performing all of those duties usually incumbent on the head of the family, the mother can ever be said to be, legally speaking, dependent upon her minor child for support, and the child can ever be said in such a case to contribute to the mother's support, within the purview of this statute. In other words, the argument is that the father is entitled to the earnings of his minor child, and that, whenever such earnings are used to aid in the support of the family, the contribution comes, not from the child, but from the father. The statute with which we are now dealing, being in derogation of the common law, must be strictly construed. *Marshall v. Macon*, 103 Ga. 725, 30 S. E. 571, 41 L. R. A. 211, 68 Am. St. Rep. 140; *Robinson v. Georgia R. Co.*, 117 Ga. 168, 43 S. E. 452, 60 L. R. A. 555, 97 Am. St. Rep. 156. The act is partly punitive and partly compensatory. As was said by Mr. Justice Lumpkin, in *Georgia R. & B. Co. v. Spinks*, 111 Ga. 571, 36 S. E. 855: "So much, therefore, of the statute as confers upon parents the right to sue for the wrongful killing of a child is in large measure punitive, and hence the reason for holding that at least this portion of the homicide act should be subjected to strict construction. It is not, however, a purely penal act; for, if the General Assembly had intended that for every death resulting from crime or negligence a right of action should arise, it would have taken care to so provide, and in no case would a plaintiff be wanting. The act, therefore, is to a considerable extent compensatory in its character." This results from the fact that the measure of damages under the statute is the full value of the life of the child, which may be, and in most cases is, largely in excess of the amount which would probably be contributed to the support of the parent; but at the same time it is an

arbitrary measure of damages, fixed by the General Assembly as compensation for the loss of this contribution to the parent's support.

The question, therefore, arises: To what extent must the parent be dependent upon the child for support, and to what extent must the child contribute to the parent's support, before the parent will have a right of action for its homicide? In one of the earliest cases in which the act of 1887 was under consideration, the Supreme Court held that the words in the statute, "who contributes to his or her support," mean that the contribution to the father or mother by the child need not be wholly sufficient, but need only be such as is in part sufficient, for such support, and that the word "dependent" means wholly or in part dependent materially upon such child for support. *Daniels v. Savannah Ry. Co.*, 86 Ga. 236, 12 S. E. 365. As an illustration, the court in that case said that a mother might have several children who contributed to her support, she not being dependent on one child more than on another, but that if she were dependent upon any one of them, "wholly or partially, and he contributed to her support," she would be entitled to recover for his negligent homicide. *Augusta Ry. Co. v. Glover*, 92 Ga. 132, 13 S. E. 406. See, also, *Atlanta, etc., Ry. Co. v. Gravitt*, 93 Ga. 369, 20 S. E. 550, 26 L. R. A. 553, 44 Am. St. Rep. 145. In *Central of Ga. Ry. Co. v. Henson*, 121 Ga. 462, 49 S. E. 278, the court said: "It is well settled that it is not necessary, under this section, that the plaintiff show that he or she depended alone upon the deceased for his or her entire support, but that partial dependence upon the child's labor, accompanied by substantial contribution therefrom to the maintenance of the plaintiff, is sufficient." See, also, *Savannah El. Co. v. Bell*, 124 Ga. 663, 53 S. E. 109; *Atlantic Coast Line R. Co. v. McDonald*, 135 Ga. 635(7), 70 S. E. 249. Considering the previous decisions of the Supreme Court, this court, in *Western Union Telegraph Co. v. Harris*, 6 Ga. App. 280, 64 S. E. 1123, said: "It is sufficient if the contribution made by the child in aid of the parent's necessities be a substantial contribution."

Having said in one case that the contribution must be *material*, and in another case that it must be *substantial*, it is necessary to determine what contribution or what support by the child would be material or substantial, within the meaning of the law. No fixed, definite rule can be laid down, which would be applicable in all cases; but each case must depend upon its own peculiar facts. The dependence and contribution to support must not be fanciful. It must not be imaginary; it must be real; it must be actual; it must be to such an extent as substantially or materially to aid the parent. In applying this rule to the facts in particular cases, it will be helpful to examine previous decisions of the Supreme Court, in

order to ascertain under what facts and circumstances parents have been permitted to recover for the negligent homicide of a minor child. For instance, in *Augusta Ry. Co. v. Glover*, supra, the court held that, where a father and mother and minor children reside together and are mutually dependent upon the labor of the family for support, the minor whose labor, or the proceeds of it, comes into the common stock, is to be considered as contributing substantially to the support of the mother. The suggestion made in the argument in the present case, that, unless the child contributes more than he consumes, he cannot be said to be, in a legal sense, contributing to his parent's support, is answered by Mr. Chief Justice Bleckley in the *Glover Case*, as follows: "Members of the same household, who live by their common labor and its proceeds, have a mutual dependence one upon another. Certainly so, unless it be affirmatively shown that a particular member consumes as much or more, of the common stock than he contributes to it. Even that would not be a conclusive test, for the services of a child to a mother or of a mother to a child may well be reckoned as contributing substantially to the support of the recipient far beyond any money value which the services may have, and the chief element of dependence may be in respect to personal services of this nature." The learned Chief Justice further suggested that, "in the case of laboring people, some regard must be had to the probability of future dependence of an older member of the family upon younger ones"; that in the natural order of human events old age would overtake the parent; that the child was one of the props and stays which nature had provided; and that, when this prop was removed, the law demanded at the hands of the wrongdoer, for the benefit of the parent, the full value of his life. In *Atlanta, etc., Ry. Co. v. Gravitt*, 93 Ga. 369, 20 S. E. 550, 26 L. R. A. 553, 44 Am. St. Rep. 145, it was held that a boy who worked with his father on the farm, and rendered services to his mother about the house in the performance of her household duties, contributed substantially to the support of his mother, and she was, in a legal sense, dependent upon him. In *Central of Georgia Ry. Co. v. Henson*, 121 Ga. 462, 49 S. E. 278, it appeared that the child actually earned some money which contributed to a material extent to the support of the parent. Of course, if the parent actually has an income of his own sufficient to maintain him, from whatever source derived, he cannot be said to be dependent either wholly or in part upon the labors of his child. *Savannah El. Co. v. Bell*, 124 Ga. 663, 53 S. E. 109; *Atlantic Coast Line R. Co. v. McDonald*, 135 Ga. 636, 70 S. E. 249.

It is utterly immaterial that the child does not earn sufficient money to support himself.

If the mother gets the benefit of what he does earn, or of his labor, and she is dependent upon such labor or earnings for support, she has a right to recover for his negligent homicide. This was directly held in the case last cited. The statute contemplates present support. It does not deal with the past or the future. The child must have been actually contributing to the support of the parent at the time of its homicide, and the parent must have been dependent, either wholly or in part, upon the child at that time, in order to authorize a recovery. *Smith v. Hatcher*, 102 Ga. 158, 29 S. E. 162. In *Georgia R. & B. Co. v. Spinks*, 111 Ga. 571, 36 S. E. 855, the rule is stated thus: "Where a family of working people, including parents and a minor child, were mutually dependent upon the labor of one another for a living, and the child rendered valuable services, of which the mother got the benefit, she was dependent upon him if he thus contributed to her support." The statute contemplates individual dependence, and hence it was held in the case last cited, that a father could not recover for the homicide of his minor son, where the earnings of the parent were sufficient to support himself, although he was compelled to expend a large portion of these earnings in the support of other members of his family, and the deceased child contributed to the support of the family. The difference between mother and father is that in most cases the father is self-sustaining, whereas the mother attends to the household duties, and performs those acts usually incumbent on a mother, and does not contribute any money toward the family's support. The statute recognizes the superior claims of the mother, because the father can sue only in the event there is no mother. The statute, therefore, is a recognition of the fact that the mother is the parent who is usually dependent upon other members of the family for support.

Generally speaking, it is true that a minor child who has not been emancipated by his father has no legal title to his earnings, that the fruits of his labor belong to his father, and that in a strict technical sense, when such a child expends his earnings, with the consent of his father, for the benefit of some one else, this is a contribution from the father. But clearly the statute under consideration in the present case is not dealing with contribution in this legal sense. The child need not contribute any money to the support of its mother, in order to authorize a recovery by her. If he performs substantial services of which she receives the benefit in and about the household, this is a contribution to her support, and she is dependent upon that child, within the meaning of the law, without reference to whether he contributes one penny to her support. The statute deals with fact, not theory. It is the fact of contribution and the fact of depend-

ency which create the right of action. It is utterly immaterial that the father may be legally entitled to the minor child's earnings and may be legally entitled to the fruits of his labor. If a dependent mother actually gets the benefit of the child's earnings, or of the child's labor, either with or without his father's consent, she is dependent upon that child in a legal sense, and the child materially contributes to her support, within the meaning of the statute. As was so well expressed by Mr. Justice Cobb in the case of *Savannah El. Co. v. Bell*, 124 Ga. 665, 53 S. E. 111, "It is not necessary, under the statute, that the child contributing to the support of the parent should be under any legal obligation to make the contribution. It is the fact of contribution, and not the legal obligation to make it, that the statute makes the ingredient of the cause of action. *Daly v. New Jersey Co.*, 155 Mass. 5 [29 N. E. 507]."

The logical result of the argument of counsel for the defendant in error is that in no case where the father is in life, living with the family and performing the duties of the head of the household, can the mother be said, under any circumstances, to be dependent upon the services of her minor child, nor can he be said to contribute to her support. To give the statute this construction would defeat its primary object and withdraw this protection from the very parent whose welfare the General Assembly was most solicitous to conserve. We are very clear, both upon precedent and principle, that no such construction of the statute is admissible, and we hold that when, in a case of this character, the mother brings suit, she is entitled to maintain her action, if she can show that the child was at the time of his death materially or substantially contributing to her support, and she was wholly or partially dependent upon such contribution, without reference to the fact that the father may be alive, in good health, and exercising his parental rights over the child up to the time of its death. The right of the parent to recover for the homicide of a child upon whom he or she is dependent is wholly independent of the claim of the father for the loss of the child's services. Both causes of action may exist at the same time. *Augusta Ry. Co. v. Glover*, 92 Ga. 132(4), 18 S. E. 406.

The question whether, in a given case, the child contributes substantially or materially to his parent's support, and the parent is dependent on that child, within the meaning of the statute under consideration, is a question of fact to be determined by the jury. In view of the fact that pecuniary contribution is not essential, it cannot be said, as a matter of law, that the facts alleged in the plaintiff's petition in the present case were not sufficient to entitle her to go to the jury upon this question.

[2] 2. The next question is whether or not

the judgment dismissing the petition can be sustained upon the theory that, as a matter of law, a child between six and seven years of age cannot be said to contribute to its parent's support, and the parent cannot be said to be dependent wholly or partially upon such child, within the meaning of the statute upon which the suit is based. As petitions are construed most strongly against the pleader, the allegation that the deceased was between six and seven years of age will be held to mean that the deceased was slightly more than six years of age. There are exceptional cases in which courts might hold, as a matter of law, that a child has no earning capacity and cannot contribute substantially to the support of anybody. Courts cannot shut their eyes to matters of common knowledge, such as the fact that an infant in arms cannot materially contribute to another's support. On the other hand, courts judicially know that children of certain ages, in good health, of average capacity, are capable of contributing to the support of their parents. Between these two extremes the line must be drawn somewhere, and there is a point where the courts will not undertake to determine the question as a matter of law, but will leave it to be solved by the jury as an issue of fact. Many cases have been considered by the Supreme Court, where suits have been brought under this statute for the negligent homicide of a minor child, and where actions have been brought by a father under the common law, to recover for loss of earnings of his minor child. In *Sugarman v. Atlanta Ry. Co.*, 94 Ga. 604, 21 S. E. 581, a father sought to recover for loss of services of a girl not quite 5 years old at the time she was killed. The court sustained a general demurrer to the petition, and the Supreme Court reversed this judgment, holding that a cause of action was set forth in the petition. While it does not appear that the point as to the age of the child was expressly made, the judgment holding that a cause of action was set forth could mean nothing less than that in the opinion of the Supreme Court it was a question for the jury to say whether or not the plaintiff's child was old enough to render valuable services. In *Atlanta, etc., Ry. Co. v. Gravitt*, supra, the suit was by the father, and the boy killed was 11 years old. In *Southern Ry. Co. v. Covenia*, 100 Ga. 46, 29 S. E. 219, 40 L. R. A. 253, 62 Am. St. Rep. 312, it was held that the court would take judicial cognizance of the fact that an infant only 1 year 8 months and 10 days old was incapable of rendering valuable services. In *Atlanta Ry. Co. v. Arnold*, 100 Ga. 566, 28 S. E. 224, the court, by four justices, one dissenting and one being disqualified, applied the rule laid down in the *Covenia* Case to a child between 2½ and 3 years old.

In *Crawford v. Sou. Ry. Co.*, 106 Ga. 870, 33 S. E. 826, a father brought suit to recover

for the homicide of a minor daughter 4½ years of age. The court held that it was a question for the jury to determine whether the child was capable of rendering services of a pecuniary value. The following language of Mr. Justice Fish states the rule of the Supreme Court upon the question now under consideration: "It is easy enough for a court to decide, as a matter of law, that any child of a given age is incapable of rendering valuable services, notwithstanding the allegations of a petition may be to the contrary, where the age in question is such that, according to all human observation and experience, it would be utterly preposterous to believe that a child who had not passed beyond that age could render such services. For instance, no sensible man believes that any child a year old can perform service of value to its parents. But by gradually increasing the age we must, sooner or later, arrive at an age which is debatable ground, where reasonable minds will differ in opinion upon the question whether any child of that particular age can render service of pecuniary worth. Just when that debatable ground will be reached, it is, in the very nature of things, impossible to determine. When the line is reached where it seems possible that reasonable minds may begin to differ upon this question, the only course for a court to pursue is to leave the determination of the question to a jury." In *Central of Ga. Ry. Co. v. Motz*, 130 Ga. 414, 61 S. E. 1, the child was 9 years of age. In *Atlantic Coast Line R. Co. v. McDonald*, 135 Ga. 635, 70 S. E. 249, it was held that a mother might recover for the tortious homicide of her 9 year old son. In *Stamps v. Newton County*, 8 Ga. App. 229, 68 S. E. 947, the action was by a mother and the child was 5 years old. A verdict in favor of the defendant was sustained, and no point was made as to the age of the child; but in that case counsel for both sides, and this court, seemed to have accepted the theory that it would have been a question for the jury to say whether or not a child of such an age was capable of contributing substantially to its mother's support.

Upon the authority of these decisions, it cannot be said, as a matter of law, that the plaintiff's son was incapable of rendering services which would materially or substantially contribute to his mother's support. It is said, however, that because it has been held that a father may recover upon his common-law right for loss of services of a child of tender years, it does not follow that a parent may recover, under the statute now under consideration, for the tortious homicide of a child of the same age. In other words, it is argued that there is a distinction between earning capacity and the ability to contribute substantially or materially to the parent's support. We do not think there is any rational distinction between the two cases. In the suit by the father upon his com-

mon-law right of action, the test is the earning capacity of the child. In such a case it is immaterial whether the child is actually earning anything or not. For instance, the father may recover for the loss of services of a child wrongfully killed while he is attending school and wholly a charge upon the parent. In a case like the present, however, it must appear that the child is actually contributing to the parent's support, and that the parent is actually dependent, either wholly or partially, upon the child's labor. It would make no difference how great the earning capacity of the child might be; if he was not actually contributing to his parent's support, the action would fail. A boy of 18, attending college and capable of earning a considerable amount of money, but not actually earning a penny, might be wrongfully killed, and in such a case neither the father nor the mother would have a right of action for his tortious homicide under this statute. But the father would have a right to recover for loss of services up to the time the child became 21 years of age, without reference to whether he was actually earning a single penny. This marks the distinction between the two cases, and the only distinction. A child who has earning capacity is capable of contributing materially to the support of his parent, within the meaning of the statute with which we are now dealing, and if such a child actually puts his earning capacity into operation, either in the form of labor for his parent, or by contributing to the parent the proceeds of labor which he performs for some one else, he is contributing substantially to the parent's support. Under the allegations of the petition in the present case, it was a question for the jury whether or not, at the time the plaintiff's son was killed, he was actually contributing to his mother's support and she was wholly or partially dependent upon him for support. The learned trial judge should not have decided this question upon demurrer, as a matter of law, adversely to the plaintiff, but it should be submitted to the jury as an issue of fact.

[3] 3. The special demurrer is rapidly outliving its usefulness. The law looks at substance rather than form. The legitimate function of a special demurrer is to compel the pleader to disclose whether he really has a cause of action or defense. The requirement that a plaintiff shall "plainly, fully, and distinctly" set forth his ground of complaint does not mean that he shall disclose the evidence upon which he relies, or indulge in needless particularity, but means only that his demand shall be set forth in terms sufficiently full and distinct to enable the court to determine whether a cause of action exists and his adversary to understand the exact nature of the claim made against him. It is a useless consumption of time to try a case where the plaintiff really has no lawful complaint; and so he must disclose his charge with sufficient particular-

ity to set this question at rest. For instance, if the suit is by a parent to recover for the homicide of a minor child, a general averment that the child was a minor would not be sufficient, because, if the child was one or two years old, the court would hold that the plaintiff had no cause of action. But an allegation that the child was between six and seven is sufficient, because it is immaterial, for purposes of pleading, whether the child was six or seven. And likewise as to an allegation that the child was at a point "close" to a certain crossing, since this was mere matter of description; it being immaterial to the cause of action whether the child was near or upon the crossing.

[4] A general allegation of negligence is a mere conclusion. The conclusion may be wrong, and, therefore, the particular facts relied upon to support the conclusion should be pleaded. It is permissible, however, to set forth the facts, and then conclude that these facts amount to negligence. Demurrer will then raise the question whether the conclusion is good in law. As applied to the present case, the allegations were that the defendant failed to give warning of the rapid approach of the car. We construe the averment in paragraph 21 to mean that the defendant was negligent in this respect. So construing it, it was not subject to demurrer.

[5] 4. The averment in paragraph 30 that the deceased would have been a useful man to the petitioner and the community was irrelevant. The question is: Was the deceased at the time of his death substantially contributing to his mother's support, and was she wholly or partially dependent upon him? He may have become a useful man, both to his mother and the community, and still she might not have been dependent upon him.

[6] 5. The averments in paragraph 29 are proper subject-matter of proof. If the mother was dependent upon the child's labors for assistance such as that here described, the jury should be allowed to consider this fact, along with the other evidence in the case. The averment that the deceased contributed to the petitioner's support, and that she was dependent on him, was intended to be supported by the other allegations in paragraph 29, and, so treated, it is sufficient.

[7] 6. We have carefully read the special grounds of demurrer, to the overruling of which exception is taken in the cross-bill, and none of them seem to us to be meritorious. It is not necessary to allege on which side of the road the wagon was standing. This was mere matter of inducement, and was averred simply to show why the deceased did not see the automobile approaching, the reason being that he was behind the wagon.

[8] The allegations in paragraph 15 and 16, that the driver of the car failed to give any warning, by bell, horn, or other signal, was sufficient. The act of 1910 in relation to the operation of automobiles requires that

the person operating the machine "shall give reasonable warning of its approach by the use of a bell, horn, gong, or other signal, and use every reasonable precaution to insure the safety" of pedestrians and animals on the roadway. Acts 1910, p. 92. It was sufficient to allege that the defendant had violated this requirement of the act. The allegation was a statement of fact, and not a conclusion.

[9] The act further provides that an automobile shall not be operated upon any of the highways "of this state . . . at a rate of speed greater than is reasonable and proper, having regard to the traffic and use of such highway, or so as to endanger the life and limb of any person or the safety of any property, and upon approaching a bridge, dam, high embankment, sharp curve, descent, or crossing or intersecting highways and railroad crossings, the person operating a machine shall have it under control and operate it at a speed not greater than six miles per hour." The petition alleged that the motor car came around a curve without warning. It is averred generally in paragraph 18 that it came at a great rate of speed, and in paragraph 19 the plaintiff charges that the rate of speed was not reasonable or proper, having regard to the traffic use of the highway, and that the same endangered life and limb of those on the highway, and that the machine approached the crossing referred to in the petition at a greater rate of speed than six miles an hour. Taking these allegations all together, they were not subject to demurrer. Properly construed, the plaintiff intended to aver that the machine was running slightly in excess of six miles an hour, because the allegation must be taken most strongly against her, and she concludes that this rate of speed was not reasonable or proper. Under the facts alleged, it was negligence to run the machine at a greater rate of speed than six miles per hour and without giving the warning which the law requires. The allegations were sufficiently specific as against demurrer.

[10] The averment that the defendant was chargeable with the conduct of her chauffeur was surplusage and harmless. Under the facts alleged, the law would charge the defendant with the consequences of the negligent act of her agent—the driver. The same observation applies to the allegation in paragraph 24 to the effect that the negligence of the chauffeur was the negligence of the defendant.

[11] The averment that the deceased and petitioner were free from fault, and could not have avoided the result of the defendant's negligence by the use of ordinary care, is not a conclusion of the pleader, but an allegation of a substantive fact.

[12] The allegation in paragraph 30 that the deceased's earning capacity would be increased as he grew older is a statement of fact, and is sufficiently definite in pleading.

It is subject, however, to the objection that the plaintiff failed to allege anywhere in the petition that the deceased had earning capacity. While there is no direct allegation to this effect in the petition, there are averments from which the conclusion is properly reached that the deceased did have earning capacity and did contribute to his mother's support.

Our conclusion is that the court erred in sustaining the general demurrer, but committed no substantial error in his rulings upon the special demurrers. The result is that the judgment on the main bill of exceptions will be reversed, and on the cross-bill affirmed.

Judgment on main bill reversed; on cross-bill, affirmed.

(10 Ga. App. 826)

**LITTLE v. STATE** (No. 3,981.)

(Court of Appeals of Georgia. March 18, 1912.)

*(Syllabus by the Court.)*

**1. CRIMINAL LAW (§ 594\*)—ADJOURNMENT OF TRIAL.**

There was no abuse of sound legal discretion in refusing to stop the trial of the case and allow the attorney for the accused to procure the attendance of witnesses to meet the facts disclosed by the witnesses for the state.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1321, 1322, 1332; Dec. Dig. § 594.\*]

**2. REVIEW ON APPEAL.**

No error of law appears, and the evidence supports the verdict.

Error from Superior Court, Putnam County; Jas. B. Park, Judge.

Berry Little was convicted of crime, and brings error. Affirmed.

W. T. Davidson, for plaintiff in error.  
Jos. E. Pottle, Sol. Gen., and S. T. Wingfield, for the State.

**HILL, C. J.** Judgment affirmed.

(10 Ga. App. 777)

**ECTOR v. STATE.** (No. 3,794.)

(Court of Appeals of Georgia. March 19, 1912.)

*(Syllabus by the Court.)*

**WITNESSES (§ 52\*)—COMPETENCY—HUSBAND AND WIFE.**

A husband is not a competent witness against his wife upon her trial for crime. In no criminal case in Georgia, in which the accused is a wife, is the testimony of the defendant's husband admissible against her; and this is true, whether the testimony sought to be elicited from the husband be direct or circumstantial in its nature.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 124-126, 136, 165; Dec. Dig. § 52.\*]

Error from City Court of Griffin; J. J. Flynt, Judge.

Lizzie Ector was convicted of stabbing her husband, and brings error. Reversed.

Thos. W. Thurman, for plaintiff in error.  
Wm. H. Beck, Sol., for the State.

**RUSSELL, J.** The only question in this case is whether the husband is a competent witness upon the trial of his wife for the commission of a crime. The trial judge permitted the husband to testify against his wife, and in fact he was the only witness who gave any direct testimony. The wife was charged with stabbing the husband, and the husband swore out the warrant upon which the accusation was based, and also testified to the fact that his wife was the party who cut him.

Under the provisions of Penal Code 1910, § 1037, par. 4, the question is not a debatable one. A husband is not a competent witness against his wife upon her trial for crime. In no criminal case in Georgia, in which the accused is a wife, can the defendant's husband testify against her, it matters not whether the testimony sought to be elicited from him be direct or circumstantial. The wife can, if she chooses, testify against her husband in any case where the charge involves a crime against her person; but the reverse of the proposition is not true. Under the provisions of the Code section to which we have referred above, the husband is neither competent nor compellable to give evidence against his wife in any criminal proceeding, though the wife is competent, but not compellable, to testify against her husband upon his trial for "any criminal offense committed, or attempted to have been committed, upon her person," as well as "a competent witness to testify for or against her husband in cases of abandonment of his child." As to husband and wife, with regard to the capacity of each as a witness with reference to the marriage relation, the case stands thus. The wife cannot testify for her husband upon his trial for any criminal charge except that of abandonment. She cannot testify *against* him unless the offense was committed or sought to be committed upon her own person; and in those cases where she is competent as a witness she is not to be compelled to testify if she prefers to remain silent. But the law shuts the husband's mouth, whether he wishes to speak or not, in every case where his wife is charged with crime; and it makes no exception, even if the crime is charged to have been committed upon his person.

There was a time when the rule in Georgia was different. Under Code 1861, § 3782, which was adopted by an act of the General Assembly approved June 19, 1860, it was declared: "Husband and wife, lawfully married, cannot be witnesses for or against each other, nor can the wife be a witness for a third person, where her testimony may indirectly affect her husband. The objection exists after the dissolution of the marriage, by death or otherwise, as to all knowledge

acquired by either party by reason of the marriage relation. An exception to this general rule exists in all criminal or quasi criminal proceedings against either party for offenses upon the person of the other." It will be seen that under this provision of the Code, while both husband and wife were generally incompetent where the rights of either party in a criminal case were concerned, and the wife was wholly disqualified as a witness in a civil case, if the rights of her husband were even indirectly affected, still, by express exception, where the offense was one charged to have been committed by either of the married pair upon the person of the other, this opposite party could testify. It is evident that this exception, which gave the husband the right to testify against his wife, was purposely stricken, and that the withdrawal from the Codes of 1867, 1873, 1882, and 1895, as well as from the present Code of 1910, of that provision of the Code of 1861 which permitted a husband to testify in a case where his wife had assaulted him, was not a matter of chance or oversight, but was the result of a deliberate design to change the previous law and our public policy upon the subject.

The history of the evolution of our present law on this subject is somewhat interesting. That the privilege of husband to testify against his wife was not unintentionally excluded from our law is apparent in the passage of the act approved December 15, 1866, and known as the "evidence act" of that year. Acts 1866, p. 138. In the second section of that act it was declared that "nothing herein contained shall, in any criminal proceeding, render any husband competent or compellable to give evidence for or against his wife, or any wife competent or compellable to give evidence for or against her husband." This statute of itself repealed the Code section to which we have referred, and this legislation was codified as the fourth subdivision of section 3798 of the Code of 1867, and in the same form is found as the fourth subdivision of section 3854 of the Code of 1873, in which it is declared that "no husband shall be competent or compellable to give evidence for or against his wife in any criminal proceeding, nor shall any wife, in any criminal proceeding, be competent or compellable to give evidence for or against her husband." The same identical language appears in the Codes of 1882 and 1895. But in 1880 the Legislature passed an act (Acts 1880-81, p. 121) providing that the wife should be competent, but not compellable, to testify against her husband upon his trial for "any criminal offense committed, or attempted to have been committed, upon her person"; and in the Code of 1882 this exception in behalf of the wife was inserted as the concluding portion of the subdivision of section 3854, which provides: "No husband shall be competent or compellable to give evidence for or against his wife in any

criminal proceeding, nor shall any wife, in any criminal proceeding, be competent or compellable to give evidence for or against her husband. But the wife shall be competent, but not compellable, to testify against her husband, upon his trial for any criminal offense committed, or attempted to have been committed, upon the person of the wife." In Penal Code 1895, § 1011, par. 4, it is declared: "Husband and wife shall not be competent or compellable to give evidence in any criminal proceeding for or against each other, except that the wife shall be competent, but not compellable, to testify against her husband, upon his trial for any criminal offense committed, or attempted to have been committed, upon her person. She is also a competent witness, to testify for or against her husband in cases of abandonment of his child, as provided for in section 114 of this Code."

With the exception of this addition taken from the act of 1880, and the provision allowing the wife to testify against her husband in cases of abandonment, the language of section 1037 of the Code of 1910 varies but little from the verbiage used in the original section (3798) of the Code of 1867, without the exception which the Code of 1867 contained in favor of the admissibility of the husband. The statute which made the wife a competent witness in cases of wife-beating was passed in 1857 (Acts 1857, p. 126), and was therefore prior to the original exception in behalf of the husband, of which we have spoken. It will thus be seen that, in the evolution of the rule of evidence which we are now considering, various statutes have been passed extending the competency of the wife as a witness, but no such privilege has been given to the husband. If it is not to be considered as evidence of our innate spirit of chivalry toward woman, or of our greater confidence in her freedom from influence, it is still a manifestation of a partiality in behalf of the wife which is not without reason. The Legislature, no doubt, had in mind, in restoring the provision which made the wife a competent witness in all cases where her husband was her assailant, that there were instances where wives could in no other way be protected from the ferocity of brutal husbands, and that the abuse of the privilege would be prevented by the fact that, though the wife is competent, she is not compellable, to testify against her husband.

On the other hand, we think it plain that, in not restoring the competency of the husband as to offenses committed upon his person by his wife, the Legislature perhaps had in mind the fact that attacks upon husbands by wives were very rare, and that, even if they sometimes occurred, the right to testify on the part of the husband might in some cases be abused, and used as a means of getting rid of a wife of whom the husband had tired. As the conviction in this case depends



solely upon the testimony of the husband, and the state's counsel frankly admits in his brief that, if the testimony of the husband is illegal and inadmissible, the conviction cannot be supported, we conclude that the judgment finding the defendant guilty is unauthorized, and the trial judge erred in refusing a new trial.

Judgment reversed.

POTTLE, J., not presiding.

(10 Ga. App. 792)

KEENAN v. STATE. (No. 3,940.)  
(Court of Appeals of Georgia. March 19, 1912.)

(Syllabus by the Court.)

1. BURGLARY (§ 4\*)—"PLACE OF BUSINESS."

The words "place of business," as used in the statute defining burglary, mean any house, other than a "dwelling, mansion, or storehouse," occupied as a place of business, in which valuable goods are contained. The allegations of the indictment were sufficient to show that the "place of business" alleged to have been broken into and entered with intent to commit a larceny was a house, and that valuable goods were contained therein.

[Ed. Note.—For other cases, see Burglary, Cent. Dig. §§ 14-18; Dec. Dig. § 4.\*]

For other definitions, see Words and Phrases, vol. 6, pp. 5390-5392.]

2. INDICTMENT AND INFORMATION (§ 202\*)—  
INDICTMENT—DEFECTS CURED BY VERDICT—  
"PLACE OF BUSINESS."

If the words "place of business," with the context, were insufficient to show that "the place of business" was a house, it was a formal defect, to be reached by special demurrer, and was cured by the verdict.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 640-650; Dec. Dig. § 202.\*]

Error from Superior Court, Chatham County; W. G. Charlton, Judge.

Fred Keenan was convicted of burglary, and brings error. Affirmed.

Shelby Myrick, for plaintiff in error. W. C. Hartridge, Sol. Gen., and Morris H. Bernstein, for the State.

HILL, C. J. The plaintiff in error was convicted of burglary, and made a motion in arrest of judgment, which was overruled, and he excepted.

The first count of the indictment (omitting formal parts) charges as follows: "The place of business of one W. G. Austin, doing business as the Savannah Motor Car Company, where valuable goods and wares are stored, did feloniously and burglariously break and enter, with intent then and there to commit a larceny therein." The second count of the indictment charges, in the same language as the first count, the offense of burglary, adding thereto the allegation that "after so breaking and entering, twelve automobile tires, of the value of \$400, the property of one William G. Austin, doing

business as Savannah Motor Car Company, and twelve inner tubes, of the value of \$75, the property of one William G. Austin, doing business as the Savannah Motor Car Co., being found therein, did then and there wrongfully and fraudulently and privately take and carry away with the intent to steal the same." The motion in arrest of judgment is based upon three grounds: (1) That neither of the counts of the indictment alleges that valuable goods and wares were stored in the place of business at the date of the alleged offense; (2) that neither of the counts alleges the character of the place of business in such way as to show that the place of business was the subject of burglary, under the statute of this state; and (3) that neither of the counts alleges that the place of business set out in the indictment was a storehouse, building, or house of any kind, or was such premises as could be the subject of larceny under the laws of Georgia.

[1] 1. The first objection is fully met by the allegations of the indictment. The first count charges that the place of business broken and entered with intent to commit a larceny was the place of business of a designated person, "where valuable goods and wares are stored." The second count repeats these allegations, and alleges, further, that after breaking and entering this place of business the accused did take therefrom described personal property. It is difficult to understand how goods and wares can be taken from a place of business without having been stored or contained therein. The allegations on this point were clear, distinct, certain, and definite, and we fail to see how they could have been made more specific.

[2] 2, 3. The second and third objections to the allegations of the indictment are based upon the ground that it does not specifically appear that the place of business set out in the indictment was a storehouse, or building of any kind, or that it was such premises as could be the subject of burglary under the laws of Georgia. Section 146 of the Penal Code of 1910 defines burglary as follows: "Burglary is the breaking and entering into the dwelling, mansion, or storehouse, or other place of business of another, where valuable goods, wares, produce, or any other article of value are contained or stored, with intent to commit a felony or larceny." This statute enlarges the common-law definition of burglary; for burglary at common law was the breaking and entering a mansion or dwelling house with intent to commit a felony or larceny therein. This section of the Code includes, not only a dwelling house or mansion, but any storehouse or other place of business where valuable goods of any character are contained or stored. The words "other place of business," considered with the context, clearly mean a house used as a place of business;

but the place of business, while it means a house used for that purpose, is not intended to be restricted to a house used as a storehouse, or of the nature of a storehouse. The language includes any house, used as a place of business by another where valuable goods are contained, whether it be a storehouse or not. The language of the indictment clearly charges that the place of business was a house where valuable property was stored or contained. The allegations are that the place of business was broken into and entered, and certain described property taken therefrom. The indictment states the offense in the terms and language of the Code, and so plainly that the nature of the offense charged could have been easily understood by the jury. Penal Code 1910, § 954. Indeed, no other inference could be drawn from the allegations, considered as a whole, than that the place of business that was burglarized was a house where valuable goods were contained. *Bethune v. State*, 48 Ga. 505. If, however, the allegation of the indictment as to the character of the place of business was not sufficiently specific, it was merely a formal defect, and subject to special demurrer, was not good in arrest of judgment, and was cured by the verdict. We think that the objections urged to the indictment were without merit, either in form or substance, and that the motion in arrest of judgment was properly overruled. Judgment affirmed.

(10 Ga. App. 816)

BRUNDRIGE v. STATE. (No. 3,964.)

(Court of Appeals of Georgia. March 19, 1912.)

(Syllabus by the Court.)

VENDOR AND PURCHASER (§ 3\*)—SALE OF CROP—EVIDENCE OF RELATIONSHIP.

The contract between the prosecutor and the accused created the relationship of vendor and vendee, and not that of landlord and tenant, and the prosecution for a violation of section 721 of the Penal Code of 1910 was unauthorized.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. § 3; Dec. Dig. § 3.\*]

Error from City Court of Sparta; R. W. Moore, Judge.

E. V. Brundrige was convicted of violation of Pen. Code 1910, §§ 720, 721, and brings error. Reversed.

T. M. Hunt, for plaintiff in error. R. L. Merritt, Sol., for the State.

HILL, C. J. The plaintiff in error was convicted of a violation of sections 720 and 721 of the Penal Code of 1910, making it a misdemeanor for a tenant to sell or otherwise dispose of the year's crop before the payment of the rent, or for advances made upon the crop, without the consent and to the injury of the landlord. His motion for

a new trial was overruled, and he brings error.

There is one controlling question of law raised by the record: Was the relationship between the accused and the prosecutor that of landlord and tenant, or that of vendor and vendee? This must be determined by the contract between the two. It is as follows: "This is to certify that I, Eddie Brundrige, have this day leased from Mrs. Eva H. Tye, her heirs, executors, or assigns, all that part of the Henry Culver tract of land lying west of Sandy Run creek, being and lying in the 101st district, G. M., of Hancock county, Georgia, containing 315 acres, more or less, for the term of seven years, for which consideration I have signed and delivered to Mrs. Eva H. Tye seven rent notes, all dated this date, and to become due and to contain the amounts that will appear on the face of each note as described here below, all bearing interest from date of maturity at the rate of 8 per cent. per annum, and each of them in the principal sum of \$340.20, all payable to Mrs. Eva H. Tye on October 1, 1911, October 1, 1912, October 1, 1913, October 1, 1914, October 1, 1915, October 1, 1916, October 1, 1917. It is agreed and understood by the parties hereto that, should there be any default in the prompt payment of all principal and interest, as above specified, then, at the option of the holder of said notes, they shall become due and payable at the date of such default, regardless of the dates of maturity, thereby divesting the said Eddie Brundrige out of all rights, title, and equities that he may have in and to the said property, and vesting the same in the aforesaid Mrs. Eva H. Tye. Should, however, I, Eddie Brundrige, well and truly pay said rent notes, then the said Mrs. Eva H. Tye binds and obligates herself to give to Eddie Brundrige guaranteed deeds to the aforesaid tract of land. [Signed] E. A. Brundrige. [L. S.] Signed, sealed, and delivered in the presence of M. Arnold, N. P. & J. P."

While the instrument is not signed by Mrs. Eva H. Tye, it is manifestly intended as in the nature of a bond for title. The consideration for the sale of the land is the sum represented by the notes, and, if they were promptly paid on maturity, Mrs. Tye agreed to execute a deed to the described land to the maker. The defense relied upon was that Mrs. Tye did not sign this contract, as she had agreed to do, and that for this reason the accused refused to pay the note, as Mrs. Tye, by refusing to sign the obligation to make him a deed to the land, placed him where he could not compel her to make title. The case of *Wilkins v. Fulcher*, 9 Ga. App. 68, 70 S. E. 691, relied upon by the prosecution, is distinguished from the instant case on the facts. There the bond for title recited that if the vendee failed to pay the purchase-money notes for the land the sale

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

was to be rescinded, and in that contingency he promised to pay a stipulated sum as rent. Here there is no such promise. It is manifest that the relation of vendor and vendee, and not that of landlord and tenant, was created by the terms of the instrument, and it follows that the criminal prosecution was unauthorized.

Judgment reversed.

(10 Ga. App. 784)

MOSS v. ANDERSON. (No. 8,872.)

(Court of Appeals of Georgia. March 19, 1912.)

(Syllabus by the Court.)

JUDGMENT (§ 379\*)—VACATION—SUFFICIENCY OF PROPOSED DEFENSE.

A motion by a defendant to set aside a verdict and judgment against him was properly overruled, when it appeared that the defense relied on by the movant was contained in a proposed amendment to the answer, a copy of which was exhibited with the motion, and the original answer did not contain enough to amend by. If in such a case the motion should be granted, the amendment would not be allowable, and the court would be compelled to strike the original answer, and again enter up verdict and judgment in the plaintiff's favor.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 682, 683, 717, 718; Dec. Dig. § 379.\*]

Error from City Court of Atlanta; H. M. Reid, Judge.

Action by S. A. Anderson against T. J. Moss and others, executors. Judgment for plaintiff, and defendant T. J. Moss brings error. Affirmed.

Moore & Branch and H. B. Moss, for plaintiff in error. John Awtrey and Geo. F. Gober, for defendant in error.

POTTLE, J. S. A. Anderson brought suit on a promissory note against H. B. Moss and T. J. Moss, as executors of the will of A. Y. Moss. Verdict and judgment were rendered in the plaintiff's favor. During the term T. J. Moss filed a motion to set aside the verdict and judgment against him, upon the ground that a consent agreement had been entered into by the attorneys for both parties, under the terms of which the case should not have been called for trial at the term at which the verdict was rendered, and at which time the attorney for the executors was absent. The trial judge overruled the motion, and this is the error assigned.

The truth of the facts stated in the motion is vigorously contested by the adversary counsel. Much was said in the argument in reference to the power of the judge to entertain the motion, and as to whether sufficient facts were set forth to authorize the

court to grant the relief prayed for; but we do not find it necessary to discuss these questions. The petition alleged that the note sued on was executed by A. Y. Moss to the defendant H. B. Moss, and indorsed by the latter over to the plaintiff. There was a demurrer to the petition, on the ground that, the plaintiff having waited 17 years to bring the action, his claim should be disallowed as a stale demand. The answer admitted that the defendant T. J. Moss was executor as alleged, and averred that the defendant was unable to admit or deny whether A. Y. Moss had turned over the note sued on to H. B. Moss, or whether the defendants were indebted to the plaintiff, as alleged in the petition. The only other paragraph in the answer was as follows: "Further answering plaintiff's petition, from the best information that defendant can obtain, plaintiff is not entitled to recover of defendant, as executor, any amount whatever." It needs no argument to show that this answer utterly fails to set forth any defense whatever to the action.

The motion to set aside the verdict and judgment averred that the defendant executor, since the filing of his original answer, had learned facts which made a valid defense to the suit; and a proposed amendment to the answer was exhibited with the motion. It is not at all certain that this amendment set forth a good defense; but, even if it did, there was nothing in the original answer to amend by, and for this reason the amendment should not have been allowed. *Smith v. First Natl. Bank*, 115 Ga. 608, 41 S. E. 983. This being true, even if the defendant's motion had been granted, and the verdict and judgment set aside, and the case reinstated, it could not have availed him. The case would have stood just as it did before the verdict and judgment were entered. There was nothing on which an amendment setting forth a valid defense to the action could have been predicated, and the court would have been obliged to disallow the amendment, strike the original answer, and enter up verdict and judgment against the defendants as if the case had been in default. The note was under seal, and the suit was brought within the statutory limitation period. There was, therefore, no merit in the demurrer.

For these reasons, without reference to other questions made in the record, the court did not err in refusing to grant the motion. A motion was made by the defendant in error to award damages; but we do not think, under all the facts and circumstances, that the appeal is so frivolous as to justify the granting of such motion.

Judgment affirmed.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep't indexes

(10 Ga. App. 786)

**LAWRENCE v. STATE.** (No. 3,931.)  
(Court of Appeals of Georgia, March 19, 1912.)

(Syllabus by the Court.)

**1. ANIMALS (§ 13\*)—INDICTMENT AND INFORMATION (§ 125\*)—MARKING AND BRANDING—DUPLICITY IN INDICTMENT.**

An indictment under section 162 of the Penal Code of 1910, charging the offense of felony in that the accused did on a certain day mark and brand the animal described in the indictment in the manner therein set forth, and "by then and there altering and changing the mark" on said animal, is not subject to demurrer, either on the ground that it sets forth two separate, distinct felonies in one count, or that it fails to describe how and in what manner the animal was marked or branded before the mark was changed, or how and in what manner the mark was changed. But one offense is charged in the indictment, to wit, the marking and branding of the animal; the other allegations referring simply to concurrent acts relating to the transaction previously described in the indictment.

[Ed. Note.—For other cases, see *Animals*, Cent. Dig. §§ 18-25; Dec. Dig. § 13.\* *Indictment and Information*, Cent. Dig. §§ 334-400; Dec. Dig. § 125.\*]

**2. ANIMALS (§ 12\*)—MARKING AND BRANDING—CRIMINAL RESPONSIBILITY—KNOWLEDGE OF ACCUSED.**

It is not necessary, to support a conviction under such an indictment, that it should appear that at the time the criminal act was committed the accused knew who was the owner of the animal. As to this matter, it is sufficient if it appear that the animal was not the property of the accused, and that he marked or branded it in the manner described in the indictment, with an intention to appropriate it to his own use, or to prevent identification by the true owner.

[Ed. Note.—For other cases, see *Animals*, Cent. Dig. §§ 18-25; Dec. Dig. § 12.\*]

**3. CRIMINAL LAW (§ 785\*)—INSTRUCTIONS—CREDIBILITY OF WITNESSES.**

It is erroneous to charge the jury that they "may believe that witness who has the best means of knowing the facts about which he testifies and the least inducement to swear falsely," without adding the qualification that the witnesses should be of equal credibility. An instruction of the nature just indicated will, under the facts of the present case, require the granting of a new trial.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 1774, 1776-1781, 1889-1894; Dec. Dig. § 785.\*]

Error from Superior Court, Catoosa County; A. W. Fite, Judge.

J. L. Lawrence was convicted of marking and branding an animal, and brings error. Reversed.

Lawrence was arraigned under an indictment charging that a certain red steer, the property of J. B. Beaver, the accused "did then and there unlawfully and feloniously mark, \* \* \* by cutting off a part of the left ear of said steer, and by branding on the left hip of said steer a letter 'L,' and by then and there altering and changing the mark on said steer, with the intention to claim and appropriate said steer to his (the said J. L. Lawrence's) own use, and to pre-

vent identification by the said owner of said steer." The accused moved to quash the indictment, on the grounds that it charged two separate and distinct offenses in one count, and failed to allege how the steer was marked or branded before the alteration was made, or how or in what manner the accused changed the mark on the steer. Exceptions pendente lite were filed to the overruling of the motion to quash, and error has been assigned in this court upon these exceptions. The accused was convicted, and his motion for a new trial denied, and error is also assigned upon this judgment.

J. E. Rosser and Maddox, McCamy & Shumate, for plaintiff in error. T. C. Milner, Sol. Gen., and Geo. W. Stevens, for the State.

POTTLE, J. [1] 1. We agree that section 162 of the Penal Code of 1910 defines two distinct offenses; one the marking or branding of the animal, and the other the altering or changing the mark or brand. We also agree that two separate and distinct offenses cannot be joined in one count in the same indictment, where the objection is raised on arraignment by motion to quash or special demurrer to the indictment. 1 Bishop, *Criminal Procedure*, § 432. But we do not think the indictment in the present case charges two offenses. The offense described in the indictment is that of marking and branding the steer in the manner therein described. The allegation in reference to altering and changing the mark is mere matter of inducement, descriptive of the manner in which the main offense charged in the indictment was consummated. If the indictment had used the disjunctive "or," instead of the conjunctive "and," it would, of course, have been subject to demurrer, because in that case it would have described two separate and distinct offenses, and it could not have been told with which offense the accused stood charged. *Haley v. State*, 124 Ga. 216, 52 S. E. 159. The test is whether or not the acts described in the indictment relate to but one transaction. If they do, it is well settled that offenses, though not of the same nature, but blended together by concurrent acts, may be joined in one count. *Mitchell v. State*, 6 Ga. App. 554, 65 S. E. 326; *Lepinsky v. State*, 7 Ga. App. 285, 66 S. E. 965; *Hall v. State*, 8 Ga. App. 747, 70 S. E. 211. It is clear that the present indictment relates only to one transaction, and that the averment in reference to altering and changing the mark is simply an allegation of an act which concurred with the act of branding and was a part of that transaction. So construing the indictment, it was not subject to the first ground of the demurrer. *Thomas v. State*, 59 Ga. 784; *Heath v. State*, 91 Ga. 126, 16 S. E. 637; *Hale v. State*, 120 Ga. 184, 47 S. E. 531.

Under the construction which we have placed upon the indictment it was not material that the accused should have been specifically informed as to how the steer was marked or branded before the mark was changed, nor as to the exact manner in which the mark was changed. The offense charged was that of marking and branding, or marking or branding, and this offense is made out when it appears that the accused either marked or branded the steer in the manner described in the indictment. Its previous condition as to marks and brands is not material.

[2] 2. In the indictment the steer alleged to have been marked was described as the property of J. B. Beaver, and the evidence warranted a finding that this allegation was true. The court charged the jury in substance that if the accused marked the steer, and did it for the purpose of appropriating it to his own use and preventing the owner from identifying it, it would be immaterial whether at the time the marking was done the accused knew who was the owner of the steer. We see no error in this instruction. The indictment did not allege that the accused knew the steer was the property of J. B. Beaver, and it was not necessary that such an allegation should be made. It is not at all certain that it was necessary to allege who owned the steer; but, having alleged it, it was necessary to prove it, and this the state did. The gist of the offense is marking or branding an animal not the property of the person marking it, with the intention of claiming or appropriating it to his own use, or of preventing identification by the true owner, whoever he may be. To make out the offense, it is not necessary to prove that the accused knew who the owner was. It is sufficient if it be shown that the animal was not the property of the accused, and that he marked it or branded it for the purpose either of appropriating it to his own use or of preventing identification by its owner.

[3] 3. The presiding judge charged the jury as follows: "In determining the weight you will give the evidence of the witnesses, take their manner of testifying, their interest or want of interest in the case, their feeling, prejudice, bias, relationship to the parties and to the case, or anything of that kind that may appear from the evidence; and you may believe that witness who has the best means of knowing the facts about which he testifies and the least inducement to swear falsely, and under these rules determine what the truth of the evidence is." In the case of *L. & N. R. Co. v. Rogers*, 136 Ga. 674, 71 S. E. 1102, a new trial was granted on account of an instruction in almost identically the language above set forth. It was held to be error to instruct the jury that they might believe that witness, or

those witnesses, who had had the best means of knowing the facts to which they testified, and the least inducement to swear falsely, without the qualification that the witnesses be of equal credibility. Quoting from a former opinion of Mr. Chief Justice Simmons, the Supreme Court said: "Such a witness may for other reasons be entirely unworthy of belief; and certainly it would not then be the duty of the jury to believe him." In the present case the alleged owner of the animal, J. B. Beaver, testified positively as to his ownership. There were several witnesses for the defendant under whose testimony the jury might have found that the animal which the accused marked did not belong to Beaver, but was an animal which the accused had bought from another person. This being so, under the ruling of the Supreme Court in the case above referred to, the erroneous instruction above quoted required the granting of a new trial.

Judgment reversed.

(10 Ga. App. 827)

DOWNER v. STATE. (No. 3,990.)  
(Court of Appeals of Georgia. March 19, 1912.)

(Syllabus by the Court.)

1. LARCENY (§ 20\*)—ELEMENTS OF OFFENSE  
—LARCENY FROM "DWELLING HOUSE."

The front porch of a dwelling house, covered by a roof, is a part of the dwelling house, and the larceny of property from the front porch is, in contemplation of law, a larceny from the dwelling house.

[Ed. Note.—For other cases, see *Larceny*, Cent. Dig. § 47; Dec. Dig. § 20.\*

For other definitions, see *Words and Phrases*, vol. 3, pp. 2285-2295; vol. 8, p. 7646; vol. 5, pp. 3991-4008.]

2. LARCENY (§ 59\*)—CRIMINAL PROSECUTION  
—SUFFICIENCY OF EVIDENCE.

There was sufficient evidence to show that the value of the property alleged to have been stolen exceeded \$50.

[Ed. Note.—For other cases, see *Larceny*, Cent. Dig. §§ 154, 155; Dec. Dig. § 59.\*]

3. CRIMINAL LAW (§ 925\*)—GROUNDS—MATTERS AFFECTING JURY.

Where, during the trial of a criminal case, the jury were, by consent, allowed to disperse, and one of the jurors heard a conversation between a witness for the state and a third person, in which the accused was denounced by the witness as having stated a falsehood, in his statement to the jury, as to a material fact, this denunciation had presumptively an effect on the mind of the juror detrimental to the accused, and this presumption was not fully rebutted by the affidavit of the juror that it did not influence his finding. In the interest of a fair and impartial trial, and the finding of a verdict based solely on the evidence, unaffected by any extraneous circumstance, another trial should have been granted.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 2238-2247; Dec. Dig. § 925.\*]

4. OTHER ASSIGNMENTS WITHOUT MERIT.

The other assignments of error are without merit.

Error from Superior Court, Elbert County; D. W. Meadow, Judge.

John Downer was convicted of larceny from a dwelling, and brings error. Reversed.

P. Middlebrooks and Donnelly Bennett, for plaintiff in error. Thos. J. Brown, Sol. Gen., for the State.

HILL, C. J. John Downer was convicted of larceny from the house, the property stolen being a Columbia bicycle, which was left on the front porch of a dwelling house by the owner and stolen therefrom at night. His motion for a new trial was overruled, and he brings error. A consideration of the general grounds is not necessary, since another trial will have to be granted on one of the special grounds.

[1] 1. It is contended by the plaintiff in error that there could be no legal conviction of larceny from the house, because the evidence discloses the fact that the property was not stolen from inside the house, but from the front porch of the dwelling house, and that the evidence showed that this front porch, although inclosed by a roof and constituting a part of the dwelling house, was not itself laterally inclosed. The point is without merit. The front porch of a house is a part of the house itself, and if property is taken from the front porch, where it was left by the owner, it is taken from the house in the meaning of the statute. *Johnson v. State*, 2 Ga. App. 405, 58 S. E. 684. In the case of *Burge v. State*, 62 Ga. 170, a watch was left hanging on the front porch, which was covered by the roof of the house, and the accused took it therefrom. It was held that this was larceny from the house. The case of *McCabe v. State*, 1 Ga. App. 719, 58 S. E. 277, relied on by the plaintiff in error, is distinguishable on the facts from the present case. In that case the property was stolen from a wharf or pier, which had no lateral inclosure, although covered by a roof.

[2] 2. The indictment alleged that the property stolen was of the value of \$53.50. The evidence showed that the owner gave this amount for the property at wholesale, and that the retail value of the bicycle was from \$75 to \$80. It was also shown that the value of the bicycle, when stolen, exceeded \$50. This was sufficient proof on the question of value, and authorized the imposition of a felony sentence.

[3] 3. While the trial was in progress, the jury were allowed to disperse, and it is alleged that one of the jurors had a conversation with one of the witnesses for the state as follows: Juror: "What is that negro, John Downer [referring to the defendant, on trial], doing with your coat on?" The witness replied that he had traded him a watch for it, and that he (witness) met John Downer in the road in Hart county, and that John Downer had the bicycle that they were try-

ing him for stealing, and John Downer was a liar when he said that he did not meet him. This juror, in the countershowing made in reply to this statement, said that the conversation as detailed was not had with him, but was had with another person, in his presence and hearing. The juror does not disclose the name of the person with whom the conversation took place in his hearing. This, however, is immaterial, for he admits that the conversation took place, and that he heard this witness for the state denounce the defendant on trial as a liar in the statement which he had made to the jury. The juror states, in his affidavit, that the conversation in question did not influence him in making his verdict. We think, however, that it was impossible for the juror to know whether he was influenced by this statement or not. The only effect it could have had upon him was detrimental to the accused. In *Brown v. State*, 65 Ga. 332, it was held that the fact that persons discussed a case on trial near the jury was not ground for a new trial, where it appears that the jury did not hear anything said that could have influenced their finding. Where a juror, charged with the duty of finding a verdict solely according to the evidence, hears a conversation in which the statement by the accused to the jury is characterized as a falsehood, it cannot be said that such characterization could not have tended to influence the juror to the injury of the accused. Presumptively it did so, and this presumption is too reasonable to be fully rebutted by a mere statement by the juror that it did not so influence him. While the evidence strongly supports the verdict of guilty, yet the accused is entitled, however strong the evidence may be against him, to a finding based solely and exclusively on the evidence, unaffected in any manner by extraneous matter. We are constrained, therefore, to hold that a new trial should have been granted on this ground.

[4] The other assignments of error are without merit.

Judgment reversed.

(10 Ga. App. 801)

DIXON v. CITY OF WAYNESBORO.  
(No. 3,951.)

(Court of Appeals of Georgia. March 19, 1912.)

(Syllabus by the Court.)

MUNICIPAL CORPORATIONS (§ 642\*)—CERTIORARI—FAILURE TO FILE BOND—DISMISSAL.

This being a certiorari sued out to review the judgment of a municipal court, and there being in the petition no averment that the bond required by the act approved December 10, 1902 (Acts 1902, p. 105), had been given, or the pauper affidavit filed, and it nowhere appearing in the record that the bond or the pauper affidavit had been filed, there was no error in dismissing the certiorari. *McDonald v. Ludowici*, 3 Ga. App. 654, 60 S. E. 337; *Allen v. Atlanta*, 7 Ga. App. 99, 66 S. E. 255;

Veazy v. Mayor, etc., of Crawfordville, 126 Ga. 89, 54 S. E. 817.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1412-1415; Dec. Dig. § 642.\*]

Error from Superior Court, Burke County; H. C. Hammond, Judge.

J. E. Dixon was convicted of violating an ordinance of the City of Waynesboro. From a judgment dismissing certiorari, he brings error. Affirmed.

C. B. Garlick, for plaintiff in error. E. L. Brinson, for defendant in error.

HILL, C. J. Judgment affirmed.

(10 Ga. App. 818)

EADY v. STATE. (No. 3,972.)

(Court of Appeals of Georgia. March 19, 1912.)

(Syllabus by the Court.)

1. CRIMINAL LAW (§ 210\*)—"PROSECUTOR."

A "prosecutor" is one who instigates a prosecution, by making an affidavit charging a named person with the commission of a penal offense, on which a warrant is issued or an indictment or accusation is based. 6 Words and Phrases Judicially Defined, p. 5739.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 419; Dec. Dig. § 210.\*]

2. INDICTMENT AND INFORMATION (§ 52\*)—ACCUSATION—SUFFICIENCY.

An act of the Legislature creating a city court, which provides that "defendants in criminal cases \* \* \* shall be tried on a written accusation \* \* \* founded upon the affidavit of the prosecutor," is fully complied with by a written accusation filed in the court, signed by the solicitor of the court, which recites that it is founded upon a designated affidavit, set out in full immediately preceding the accusation, and referred to therein as the "above and foregoing affidavit."

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 163-168; Dec. Dig. § 52.\*]

Error from City Court of Blackshear; W. A. Milton, Judge.

Lonnle Eady was convicted of crime, and brings error. Affirmed.

E. H. Williams, for plaintiff in error. S. F. Memory, Sol., for the State.

HILL, C. J. Judgment affirmed.

(10 Ga. App. 708)

CITIZENS' BANK OF VALDOSTA v. PEEPLES. (No. 3,798.)

(Court of Appeals of Georgia. March 6, 1912.)

(Syllabus by the Court.)

1. TROVER AND CONVERSION (§ 34\*)—PAROL EVIDENCE AFFECTING WRITING—SHOWING INVALIDITY OF CONTRACT.

Where, in a trover case, the plaintiff offers as evidence of his title a purchase-money note containing a retention of title to the property sued for, the defendant may, without having filed a plea of non est factum, introduce evi-

dence to show that the note relied upon by the plaintiff as evidence of his title is a forgery.

[Ed. Note.—For other cases, see Trover and Conversion, Cent. Dig. §§ 207-214; Dec. Dig. § 34.\*]

2. TROVER AND CONVERSION (§ 67\*)—PROCEEDINGS—INSTRUCTIONS.

Under the facts of the present case it was prejudicial error against the plaintiff to charge the jury that before the plaintiff could recover it must have appeared from the evidence that the defendant was in possession of the property sued for at the time of the filing of the suit.

[Ed. Note.—For other cases, see Trover and Conversion, Cent. Dig. §§ 295-303; Dec. Dig. § 67.\*]

Error from City Court of Nashville; W. D. Bule, Judge.

Action by the Citizens' Bank of Valdosta against J. P. Peeples. Judgment for defendant, and plaintiff brings error. Reversed.

On July 15, 1908, an action of trover was brought by the Citizens' Bank of Valdosta against J. P. Peeples. The defendant replevied the property. The plaintiff claimed the property under a note containing a retention of title, alleged to have been given by the defendant to one Griffith for the purchase price of one black, cross-eyed mare mule and one black horse, being the same property which was described in the petition. The note was dated October 30, 1907, was to become due on April 1, 1908, was transferred to the bank by Griffith on December 19, 1907, and was recorded by the bank on April 12, 1909. In paragraph 1 of the defendant's answer he denied that he was in possession of the property described in the petition, or that the plaintiff had title thereto. The same paragraph of the answer, however, contains this allegation: "Further answering said paragraph, defendant alleges that he is in possession of one mouse-colored, cross-eyed mare mule, about six years old, but that he purchased same from one W. A. Griffith, and has fully paid him for same." In the second paragraph of the defendant's answer, referring to the property described in the petition, it is alleged that "he has not the said described property in his possession, and therefore could not deliver same."

At the trial the plaintiff introduced the note in evidence, and proved the transfer on the date above mentioned, and offered evidence to show that the property described in the petition was of the value therein alleged. There was also evidence in behalf of the plaintiff that both the mule and the horse were sold by Griffith to the defendant, that the defendant took possession of the property at the time of the sale, that he executed the note containing a retention of title, and that he never paid the purchase price. There was evidence for the defendant that he could neither read nor write, and that he did not in fact execute

the note, it having been signed by his mark; that he had paid Griffith in full for the mule, and that he had returned the horse to Griffith prior to the bringing of the suit; that Griffith had accepted the horse and had disposed of it. The defendant testified in his own behalf that he had traded the mule described in the petition; but it does not appear from his testimony whether this was done before or after the filing of the suit. The jury returned a verdict in favor of the defendant, and the plaintiff's motion for new trial was overruled.

Alexander & Gary and W. A. Dodson, for plaintiff in error. J. Z. Jackson, for defendant in error.

**POTTLE, J.** (after stating the facts as above). [1] 1. In the motion for new trial error is assigned upon the admission of testimony for the defendant tending to show that he had not executed the note which had been transferred by Griffith to the bank, and also upon an instruction to the jury that if they believed that the defendant had not executed the note the plaintiff would not be entitled to recover. It is contended that, inasmuch as the defendant did not file a plea of non est factum, he should not have been permitted to introduce evidence that the note was a forgery. We do not think this contention is well founded. The note was not the foundation of the plaintiff's action, within the meaning of Civil Code 1910, § 5650. It was simply evidence of the plaintiff's title, and could be attacked by the defendant as a forgery, in the same way that a defendant in an ejectment case can show that a deed offered as evidence of the plaintiff's title was a forgery. The note was admissible in evidence and the burden was on the defendant to show that he had not in fact executed it; but he had a right to attempt to carry this burden without having to file a plea of non est factum. *Anderson v. Cuthbert*, 103 Ga. 767, 30 S. E. 244.

[2] 2. The trial judge charged the jury as follows: "The first question is: Did the defendant sign the note, or authorize it to be signed for him? Then you say, further, if he was in possession of the property at the time of the filing of the suit. If you find these questions in the affirmative, then you would be authorized to find in favor of the plaintiff." We think this charge was error, and entitles the plaintiff to a new trial. In the first place, there was an admission in the defendant's answer that he was in possession of the mule at the time suit was filed. In the second place, it was not necessary, in order to entitle the plaintiff to recover, that the defendant should have been in possession of the property at the time of the filing of the suit. It was only essential that the plaintiff should show that it had title to the property in dispute and that

the defendant had been in possession of it at some time after the plaintiff acquired title. The only purpose of a demand in a trover case is to furnish evidence of a conversion. The defendant having admitted in his answer that he was in possession of a portion of the property and that he had refused to deliver it to the plaintiff, and having testified that he had traded the mule, no demand was necessary, so far as the mule was concerned, because, taking the defendant's answer and his testimony together, it is evident if both are true, he must have traded the mule after the suit was filed. The trading of the mule was a conversion by the defendant, and no proof of demand was necessary to authorize the plaintiff to recover the mule or its value. So far as the horse is concerned, it does not appear exactly when the defendant delivered the horse back to Griffith. If this was done after the transfer of the note and after its record, of course this was sufficient evidence of a conversion of the horse, as against the plaintiff, and no demand was necessary. If, at the time the defendant surrendered the horse to Griffith, the defendant had no actual or constructive knowledge that the note had been transferred to the bank, he would be relieved, so far as the horse was concerned. The evidence was in sharp conflict as to whether the defendant had executed the note upon which the plaintiff relied in support of its title, and it was harmful error against the plaintiff to instruct the jury that, before the plaintiff could recover, it must have appeared from the evidence that the defendant was in possession of the property at the time of the filing of the suit. For this reason, the judgment overruling the motion for new trial must be reversed.

Judgment reversed.

(10 Ga. App. 795)

**MARTIN v. STATE.** (No. 3,948.)

(Court of Appeals of Georgia. March 19, 1912.)

(Syllabus by the Court.)

**1. INDICTMENT AND INFORMATION (§ 187\*)—MOTIONS—STRIKING OUT QUESTIONS.**

Where there are good and bad counts in an indictment, the court may strike the bad counts, without quashing the whole indictment.

[Ed. Note.—For other cases, see *Indictment and Information*, Cent. Dig. §§ 480-487; Dec. Dig. § 187.\*]

**2. CRIMINAL LAW (§ 370\*)—EVIDENCE—OTHER OFFENSES.**

Where one on trial for larceny is shown to have recently been in possession of the property described in the indictment, and that the same had been stolen, it is permissible for the state to prove that, at the place where and the time when the stolen goods were found, there were also found numerous other articles of the same kind which had likewise been stolen. (Russell, J., dissenting.)

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 825-829; Dec. Dig. § 370.\*]



### 3. REQUESTS TO CHARGE—SUFFICIENCY OF EVIDENCE—NO ERROR.

The requests to charge, so far as legal and pertinent, were fully covered by the general charge, which fairly presented the issues involved. The evidence fully supports the verdict, and there is no error in the record.

Error from City Court of Floyd County; J. H. Reece, Judge.

Will Martin was convicted of larceny, and brings error. Affirmed.

See, also, 74 S. E. 306.

Eubanks & Mebane and F. W. Copeland, for plaintiff in error. John W. Bale, Sol. Gen., Moses Wright, and A. W. Shanklin, for the State.

POTILE, J. The accused was arraigned under an indictment containing two counts; one charging the larceny of certain described buggy and wagon harness, and the other alleging that he had received the harness, knowing it to have been stolen. The accused demurred, upon the ground that the indictment charged two separate and distinct offenses, and failed to allege either that the accused had received the property in the county in which the indictment was found or that he had carried the harness into that county after receiving it elsewhere. The court sustained the demurrer to the count for receiving stolen property, and ruled the accused to trial on the count charging the larceny. After conviction he filed a motion for a new trial, which was overruled, and he excepted, assigning error upon this judgment, and upon the court's refusal to quash the whole indictment.

[1] 1. The point is made that a defective count renders the whole indictment bad, and that the demurrer should have been sustained generally. The joinder of the two counts was not cause for quashing the indictment. *Johnson v. State*, 61 Ga. 213. In the English case of *Rex v. Petherus*, 2 Stra. 1026, an indictment charged one assault in 21 counts, and Lord Hardwicke declined to quash a part of them without quashing the whole indictment. Mr. Bishop, in his *New Criminal Procedure* (volume 1, § 764), points out that many of the English cases, giving too wide a scope to this decision, hold that the court cannot quash a defective count and leave a good one to stand, but the whole must be quashed or none, but that the later English doctrine permits the striking out of any number of counts less than all. In this country the decisions are in conflict. See cases cited by Bishop. In *Sutton v. State*, 122 Ga. 158, 50 S. E. 60, it was held that when an indictment contains two counts, one bad and the other good, a general demurrer to the whole indictment will not be sustained. It is familiar practice in this state for the court to require the prosecuting attorney to elect upon which count he will proceed. Often the accused has the right to compel an election, the practical effect of which is the en-

tering of a nolle prosequi as to all the counts save the one relied upon for a conviction. Each count contains a separate and distinct charge. It is an indictment within an indictment, and we know of no reason why, where there are two counts, one good and one bad, the bad count cannot be quashed and the good one left.

[2] 2. The indictment charged the larceny of certain harness, the property of one Davis. The accused was found in possession of some 22 sets of harness, including those described in the indictment. The state showed the larceny of the harness belonging to Davis, and relied for a conviction upon the inference of guilt arising from recent possession by the accused of the stolen property. Complaint is made that the court allowed proof of the theft of several sets of the harness which were found in possession of the accused along with the Davis harness. The point made is that the evidence in reference to the other property was not admissible, because it appeared that in each instance the theft did not occur at the place where or the time when the larceny charged in the indictment took place. Ordinarily, evidence of other criminal transactions is not admissible. Some of the exceptions are when it shows "a system of mutually dependent crimes," or is "evidence of guilty knowledge," or bears upon the question of identity of the accused, "or articles connected with the offense," or where the evidence of other transactions tends to "prove malice, intent, motive, or the like." *Cawthon v. State*, 119 Ga. 395, 409, 48 S. E. 897, 901. If the evidence of other transactions tends "to illustrate the transaction in issue, or to establish some necessary ingredient of the particular offense under investigation," it is admissible. *Ray v. State*, 4 Ga. App. 67, 70, 60 S. E. 816. See, also, *Robinson v. State*, 6 Ga. App. 696, 711, 65 S. E. 792; *Hall v. State*, 7 Ga. App. 115, 120, 66 S. E. 390; *Lee v. State*, 8 Ga. App. 413, 69 S. E. 310; *Farmer v. State*, 100 Ga. 41, 28 S. E. 26. The fact that the accused was found at the same time and place in possession of other property of the same kind which had been stolen tended very strongly to show guilty possession of the property described in the indictment. Most of the harness found in the possession of the accused was obtained from irresponsible persons, and was shown to have been stolen. It is not reasonable that the accused could, without guilty knowledge, be in possession of so much stolen property, acquired from such a source. He was tried as the principal, and the state relied solely on recent possession unexplained. The important question was: Did the accused satisfactorily explain his possession of the Davis harness, and thus rebut the inference of guilt arising from possession? On this question the evidence in reference to the possession of other stolen property of a similar nature shed a world

of light. The state might well say to the accused: You say you were a bona fide purchaser of the Davis harness, without knowledge that it was stolen. How comes it, then, that in the same place and at the same time you were found with 22 other sets of harness, many of which were also stolen, somewhere about the same time those belonging to Davis were taken? The evidence not only illustrates, but illuminates, the transaction at issue. It makes almost conclusive the inference that the accused either stole the Davis harness or received them knowing they were stolen. True, he was not on trial for receiving stolen goods; but since the state need show only recent possession of stolen goods, to make out a prima facie case of larceny, evidence in reference to the other property was just as much admissible in the one case as in the other. The court carefully confined the jury to the legitimate purpose for which the evidence might be used, and there was no error in the instructions on this subject. In *Hawkins' Case*, 6 Ga. App. 109, 64 S. E. 289, the accused was not shown to have been in possession of other stolen property, nor was he connected in any way with the other articles which the prosecutor claimed to have lost.

[3] 3. The evidence fully supports the verdict. The requests to charge, so far as legal and pertinent, were covered by the general charge, which fairly presented the issues involved. The complaint in reference to the charge on the subject of impeachment is too general and indefinite to raise any question for decision. There was no error.

Judgment affirmed.

RUSSELL, J., dissents.

(10 Ga. App. 798)

MARTIN v. STATE. (No. 3,949.)

(Court of Appeals of Georgia. March 19, 1912.)

(Syllabus by the Court.)

1. CRIMINAL LAW (§ 919\*)—TRIAL—REMARKS OF COUNSEL—ACTION OF COURT.

Counsel should not in their argument state prejudicial facts, not appearing from the evidence, or not fairly deducible therefrom. Where, in a criminal case, a verdict of acquittal is authorized, and such a prejudicial argument is made by the state's attorney, it is error, requiring the grant of a new trial, to decline to rebuke counsel and give proper cautionary instructions to the jury, when timely objection to such argument has been made.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2197-2201; Dec. Dig. § 919.\*]

2. CRIMINAL LAW (§ 919\*)—TRIAL—ARGUMENT OF COUNSEL—PRELIMINARY MOTION.

Statements made to the court by counsel while discussing a preliminary motion, before the jury is impaneled, furnish no reason for setting aside a verdict.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2197-2201; Dec. Dig. § 919.\*]

3. CRIMINAL LAW (§ 784\*)—TRIAL—INSTRUCTIONS—RULES OF EVIDENCE.

Where, in a criminal case, all the evidence is circumstantial, it is erroneous to charge in such a way as to leave the impression that there is direct evidence against the accused.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1883-1888, 1922, 1960; Dec. Dig. § 784.\*]

4. FORMER DECISION CONTROLLING.

Other points are controlled by the decision this day rendered in *Martin v. State* (No. 3,848) 74 S. E. 304.

Error from City Court of Floyd County; J. H. Reece, Judge.

Will Martin was convicted of larceny, and brings error. Reversed.

See, also, 74 S. E. 304.

Eubanks & Mebane and F. W. Copeland, for plaintiff in error. John W. Bale, Sol. Gen., Moses Wright, and A. W. Shanklin, for the State.

POTTLE, J. [4] This is a companion case to that of *Martin v. State*, 74 S. E. 304, this day decided. All the points raised in the present record are controlled by that decision, except those referred to in the headnotes.

[2] Complaint is made of certain alleged prejudicial statements made by counsel for the state during the hearing of a motion for continuance and before the jury was impaneled. These statements, being made to the court, furnish no reason for setting aside a verdict afterwards rendered against the accused. The remedy, if the accused had any, was to challenge the poll of each juror, and ascertain if the statements made in his hearing by the state's attorney had prejudiced the juror against the accused. *Smith v. State*, 7 Ga. App. 253 (2b), 66 S. E. 556; *Kidd v. State*, 10 Ga. App. 148, 72 S. E. 718.

[3] The evidence was wholly circumstantial. This being true, it was inaccurate and probably harmful for the court to state to the jury that it was claimed that at least a part of the evidence was circumstantial. The only really material error in the record is that indicated by the first headnote. The accused was found in the recent possession of a set of harness belonging to one Wilkerson; and there was evidence that this set of harness had been stolen. It also appeared that a number of other sets of harness were found in the possession of the accused at the same time and place the harness described in the indictment was found. Unlike the evidence in the case against the accused, reference to which has hereinbefore been made, there was no evidence that any of these sets of harness, except that belonging to Wilkerson, had been stolen. There was evidence that the accused was a small trader, and that for several years he had been engaged from time to time in buying and selling articles such as those which were found in his possession.

[1] While making the concluding argument to the jury, one of the attorneys employed to assist the Solicitor General used this language: "Officers found Claud Wilkerson's harness in Will Martin's barn, along with 22 other sets of stolen harness." Counsel for the defendant objected to this argument, and moved the court to declare a mistrial. "The court overruled the motion to declare a mistrial, declined to rule out said statement and to rebuke counsel for making it, and failed to caution the jury that such statement was improper." This court is not disposed to unduly circumscribe counsel in their arguments, but, on the contrary, is inclined to allow them all reasonable latitude, provided they do not go beyond the facts in evidence, or inferences which may be fairly deduced therefrom. There is nothing in the evidence in this case to indicate that there were 22 other sets of stolen harness in the barn of the accused. Nor is there any testimony from which such an inference could fairly be drawn. It certainly was not fair to assume that, because these sets of harness were found in the possession of the accused, they had necessarily been stolen. It is very probably true that the counsel who made the statement may have had in mind the evidence which had been introduced in the other case against this same defendant, to the effect that several of these same sets of harness had in fact been stolen. In the other case we have held that this evidence was admissible, and hence it would have been legitimate, with this evidence in, for counsel to have commented upon it; but, in the absence of such evidence, it was altogether improper to make the statement above quoted, and, when objection was made to it by counsel for the accused, the court should at least have rebuked counsel, and cautioned the jury to disregard the improper statement. Having failed to do this, and the argument being of such a nature as naturally to prejudice the defense, a new trial is ordered, upon this ground alone; there being evidence in the record from which the jury might properly have returned a verdict of acquittal.

Judgment reversed.

(10 Ga. App. 781)

HOLCOMB v. MASHBURN. (No. 3,845.)

(Court of Appeals of Georgia. March 19, 1912.)

(Syllabus by the Court.)

FRAUDS, STATUTE OF (§ 33\*)—PROMISE TO ANSWER FOR DEBT OF ANOTHER—ORIGINAL OR COLLATERAL UNDERTAKING.

Where one interested in a business conducted by a corporation orally agreed with a creditor of the corporation, in consideration of a loan made to the promisor, to be used in the business, that he would see the debt of the corporation paid, and would likewise see that all future obligations of the corporation to the creditor were discharged, the agreement

was not void under the statute of frauds, and the promisor was liable to the creditor, both for the amount of the past-due indebtedness and for the value of goods afterwards sold the corporation upon the faith of his promise.

[Ed. Note.—For other cases, see *Frauds*, Statute of, Cent. Dig. §§ 50-53, 56; Dec. Dig. § 33.\*]

Error from Superior Court, Fulton County; J. T. Pendleton, Judge.

Action by W. O. Mashburn against Guy Holcomb. Judgment for plaintiff, and defendant brings error. Reversed.

Moore & Pomeroy and W. W. Hood, for plaintiff in error. J. E. & L. F. McClelland, for defendant in error.

POTTLE, J. Mashburn sued Holcomb on a promissory note. The defendant admitted the execution of the note, but pleaded that Mashburn was indebted to him on an account in a sum larger than the note sued on. At the conclusion of the evidence the judge directed a verdict in favor of the plaintiff, and this is the error assigned.

It appears from the evidence that Mashburn was manager for, and largely interested in, a corporation by the name of the Southern Soda Water Company. Holcomb was a member of the firm of Marshall & Holcomb which had been selling to the corporation lithia water, and the corporation had become indebted to the partnership in the sum of \$450. While this indebtedness was in existence, Mashburn applied to the firm for a loan of \$500, to be used in the business of the Southern Soda Water Company. As to the agreement between Mashburn and the partnership, in reference to this loan, the defendant testified: "Whereupon he stated that, if Marshall & Holcomb would make the loan to him as originally agreed, he would not only pay it back on a certain day, but would give the firm a check for the account of \$250 which they had on the books against the Southern Soda Water Company, and he would personally see that every dollar that they sold them in the future would be paid. Whereupon I made the loan." Further, the defendant testified that Mashburn said to him: "You continue to sell, you make this loan, and I'll pay this back on a certain day (some nine or ten days ahead), and at the same time I'll pay you \$250 on account—pay the firm of Marshall & Holcomb \$250 on account—and I'll see that they get every cent the Southern Soda Water Company owes them, and every cent they become obligated to you for in the future. I'll see that you get your money." Again, on cross-examination, the plaintiff testified that at the time the conversation between him and Mashburn took place the words used by Mashburn were that "he would personally see that the account was paid." It appeared that, shortly after this conversation took place, the firm of Marshall & Holcomb loaned Mashburn

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

\$500, and continued to sell and deliver lithia water to the Southern Soda Water Company at its place of business in Atlanta, and that an admitted indebtedness of \$317.14 arose. Before suit was instituted the firm of Marshall & Holcomb transferred to Holcomb in writing the account which they claimed against Mashburn. It appears that the defendant's firm delivered at the company's place of business coupon books containing tickets, and that the lithia water was delivered in exchange for these tickets. The books were receipted for by clerks from time to time as they were delivered. The presiding judge directed a verdict in favor of the plaintiff, upon the theory that the contract relied on by the defendant was void under the fourth section of the statute of frauds, being a "promise to answer for the debt, default or miscarriage of another." Civil Code 1910, § 3222.

There is no testimony that the defendant's firm expressly released the Southern Soda Water Company from the indebtedness which it owed at the time of the agreement with Mashburn. It is very clear, however, from the testimony of the plaintiff, that the agreement with Mashburn was that a loan of \$500 would be made to him, provided he would pay or see paid the old account due by the company of which he was manager, and that this loan was actually made in pursuance of this agreement. This being so, there was such performance on one side and acceptance by the other as to take the agreement without the statute of frauds and to bring it within the exception stated in Civil Code 1910, § 3223. The same rule would apply to the future sales; but in addition to this the contract as testified to by Holcomb was an original, and not a collateral, undertaking on the part of Mashburn. See *Maddox v. Pierce*, 74 Ga. 838; *Sext v. Gelse*, 80 Ga. 698, 6 S. E. 174; *Ferst's Sons v. Bank of Waycross*, 111 Ga. 229, 36 S. E. 773; *Evans v. Griffin*, 1 Ga. App. 327, 57 S. E. 921. One test is whether the original debtor is still held liable; but this is not the only test, because, if the undertaking be a joint one on the part of the original debtor and the new promisor, the undertaking of the latter would still be an original promise, and not a collateral agreement to become security for the original debt. *Cruse v. Foster*, 76 Ga. 723. The fact that the coupon books were receipted for in the name of the corporation by one of its clerks might be a circumstance to determine whether the creditor still looked to the corporation for payment, but it is by no means conclusive on the question, and is subject to explanation. The financial condition of the Southern Soda Water Company, and Mashburn's interest in the company, at the time the defendant claims he made the agreement with Mashburn, are a proper subject-matter of inquiry,

as a circumstance tending to explain why Mashburn might have made the agreement testified to by the defendant.

Judgment reversed.

(10 Ga. App. 754)

**McCARTER v. McCARTER.** (No. 3,857.)

(Court of Appeals of Georgia. March 6, 1912.)

(Syllabus by the Court.)

**1. PARENT AND CHILD (§ 3\*)—SEPARATION OF PARENTS—SUPPORT OF MINOR CHILDREN.**

A contract between the father and mother of minor children, under the terms of which it is agreed that the parties shall thereafter live in a state of separation, each having the custody of the children at specified intervals of time, the father to pay for the education of the children, there being no express stipulation as to who shall support and maintain them, does not release the parental rights of the father to the mother, within the meaning of Civil Code 1910, § 3021, nor relieve the father from the legal obligation resting upon him to support the children.

[Ed. Note.—For other cases, see *Parent and Child*, Cent. Dig. §§ 33-62; Dec. Dig. § 3.\*]

**2. HUSBAND AND WIFE (§ 19\*)—SEPARATION—MEDICAL EXPENSES OF CHILDREN.**

Where such a contract has been entered into, and the mother pays for necessary medicine and the services of a physician for such minor children, she may maintain an action against the father for the amount thus expended.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. §§ 121-138; Dec. Dig. § 19.\*]

Error from Superior Court, Walker County; J. W. Maddox, Judge.

Action by E. E. McCarter against U. S. McCarter. Judgment for plaintiff was reversed on certiorari, and he brings error. Reversed.

J. E. Rosser and R. M. W. Glenn, for plaintiff in error. Jas. P. Shattuck, for defendant in error.

**POTTLE, J.** In a suit on an open account in a justice's court the plaintiff recovered a verdict against the defendant for \$15.55. The defendant's certiorari was sustained by the judge of the superior court, and final judgment awarded in his favor. The plaintiff excepted.

The facts are unusual. The plaintiff is the wife of the defendant. On April 9, 1910, they separated by mutual agreement, and at that time entered into a written contract containing substantially the following provisions: Defendant was to pay to plaintiff \$1,400 in settlement of any claim for alimony which she might have and as the purchase price of a certain described tract of land belonging to her. In addition to this she was given specified personal property and household effects. There were two minor children. It was agreed that the children should remain with their mother from Monday in the forenoon until Friday after-

noon, and the father was to have the privilege of having the children with him the remaining portion of the week. Neither parent was to interfere with the custody or control of the children while they were with the other parent; but each parent was to have the right at all times to visit the children, so as to look after their welfare wherever they might be located. It was further agreed that the children should be sent to school for a specified number of months, and that the father should buy their books and pay their tuition. The father was likewise to furnish one of the children with clothing upon condition that this child should attend school, and the father was to have the privilege of bringing such things as he might deem proper at any time to the other child, a daughter. Both of the parties to the contract agreed to work for the interest and welfare of their two children. It was finally agreed that neither of the parties should have any right to bring suit for the custody or control of the children, nor should the wife have any action for alimony, and, except as above stated, there was nothing in the contract in reference to the support of the children. The account sued on was for sums of money which the plaintiff had paid to a drug company and a physician for drugs and medical attention for the children. The account as originally made was charged to the plaintiff and the indebtedness incurred by her without the knowledge or consent of her husband. She paid the account, and brought suit against her husband to recover the amount thereof.

[1] In this state a father may by voluntary contract release the parental rights over his minor child to a third person. Civil Code 1910, § 3021. When a father makes an absolute and unconditional gift of his minor child to another, and the gift is accepted and the child taken into the home of the donee, the latter is entitled to the proceeds of the labor of the child, and is bound for its care, maintenance, and support, in the absence of any express agreement, or any facts or circumstances from which the contrary would be implied. *Eaves v. Fears*, 131 Ga. 820, 64 S. E. 269. We know of no reason why the rule just stated would not be applicable to the mother of the child as well as to any other person. Indeed, there are many reasons why the rule should be more peculiarly applicable to a mother than to one not related to the child. Where husband and wife separate, and no provision is made for her support, either voluntarily or by decree of the court, the husband is liable to third persons for the board and support of his wife and necessities furnished to her or for the benefit of his children in her custody. Civil Code 1910, § 2988. "The rights of children under any deed of separation or voluntary provision or decree for alimony shall not be affected thereby." Civil Code 1910, § 2990. Where, on account

of the husband's misconduct, the wife obtains a divorce, and a decree awarding to her the custody of the minor children, and no provision is made in the decree for the support of the children, the father is not relieved from his moral obligation to furnish such support. If he should fail to do this, and the mother makes expenditures for the proper support of the children, she can recover from the father the amount of these expenditures. *Brown v. Brown*, 132 Ga. 712, 64 S. E. 1092; 131 Am. St. Rep. 229. In the case just cited, the Supreme Court expressly stated that it did not mean to hold that, in an action brought by the wife for the recovery of expenditures made by her in support of the child after she obtained the decree awarding to her the custody of the child, it would not be a good defense for the husband to show that, in consideration of his withdrawing any objections to the award of the custody of the child to her, she agreed to thereafter support the child and to relieve him from liability for its support. Without reference to what might be the result of a third person's furnishing necessities to a child which its father failed to support, where such person had no notice that the father had released his parental rights over the child, and without reference to whether the mere custody of a minor child by a third person would be enough to put one furnishing necessities for the child upon inquiry to ascertain whether the father had surrendered his control over the child, it is clear that where the father has done so, and the person furnishing the support has notice of the fact, he cannot maintain an action against the father.

[2] The real question in the present case is whether or not the agreement entered into by the husband and wife on April 9, 1909, had the effect of releasing the parental rights of the father over his minor children and surrendering them to the mother, and of imposing upon her the corresponding obligation to support the children. We think the true rule is that, before a father will be held to have by contract surrendered control over his minor child and become relieved of the obligation to support it, an agreement to this effect must be shown, clear and definite in its terms. It ought to take a strong case to relieve a father from the legal and moral obligation resting upon him to care for and maintain his minor child. An inspection of the agreement in this case between the parties shows that no provision was expressly made for the support of these children. The father did not surrender his parental control over his children; but, on the contrary, while the custody was with the mother for the larger portion of time, the father retained the right to have them with him at stated intervals, and the right to visit the children, "so as to look after their welfare," wherever they might be located. He expressly obligated himself to buy them

schoolbooks and pay their tuition, and reserved the "privilege" of giving to his minor daughter such things as he might deem proper from time to time. The contract further provided that both of the parties should "work for the interest and welfare of their two children." In other words, we construe it as a joint agreement, partially fixing the rights and liabilities of each parent, simply in order to forestall domestic friction. There was no express agreement that the mother should support these children. Suppose, therefore, she had refused to do it; could it be said that the father was relieved from the legal obligation resting on him to furnish maintenance for these helpless children? We cannot know what the parties had in mind, except as they have expressed themselves in the writing, and in the absence of an express agreement, completely surrendering his parental rights and relieving himself from his legal obligation to support his children, we are unwilling to hold that the father is not liable for necessities furnished to the children, which he himself failed to provide. This being so, the mother had a right to provide the necessities and to look to the father for reimbursement. The verdict in favor of the plaintiff was demanded by the evidence, and the court erred in sustaining the certiorari.

Judgment reversed.

(10 Ga. App. 771)

**HARTWELL RY. CO. v. KIDD.** (No. 3,678.)  
(Court of Appeals of Georgia. March 19, 1912.)

*(Syllabus by the Court.)*

**1. CARRIERS (§ 177\*)—CARRIAGE OF GOODS—CONNECTING CARRIERS—NATURE AND FORM OF ACTION.**

Where goods transported over the line of more than one carrier are damaged in transit, the holder of the bill of lading may sue the delivering carrier, either for the breach of its implied obligation to deliver promptly and safely, or upon its statutory liability as the last carrier which received the goods "as in good order." Where, in such a suit, there is no allegation that the carrier received the goods as in good order, the action will be construed as being one based upon the common-law liability of the carrier.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 775-803; Dec. Dig. § 177.\*]

**2. ACTION (§ 36\*)—CHANGE OF FORM.**

An action against a carrier, based upon its common-law liability for damage to goods shipped, cannot by amendment be converted into a suit founded upon the statutory liability created by section 2752 of the Civil Code of 1910.

[Ed. Note.—For other cases, see Action, Cent. Dig. §§ 295-310; Dec. Dig. § 36.\*]

**3. CARRIERS (§ 185\*)—CARRIAGE OF GOODS—CONNECTING CARRIERS—REBUTAL OF PRESUMPTION.**

Although, when a suit against a connecting carrier for damages to goods in transit is based upon the common-law liability of the carrier, there is a presumption that the goods were received in good order, this presumption

may be rebutted; and when, in such a suit, it affirmatively appears that the goods were delivered to the plaintiff in the condition in which they were received by the carrier, a recovery is unauthorized.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 835-850; Dec. Dig. § 185.\*]

**4. EVIDENCE (§ 48\*)—JUDICIAL NOTICE—CARRIER'S RATES.**

Courts will not take judicial cognizance of the schedule of rates filed by a carrier with the Interstate Commerce Commission and published as required by the acts of Congress. A recovery as for an overcharge in freight upon an interstate shipment is not authorized, when there is no proof of the lawful rate which the carrier is allowed to demand.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 70; Dec. Dig. § 48.\*]

**5. CARRIERS (§ 202\*)—CARRIAGE OF LIVE STOCK—ACTIONS—SUFFICIENCY OF EVIDENCE.**

The evidence was not sufficient to authorize a recovery as for an overcharge for feeding the live stock which were the subject-matter of the contract of carriage.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 906-915; Dec. Dig. § 202.\*]

Error from Superior Court, Hart County; D. W. Meadow, Judge.

Action by C. I. Kidd against the Hartwell Railway Company. Judgment for plaintiff, and defendant brings error. Reversed.

The action was brought in a justice's court to recover \$95.75, embracing three items of alleged damage, and was tried on appeal in the superior court. In the cause of action attached to the summons it was alleged that 10 head of live stock had been delivered to a common carrier at Maryville, Tenn., to be delivered to the plaintiff at Hartwell, Ga.; that there was an unreasonable delay in delivery, caused by the negligence of the defendant; that the stock were not properly watered and fed, and were exposed to bad weather, which resulted in colds, distemper, and other diseases, and thereby reduced the market value of the stock in the sum of \$80; that the defendant collected \$10 for watering and feeding the stock, when \$5 was the proper charge; and that the collectible rate of freight on the shipment was \$59.25, and the defendant exacted \$70, an overcharge of \$10.75.

The defendant demurred, on the ground that the plaintiff had combined a suit on contract with an action ex delicto. The demurrer was overruled, and exception was duly taken to this judgment. Over objection of the defendant, the plaintiff was permitted to amend by alleging that the defendant received the stock "as in good order," and was liable, under section 2752 of the Civil Code of 1910, for \$80 damage. The objection was that the amendment set forth a new cause of action, and exception was duly taken to the allowance of this amendment.

The defendant answered that it did not feed and water the stock, and that it made no charge therefor; that it did not receive

from the plaintiff any part of the freight charges, but they were paid by the shipper to the initial carrier, the Louisville & Nashville Railway Company; that the defendant did not damage the stock, but delivered the shipment to the plaintiff promptly in the condition in which it was received from the initial carrier. By amendment the defendant pleaded a special contract made with the initial carrier, under the terms of which, as a condition precedent to the recovery of damages for injury to the stock, the plaintiff was required to give written notice to the agent of the delivering carrier, before the stock was removed from the place of shipment and mingled with other stock.

The plaintiff recovered the full amount sued for, and the defendant's motion for a new trial was overruled.

James H. Skelton, for plaintiff in error.  
W. L. Hodges, for defendant in error.

POTTLER, J. [1] 1. When goods are delivered to a carrier, and direction given to ship to a designated point, the law implies a promise to transport at the lawful rate by the nearest practicable route; and this implied promise extends to every carrier who handles the shipment. Where goods transported over the line of more than one carrier are damaged in transit, the person entitled to recover the damages may sue upon the common-law liability arising upon the implied promise, or upon an express contract, if one was made, or, in this state, he may bring his action, under Civil Code 1910, § 2752, against the last carrier receiving the goods "as in good order." In the present case it is manifest that the suit as originally brought was not under the section of the Code as the last carrier receiving the goods "as in good order." There is no allegation that the defendant received the goods "as in good order." A general averment of negligence on the part of the defendant will not suffice to take the place of this essential allegation. No express contract is pleaded by the plaintiff, and it is clear that the suit is predicated upon the carrier's common-law liability. The case of *Western & Atlantic R. Co. v. Exposition Cotton Mills*, 81 Ga. 522 (2), 7 S. E. 916, 2 L. R. A. 102, is directly in point, as is also *Central of Ga. Ry. Co. v. Jones*, 7 Ga. App. 165, 68 S. E. 492.

[2] 2. Where goods conveyed over the line of more than one carrier are damaged in transit, and suit is brought against the last carrier, upon the common-law liability, the defendant is presumed to have received the shipment in good order; but this presumption may be rebutted by proof that the goods were delivered to the consignee in the same condition in which they were received by the defendant. But where the suit is brought upon the statutory liability, the carrier's receipt of the goods "as in good order," without exception, is conclusive upon the carrier.

*L. & N. R. Co. v. Burns*, 9 Ga. App. 241, 70 S. E. 1112, and citations; *Southern Ry. Co. v. Waters*, 125 Ga. 520, 54 S. E. 620; *Susong v. Ry. Co.*, 115 Ga. 361, 41 S. E. 566. Under this statute the carrier is estopped to deny liability, without reference to whether it occasioned the damage, when it either actually or constructively received the goods "as in good order." This is totally different from the common-law liability, under which the carrier is held responsible only for its own negligence. Hence it is that a suit brought against a carrier for its own negligence under its common-law liability cannot by amendment be converted into an action to enforce the statutory liability. *Exposition Mills v. W. & A. R. Co.*, 83 Ga. 441, 10 S. E. 113; *Kavanaugh v. Southern Ry. Co.*, 120 Ga. 62, 67, 47 S. E. 528, 1 Ann. Cas. 705. The court erred in allowing the amendment.

[3] 3. As the evidence demanded a finding that the defendant promptly delivered the car to the plaintiff, and that the stock were not injured while in its possession, a verdict in the plaintiff's favor was unauthorized, so far as the sum claimed as damages for injury to the stock was concerned.

[4] 4. Carriers engaged in interstate commerce are required by the act of Congress to file with the Interstate Commerce Commission schedules showing all the rates and charges for transportation between different points on its own route and points on the route of any other carrier, when a through route and a joint rate have been established. These schedules are required to be posted in two conspicuous places at every point where the carrier receives passengers or freight, respectively, in such form that they can be conveniently inspected by the public. See 2 *Hutch. Carriers* (3d Ed.) p. 578. The jury found in favor of the plaintiff \$10.75 for overcharge in the transportation rate. There was no evidence as to whether the initial carrier had filed and published a schedule of transportation charges, or established through routes and reasonable rates applicable thereto, as required by law. The only evidence in the record, as to the lawful transportation charge, is the statement of the plaintiff that the agent of the Southern Railway Company told him the rate was \$59.25, and that he had previously shipped a car over the Southern Railway from Maryville, Tenn., to Hartwell, Ga., at that rate. Manifestly this is no proof of the lawful rate which the carriers were entitled to collect. Without reference to whether the courts will take judicial notice of the rules and regulations of the Interstate Commerce Commission without proof (as to which see *Wadley Sou. Ry. Co. v. State*, 137 Ga. —, 73 S. E. 744, where the Supreme Court declined to take notice, without proof, of the existence or nonexistence of a rule of the State Railroad Commission), or whether the courts know judicially the maximum rate

which a carrier is allowed to charge in a given case between points within this state, the maximum rates for intrastate shipments being prescribed and promulgated by the rules and regulations of the State Commission, we cannot take judicial cognizance of interstate rates and tariffs. The Interstate Commerce Commission does not primarily fix interstate rates. They are fixed and promulgated by the carrier, under the supervisory control of the Commission, with the right, upon complaint in a given case, to require the rate to be changed. When carriers have failed voluntarily to establish joint rates and through routes, the Commission has power to do so.

The rates as filed and published being conclusive on both shipper and carrier, it is no great hardship on a shipper who claims an overcharge to require him to furnish the proof to sustain his claim. We may presume that the carrier has filed and published a schedule of rates as required by law; but we do not think we are bound to know, without proof, what is the published and authorized through rate on a car of live stock from Maryville, Tenn., to Hartwell, Ga. The evidence shows that there was a written contract of affreightment with the initial carrier, under which it guaranteed that the total freight rate would not exceed \$70. This was the sum collected, and, in the absence of proof to the contrary, it must be assumed that the carriers did not exact more than the law permitted them to collect. We may say, in passing, that we have taken pains to refer to a copy of the published rates on file with the Interstate Commerce Commission, and the rate collected appears to be the same as that specified in the published tariff. If the rate charged was the rate filed and published, it, of course, follows that no action can be maintained in a state court to recover, as for an overcharge, upon the theory that the rate is unreasonable. *Sou. Ry. Co. v. Moore*, 133 Ga. 806, 818, 87 S. E. 85, 26 L. R. A. (N. S.) 851. The rate agreed upon between the initial carrier and the shipper being the rate collected, no question is presented as to the right of the connecting carrier to collect a greater rate, if the one fixed by the initial carrier was less than the maximum lawful rate. See *Goodin v. Sou. Ry. Co.*, 125 Ga. 630, 54 S. E. 720, 6 L. R. A. (N. S.) 1054, 5 Ann. Cas. 573.

[5] 5. If the defendant exacted of the plaintiff more than the initial carrier paid for feeding and watering the live stock, or more than a just and lawful charge for this service, the plaintiff can recover the overcharge. But the burden is on the plaintiff to prove the illegal exaction. We do not think he carried it in this case. His mere statement that he paid \$10, and should not have been charged but \$5, will not suffice. He must offer sufficient data to enable the

jury to reach a correct conclusion. He does not show how many times the stock were fed, or what was paid by the carrier, or what should have been paid. It does not clearly appear that the charge for feeding was in fact paid to the defendant. The evidence was not sufficient to authorize a recovery of the item for overcharge in feeding. The effect of the act of Congress known as the "Hepburn Act" (Act June 29, 1906, c. 3591, 34 Stat. 584 [U. S. Comp. St. Supp. 1909, p. 1149]) upon the special contract of affreightment made with the initial carrier, and the extent to which such a contract is binding upon the defendant as connecting carrier, are questions with which we do not find it necessary to deal. The demurrer was too general, but was without merit.

Judgment reversed.

(10 Ga. App. 819)

**GUNN v. STATE. (No. 3,975.)**

(Court of Appeals of Georgia. March 19, 1912.)

*(Syllabus by the Court.)*

**1. CRIMINAL LAW (§ 1158\*)—MISNOMER—DECISION OF TRIAL JUDGE.**

Where a plea of misnomer is filed, the merit of the plea (so far as concerns the verity of the statement that the defendant is charged by a name other than his true name) is dependent upon an inspection of the original indictment or other accusation; and the decision of the trial judge that the name in which the accused is charged in the indictment is the same as that which his plea admits to be his true name is final, where the writing in the indictment, though somewhat illegible or unintelligible, can reasonably be said to represent the true name of the accused.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3061-3066, 3070, 3071, 3074; Dec. Dig. § 1158.\*]

**2. INDICTMENT AND INFORMATION (§ 147\*)—ALTERATION—DEMURRER.**

The charge that an indictment has been altered, since it was returned into court, cannot be presented by demurrer.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 490-494; Dec. Dig. § 147.\*]

**3. REVIEW ON CERTIORARI.**

The judge of the superior court did not err in overruling the petition for certiorari.

Error from Superior Court, Greene County; Jas. B. Park, Judge.

Paul (alias Coot) Gunn was convicted of gaming, and brings error. Affirmed.

J. A. Beazley, for plaintiff in error. Jos. E. Pottle, Sol. Gen., and Jas. Davison, for the State.

**RUSSELL, J.** To the indictment (which had been transferred from the superior court to the county court of Greene county) the defendant interposed a demurrer, setting up that the indictment did not charge him with any offense, because it alleged that Paul Green, alias Coot Green, did play and bet

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.



for money, and not Paul Gunn, and that the demurrant had never been known as Paul Green; also that the indictment showed on its face that it was not in the shape in which it was when it left the grand jury room, or was returned by the grand jury, for "some one had attempted to make Gunn out of Green." A third ground of the demurrer, based upon the fact that a prior indictment for the same offense had been quashed, was not insisted upon. The defendant also filed a plea of misnomer, alleging that he had never been known by the name of Paul Green, or Coot Green; that his true name was Paul Gunn, and he had sometimes been known by the name of Coot Gunn, but had never been known by any other name or names, and never by the name of Paul Green or Coot Green. The judge of the county court overruled the demurrer and the plea of misnomer, and the judge of the superior court sustained these rulings by overruling a petition for certiorari.

[1] 1. It is very plain, from the record, that the judge of the county court, who had the original indictment before him, overruled the plea of misnomer, because it appeared to him that the indictment did not charge the defendant in the name of Paul Green or Coot Green, as alleged in the plea, but that the indictment stated the name of the accused to be Paul Gunn or Coot Gunn, thus charging him in his true name. It is true, as stated by counsel for plaintiff in error in his brief, that "Gunn" and "Green" could not be treated as *idem sonans*; but it is easy to see how "Green" and "Gunn" might be mistaken for each other when written by one who wrote hastily, and whose handwriting was not plainly legible. The judge of the county court had the original writing before him, and therefore, if the writing was hard to decipher, had a better opportunity of determining what was really written in the indictment than a reviewing court could possibly have. Evidently he adjudged the name of the accused, as written in the indictment, to be Gunn, and not Green; and, this being so, the plea of misnomer could not be sustained. Furthermore, the defendant admitted that he was apparently accused in his true name of Gunn, because he alleged that the indictment had been altered subsequently to its return into court by the grand jury. And, as further showing that the accused was charged in his true name, no matter if the writing was bad, or even if it had been altered, the clerk of the court, in transmitting a copy of the indictment to this court, puts the name of the defendant as Gunn, wherever it appears in the indictment.

It is not suggested that the certified copy of the record is incorrect, and no motion is made here to correct it. We are therefore obliged to assume that the name of the defendant, as stated in the original indictment,

appears so written therein that, even if it is doubtful whether it is Gunn or Green, it can reasonably be interpreted to be Gunn, and would ordinarily be read as Gunn, and not as Green. We cannot tell from the record whether the plea of misnomer was submitted to the judge to pass upon the facts without the intervention of a jury; but, whether this is true or not, if it appears upon the face of the indictment that the accused was already charged in his true name, the judge did not err in passing upon the plea without submitting it. He should overrule it, as in the present instance, or decline to entertain it and strike it. Passing by the alteration of the indictment alleged in the second ground of the demurrer, we hold, as to the first ground, that where a plea of misnomer is filed, and the merit of the plea (so far as concerns the verity of the statement that the defendant is charged by a name other than his true name) is dependent upon an inspection of the original indictment or other accusation, the decision of the trial judge, that the name in which the accused is charged in the indictment is the same as that which the defendant in his plea admits to be his true name, is final, where the writing in the indictment, though somewhat illegible or unintelligible, can reasonably be said to represent the true name of the accused.

[2] 2. It appears, from the recital of the petition for certiorari, which the county judge in his answer admitted to be true, that the solicitor admitted that the indictment did at one time read as follows: "Charge and accuse Paul Gunn, alias Coot Gunn, with the offense of misdemeanor, for that the said Paul Green, alias Coot Green, did play and bet for money," etc., and that some one had changed it after it left the grand jury room. The fact that extraneous evidence is required to support this second ground of the demurrer shows that the alleged defect, or that the alleged alteration of the indictment, could not be reached by demurrer. A demurrer must necessarily be addressed to defects apparent upon the face of the pleadings as they are at the time the demurrer is filed, and must be addressed to the pleadings as they appear of file. The overruling of this ground of the demurrer by the judge of the county court could properly have been placed either upon the ground that the demurrer was speaking of something not apparent upon the face of the record (and certainly so if the original paper itself did not plainly show it had been altered), or upon the ground that the defendant should have presented the objection by plea in abatement.

[3] 3. The point of the petition for certiorari was that Paul Gunn had been convicted of gaming because Paul Green gambled, and counsel for the plaintiff in error, in his brief, says that it seems, if a con-

viction under this indictment is allowed to stand, that that would be the result reached. This point is not involved. It is admitted in the petition for certiorari that the evidence introduced made out a case of gaming against the defendant. Therefore only two questions were presented to the judge of the superior court, both of which were purely technical, and both of which, for the reasons stated above, were correctly decided. The demurrer could not reach the alteration in the indictment, if it was altered, and the reading of the indictment itself controlled the plea of misnomer.

Judgment affirmed.

(10 Ga. App. 823)

**HAYS v. STATE.** (No. 3,979.)

(Court of Appeals of Georgia. March 19, 1912.)

*(Syllabus by the Court.)*

**1. CRIMINAL LAW (§ 804\*)—INSTRUCTIONS.**

The mandatory requirement of section 1056 of the Penal Code of 1910 that, when requested by either party before argument begins, the judges shall "write out their charges and read them to the jury, and it shall be error to give any other or additional charge than that so written and read," is not complied with when, in the charge as written, there appears a notation as follows: "§ 1010, Code 1895, volume 3, read if statement made by defendant; erase if none." The charge, as given, not appearing in the record, and the evidence being conflicting, the failure to comply with this requirement of the statute demands a new trial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1948-1957; Dec. Dig. § 804.\*]

**2. WITNESSES (§ 406\*)—EVIDENCE—ADMISSIBILITY.**

The evidence being conflicting upon the question as to whether any offense was committed at the time and place alleged in the indictment, and whether, if so, the accused was the perpetrator, it was error to reject evidence that a person in the presence of the state's witness, who had identified the accused as the perpetrator of the offense, had been heard making inquiry as to the identity of the person who had used the profane language described in the indictment.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1276-1279; Dec. Dig. § 406.\*]

**3. CRIMINAL LAW (§ 784\*)—INSTRUCTIONS—CIRCUMSTANTIAL EVIDENCE.**

The law relative to circumstantial evidence should have been charged.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1883-1888, 1922, 1960; Dec. Dig. § 784.\*]

**4. SUFFICIENCY OF EVIDENCE.**

There was sufficient evidence to authorize the verdict, and, except as above indicated, no material error was committed.

Error from City Court of Monticello; A. S. Thurman, Judge.

George Hays was convicted of using profane language in the presence of a woman, and brings error. Reversed.

A. Y. Clement, for plaintiff in error.  
Greene F. Johnson, Sol., for the State.

**POTTLE, J.** The accused was convicted of using profane language in the presence of a female. The evidence was sharply conflicting. The chief witness for the state testified that he was driving by a negro church in company with a young lady, and that as he passed the church the negro, who was one of a party of several, used the profane language set forth in the indictment. This witness further testified that he went within five or six feet of the accused, and, though the moon was not shining, the night was bright, and the circumstances were such as to indicate that the accused must have known that the lady was in the buggy. Opposed to this testimony was that of two white men, who claimed to have been present at the time the language was alleged to have been used, and who testified positively that no such language was used by the accused.

[1] 1. Counsel for the accused requested the judge to reduce his charge to writing. The judge, in attempting to comply with this request, used a printed charge in which the following notation appeared: "§ 1010, Code 1895, volume 3, read if statement made by defendant; erase if none." It is contended that this was not a compliance with the mandatory requirement of the law that the charge be reduced to writing. A somewhat similar question was raised in the case of *Walker v. State*, 8 Ga. App. 214, 68 S. E. 873. There the charge, as in the present case, was reduced to writing, except that it contained a notation indicating that the judge had read to the jury an act under which the indictment was drawn, but this notation appeared in the charge as follows: "Acts 1907, page — through words 'in section 1039,' p. 82." It was held in that case that this was not a compliance with the requirement of the section, which compelled the judge to reduce his charge to writing when a request to that effect is duly made by the accused. In that case attention was called to the fact that the Supreme Court had previously ruled that the judge, instead of copying in his charge sections of the Code which he submits to the jury, may read them verbatim to the jury, noting accurately in his charge the sections of the Code so read. As in the *Walker Case*, the judge's charge is not sent up in the record, and we have no means of telling whether the judge actually read the section of the Code noted in his charge or not. It appears that the defendant did make a statement in the case.

Section 1056 of the Penal Code of 1910 provides that, when counsel for either party requests it before argument begins, the judges shall "write out their charges and read them to the jury, and it shall be error to give any other or additional charge than that so written and read." It is somewhat an extension of the mandatory requirement of this section to permit the judge to read a

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

section of the Code without copying it in his charge, simply noting in his charge the number of the section so read. But certainly, when the judge undertakes to comply with this statute by noting in the written charge sections of the Code or statutes which he may read to the jury, it must unequivocally appear, from the charge, that the sections were in fact read as noted. Here it is impossible to tell whether the judge read section 1010 of the Code of 1895 or not. It does appear that the defendant made a statement, and presumably the section was read to the jury; but the plain requirement of the statute is that the written charge shall show unequivocally, either verbatim or by reference, every instruction given to the jury, and, when this mandatory requirement of the statute has been violated, it is the duty of this court to direct a new trial in any case where the evidence is conflicting and a different result would have been authorized.

[2] 2. While one of the state's witnesses was on the stand, the accused offered to show that this witness, in company with two kinsman, afterwards went back to the negro church on the same night for the purpose of ascertaining who had used the profane language, and that one of the persons accompanying the witness, in his presence, made inquiry at the church as to which one of the negroes had previously used the profane language described in the indictment. The court declined to admit this proof, and we think this was error. One of the defenses was that the accused was not the person who used the profane language, and it was sought to show that the state's witness had really not been able to identify the accused as the perpetrator of the offense. It was competent for the accused to show, if he could, that this witness for the state, on the same night on which the offense was alleged to have been committed, approached the accused and several other negroes at the church, and that one of these persons who accompanied the witness, in his presence, before charging the accused with the offense, inquired as to who had previously used the profane language when the witness had passed along in his buggy with the young lady.

[3, 4] 3, 4. We think there was enough evidence to authorize a conviction. It is contended that there was no proof by the state that the language, if used, was used without provocation, or that the accused knew of the presence of the young lady. These things may be shown by circumstantial as well as by direct evidence, and there were sufficient facts and circumstances to justify the jury in finding both that the language was used by the accused without provocation and that he knew of the presence of the young lady in question. It is contended that the court should not have charged all of section 396 of the Penal Code of 1895, since the lan-

guage described in the indictment was profane, and there was no charge that the accused had used opprobrious words or abusive language to another, tending to cause a breach of the peace. It would have been better not to read this entire section, and if it was read the court should have been careful to instruct the jury that only the latter part of the section was applicable to the charge made in the indictment; but his failure to do this is not reversible error.

Complaint is also made that the court refused to give a certain instruction, requested in writing, in reference to the degree of proof required to authorize a conviction. As stated, the charge was not sent up with the record. The request referred to was pertinent and legal, and an instruction of the nature therein indicated should have been given. There was no direct proof that the accused knew of the presence of the young lady. There was some evidence that he could have seen her, and probably did see her; but there was also evidence that the night was dark. This necessary element of the case depended upon circumstantial evidence, and the judge should have charged the law relative to that character of evidence. *Riley v. State*, 1 Ga. App. 651, 57 S. E. 1031.

Judgment reversed.

(10 Ga. App. 806)

MOORE v. STATE. (No. 3,963.)

(Court of Appeals of Georgia. March 19, 1912.)

(Syllabus by the Court.)

1. CRIMINAL LAW (§§ 720½, 721½\*)—ARGUMENT OF COUNSEL.

While, as a general rule, the right of counsel to argue as to occurrences which have taken place in the presence of the jury during the trial, and to suggest to the jury any inferences legitimately deducible therefrom, is not to be abridged, still, in a criminal case, the prosecuting attorney should not be permitted, over the defendant's objection, to express his individual opinion that the defendant then on trial is guilty, or to argue that the failure of the defendant to introduce testimony is attributable to a sense of conscious guilt.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1673, 1677; Dec. Dig. §§ 720½, 721½.\*]

2. CRIMINAL LAW (§§ 1037, 1171\*) — ARGUMENT OF COUNSEL—NEW TRIAL.

Improper remarks of counsel will not work a new trial, where timely objection is not made, where it plainly appears that, under the law and the evidence, no other result was possible than that reached in the verdict rendered.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1691, 2645, 3126, 3127; Dec. Dig. §§ 1037, 1171.\*]

3. REVIEW ON APPEAL.

Other than as dealt with in the first and second divisions of the opinion, the trial was free from error.

Pottle, J., dissenting.

Error from Superior Court, Coffee County; T. A. Parker, Judge.

Elisha Moore was convicted of crime, and brings error. Reversed.

J. W. Quincey, C. A. Ward, W. A. Wood, and F. Willis Dart, for plaintiff in error. M. D. Dickerson, Sol. Gen., and McDonald & Willingham, for the State.

RUSSELL, J. Section 4957 of the Civil Code of 1910 declares that, "where counsel in the hearing of the jury make statements of prejudicial matters which are not in evidence, it is the duty of the court to interpose and prevent the same; and, on objection made, he shall also rebuke the same, and by all needful and proper instructions to the jury endeavor to remove the improper impression from their minds; or, in his discretion, he may order a mistrial, if the plaintiff's attorney is the offender." As pointed out by Justice Cobb in *O'Dell v. State*, 120 Ga. 155, 47 S. E. 577, this section is a codification of rulings contained in two criminal and two civil cases—*Croom v. State*, 90 Ga. 430 (4), 17 S. E. 1003; *Farmer v. State*, 91 Ga. 720 (2), 18 S. E. 987; *Augusta Railroad Co. v. Randall*, 85 Ga. 298 (6), 11 S. E. 706; *Metropolitan Street Railroad Co. v. Johnson*, 90 Ga. 501 (6), 16 S. E. 49. In the criminal cases above cited, and in the *Johnson Case*, supra, the ruling was invoked; but in the *Randall Case*, supra, the judgment was reversed, even though it does not appear that a ruling was invoked. In the present case it appears from the note of the presiding judge that the defendant had twice moved to continue the case on account of the absence of a witness, Roy Paulk, upon the statement that he expected to prove by this witness that the state's witness was of bad character, and not worthy of belief, and had made statements denying that he had bought the liquor from the defendant. In other words, the defendant had stated, upon the showing for a continuance, that he expected to elicit from the absent witness, for the purpose of impeaching the state's witness, evidence of the bad character of the state's witness, and also expected to prove by the absent witness that the state's witness had made contradictory statements as to matters material to the issue.

It appears, from the recitals of the ground of the motion for new trial, as approved by the trial judge, that the motion for a continuance was made on Tuesday, November 7th, the day previous to that on which the trial was held, and the court did not at that time put the defendant to trial, but directed the sheriff to bring in the witness Paulk, and when the case was tried on Wednesday Paulk was present and was sworn, but was not introduced by the defendant. In his argument to the jury J. N. McDonald, Esq., who was of counsel for the state, referred to the statement of counsel as to desiring the presence of the witness Paulk, and argued

that the defendant had failed to introduce this witness, or to prove by him what counsel said he expected to prove by him, and that the statement was made to continue the case solely for delay, adding in his argument, "that the said statement had been made because the defendant knew he was guilty, and for the purpose of flim-flamming the court, and to continue the case, and \* \* \* that this was an evidence of the defendant's guilt." At the commencement of this part of the argument the defendant's counsel objected, upon the ground that there was nothing in the record, or before the jury, or in the evidence to authorize this kind of argument, and that it was prejudicial to the defendant's case, and requested the court to require counsel to desist from this kind of argument. The court overruled the objection, and held that it was permissible for counsel to argue before the jury anything that came up during the term of court in the presence of the jurors, in connection with the case, either during the trial or prior thereto, and that he would permit state's counsel to continue the argument along this line. The state's counsel thereafter proceeded with the argument over the counsel's objection.

[1, 2] The question presented by this assignment of error is twofold: (1) Was the argument unauthorized and prejudicial to the defendant? (2) If so, was the attention of the judge called to it, and his authoritative intervention so properly invoked as that his refusal to sustain the objection and to endeavor to remove the impression made upon the mind of the jury by improper argument, was error, requiring the grant of a new trial? The proposition that argument not based upon evidence is, generally speaking, improper scarcely needs to be supported by citations of authority. The jury are sworn in every criminal case to render a true verdict according to the evidence; but, as the right of counsel to argue many circumstances which may legitimately appear upon the trial in connection with the taking of the testimony is not to be unduly prescribed, it is manifest that argument with reference to these matters is not to be inhibited, and that to confine counsel solely to the words of the testimony would be to give the rule too narrow a meaning. As the law allows the jury to judge of the manner of the witnesses on the stand, and to weigh their testimony by their interest in the case, and measure their credibility by various other circumstances which may present themselves to the attention of the jury during the trial, it is plain that the jury, in determining as to the credibility of testimony put before them, can consider some matters which would not come within the testimony itself. The testimony of a particular witness might make or disprove the case of guilt, and yet his manner, as a whole, might convince the jury that he did not speak the truth when he stated the facts by him

related. Certainly anything that occurs in the presence of the jury, after they are impaneled, which could legitimately throw light on the credibility of any witness, or which could add or detract from the weight of his testimony, would be legitimately a subject-matter for their consideration, and, consequently, proper subject of argument on the part of counsel.

In the present case, however, the statements which were being criticised by counsel were not addressed to the jury, but were made to the judge, in moving to postpone or continue the case. Juries have no duty in connection with the continuance of a case, and no power to affect a judgment upon the motion. The jury does not hear, as evidence in the case, the evidence relating to a motion for continuance; for they have no power to pass upon the sufficiency or credibility of such testimony. It is a matter solely for the court. On the motion for continuance the judge may disbelieve a witness whom the jury might believe, or on countershowing he may believe a witness whom the jury would entirely discredit; so that in a technical sense the evidence submitted to a court, upon a motion for continuance or postponement, is not the evidence with which the jury have to deal upon the trial, or the evidence included in their oath. Plainly, then, the objection of the counsel for the plaintiff in error that the argument was not authorized by evidence is supported. Nor does it appear that the showing for continuance was made in the presence of the jury who actually tried the case. As the motion for postponement was made the day before the trial, the jury, of course, had not been impaneled. The particular 12 jurors to whom the argument of state's counsel was being addressed may have heard the statement of counsel on the day previous, or they may not. Until they were impaneled there was nothing to require their attention to evidence, and, furthermore, a portion of the jury might have been engaged in some other case at the time the case was called on a previous day, or some of them might have been temporarily excused from the courtroom. There is nothing to show that the identical 12 men who were passing upon the issue of the defendant's guilt or innocence, and who had been sworn to determine that issue, according to the evidence, were present the previous day, and heard what transpired. Furthermore, the statement in reference to what was expected to be shown by the absent witness seems to have been made, not by defendant himself as a witness under oath, but merely as the statement of defendant's counsel in his behalf.

For all of these reasons it seems to us that any reference to the statements of the defendant's counsel the previous day, before the jury were impaneled, can readily be determined to be improper, though not

necessarily prejudicial; and certainly they are not ground for reversal, unless proper and timely objection was made. The rule seems to be well settled that unless an objection is interposed, and some ruling on the part of the court is invoked, a party will be deemed to have waived his right to objection, and, after verdict, will not be heard to assign error upon improper argument. As the converse to this proposition, it appears evident, from the cases cited, that where counsel indulges in argument unsupported by evidence, and not based upon any matter which occurred during the trial in the presence of the jury after they were impaneled, a new trial should be granted, if the intervention and protection of the court is invoked in the proper way and at the proper time, and is refused.

Practically the same point as is here involved seems to have been decided upon practically the same state of facts in *Blackman v. State*, 78 Ga. 592, 595, 3 S. E. 418, 419; and, while this ruling was not made by a full bench, the similarity between the facts in that case and in the instant case, as well as the soundness of its reasoning, would commend it as a safe precedent. In that case the court said: "On the twenty-third ground of this motion we shall be compelled to send this case back for another hearing. That ground complains that the court, despite the objection of the defendant's counsel, permitted Edgar M. Butt, Esq., one of the counsel for the state, to refer in his argument to what the prisoner in his motion for continuance said he could prove, and to mention that the defendant had failed to prove what he said he could prove, and to insist upon this before the jury as an evidence of guilt. On the margin of the paper containing this ground of the motion there is the following note, signed by the judge: 'Defendant made a motion for continuance on account of absent witnesses. The court delayed the case and sent for and procured the absent witnesses. They were not introduced, and Judge Butt'— Here the note ends. It undoubtedly shows that he had not reached the end of what he intended to state. He probably intended to add more, but the record does not show what it was. Now this defendant, as appears from the record, had made a motion to continue this case for the absence of certain witnesses, by whom he expected to prove that he was not near the scene of the homicide at the time it took place. These persons were sent for. They appeared, but he failed to introduce them. This motion was made, it will be remarked, before the jury was impaneled, and was probably made in writing, or, if made orally, there was no evidence of it before that jury, and it was certainly a very damaging circumstance to allow counsel to proceed and argue the guilt of the prisoner from his failure to produce these witnesses; and

when the court's attention was called to this subject, he should promptly have re-proved the proceeding and admonished the jury that it was improper, and that they should give it no attention, but this he seems to have declined. Unless this was a case of circumstantial evidence so strong as to imperatively demand the finding the jury made, we can easily see how injury, and great injury, might have resulted to this defendant from such a course of proceeding. The defendant may be guilty, and may have been proved to be guilty; but his guilt could be established only by legal testimony properly introduced to the jury by witnesses with whom he was entitled to be confronted. Has the defendant had a fair trial, with none but legal testimony before the jury? We think not. We cannot undertake to say what influence the circumstances improperly insisted upon in the argument may have had upon the jury; and a new trial is therefore granted solely upon the twenty-third ground of the motion."

The state's counsel relies upon the earlier case of *Inman v. State*, 72 Ga. 269, as presenting a rule contrary to the rule laid down in the *Blackman Case*, *supra*, and as being controlling, because an earlier authority. We do not see that the decision in the *Blackman Case* in any wise conflicts with the ruling in the *Inman Case*. All that was said by the solicitor general in the *Inman Case*, as explained by the trial judge, was that the defendant had moved for a continuance on the ground of the absence of a witness, and when this witness was produced in court he did not have him sworn as a witness. The only comment of the solicitor general upon the alleged facts was that counsel for the defendant had dilly-dallied with the case. There was no criticism of the defendant himself, nor any charge that the conduct of the defendant or of his counsel was influenced by any motive other than the desire for delay. There was not even a suggestion in the argument of the state's counsel that the conduct of the defendant's counsel was conclusive of the defendant's guilt, and certainly there was no assertion, as in the present case, that that conduct was due to the defendant's consciousness of guilt. The most that appeared in the *Inman Case* is that the solicitor general criticised the delay in the case. But desire for delay, in some cases, might be consistent with the defendant's innocence.

In the present case counsel for the state asserted unequivocally that the whole purpose was to "flim-flam" the court into granting a continuance, and that the witness was not produced because the defendant was guilty, and conscious that he was guilty. In the *Inman Case* Justice Blandford did not enter into a discussion of the principles involved, but seems to have decided the point merely with reference to the particular circumstances

which surrounded it, and it did not appear that the argument necessarily concerned the question of the guilt or innocence of the accused. Furthermore, in the *Inman Case* the defendant's counsel merely entered a general objection. He did not invoke any affirmative relief. In the *Blackman Case* (while it is a later case) the reasons upon which it is based are stated, and the general result of permitting argument not authorized by evidence, and as to matters not addressed to the jury, was in the mind of the court. In comparing the decisions in these two cases it must be remembered, even if we adhere to the rule which gives authority to the older decision, that the subject was not at that time embraced in the Code. All of the rulings to which we have referred as forming the basis of section 4957 of the Civil Code of 1910 were made subsequently to the decisions in these two cases; but in 1895 the Legislature embodied those rulings in the Code (Civil Code of 1895, § 4419), and for that reason, in so far as anything ruled in either of these cases conflicts with the Code, it must yield to the express legislative mandate. As we stated above, it would seem to follow, from the rulings in which new trials were refused because no objection to the prejudicial argument was interposed at the time of the argument, that if objection had been interposed, as in the present case, a new trial would have been granted.

In our opinion, therefore, the question in every case turns upon whether the nature of the argument is such that it is manifestly improper and prejudicial to the rights of the opposite party. If the nature of the remark is such that it can plainly be seen that it could not have affected the result, the error would be harmless, and would afford no ground for a new trial. For this reason, if the argument was directed to some collateral matter, not directly affecting the guilt or innocence of the accused in a criminal trial, though the argument might be improper, the error would seem to be immaterial. Under this head we might class criticisms of the defendant's appearance, style of dress, tone of voice, and physical defects. While such argument would be improper, it might not be prejudicial, though in some jurisdictions it has been held to be reversible error. On the other hand, if the statement is an expression of the personal opinion of the prosecuting attorney in a criminal case that the defendant is guilty, this is error, and it must be presumed to be prejudicial error, because cases can be imagined where counsel might be engaged for the prosecution whose personal opinion would have such weight with the jury as to unduly affect their finding upon the facts, or if the argument is such, although deductible from some of the evidence, as to address itself unfairly to passion or prejudice, as in the *Farmer Case*, *supra*, this, if objected to, would afford ground for a new

trial because the argument is not legitimate. For the same reason, the pressing upon the jury of an inference drawn from facts outside of the evidence, or circumstances which may not rest within the knowledge of the jury, except from the statement of counsel, is manifestly improper, and where the inference drawn from such unauthorized statements is adopted and used as conclusive evidence of guilt, it cannot be said to be harmless.

When counsel in the present case asserted that the defendant was trying to "flim-flam" the court, because he had moved to continue his case, counsel was addressing an argument to the jury with which they had no concern. The argument might have been proper to the court in resisting the motion for continuance, but certainly the only effect of it before the jury would be to prejudice them against the defendant; for the question before the jury was, not whether the defendant's motion for a continuance was meritorious, but whether he was guilty of the offense charged in the indictment, and counsel's statement that the defendant had not put up the witness because he knew he was guilty seems to us to be objectionable for the same reason that counsel for the state is not permitted to state to the jury that the defendant has not made a statement, or to argue, from the fact that the defendant has not made a statement, that it may be inferred that he is guilty of the offense charged. The rule that the defendant's failure to make a statement cannot be commented upon has been rigidly adhered to ever since it was laid down in *Bennett v. State*, 86 Ga. 401, 12 S. E. 806, 12 L. R. A. 449, 22 Am. St. Rep. 465. If the law, in its care for the rights of defendants and in seeing that they are accorded a fair trial, deems it no proper evidence of guilt that the defendant (who most frequently has it within his power to explain circumstances evidencing his guilt) makes no statement in his own behalf, it would seem that an inference of guilt, dependent only upon the fact that the defendant decided not to introduce a witness whom he had summoned, and whom he said he desired to use for the purpose of impeachment, would not rest upon a more substantial basis. If it is not permissible to argue that the defendant is probably guilty because he sits silently by and does not deny the truth of statements which he, above all others, must know to be false, when the jury can believe his statement in preference to sworn testimony, it would seem unreasonable that the law should permit the jury to presume that the defendant is guilty because he did not introduce a witness whom he had summoned for the purpose of impeaching a witness testifying against him. Incriminatory circumstantial evidence is faulty, unless it produces such conviction as excludes any other reasonable supposition than the hypothesis claimed. It is just as reasonable to suppose

that a defendant's reason for not introducing a witness he has subpoenaed is that the witness does not know, or will not testify, to the fact that the defendant wishes to establish, as to entertain any other supposition that can arise; but the fact that that witness does not know or will not testify to the particular fact does not disprove the existence of that fact. On the contrary, the fact may, be well known to others, who may or may not be present, and who may or may not testify.

Taking the facts of this particular case: The presence of the witness Paulk, as stated by the defendant's counsel, was desired because they expected, by his testimony, to prove the general bad character of one of the state's witnesses, and also contradictory statements on the part of the same witness. The jury saw the witness Paulk sworn by the defendant. The most that could have been argued from this by state's counsel under any view of the case, would have been that, as the defendant did not introduce Paulk, the jury might reasonably infer that Paulk would not testify to the general bad character of the state's witness, or to any contradictory statements made by the witness; and yet we do not think that from this the jury would have been authorized to infer that the defendant was conscious of his guilt, or guilty. The defendant might have been misinformed as to what Paulk would swear, or, even if this was not the case, it sometimes happens that a witness will "talk" differently from what he will "swear." Granting, even, that the defendant did not know that Paulk would swear as his counsel, on the motion for a continuance, stated that they expected him to swear, or that the defendant knew he would not swear either to the bad character of the state's witness or to any contradictory statements, this fact does not necessarily lead to the conclusion that the defendant was guilty and conscious of guilt, though it would have shown him to be acting in a most reprehensible manner, in attempting to "flim-flam" the court. It is reasonable to suppose that in many cases parties determine, from developments in the case, not to introduce particular witnesses, and sometimes not to introduce any testimony, in order to gain the advantage of a concluding argument, or because the point which they desire to put in proof has already been established by testimony coming from the opposite side. Sometimes the bad character of the witness can be demonstrated by cross-examination as effectually as it would by testimony from the mouths of witnesses that they would not believe him on oath. The nature and manner of his testimony may be such as to satisfy the jury that they would not believe him on oath, and this is the all-important desideratum. We conclude, therefore, that when the court gave sanction to the argument that an inference of guilt could arise

from the fact that the defendant had not introduced the witness for the purpose of impeaching the state's witness, as it had been stated he intended to do, and permitted the counsel for the state to continue the argument, the jury were presumably misled and influenced by this argument to the prejudice of the defendant.

[3] But for this error we would unhesitatingly affirm the judgment, for there is no merit in the several exceptions to the charge of the court. The evidence would have authorized the conviction of the defendant, but the credibility of the state's witness was the issue in the case. The witness admittedly had a tremendous interest in the case, because he was charged with the same offense, and upon the result of the defendant's case depended the acquittal or conviction of the witness. If the defendant in this case should have been acquitted, the guilt of the witness seemed to be inevitable. If the defendant in this case should be convicted, the witness had an excellent chance to be acquitted. If the defendant's omission to break down the testimony of this witness for the state, when it was in his power to do so, was due to the consciousness of guilt, as asserted by the defendant's counsel, it might have been conclusive to the jury. There was no evidence as to the defendant's inner consciousness, and the placing of such evidence could not be supplied by an inference arising from his failure to introduce a witness, unless it could have been to prove his real reason for not introducing the witness. The mere nonintroduction of a wit-

ness, where it was not claimed that the witness knew anything of the actual transaction, could not more reasonably raise such an inference than the fact that the defendant preferred not to surrender the right of having his counsel make the concluding argument.

The argument was improper and prejudicial. The court should have sustained the objection, and should at least have reprimanded counsel and instructed the jury not to regard the reference which had been made to the motives of the defendant, but to determine his guilt or innocence from the evidence before them.

Judgment reversed.

POTTLE, J. (dissenting). I agree with the state's attorney that the accused "was guilty and knew he was guilty." I do not think it was improper for state's counsel to tell the jury that the defendant was guilty. A juror of average intelligence must have understood this simply to be counsel's contention under the evidence. If one is guilty, he necessarily knows it, and therefore the further contention of counsel that the accused knew he was guilty was not prejudicial. The Supreme Court has more than once held that counsel may allude in argument to what has occurred in the case "from the time it is called, through its entire progress, and the conduct of the party or his counsel in connection therewith is a proper subject-matter for argument." To my mind the point is controlled by *Inman v. State*, 72 Ga. 269 (3), nor do I think the ruling therein made was changed by the Code.



(158 N. C. 463)

**PHEENY et ux. v. HUGHES.**

(Supreme Court of North Carolina. April 3, 1912.)

**ADVERSE POSSESSION (§ 101\*)—EXTENT OF POSSESSION.**

Where plaintiffs were in actual possession under a deed of a tract of land on one side of a creek, their possession extended to the boundary of the tract on the other side, and they acquired title to the whole tract by seven years' adverse possession under such color of title.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 575-589; Dec. Dig. § 101.\*]

Appeal from Superior Court, Moore County; Ferguson, Judge.

Action by R. W. Phoeny and wife against Johnson Hughes. Judgment for plaintiffs, and defendant appeals. Affirmed.

H. F. Seawell, for appellant. R. L. Burns and C. M. Muse, for appellees.

**CLARK, C. J.** This is an action by plaintiffs to quiet their title to a 48-acre tract of land. They claim title under a deed by G. C. Graves, mortgagee, December 14, 1898, which recites the execution of a mortgage to him by Richardson, sale thereunder, and purchase by the plaintiffs. The loss of the mortgage was shown. Title out of the state was shown by possession under the Richardsons since 1857. The defendant claims under a deed from G. C. Graves, June 9, 1908, and a conveyance to said Graves of 93½ acres June 14, 1898. Both parties claim under G. C. Graves and within the Richardson boundaries of a 175-acre tract acquired by the Richardsons in 1857. Neither party showed actual possession of that part of the 48-acre tract which lies east of the creek and which is also within the bounds of the defendant's deed.

The judge properly refused the motion to nonsuit and charged that the plaintiffs, having shown color of title and actual possession within the bounds thereof for seven years, were entitled to recover, unless the defendant had shown possession by Graves or himself for seven years subsequent to the date of the deed from Graves to the plaintiffs. This is not the case where there is a lappage under distinct lines of title and no one is in actual possession thereof. In such case, each party having constructive possession under his deed up to the boundaries thereof, the law carries the possession to the party having the oldest title. But here the plaintiffs' entire tract was within the limits of the Richardson boundary, and, the plaintiffs having actual possession of said tract west of the creek, their constructive possession extended to the boundary of said tract on the east side of the creek. Having been exposed for more than seven years to action, they have acquired title by possession under their color for the entire tract covered by their deed.

Currie v. Gilchrist, 147 N. C. 649, 61 S. E. 581; Simmons v. Box Co., 153 N. C. 261, 69 S. E. 146.

The motion for nonsuit was properly denied. It is unnecessary to consider the other exceptions.

No error.

(158 N. C. 325)

**GAYLORD v. McCOY et al.**

(Supreme Court of North Carolina. March 27, 1912.)

**1. VENDOR AND PURCHASER (§ 57\*)—CONTRACTS—DESCRIPTION OF LAND—EVIDENCE.**

An option to purchase land particularly described, "being all of the land owned by the vendor in the county," is a contract to convey only the land within the boundaries described, and does not include other land owned by the vendor in the county named, the words in quotation being mere words of description.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 87; Dec. Dig. § 57.\*]

**2. EVIDENCE (§ 460\*)—PAROL EVIDENCE.**

Parol evidence is admissible to show the lands embraced in the description in a contract of sale of land in a designated township on which the vendor "resides at the present time."

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2115-2128; Dec. Dig. § 460.\*]

Appeal from Superior Court, Brunswick County; Whedbee, Judge.

Action by George O. Gaylord against Mrs. M. E. McCoy and others. From a judgment for plaintiff, defendants appeal. Reversed.

John D. Bellamy, E. Bryan, and C. Ed. Taylor, for appellants. Rountree & Carr, for appellee.

**CLARK, C. J.** [1, 2] On July 1, 1899, the defendants executed to the plaintiff an option by which they agreed to convey to the plaintiff in consideration of \$9,000, to be paid on or before November 3, 1909, the following property: "All that certain tract or parcel of land, situate, lying and being in Northwest Township, Brunswick county, state of North Carolina, adjoining the lands of M. W. Murrell, B. T. Trimmer, Z. E. Murrell, the Metts estate, and lying on both sides of the Carolina Central Railroad, known as the L. C. McCoy place, being the same on which Mrs. M. E. McCoy resides at the present time; said tract of land containing fifteen hundred acres, more or less, and lies on the waters of Mill Creek and near the waters of Hood's Creek and is all of the land owned by Mrs. M. E. McCoy, C. L. McCoy and wife, Charles F. McCoy and wife and F. M. McCoy and wife, in the county of Brunswick, state of North Carolina." When the time came for the payment of the purchase money and the delivery of the deed, the defendants tendered a deed which did not include in the description the words set out in italics above.

The plaintiff admits that the words in the option are restricted by the description

"situate in Brunswick county" and, if there are any lands within the above boundaries which lie outside of Brunswick county, he makes no claim thereto. But he contends that there are 66 acres lying within said county and which may not be within the above boundaries for which he is entitled to a conveyance because they were a part of the land "lying within Brunswick county and owned by the defendants" at the time the option was given.

An examination of the option will show that the words in italics, as above set out, are merely words of description, and that there is no obligation in the option to convey such land if outside of the boundaries of that which the defendants contracted to convey under the option. We are of opinion that the court erred in excluding parol testimony to show what lands were embraced within the description in the option of the "L. C. McCoy place on which Mrs. M. E. McCoy resides at the present time." *Harper v. Anderson*, 130 N. C. 538, 41 S. E. 1021; *Cox v. McGowan*, 116 N. C. 131, 21 S. E. 108; *Carter v. White*, 101 N. C. 30, 7 S. E. 473. The last-named case is almost identical as to the facts with this case. If the bounds of the tract described in the option embrace the said 66 acres, the conveyance tendered to the plaintiff should also include them. If said boundaries did not include said 66 acres, there is no obligation on the defendants to convey the same.

This renders it unnecessary to discuss the other exceptions taken.

Error.

(159 N. C. 168)

PERSON et ux. v. ROBERTS et al.

(Supreme Court of North Carolina. March 20, 1912.)

1. STIPULATIONS (§ 14\*)—CONSTRUCTION.

Where, in an action to recover land, plaintiff introduced a sheriff's deed, but not the execution on which it was based, and before the hearing of an appeal the parties stipulated that the deed was made on executions in a specified action and that a certified copy of the deed was filed, from which it appeared that it was issued pursuant to a sale of land made by the sheriff, etc., but it was not agreed that the sheriff's deed was actually made after a sale under execution duly issued from the court, such recitals, in the absence of preliminary proof of search for the executions and their loss, were insufficient to establish a prima facie case that the executions had issued.

[Ed. Note.—For other cases, see Stipulations, Cent. Dig. §§ 24-27; Dec. Dig. § 14.\*]

2. EXECUTION (§ 320\*)—SALE—SHERIFF'S DEED—RECITALS.

Where the plaintiff in the judgment is also purchaser of land at a sale on execution issued on the judgment, recitals in the sheriff's deed of the issuance of the executions and the sale thereunder are not sufficient to establish those facts prima facie, but plaintiff is bound to prove the judgment and execution, though, if a stranger to the judgment is the purchaser, he may establish a prima facie case by proving the execution only; but if the execution is lost,

then the recital in the sheriff's deed that it was issued, and that the sheriff made the sale thereunder, will be received as prima facie evidence of the fact.

[Ed. Note.—For other cases, see Execution, Cent. Dig. §§ 940-945; Dec. Dig. § 320.\*]

3. JUDGMENT (§ 951\*)—CONCLUSIVENESS—CAUSES OF ACTION—IDENTITY—PROOF.

If it is material to show that two actions were for the same cause and for the same relief, parol evidence is admissible only to aid the record; and hence, where there was no complaint filed in the former action, parol proof of the cause of action was inadmissible.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1808-1812; Dec. Dig. § 951.\*]

4. APPEAL AND ERROR (§ 1052\*)—EVIDENCE—PREJUDICE.

Erroneous admission of parol evidence to show the identity of two causes of action, for the purpose of rebutting defendant's claim of adverse possession, was harmless where such claim was not sustained.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4171-4177; Dec. Dig. § 1052.\*]

5. EJECTMENT (§ 15\*)—COMMON SOURCE—SENIOR TITLE.

Where plaintiff and defendants claimed from a common source, the holder of the senior title was entitled to recover.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. §§ 59-62; Dec. Dig. § 15.\*]

6. WITNESSES (§ 252\*)—ILLUSTRATION—UNOFFICIAL MAPS.

It was proper for the court to permit a witness to use an unofficial map to illustrate his testimony.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 866, 867; Dec. Dig. § 252.\*]

7. DEEDS (§ 118\*)—CONSTRUCTION—INDORSEMENT.

Where no reference was made in a deed to an indorsement thereon, and there was nothing to show by whom or by what authority it was made, it was incompetent as evidence to alter the description of the land in the deed.

[Ed. Note.—For other cases, see Deeds, Dec. Dig. § 118.\*]

Appeal from Superior Court, Wayne County; Cooke, Judge.

Action by J. E. Person and wife against Joseph J. Roberts and another. Judgment for plaintiffs, and defendants appeal. Reversed.

W. T. Dortch and W. C. Munroe, for appellants. M. T. Dickinson and Aycok & Winston, for appellees.

WALKER, J. This is an action to recover land. There was a verdict and judgment for the plaintiffs, and defendants appealed.

Plaintiffs sought to show that both parties claimed title from a common source—that is, under William Lewis, the original owner of the land—for the purpose of estopping the defendants. In order to do this, they introduced a deed from John T. Kennedy, sheriff, to John Coley, whose lands, at his death, were divided among his heirs, and tract No. 2 allotted to the feme plaintiff, which includes the land in controversy. Plaintiffs introduced other deeds for the land,

but the sheriff's deed is the only one we need consider. Deeds were introduced showing that defendants claimed the land under William Lewis. There was no evidence of an execution against William Lewis, under which the land was sold; but the case was argued upon the theory that the deed recited the executions against him, under which the land was sold and the deed executed to the purchaser, John Coley.

[1] At the hearing in this court, the following agreement, signed by the respective counsel, was brought to our notice and filed in the record. This agreement referred to the sheriff's deed, and is as follows: "This deed was made under executions in the case of John L. Bridgers v. William Lewis, in the county court of Wayne county, and in the cases of C. L. Perkins v. William Lewis, and E. B. Borden v. William Lewis, in the superior court of Wayne county." Afterwards a certified copy of the sheriff's deed was filed, and it appears therefrom that the deed contains full recitals of the several executions in favor of John L. Bridgers, C. L. Perkins, and E. B. Borden against William Lewis, which had issued from the county and superior courts of Wayne county, and under which the sale of the land was made by the sheriff and the deed executed to John Coley, who was the purchaser. The question raised in this court by the counsel of defendant was that the chain of plaintiffs' title from William Lewis was not complete, by reason of the fact that they had not shown in evidence any execution authorizing the sheriff to levy upon and sell the land. It may be that the parties did not intend to agree that executions had actually issued, but only that the deed contained a recital to that effect; but we must construe the agreement as it is written, and so construed it means but one thing, viz., that "the deed was made under executions in the case of John L. Bridgers and others," which, of course, means that the executions were issued, and the sheriff sold the land under them. It could not well have been made otherwise under them.

[2] We do not think the recital would have been sufficient as evidence that the executions had been issued. Plaintiffs relied on *Wainwright v. Bobbitt*, 127 N. C. 274, 37 S. E. 336, to sustain their contention that it is, at least, prima facie evidence of the fact. But in that case there was some evidence of a search made by the clerk of the court for the execution, and the docket entries showed that executions had been issued on the judgment. Unless this reconciles that case with former decisions of this court, we cannot approve what is said by the court, that more recent decisions have settled the doctrine that the recital in a sheriff's deed, as to the issue of executions, is prima facie evidence of the fact. We think our cases are all the other way, and we have uniformly and consistently held, since the decision in

*Rutherford v. Raburn*, 32 N. C. 144, modifying the doctrine as stated in *Hamilton v. Adams*, 6 N. C. 161, that the plaintiff in the judgment, who is also purchaser at the sale under execution, must show judgment and execution; but a stranger to the judgment only the execution. When the execution is lost, the recital in the sheriff's deed, that one had issued under which he made the sale, is prima facie evidence of the fact. *Hardin v. Cheek*, 48 N. C. 135, 64 Am. Dec. 600, is cited in *Wainwright v. Bobbitt*, and is also relied on by plaintiffs. But that case was distinguished from prior decisions in *Rollins v. Henry*, 78 N. C. 342, by the fact that the judgment and execution were very ancient, dating back to 1775, 80 years before the trial of the ejectment. The particular objections in *Hardin v. Cheek* were, first, that there was no judgment, but this was answered by the statement that the plaintiff was not a party to the judgment, and therefore was not required to show that it had been rendered; second, that there was no evidence, not of the execution, but of the levy and sale, which were recited in the sheriff's deed. These were official acts of the sheriff, and under the authorities the recital, perhaps, was evidence of them, and they could be proved by parol. *Miller v. Miller*, 89 N. C. 402; *Rollins v. Henry*, supra; *McKee v. Lineberger*, 87 N. C. 182. The levy, advertisement, and sale are acts done by the sheriff and in his official capacity, and are susceptible of oral proof, and, besides, being the acts of a sworn officer, the recital of them in his deed, like similar recitals in a return by the officer, is prima facie evidence that the facts are truly stated. We find it stated in 17 Cyc. 1349 that upon the sale of property by an officer the recital in his deed of compliance with the various requirements of the statute is prima facie evidence of the fact; but it may be overcome by testimony proving its falsity. This statement, of course, is to be considered as subject to certain rights of a purchaser, who buys without notice of an irregularity.

It is further said that, in some jurisdictions, a judgment and execution must be produced, and thereafter the recitals in the sheriff's deed, as to his acts thereunder, such as levy, advertisement, and sale, are prima facie evidence of such facts. The author (*Hon. John G. Carlisle*) refers to statutes in other jurisdictions as requiring recitals of judgments, execution, and so forth, in the sheriff's deed, and making them evidence of the facts therein stated. The annotator of the text seems to say that *Wainwright v. Bobbitt* is in conflict with the other decisions of this court; but we think it can be brought into harmony with them in the way we have indicated. Where it is said that the recital is prima facie evidence that an execution had been issued, the language of the court must be construed with reference to the par-

ticular facts of the case then being decided, and it will be found that the expression is used with reference to proof that the execution had been lost, or reference is made to the official acts of the sheriff, such as levy and sale. We take it that *Rollins v. Henry* finally and conclusively settled the law in this respect; for Justice Rodman there says: "The rule which seems to be established, and which is supported by reason, appears to be this: The return to an execution is ordinarily the best evidence of a levy and sale under it. But when the execution has not been returned to the clerk's office, and it, with any return on it, has been destroyed or lost, and it is proved otherwise than from the recital that there was a judgment and execution, the recital in a sheriff's deed is prima facie evidence of the levy and sale; they being official acts of the sheriff, even although the sale was not (sic) a recent one. The rule is intended to be applicable only to cases like the present, and does not touch cases like *Hardin v. Cheek*, where the deed was an ancient one, but there was no proof of a judgment and execution." We have discussed this question somewhat at length because of its great importance, and as it is very likely to arise in everyday practice. The act of issuing an execution is not that of the sheriff, but of the clerk, and can easily be proved by the execution itself, or, in its absence, if lost, by the record, and, if not, then the recital in the sheriff's deed becomes prima facie evidence. In this case, though, it is admitted that executions were issued, as we have shown.

[3, 4] It appears that a former suit was brought, but no complaint filed; and plaintiffs were permitted to show by parol what was the cause of action in that case, for the purpose, we presume, of rebutting the defense of the statute of limitations, or, to be more exact, the claim of title by adverse possession. If it had been material to show that the two actions were for the same cause and the same relief, the ruling would be erroneous. The point was decided against the contention of the plaintiffs in *Bryan v. Malloy*, 90 N. C. 508, in which Justice Ashe says: "Verdicts, judgments, depositions in a former cause, and the former testimony of deceased witnesses are considered as resting on the same principle. \* \* \* The plaintiffs offered parol evidence to show that the action was brought to set aside the deed made by the Sinclairs to Kennedy. But his honor excluded the evidence and the deposition taken in the cause. The plaintiffs alleged error in these rulings, and in support of their position relied upon the cases of *Long v. Baugas*, 24 N. C. 290 [38 Am. Dec. 694], and *Yates v. Yates*, 81 N. C. 397. In the former of these cases, Chief Justice Ruffin, who spoke for the court, said: 'If the record can be aided by the averments and parol evidence, as held in *New York*, we

find, according to those cases, that it can only be done when, from the form of the issues, the record does not and could not show the grounds upon which the verdict proceeded, and when the grounds alleged are such as might legally have been given in evidence under the issue, and were in evidence in such way as to make it appear from the issue and verdict that these facts and grounds must have been necessarily and directly in question, or determined, and that upon these grounds, and no other, the verdict must have been found.' In *Yates v. Yates*, the court cited this decision with approval, and reiterated the doctrine there enunciated. The principle established in these adjudications is that parol proof is admissible, and only admissible in aid of the record; that is, whenever the record of the first trial fails to disclose the precise point on which it was decided, it is competent for the party pleading it as an estoppel to aver the identity of the point or question on which the decision was had, and to support it by proof. But there must be a record to be aided. When there is no record, as in our case (in which there was no complaint), there is no foundation for the proof." But our examination of the record does not disclose to us any such evidence of the defendants' adverse possession as made the testimony material or the fact of a former suit essential. Plaintiffs might well recover without it; the statute was not in their way, and therefore the error was harmless.

[5] The real question in the case was whether the parties claimed title from a common source, the plaintiffs having the older title, and the evidence showed that they did. The judge left it to the jury to say if this was true, and also required them to find that the plaintiffs' deeds covered the locus in quo. The jury found with the plaintiffs on this question, and as the parties claimed from a common source of title, and the plaintiffs held the senior title, they were entitled to recover. *Bowen v. Perkins*, 154 N. C. 449, 70 S. E. 843.

There are numerous exceptions to evidence relating to the location of the land; but no new principle is involved. The facts proposed to be elicited all tended to show that the description in the plaintiffs' deed embraced the land; and the evidence therefore was admissible.

[6] It was competent for the court to permit a witness to use even an unofficial map for the purpose of illustrating his testimony, or of making it intelligible to the court and jury. *Andrews v. Jones*, 122 N. C. 666, 30 S. E. 19, and cases cited; *Pickett v. Railroad*, 153 N. C. 148, 69 S. E. 8.

[7] The entry which was indorsed on the deed was no part thereof, and was therefore incompetent as evidence to alter or change its description of the land. There is no reference in the deed to it, and nothing to

show who put it there, or by what authority the entry was made.

Since this opinion was prepared, counsel have agreed, in writing, that it was not their intention to admit that the sheriff's deed was actually made after a sale under execution which had duly issued from the court, but only that the deed recited that fact, and, if their former agreement is otherwise expressed, it was inadvertently done. Upon this assurance of counsel, which we now adopt as the true meaning of their stipulation, we must declare, in accordance with our ruling, that there was error in receiving the recitals of the sheriff's deed as prima facie evidence that executions had issued, without any preliminary proof of search for the executions and their loss. Because of this error, the judgment is reversed, and a new trial ordered.

New trial.

(159 N. C. 125)

**CHRISTMAN v. POSTAL TELEGRAPH CO.**  
(Supreme Court of North Carolina. March 20, 1912.)

**1. TELEGRAPHS AND TELEPHONES (§ 37\*) — MESSAGES—FAILURE TO DELIVER—DAMAGES.**

On being unable to reach home, plaintiff sent a telegram to P., directing him to send word to plaintiff's wife that plaintiff would not be home until the next day, plaintiff not sending the message direct to his wife, because she was in delicate health, and she became ill because of defendant's failure to deliver the message. *Held*, that plaintiff could not recover damages; the message not indicating that a failure to deliver it would probably cause illness.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. §§ 24, 26, 32; Dec. Dig. § 37.\*]

**2. TELEGRAPHS AND TELEPHONES (§ 66\*) — MESSAGES—FAILURE TO DELIVER.**

Plaintiff, being unable to get home as he was expected by his wife, sent a message to P., directing him to inform his wife that he would not be home until the next day, which message was never delivered. *Held*, that evidence that plaintiff informed the operator that the message was addressed to P. because the wife was sick, and plaintiff was afraid it would excite her, was competent as bearing on the question of damages arising from mental anguish.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. §§ 61-63; Dec. Dig. § 66.\*]

**3. TELEGRAPHS AND TELEPHONES (§ 66\*) — MESSAGES—EVIDENCE.**

Where plaintiff sent a message, which was never delivered, to inform his wife, who was in delicate health, that he could not get home as expected, evidence that the wife's condition was serious was admissible on the issue of mental anguish.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. §§ 61-63; Dec. Dig. § 66.\*]

**4. EVIDENCE (§ 183\*)—BEST AND SECONDARY EVIDENCE—LETTERS—LOSS.**

Where plaintiff's wife testified that she did not preserve her husband's letters, and he testified that he had searched for a letter in every place where his wife kept her letters and could not find it, it authorized the admission of secondary evidence.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 605-637; Dec. Dig. § 183.\*]

**5. TELEGRAPHS AND TELEPHONES (§ 61\*) — MESSAGES—FAILURE TO DELIVER—DAMAGES.**

Plaintiff, being unable to reach home as intended, sent a message to a friend, directing

him to inform his wife that he would not be home until the succeeding day. This message was prepaid, but was never delivered, and the wife, after plaintiff did not arrive, sent a telegram to W., at the place where she thought her husband was, directing him to come home at once, as she was very sick. The charges on this message were not prepaid, and W. directed the operator at destination to apply the money paid by plaintiff for the other message to the payment of the charges on the message sent by the wife. *Held*, that W. had no authority to direct such application, and the wife did not thereby waive her right to recover damages for the telegraph company's negligence in failing to deliver the husband's message.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. § 49; Dec. Dig. § 61.\*]

Appeal from Superior Court, Johnston County; Peebles, Judge.

Action by R. D. Christman against the Postal Telegraph Company. Judgment for plaintiff, and defendant appeals. Affirmed.

This action was brought to recover damages for the negligent failure to deliver a telegraphic message, addressed by the plaintiff, R. D. Christman, to G. F. Pope, at Dunn, N. C., January 13, 1909, as follows: "Send word to wife will be home to-morrow. Am well." The message was delivered to the defendant's operator at Wendell the afternoon of January 13, 1909, but was never sent by him to G. F. Pope. The operator was informed by R. D. Christman, at the time he received the message for transmission and was paid the charges, when asked by the operator why it was addressed to G. F. Pope, instead of his wife, that her condition was such that "he was afraid it would surprise and excite her," though he did not tell him what was the matter with her. He testified that she was in a delicate condition, though her general health was good. There is evidence that she was expecting her husband to return to Dunn by the train at 4 o'clock p. m. on January 13th, and, when he failed to come by that train, it made her very nervous and anxious, thinking that something had happened to him. She became very ill, and her health was impaired by the premature birth of her child, which lived only a few hours. She suffered very much. The court admitted this evidence only for the purpose of showing her mental anguish, and carefully charged the jury in regard to it, instructing them not to consider it upon the question of damages, as follows: "In considering the fourth issue upon the question of damages, you must exclude all evidence that the plaintiff was taken with a nervous chill, was confined to her bed and forced to seek the services of a physician, or that a child was born to her prematurely and died." There was other evidence from which the jury could infer that she suffered mental anguish as a result of the defendant's failure to send the message. The court, at the request of the defendant, gave this instruction to the jury: "The burden of proof is on the plaintiff to show by the greater weight of the evidence that her hus-

band informed the agent of the defendant at Wendell of the importance of the message; and, if she has failed to thus prove that he did, the plaintiff can only recover nominal damages, and you will answer the fourth issue, 'Fifty cents.' If you should find in passing upon the fourth issue that the plaintiff is entitled to recover actual damages, it is only such as were reasonably in the contemplation of the parties at the time the message from Christman to his wife was received by the defendant's authorized agent at Wendell for transmission, and such as would directly and proximately result and reasonably be anticipated from the alleged negligence of the defendant." The court refused to charge, at the request of defendant, that upon the evidence the feme plaintiff could only recover nominal damages. The jury returned the following verdict:

"(1) Did the defendant receive for transmission the telegraphic message alleged in the complaint, with the charges and fees paid thereon, as alleged?" "Yes."

"(2) Did the defendant negligently fail to deliver the telegraphic message aforesaid?" "Yes."

"(3) Did the plaintiff suffer mental anguish by reason of the negligent failure of defendant to deliver said message?" "Yes."

"(4) What damages, if any, are the plaintiffs entitled to recover?" "\$1,000."

The defendant, having duly reserved its exceptions to the rulings of the court, appealed from the judgment upon the verdict.

R. C. Strong, for appellant. F. H. Brooks and Aycock & Winston, for appellee.

WALKER, J. (after stating the facts as above). [1] The plaintiff was not entitled to recover damages merely because his wife became ill, as the message was not of the character to indicate that a failure to send it would naturally and probably cause her illness. Such a result was not in the contemplation of the parties, and the judge so charged the jury.

[2] But in this case the defendant was notified by the message and the information given to its operator that Mrs. Christman was in a very nervous condition, so much so that her husband would not send the message directly to her, but addressed it to a friend, who was to "break the news to her" in such way, according to his judgment and in the exercise of prudence and caution, as would prevent any harmful results. This information, with the message itself, was sufficient to notify the defendant that its contents would surprise and disappoint Mrs. Christman, and almost the only inference to be drawn was that he had changed the date of his arrival at Dunn, making it later than he had before intended, and as she had understood from him it would be. Why should he send a telegram at all, not addressed to her, but to his friend, informing her

that he would be at home the next day, if she would not expect him to come sooner? If he had not already set any earlier time for his arrival, and the time of his return to his home had been left indefinite, a simple message that he would be there the next day would not be calculated to alarm her at all, but would have rather the contrary effect. The facts in our case show that the husband was anxious about the delicate condition of his wife, and wished her to be informed of his arrival the next day as soon as possible, for he used the telegraph, instead of the mail. Why would she be alarmed by such a message, under ordinary circumstances, or if he had not told her that he would be home sooner? It was some evidence for the jury to consider upon the question of damages arising from the mental anguish caused by its negligence, and perhaps is stronger than evidence held sufficient in some of the decided cases. *Dayvis v. Telegraph Co.*, 139 N. C. 79, 51 S. E. 898; *Suttle v. Telegraph Co.*, 148 N. C. 480, 62 S. E. 593, 128 Am. St. Rep. 631. In the case last cited, after stating that there was evidence that the company was informed as to the nature of the message, and could have inferred what the consequences of delay would more than likely be, we said: "It (the company) cannot close its mind to the knowledge of facts which are apparent, and thus plead its own ignorance as an excuse for its failure to deliver the message. If it carelessly disregarded the information it received, and its evident import, its fault in this respect is not to be imputed to the plaintiff, so as to bar her right to damages. The operator was told by Mr. Suttle what his purpose was in sending the message and in asking for a prompt delivery that evening. It was to avoid the very thing that has occurred, and which every reasonable man, mindful of his obligation to others, should have known would occur. The delay of the company was clearly the proximate cause of the injury." And in *Dayvis v. Telegraph Co.*, supra, Justice Hoke said: "This message was sent to prevent anxiety in the plaintiff's mind, and but for the defendant's default it would have fulfilled its mission." This record, in one respect, presents a stronger case for the plaintiff than did the facts in the cases cited, as here the feme plaintiff's delicate physical condition must be considered, and her great susceptibility to mental disturbance or mental anguish.

[3] The court would not permit the jury to award damages merely because the feme plaintiff was made ill. This was carefully excluded by the judge. It was relevant to prove that her condition was serious, if not critical, in order that the jury might infer therefrom that she suffered mental anguish, so that the defendant's prayer for instructions was fully answered in this respect.

[4] There was sufficient evidence of the loss of Christman's letter to his wife, stating

that he would be at home on the afternoon of January 13th, if it was necessary to produce the letter, it being a collateral matter. *State v. Ferguson*, 107 N. C. 841, 12 S. E. 574; *State v. Credle*, 91 N. C. 640; *State v. Surles*, 117 N. C. 721, 23 S. E. 324; *Whitehurst v. Padgett*, 157 N. C. 424, 78 S. E. 240. Mrs. Christman testified that she did not preserve her husband's letters, and he stated that he had searched for it in every place where his wife kept her letters and papers, and could not find it.

[5] At the request of Mrs. Christman, T. V. Smith sent a telegram to R. B. Whitley at Wendell, N. C., requesting Christman "to come home at once," as his wife was very sick. The charges for this message were not prepaid, and Whitley told the operator at Wendell to apply the money paid by Christman for the other message to the payment of the charges on the message to him, and the court was requested to charge that, if they found these to be the facts, Mrs. Christman had waived her right to recover damages for any negligence in not sending and delivering the message from her husband. But this does not follow. Whitley had no authority to direct such an application of the money, and besides, the negligence had already occurred when he gave the order.

No error.

(158 N. C. 408)

#### ARCHBELL v. ARCHBELL

(Supreme Court of North Carolina. March 20, 1912.)

#### 1. HUSBAND AND WIFE (§ 278\*)—SEPARATION AGREEMENTS—VALIDITY.

A separation agreement entered into between a husband and wife living apart, or who proceed to live apart as soon as it is executed, is valid when made for an adequate reason, for Code of 1883, referring to marriage, marriage settlements, and contracts of married women, carried down as *Revisal 1905*, § 2116, provides that every woman who shall be living separate from her husband, either under a judgment of divorce or a deed of separation, shall be deemed a freetrader.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. §§ 1046-1053; Dec. Dig. § 278.\*]

#### 2. HUSBAND AND WIFE (§ 279\*)—SEPARATION AGREEMENTS—RESUMPTION OF CONJUGAL RELATIONS.

A separation agreement entered into between a husband and wife is rescinded upon their resumption of conjugal relations.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. §§ 1054, 1056-1060; Dec. Dig. § 279.\*]

#### 3. HUSBAND AND WIFE (§ 278\*)—SEPARATION AGREEMENTS—VALIDITY.

A separation agreement must be reasonable, just, and fair to the wife, having due regard to the conditions and circumstances of the parties when made.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. §§ 1046-1053; Dec. Dig. § 278.\*]

#### 4. DIVORCE (§ 40\*)—SEPARATION AGREEMENTS—RIGHT TO A DIVORCE.

Where a husband and wife enter into a valid separation agreement, it does not affect the right of either to sue for a divorce for causes occurring either before or after the agreement.

[Ed. Note.—For other cases, see *Divorce*, Cent. Dig. § 161; Dec. Dig. § 40.\*]

#### 5. DIVORCE (§ 240\*)—ALIMONY—AGREEMENTS.

A separation agreement between a husband and wife, fixing their property rights will, where a divorce is later obtained, be respected as fixing those rights.

[Ed. Note.—For other cases, see *Divorce*, Cent. Dig. §§ 675-678; Dec. Dig. § 240.\*]

#### 6. DIVORCE (§ 240\*)—ALIMONY—AMOUNT.

While an allowance of alimony may be predicated upon the capacity of the husband to labor, the right of the wife depends primarily on the property of the husband; the right itself being in the nature of property.

[Ed. Note.—For other cases, see *Divorce*, Cent. Dig. §§ 675-678; Dec. Dig. § 240.\*]

#### 7. HUSBAND AND WIFE (§ 278\*)—SEPARATION AGREEMENT—VALIDITY.

*Revisal 1905*, § 2107, provides that no contract between a husband and wife made during coverture shall be valid to affect or charge any part of the real or personal estate of the wife or accruing income thereof, unless in writing, duly proved, and, upon the examination of the wife separate and apart from her husband as required by law in the probate of deeds of *femes covert*, it shall appear to such officer that the wife executed such contract, and that the same is not unreasonable or injurious to her; the certificate of the officer stating his conclusions being conclusive of the facts therein stated, though impeachable for fraud. Section 2108 provides that contracts between husband and wife not forbidden by the preceding section, and not inconsistent with public policy, are valid, and that any married person may release and quitclaim dower, tenancy by the curtesy, and all other rights which they may, respectively, acquire by marriage. A husband and wife entered into an agreement for separation, the wife accepting \$100 in consideration of her release and relinquishment of all right of support, dower, and other personal and property rights. *Held*, that this contract being a release of the wife's property rights of support and maintenance was subject to the provisions of section 2107, and the officer not having appended any certificate showing that it was not unreasonable or injurious to her, the contract was void, for the identity of person between a husband and wife, in reference to their right to contract, is only relaxed as specified by statute.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. §§ 1046-1053; Dec. Dig. § 278.\*]

Appeal from Superior Court, Beaufort County; Cline, Judge.

Action for divorce by Jessie Archbell against William J. Archbell. From a judgment granting divorce and alimony, defendant appeals. Affirmed.

In the complaint the plaintiff by proper averment alleged cruelties and ill treatment, entitling her to divorce a mensa, etc.; alleged, further, ownership of an amount, real and personal, of property by defendant, and that he was an able-bodied man, capable of earning good wages, etc. Defendant answered, denying all allegations of cruelty, and

set up counterclaim for divorce by reason of wrongful abandonment by plaintiff, and denied the ownership of any real property whatever, alleging that it had all been disposed of, and the proceeds expended in support of plaintiff and the payment of costs and charges imposed upon him at the instance and by the wrong of plaintiff; that his personal property was of insignificant amount, and that he was a man 60 years of age, who could only do ordinary manual labor, and was incapable of earning any such amount as claimed in the complaint. The answer further set up a deed of separation entered into by plaintiff and defendant of date October 14, 1909, averred full compliance therewith on part of defendant, and relied upon the terms of same in bar of the action and in bar of any other or further allowance to plaintiff by reason of the marital relations between the parties. This contract and agreement was in terms as follows: "North Carolina, Columbus County. These articles of agreement entered into between W. J. Archbell of Beaufort county and Jessie Archbell of Columbus county, this 14th day of October, 1909, witnesseth: That whereas the said W. J. Archbell and Jessie Archbell were lawfully married in North Carolina four years ago, and for the past year have been unable to agreeably live together as man and wife; and whereas it is mutually agreeable that they shall each live separate and apart from the other: Now, therefore, for and in consideration of the sum of one hundred dollars to the said Jessie Archbell, in hand paid, the receipt of which is hereby acknowledged, the said W. J. Archbell and Jessie Archbell do mutually agree to live separate and apart from one another, and in consideration of the sum of one hundred dollars to her, the said Jessie Archbell, paid by the said W. J. Archbell, the said Jessie Archbell agrees, and by these presents does agree, to release and relinquish all right of support, all dower right, and all other personal and property rights which she might have acquired against the person or property of the said W. J. Archbell by virtue of the aforesaid marriage, and does hereby receive and accept the aforesaid one hundred dollars in full payment and satisfaction of all and of every right that she may hold against the person and estate of the said W. J. Archbell in consequence of the aforesaid marriage, and she does further agree to abandon and relinquish and release the said W. J. Archbell of all and every right of suit that she might have against him by reason of an act of abandonment that he might have committed in the past, and further agrees to release him of any claim she might have against him by reason of the aforesaid marriage. And the said W. J. Archbell agrees to release the said Jessie Archbell of all and every right of curtesy and all rights that he acquired in any property that she might have or might in the future possess and all

personal rights that he might have acquired against her by virtue of the aforesaid marriage. And it is mutually agreed that they shall each live separate and apart from the other, independently of the other to the same extent as if they had never been married, and each shall in the future contract and be contracted with independently of the other to the full extent as if they had never been married. In testimony whereof the said W. J. Archbell and Jessie Archbell have hereunto set their hands and seals this the 14th day of October, 1909. Jessie Archbell. [Seal.] W. J. Archbell. [Seal.]" The same was acknowledged before a justice of the peace in ordinary form of privy examination, probate adjudged correct by superior court clerk, Beaufort county, and duly registered in said county on October 28, 1909.

On issues submitted the jury rendered the following verdict:

"(1) Were plaintiff and defendant married as alleged?" Answer: "Yes."

"(2) Has plaintiff been a resident of the state two years before filing the complaint?" Answer: "Yes."

"(3) Did defendant in 1908 and up to February, 1909, fail and refuse to furnish plaintiff and her child proper and sufficient food, clothing, and other provisions as alleged?" Answer: "Yes."

"(4) Did defendant on and shortly after February, 1909, assault the plaintiff with strokes and other instruments as alleged?" Answer: "Yes."

"(5) Did the defendant in the year 1906 strike plaintiff with his hand as alleged by her?" Answer: "Yes."

"(6) Did defendant assault and beat plaintiff prior to May, 1906, as alleged?" Answer: "Yes."

"(7) Did defendant shortly after February, 1909, assault plaintiff on or near the bridge with her child, and whip her as alleged?" Answer: "Yes."

"(8) Did defendant wrongfully take plaintiff's infant from her, and carry it out of the state as alleged?" Answer: "Yes."

"(9) Did defendant offer such indignities to the person of plaintiff as to render her condition intolerable and life burdensome?" Answer: "Yes."

"(10) Did the defendant by cruel and barbarous treatment endanger the life of plaintiff?" Answer: "Yes."

"(11) Has the defendant been a resident of North Carolina two years preceding the filing of his answer as alleged?" Answer: "Yes."

"(12) Did the plaintiff abandon the defendant as alleged?" Answer: "No."

"(13) Was the deed of separation procured through fraud and undue influence?" Answer: "No."

On the verdict defendant through his counsel tendered judgment for divorce a mensa, and denying order for alimony by reason of the contract, etc., above set forth. The court,



being of opinion that the deed of separation was void as a matter of law, entered judgment for divorce, and awarding alimony, \$15 per month, for support of plaintiff, and \$75 to be paid into court as fees for Ward & Grimes in conducting the present suit, and defendant excepted and appealed.

E. A. Daniel, Jr., and A. D. MacLean, for appellant. Ward & Grimes, for appellee.

HOKE, J. (after stating the facts as above). [1] In *Collins v. Collins*, 62 N. C. 153, 93 Am. Dec. 606, the court made definite decision "that articles of separation between husband and wife, whether entered into before or after separation, were against law and public policy, and therefore void." Since that decision was rendered in 1867, our statutes upon "marriage and marriage settlements and contracts of married women," as entitled in the Code of 1883, and contained with amendments in Revisal 1905, c. 51, have made such distinct recognition of deeds of this character, more especially in Revisal 1905, §§ 2116, 2108, 2107, etc., that we are constrained to hold that public policy with us is no longer peremptory on this question, and that under certain conditions these deeds are not void as a matter of law. This change in our public policy which has been not inaptly termed and held synonymous with the "manifested will of the state" (*Jacoway v. Denton*, 25 Ark. p. 634), has been already recognized in several of our decisions, as in *Ellett v. Ellett*, at last term, 157 N. C. 161, 72 S. E. 861; *Smith v. King*, 107 N. C. 273, 12 S. E. 57; *Sparks v. Sparks*, 94 N. C. 527. And, while there are some differences in the matter of form and in the conditions requisite to their validity and their effect when executed, the general proposition as to the validity of these deeds in so far certainly as they concern property rights is in accord with that long established in England (*Hill v. Hill*, 1. H. L. cases 1847-48, 553, and notes to *Stapelton v. Stapelton*, 2 White & Tudor, Leading Cases in Equity, part 2, pp. 1675-1697-1698), and which has generally prevailed with the courts in this country (*Walker v. Walker*, 76 U. S. 743, 19 L. Ed. 814; *Commonwealth v. Thomas Richards*, 131 Pa. 209, 18 Atl. 1007; *Carey v. Mackey*, 82 Me. 516, 20 Atl. 84, 9 L. R. A. 113, 17 Am. St. Rep. 500; *Aspinwall v. Aspinwall*, 49 N. J. Eq. 302, 24 Atl. 926. All of them so far as examined except in New Hampshire. *Hill v. Hill*, 74 N. H. 288, 67 Atl. 406, 12 L. R. A. [N. S.] 848, 124 Am. St. Rep. 966; *Foot v. Nickerson*, 70 N. H. 496, 48 Atl. 1088, 54 L. R. A. 554). While our statute, as stated, recognizes these deeds as valid, it makes no definite regulation as to their contents or their effect when made, except in 2116, which provides in general terms that when a woman is living separate from a husband, either under a judgment of divorce or a deed of separation executed by the hus-

band and wife and registered in the county where she resides, she shall be deemed and held a free trader, with power to dispose of her personal and real estate without her husband's assent, and, the question being to a great extent without authoritative decision in this state, we must recur for guidance to the general principles applicable and to well-considered precedents elsewhere as to the nature of these instruments and the conditions and circumstances under which they may be properly upheld. From a consideration, then, of the authorities we take it as established that articles or deeds of separation are permissible where the separation has already taken place or immediately follows, but that agreements looking to a future separation of husband and wife will not be sustained; and from the apparent weight of opinion it seems in making such agreements under the circumstances indicated the parties must be moved to it by adequate reasons, and not from mere "mutual volition or caprice" under circumstances of such character as to "render it reasonably necessary to the health or happiness of the one or the other." A position well stated in a case from Montana as follows: "An agreement between husband and wife providing for a separation, an adjustment of their respective interests in property, and for the future support and maintenance of the wife is valid only when it is to take effect at once, and is immediately complied with, and when the marital relations are of such a character as to render a separation necessary for the health or happiness of one or the other. Mere willingness to live apart is not enough. Neither will the agreement be enforced when it is the result of mutual caprice or reckless disregard of marital obligations. Neither will such an agreement be enforced when it is to be used as a means to facilitate a divorce. \* \* \* Held, accordingly, a demurrer to the complaint was properly sustained, where the complaint alleges the agreement to live apart, the mutual obligations thereunder, and the breach of the contract by the husband, but neither the agreement nor the complaint contains any statement of facts showing the necessity or cause for such separation." *Stebbins v. Morris*, 19 Mont. 115, 47 Pac. 642. This case and the principle it sustains is referred to with approval in a full and learned note to *Baum v. Baum*, 109 Wis. 47, 85 N. W. 122, 53 L. R. A. 650, and reported in 83 Am. St. Rep. at pages 854-866. The note in question, however, refers to an opinion by Sanborn, Judge, in *Daniels v. Benedict*, 97 Fed. 867, and 369, 88 C. C. A. 592, 594, as a "well-considered case," and in which a contrary view is taken, the case holding, among other things, that the relations existing between husband and wife as justifying a deed of this kind must be left to the determination of the parties interested, and that the "courts cannot inquire into the sufficiency of the reasons as

affecting the validity of the agreement." It may be that our statutes (2107, 2108), hereinafter more particularly referred to, resolves this question in favor of the federal decision, and the difference appearing in these cases is not perhaps of the first importance, as it will be a very rare occurrence when a deed of the kind is made without adequate reason moving the parties. A condition assuredly present in the case before us.

[2] It is further established that, if the parties resume the conjugal relations, the agreement will be rescinded. This has been directly held with us in *Smith v. King*, 107 N. C. 273, 12 S. E. 57, and is in accord with the weight of authority. *Zimmer v. Settle*, 124 N. Y. 37, 26 N. E. 341, 21 Am. St. Rep. 638; *Tiffany on Persons and Domestic Relations*, p. 168.

[3] Again, it is held "that such an agreement must be reasonable, just and fair to the wife, having due regard to the conditions and circumstances of the parties at the time when made." *Garver, Ex'r, v. Miller*, 16 Ohio St. 528; *Hutton v. Hutton*, 3 Pa. 100.

[4] The authorities also hold that these agreements, even when valid, do not affect the right of the parties to sue for a divorce for causes occurring either before or after they are entered. *Bailey v. Bailey*, 127 N. C. 474, 37 S. E. 502; notes to *Baum v. Baum*, 83 Am. St. Rep. 873.

[5] And, while the American courts hold that deeds of separation are so far imperfect obligations that they will not be specifically enforced in that feature which contemplates or provides for the separation of the parties (*Aspinwall v. Aspinwall*, 49 N. J. Eq. 302, 24 Atl. 926, supra), when a suit for divorce is entered and the same is obtained, the agreement if otherwise valid and in so far as it affects the property rights involved should be respected by the decree (*Galusha v. Galusha*, 116 N. Y. 635, 22 N. E. 1114, 6 L. R. A. 487, 15 Am. St. Rep. 453). On the record, therefore, we could not, as formerly, declare the deed void in law as against the present public policy of the state, and, if the matter were presented only in that aspect, we would feel constrained to uphold the deed or in any event remand the case for a fuller finding as to whether the instrument in question was a fair and just arrangement.

[6, 7] We are of opinion, however, that the judgment of the lower court should be sustained for the reason on which his honor, no doubt, acted, that the deed in question is not executed in the form and manner required by our law to make it a binding agreement. On the matter of form a large number of the states upholding these deeds have heretofore maintained that the interposition of a trustee was necessary as in *Stephenson v. Osborne*, 41 Miss. 119, 90 Am. Dec. 358. This was based partly on the principle of the absolute identity of person in the case of husband and wife, which prevented their making con-

tracts directly between them, a principle approved and acted on in the English courts, and which prevailed to a great extent in North Carolina prior to the Constitution of 1868. *Barbee v. Armistead*, 32 N. C. 530, 51 Am. Dec. 404. A number of courts, however, have always maintained a contrary view, as in *Jones v. Clifton*, 101 U. S. 225, 25 L. Ed. 908; *Randall v. Randall*, 37 Mich. 563; *Commonwealth v. Richards*, 131 Pa. 209, 18 Atl. 1007, supra, etc.; and in this respect, also, a change has been wrought in our law and public policy, not only as manifested by the general provisions of the Constitution of 1868 and subsequent statutes, but more directly by express legislative enactment. Revisal 1905, §§ 2107, 2108, 2116. Section 2107 provides that no contract between husband and wife made during coverture shall be valid to affect or charge any part of the wife's real estate or the accruing income thereof for a longer time than three years, etc., or to impair or change the body or capital of her personal estate, unless in writing, etc.; the wife's privy examination to be taken with an additional certificate of the examining officer that the "same is not unreasonable or injurious to her," etc. Section 2108 provides that contracts between husband and wife not forbidden by the preceding section, and not inconsistent with public policy, are valid, and subject to the preceding section. Any married person may release or quitclaim dower tenancy by the curtesy, and all other rights which they may respectively acquire, or have acquired, by marriage in the property of the other, and such releases may be pleaded in bar of any action or proceeding for the recovery of the rights so released. While the presence of a trustee is clearly dispensed with by these enactments, it will be noted that by section 2107, in order to bind the wife by contract with the husband which may affect or charge her real estate, etc., for a longer period than three years or to impair or change the body or capital of her personal estate, the contract must be in writing, her privy examination taken, and, in addition to the ordinary form, there must be the additional certificate that the same is not unreasonable or injurious to her. The section concluding as follows: "The certificate of the officer shall state his conclusions, and shall be conclusive of the facts therein stated. But the same may be impeached for fraud as other judgments may be." Section 2108 in express terms subjects to requirements of 2107 contracts between husband and wife which purport to release a quitclaim dower curtesy, and "all other rights which they might respectively acquire or may have acquired in the property of each other." While we have held that an allowance by way of alimony may be predicated in some instances on the capacity of the husband to labor (*Muse v. Muse*, 84 N. C. 35), this right of a married woman to support and maintenance is primarily a property right, or

may be, and very usually is, made very largely dependent on amount of property owned by the husband (Taylor v. Taylor, 93 N. C. 418, 53 Am. Rep. 460; Nelson on Divorce and Separation, §§ 908-909). Our decisions are to the effect that the identity of person between husband and wife in reference to their right to contract with each other is not further relaxed or affected than is specified and required by the Constitution and statutes (Armstrong v. Best, 112 N. C. 59, 17 S. E. 14, 25 L. R. A. 188, 34 Am. St. Rep. 473; Sims v. Ray, 96 N. C. 87, 2 S. E. 443), and this section 2108 by correct interpretation clearly contemplates that a deed of the kind presented here "surrendering dower and all personal and property rights which she may have acquired against the person and property of her husband" shall only be upheld when it complies with the forms established and required by section 2107. On this ground, therefore, the ruling of the lower court holding that the instrument is void and of no effect on the right of these parties, is affirmed.

No error.

(158 N. C. 418)

DANIELS et al. v. ROANOKE R. & LUMBER CO.

(Supreme Court of North Carolina. March 20, 1912.)

**1. TRESPASS (§ 19\*)—INJURY TO LAND—TITLE TO SUPPORT ACTION.**

To recover for a trespass to the freehold, plaintiff must have had title at the time of the injury complained of.

[Ed. Note.—For other cases, see Trespass, Cent. Dig. §§ 18-31; Dec. Dig. § 19.\*]

**2. VENDOR AND PURCHASER (§ 218\*)—RIGHT AS TO TRESPASS—ACTION.**

A conveyance of land would not transfer the grantor's right of action for damages for a trespass theretofore accruing.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 456; Dec. Dig. § 218; Trespass, Cent. Dig. § 24.]

**3. CORPORATIONS (§ 518\*)—ACTIONS—DENIAL OF CORPORATE EXISTENCE—EFFECT.**

While ordinarily only the state may question the right of a corporation to exist, a denial of corporate existence in an action by a corporation requires some proof of corporate existence by plaintiff.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2028, 2086, 2087; Dec. Dig. § 518.\*]

**4. CORPORATIONS (§ 34\*)—DENIAL OF CORPORATE EXISTENCE—ESTOPPEL.**

Persons who conveyed land to a company as a corporation or received a conveyance from it as such are estopped to deny its corporate existence.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 81-96; Dec. Dig. § 34.\*]

**5. CORPORATIONS (§ 34\*)—DENIAL OF EXISTENCE—ESTOPPEL BY CONDUCT.**

Copartners, who permitted a partnership to be held out as a corporation and to receive and execute deeds and institute actions as such,

would be estopped to deny its existence as a corporation.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 81-96; Dec. Dig. § 34.\*]

**6. PARTNERSHIP (§ 68\*)—CONVEYANCES.**

A deed executed to a partnership in the partnership name is not void.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 101-111; Dec. Dig. § 68.\*]

**7. PARTNERSHIP (§ 197\*)—ACTIONS BY FIRM—ACTION IN PARTNERSHIP NAME.**

A partnership may maintain an action in the partnership name, in the absence of an objection by defendant that the copartners are not parties.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. § 360; Dec. Dig. § 197.\*]

**8. VENDOR AND PURCHASER (§ 219\*)—DAMAGES FROM TRESPASS—APPORTIONMENT BETWEEN PARTIES.**

One sued in trespass by several plaintiffs, who were successive owners of the land, cannot determine how the damages awarded shall be apportioned.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 453-460; Dec. Dig. § 219.\*]

**9. LOGS AND LOGGING (§ 3\*)—CONVEYANCE OF STANDING TIMBER—CONSTRUCTION—PROPERTY CONVEYED.**

A deed of timber of a specified size excepted cedar and gum trees, but provided that grantee might take and use such of the dead and down timber under the size therein conveyed, "including small gum," upon said lands as was necessary to enable it to construct and maintain railroads and for all other purposes incident to the removal of the timber. Held, that the failure to include cedar in the reference to "small gum" showed that the right to use cedar under the size conveyed was not granted.

[Ed. Note.—For other cases, see Logs and Logging, Cent. Dig. §§ 6-12; Dec. Dig. § 3.\*]

**10. APPEAL AND ERROR (§ 1048\*)—WITNESSES (§ 247\*)—HARMLESS ERROR—ADMISSION OF EVIDENCE.**

In an action against a railroad and lumber company for destruction of timber along the track by fire, any impropriety in the form of an answer to a question to a witness for plaintiff "along about the time those fires took place, what was the condition of the engine as to emitting sparks?" that "it was in bad condition," was not reversible; the answer being equivalent to saying that the engine emitted considerable sparks, especially where his whole examination shows that he was required to state what he meant by "bad condition."

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4140-4145, 4151, 4158-4160; Dec. Dig. § 1048; Witnesses, Cent. Dig. §§ 858-860; Dec. Dig. § 247.\*]

**11. RAILROADS (§ 481\*)—FIRES—ACTIONS—ADMISSION OF EVIDENCE.**

Evidence was admissible, in an action against a railroad company for firing timber, as to the bad condition of the engine in emitting sparks about the time the fires occurred; that its condition was such that if one stopped near the engine it would set their clothes on fire being material to the claim that the timber was fired from defendant's engine.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1717-1729; Dec. Dig. § 481.\*]

Appeal from Superior Court, Pamlico County; Ferguson, Judge.

Action by L. G. Daniels and others against

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

the Roanoke Railroad & Lumber Company. From a judgment for plaintiffs, defendant appeals. Affirmed.

This action is brought by L. G. Daniels and the Atlantic Coast Forest Preserve & Improvement Company to recover damages alleged to have been caused by the negligence of the defendant in setting out fire, damages for cutting timber under the size permitted by a deed under which the defendant claims, and for cutting cedar which the plaintiffs claim is not conveyed by said deed. The summons was issued on the 18th day of August, 1909.

On the 22d of May, 1906, the plaintiff Daniels executed a deed to the defendant Lumber Company conveying "all of the timber trees of every description on the land described (except cedar and gum) now standing or growing or which may be standing or growing during the ensuing term of six years from and after the first day of January, 1907, and which when cut will measure as much as or more than ten inches in diameter at the base, that is to say, eighteen inches above the ground" on the land described therein; and this deed further conveyed to the defendant "all the rights, privileges and easements which ordinarily are incident to and necessary for the removing of the timber conveyed, or to the cutting, rafting and removing of same," and also conveyed to defendant the right to use such dead trees and down timber, earth, underbrush, and timber under the size mentioned therein conveyed, including small gum upon said land, as may be necessary for the purpose of constructing, maintaining, and operating said roads and railroads, and for operating any locomotive or other machinery, and for all other purposes necessary and incident to the cutting, rafting, and removal of said timber. On the 17th day of December, 1908, the said L. G. Daniels conveyed the land described in the complaint, subject to the timber rights of said Lumber Company, to Albin Daniels, and on the next day, December 18, 1908, the said Albin Daniels executed a deed, conveying said land, subject to said timber rights, to the plaintiff, the Atlantic Coast Forest Preserve & Improvement Company, and on April 1, 1910, said company undertook to execute a deed reconveying said land, subject to said timber rights, to the plaintiff L. G. Daniels. In the deed executed by Albin Daniels, the plaintiff Improvement Company is described as a corporation under the laws of Massachusetts, and in the deed of April 1, 1910, the said company is also described as a corporation of Boston, Mass. Objection was made to the introduction of the last-named deed upon the ground of defective probate, and the attestation clause, the execution, and probate are as follows:

"In testimony whereof, the said party of the first part hath caused these presents to be executed in its name by its president and

attested by its secretary and its corporate seal to be hereunto affixed the day and year first above written. Atlantic Coast Forest Preserve & Improvement Company, by Alvah G. Sleeper, President, Claude H. Daniels, Clerk. Witnesses to signature: Moses H. Libby, Nellie Orton. [Notarial Seal.]

"Commonwealth of Massachusetts. [Notarial Seal.] Suffolk, ss.—Boston, April 1, 1910. There personally appeared the above-named Alvah G. Sleeper and acknowledged the foregoing instrument to be his free act and deed, before me. Walter E. Brownell, Notary Public.

"State of Minnesota, County of St. Louis—ss.: This is to certify that on the 30th day of April, 1910, before me personally came C. H. Daniels, clerk, with whom I am personally acquainted, who being by me duly sworn, says: That Alvah G. Sleeper is the president of the Atlantic Coast Forest Preserve & Improvement Company, the corporation described in and which executed the foregoing instrument, that he knows the common seal of said corporation; that the seal affixed to the foregoing instrument is said common seal and the name of the corporation was subscribed thereto by the said president, and that said president and clerk subscribed their names thereto and said common seal was affixed all by order of the board of directors of said corporation, and that the said instrument is the act and deed of said corporation. Witness my hand and seal the day and year above written. Nellie Orton, Notary Public. [Seal.] My commission expires the day A. D. 1910. Notary Public, St. Louis County, Minn. My commission expires Aug. 28, 1912. State of Minnesota, County of St. Louis—ss.

"North Carolina, Pamlico County. The foregoing certificate of Walter E. Brownell, notary public of the state of Massachusetts, and the certificate of Nellie Orton, notary public of St. Louis county, state of Minnesota, are adjudged to be correct. Let the instrument with the certificates be registered. Witness my hand, this the 5th day of August, 1910. Geo. T. Farnell, C. S. C."

There was evidence on the trial that, at the time of the execution to the defendant Lumber Company of the deed of May 22, 1906, from 125 to 150 acres of the land had cedar on it; that soon thereafter said defendant took possession of said land and began cutting and removing timber, which it continued for several years; and that at the conclusion of its operations very little cedar was on the land. There was also evidence of two fires, one in September, 1909, and the other in October of the same year, which injured the property of the plaintiff, and also that the defendant had cut timber under the size allowed by its deed. The defendant offered evidence to the contrary; but it is not necessary to state the evidence of either party more fully, as the motion of the defendant

to nonsuit is not upon the ground that there is no evidence to support the findings of the jury, except as to the first issue, and the evidence on that issue has been stated.

At the conclusion of the evidence, the defendant moved for judgment of nonsuit, upon the following grounds, as shown by the brief of the defendant: "That the plaintiffs have offered evidence showing the conveyance of title to the timber to the defendant by plaintiff L. G. Daniels, and have further offered in evidence a deed from L. G. Daniels to Albin Daniels, prior to the date of the alleged trespass, and that there is no right of L. G. Daniels to recover for any trespass that may have been committed (if any) in any view of the case between the date of the deed to Albin Daniels and date of the deed from Atlantic Coast Forest Preserve & Improvement Company to L. G. Daniels, to wit, between December 17, 1908, and the 1st day of April, 1910. That the conveyance having been made prior to the alleged trespass, divested him of all right of action during the time the title rested in Albin Daniels and the other date. The trespass having been committed between December, 1908, and April, 1910, upon all the evidence then there was no right of action in the Atlantic Coast Forest Preserve & Improvement Company, they having made a conveyance to L. G. Daniels of the land without reserving any rights of action, and there being no evidence as to their corporate existence (the corporate existence being alleged in the complaint and denied in the answer) then there is no right of recovery in the Atlantic Coast Forest Preserve & Improvement Company. If there were evidence of trespass prior to December, 1908, then L. G. Daniels, having conveyed fee-simple title, without reserving to himself the rights of action for alleged trespass, he would not be entitled to maintain his action for recovery of damages thereafter"—and that no actual possession of the land had been shown in either of the plaintiffs. The motion was denied, and defendant excepted.

The defendant requested that the following instructions be given to the jury: "(1) If the jury shall find from the evidence that any cedar was cut or used by defendants, the court charges you that under the provisions of said deed they had the right to use such cedar under the size of 10 inches in diameter at the stump, 18 inches above the ground, and such dead and down cedar, along with other undersized timber, as was necessary in the construction of its roads, engines, and machinery on said land. (2) That the defendants had the right to cut out such cedar trees as were in its roadways, and plaintiffs are not entitled to recover anything for cedar so cut and moved out of the rights of way in the construction and operation of its road upon said land." The first was refused and the defendant excepted, and the second was substantially given.

There are three exceptions to evidence, which will be referred to.

The issues and the answers thereto are as follows: (1) Is plaintiff Atlantic Coast Forest Preserve & Improvement Company a corporation? Answer: Yes. (2) Did defendants wrongfully and negligently set fire to and burn plaintiff's land, timber, and trees, as alleged in the complaint? Answer: Yes. (3) If so, what damages are plaintiffs entitled to recover therefor? Answer: \$1,500. (4) Did defendants wrongfully and negligently cut and destroy plaintiff's cedar trees and cedar timber, as alleged? Answer: Yes. (5) If so, what damages are plaintiffs entitled to recover by reason thereof? Answer: \$500. (6) Did defendants wrongfully and negligently cut and destroy plaintiffs' timber and trees other than cedar, not conveyed in said deed, as alleged? Answer: No. (7) If so, what damages are plaintiffs entitled to recover by reason thereof? Answer:

Judgment for the plaintiffs, and defendant excepted and appealed.

Moore & Dunn and Small, MacLean & McMullan, for appellant. Simmons & Ward, H. L. Gibbs, and T. D. Warren, for appellees.

ALLEN, J. No objection is made by answer or demurrer that there is a misjoinder of parties or causes of action, and no exception presents the question of the right of the plaintiffs to recover for trespasses committed after the commencement of the action. We do not intimate that such objections would have been sustained, and refer to them only for the purpose of excluding the idea that they were relied on, and are embraced in the motion for judgment of nonsuit. The defendant says that, upon the facts admitted, neither of the plaintiffs is entitled to maintain this action; that the plaintiff L. G. Daniels cannot do so as to trespasses committed prior to December 17, 1908, because on that day he conveyed the land to Albin Daniels, without reserving the right of action, nor as to trespasses after that date, because he had parted with his title to the land; and that the plaintiff Improvement Company has no right to sue, because its corporate existence is denied in the answer, and no evidence has been introduced to establish its incorporation, and further, if a corporation, having executed a deed of date April 1, 1910, conveying the land without reserving its right of action, it now has no right to sue. We will consider these questions in their order, and first as to the right of the plaintiff Daniels, and this depends on the effect of his deed to Albin Daniels.

[1, 2] The plaintiffs do not allege, as a cause of action, an injury to their possession, which would be sufficient to maintain an action for trespass (*Frisbee v. Marshall*, 122 N. C. 760, 30 S. E. 21), but they seek to recover damages for injury to the freehold—the land itself—and it therefore was neces-

sary to show title at the time of the injury complained of. If so, the plaintiff Daniels could not recover damages accruing after the execution of his deed of December 17, 1908; but we do not think this deed, which purports only to convey the land, has the effect of transferring to the grantee his right of action for damages accruing prior to its execution. *Liverman v. Railroad*, 114 N. C. 696, 19 S. E. 64; *Drake v. Howell*, 133 N. C. 168, 45 S. E. 539. In the last case cited, the plaintiff sought to recover damages for cutting timber on certain land, and the court, among other things, said: "There is an allegation in the pleadings that the plaintiffs have acquired the title to the Britt tract since this action was commenced; but this, if true, cannot help them, as a conveyance of title to the land after the defendants had committed the alleged trespass would not pass the right to the damages claimed by the plaintiffs. Such damages are personal to the owner of the property and do not pass to his grantees. *Liverman v. Railroad*, 114 N. C. 692 [19 S. E. 64]."

The right of the Improvement Company to sue depends upon the solution of other questions. The defendant denies that this plaintiff is a corporation, and it says, if there is no evidence of its corporate existence, that the deed of Albin Daniels to the Improvement Company has no effect, and that therefore the title remained in Albin Daniels, and that there can be no recovery of damages for acts committed after December 17, 1908, the date of the deed, as Albin Daniels is not a party plaintiff, and it contends further that the failure to prove that the company is a corporation incapacitates it to sue. We must then inquire: (1) Is there evidence that the Improvement Company is a corporation? (2) If not, how does this affect the title to the land and the right to sue?

[3] Ordinarily, the right to question the exercise of corporate powers is with the state and cannot be raised collaterally; but it has been held in this state that a denial of corporate existence in an answer requires some proof on the part of the plaintiff. This may be furnished by the introduction of a charter and evidence of its acceptance, by evidence of the exercise of the powers of a corporation for a long time without objection, by estoppel, and in other ways, and we are inclined to the opinion that the fact that all of the parties claim under L. G. Daniels, that Albin Daniels, in his deed of December 18, 1908, described the Improvement Company as a corporation, that the Improvement Company executed the deed of April 1, 1910, as a corporation, and that during the whole of this period the defendant was in the use and occupation of the land, is evidence of the fact; but, if this is not so, the defendant is in no way prejudiced by the failure of strict proof.

[4, 5] Albin Daniels held the title to the land one day, and there is no evidence of a trespass on that day. He conveyed to the Improvement Company as a corporation, and the Improvement Company as a corporation conveyed to the plaintiff L. G. Daniels. It follows that Albin Daniels and L. G. Daniels are estopped to deny the corporate existence of the company, and, if it is in fact a partnership, the estoppel would extend to its members, who have permitted it to be held out as a corporation, and to receive and execute deeds, and to institute actions as such. If so, all the parties who could make any claim against the defendant, covering the time when the trespasses are alleged to have been committed, are bound by the estoppel, and neither can deny that the Improvement Company is a corporation, and it is not, therefore, important to the defendant whether, as matter of fact, it is a corporation. If, however, material to the decision of this case, and it appeared that the Improvement Company was a partnership and not a corporation, it would not necessarily follow that the action could not be maintained by it.

[6] A deed to a partnership by the partnership name is not void (*Murray v. Blackledge*, 71 N. C. 492; *Simmons v. Allison*, 118 N. C. 776, 24 S. E. 716; *Grabbs v. Insurance Co.*, 125 N. C. 394, 34 S. E. 503); and a judgment in favor of a partnership, without giving the names of the partners, is valid. *Wall v. Jarrett*, 25 N. C. 42; *Lash v. Arnold*, 53 N. C. 206. These last cases were cited with approval in *Heath v. Morgan*, 117 N. C. 507, 23 S. E. 489, in which it was held that the action could not be maintained in the partnership name, because objection to the absence of the individuals as parties was taken by demurrer. *Kochs Co. v. Jackson*, 158 N. C. 326, 72 S. E. 382.

[7] In this case, the defendant does no more than deny that the Improvement Company is a corporation, and, if this is true, it may maintain the action in its partnership name, in the absence of objection by the defendant that the individuals composing the partnership are not parties.

[8] We are therefore of opinion that the plaintiff L. G. Daniels may recover damages for trespass committed prior to December 17, 1908, the date of his deed, and that the Improvement Company may recover for trespasses after that time, and also, as his honor held, that the defendant has no voice in the apportionment of the damages between them. *Hocutt v. Railroad*, 124 N. C. 217, 32 S. E. 681.

[9] We think his honor construed the deed correctly as to the right to cut cedar, and that he properly refused to give the instruction requested. The deed of the plaintiff Daniels to the defendant expressly excepts cedar and gum from the conveyance, and, in the clause allowing the use of timber un-

der the size conveyed, provides: "And it is also stipulated and agreed that the party of the second part shall have the further right to take and use such of the dead and down timber, earth and underbrush and timber under the size herein conveyed, *including small gum*, upon said lands, as may be necessary for the purpose of constructing and maintaining and operating the said roads and railroads, and for operating any locomotives or other machinery and for all other purposes necessary or incident to the cutting, rafting or removal of said timber." The mention of small gum in this clause, and the failure to refer to the cedar, excludes the idea that it was intended to extend the rights of the defendant as to the cedar. His honor instructed the jury that the defendant had the right to cut cedar when necessary to construct its roads or to move its machinery.

There are three exceptions to evidence. (1) To the evidence of a witness for the plaintiff, Edmund Jones: "Q. Along about the time those fires took place, what was the condition of the engine as to emitting sparks? A. It was in bad condition." (2) To the evidence of a witness for the plaintiffs, William Potter: "Q. Tell what you saw before this time and afterwards as to the engine emitting sparks. A. If we stopped near the engine, it would catch our cloths, and we would have to move out of the way." (3) To the introduction of the deed of April 1, 1910, from the Improvement Company to L. G. Daniels.

[10] The form of the answer of the witness Jones may be objectionable, but it is but another way of saying that the engine emitted a considerable quantity of sparks, and would not justify a reversal of the judgment, and his entire examination shows that he was required to state what he meant by "bad condition."

[11] The evidence of both witnesses was material to the claim that the defendant set out fire on the land, and competent.

It is not necessary to consider the objection to the introduction of the deed from the Improvement Company to L. G. Daniels, as both are parties plaintiff.

The record is voluminous, but we have examined it, and the briefs, with care, and find no error.

No error.

(158 N. C. 337)

ACKER et al. v. PRIDGEN.

(Supreme Court of North Carolina. March 20, 1912.)

# 1. DEEDS (§ 97\*)—CONSTRUCTION—GRANTING AND HABENDUM CLAUSES.

While the granting clause ordinarily governs the habendum clause, if it clearly appears that grantor's intention was to enlarge

or restrict the estate given by the granting clause, the habendum clause controls.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 267-273, 434-447; Dec. Dig. § 97.\*]

## 2. DEEDS (§ 129\*)—ESTATE CONVEYED—REMAINDER—"HEIRS."

The premises of a deed to man and wife read "unto the party of the second part and to their heirs and assigns forever," but the habendum read "to have and to hold the said property \* \* \* during the term of their natural lives, and after their death, to P. and B., and any other child or children that may be begotten" by grantee and his wife during marriage, "to them and their assigns forever." *Held*, that the word "heirs" in the premises was used in the sense of children, so that grantees only took a life estate with remainder over to their children.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 360-365, 416-435; Dec. Dig. § 129.\*]

For other definitions, see Words and Phrases, vol. 4, pp. 3241-3265; vol. 8, pp. 7677, 7678.]

## 3. DEEDS (§ 97\*)—PERSONS TAKING—GRANTEES IN HABENDUM CLAUSE.

While a stranger to a deed cannot be made a grantee by the habendum clause, a remainder may be limited over to him by it, if the entire deed shows that to be the intention of the parties.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 267-273, 434-447; Dec. Dig. § 97.\*]

## 4. HUSBAND AND WIFE (§ 47\*)—CONVEYANCES BETWEEN—BONA FIDE PURCHASER.

One purchasing property from her husband for a merely nominal consideration is not a bona fide purchaser for value, but only takes the husband's interest.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 232-241; Dec. Dig. § 47.\*]

## 5. PERPETUITIES (§ 4\*)—REMAINDER TO PERSONS NOT IN BEING.

A remainder over to persons in being after the termination of life estates could be created at common law.

[Ed. Note.—For other cases, see Perpetuities, Cent. Dig. §§ 4-44; Dec. Dig. § 4.\*]

Appeal from Superior Court, New Hanover County; Allen, Judge.

Action by George Acker and wife and others against Elizabeth L. Pridgen. From a judgment for plaintiffs, defendant appeals. Affirmed.

H. McClammy and S. M. Empte, for appellant. E. K. Bryan and Bellamy & Bellamy, for appellees.

BROWN, J. On August 12, 1882, Moses Moore conveyed the land in controversy to John Pridgen and wife, Peggie; the premises being "unto the party of the second part and to their heirs and assigns forever," and the habendum being "to have and to hold the said property unto John Pridgen and wife, Peggie, during the term of their natural lives, and after their death to Marion Pridgen, Ellen Beatty, and any other child or children that may be begotten by him at any time during his marriage with Peggie Pridgen, his wife, to them and their assigns forever." Peggie Pridgen died, and John Pridgen married the defendant in 1889, and

on October 13, 1904, for the nominal consideration of \$5 executed a deed in fee to the defendant for the land in controversy. John Pridgen died August 10, 1905. The judge below held that John Pridgen took only a life estate under the Moore deed, and that the remainder over to Marion Pridgen and others was good, and that the plaintiffs, the remaindermen, were entitled to recover.

In their brief the learned counsel for defendant state "that under the decisions as lately enunciated by our Supreme Court, the court has correctly decided this case, following the authority in the case of Triplett v. Williams, 149 N. C. 394 [63 S. E. 79, 24 L. R. A. (N. S.) 514], and supported in principle in the cases of Condor v. Secrest, 149 N. C. 201 [62 S. E. 921], and Sprinkle v. Spalnhour, 149 N. C. 223 [62 S. E. 910, 25 L. R. A. (N. S.) 167]." They argue at length and with much earnestness that those decisions should not be followed, but overruled. In the Triplett Case, which has been repeatedly cited and approved in subsequent opinions of this court, we admitted the technical effect of the ancient rule of the common law as applied to the construction of deeds; but we also recognized the more enlightened rules of construing deeds, which have obtained in all the courts of the country, and as well as in the English courts, in a more enlightened age. It is said in that case: "But this doctrine, which regarded the granting clause and the habendum and tenendum as separate and independent portions of the same instrument, each with its especial function, is becoming obsolete in this country, and a more liberal and enlightened rule of construction obtains, which looks at the whole instrument without reference to formal divisions, in order to ascertain the intention of the parties, and does not permit antiquated technicalities to override the plainly expressed intention of the grantor." In that opinion there are cited an array of cases and text-writers in support of the views there expressed. This more enlightened rule of construction has been previously recognized and stated by Mr. Justice Walker in *Gudger v. White*, 141 N. C. 513, 54 S. E. 388, in these words: "It is not difficult by reading the deed to reach a satisfactory conclusion as to what the parties meant, and we are required by the settled canon of construction so to interpret it as to ascertain and effectuate the intention of the parties. Their meaning, it is true, must be expressed in the instrument; but it is proper to seek for a rational purpose in the language and provisions of the deed, and to construe it consistently with reason and common sense. If there is any doubt entertained as to the real intention, we should reject that interpretation which plainly leads to injustice, and adopt that one which conforms more to the presumed meaning, because it does not produce unusual and unjust results."

[1] Those writers and courts who recog-

nize the generally preponderating influence of the premises of a deed in determining the estate conveyed admit that there are instruments in which the intention of the grantor is so plainly manifested in the habendum that it will control the premises. Mr. Devlin, in his work on Deeds, says: "It may be formulated as a rule that where it is impossible to determine from the deed and surrounding circumstances that the grantor intended the habendum to control, the granting words will govern; but if it clearly appears that it was the intention of the grantor to enlarge or restrict the granting clause by the habendum, the latter must control." 1 Dev. on Deeds, § 215; *Bodine v. Arthur*, 91 Ky. 53, 14 S. W. 904, 34 Am. St. Rep. 162; *Fogarty v. Stack*, 86 Tenn. 610, 8 S. W. 846; *Barnett v. Barnett*, 104 Cal. 298, 37 Pac. 1049; *Moore v. Waco*, 85 Tex. 206, 20 S. W. 61; *Doren v. Gillum*, 136 Ind. 134, 35 N. E. 1101. Even the common-law judges did not always confine themselves to the strict letter of the law in construing deeds, and applying the rule in *Shelly's Case*. We find it not uncommon to construe "bodily heirs," or even the word "heirs" itself, to mean children, or issue, when the context of the instrument plainly indicated the manifest intention. *Puckett v. Morgan*, 74 S. E. 15, at this term.

[2] That the grantor, Moore, used the word "heirs" in the premises in the sense of children, is plainly manifest from the context of the entire deed. The words of the habendum qualify and explain what is stated in the premises, and in the habendum the children are specified who are to take in remainder, viz., the two plaintiffs, Marion Pridgen, Ellen Beatty, children by former marriages, and any other child of John Pridgen and his wife Peggie. The fact that their names are not mentioned as among the formal parties to the deed does not avoid the limitation by way of remainder.

[3] While a stranger to a deed cannot be introduced in the habendum clause to take as grantee, he can take in remainder by way of limitation, when by construction of the entire instrument it appears that the intention of the parties is given effect. *Condor v. Secrest*, 149 N. C. 201, 62 S. E. 921.

The defendant invokes the doctrine of stare decisis, and claims that a rule of property had been established by the older decisions which should protect her title. We do not think the principle laid down in *Hill v. Brown*, 144 N. C. 117, 58 S. E. 693; *Hill v. R. R.*, 143 N. C. 539, 55 S. E. 854, 9 L. R. A. (N. S.) 606, can be properly applied here.

[4] In the first place, the defendant acquired the property by deed from her husband, John Pridgen, the life tenant, in 1904 for a nominal consideration only. She is not a purchaser for value, and stands in no better attitude than her grantor.

[5] In the second place, such a remainder as is created in favor of these plaintiffs in the Moore deed could have been created in



the earliest stages of the common law. Blair v. Osborne, 84 N. C. 420; Shepherd's Touchstone, 151, 2 Roll Ab. 68.

The judgment of the superior court is affirmed.

(159 N. C. 213)

**REXFORD et al. v. PHILLIPS et al.**  
(Supreme Court of North Carolina. March 27, 1912.)

**1. TAXATION (§ 329\*)—ASSESSMENT—LISTING FOR TAXES.**

Revisal 1905, §§ 5217, 5222, 5227, provide that an owner in person shall list his property, and section 5218 provides that persons may appoint agents to list for them, while section 5233 provides that, if the owner fails to list at the appointed time, the chairman of the board of commissioners may list the land by inserting in the tax list the description and valuation of all property which shall be assessed with a double tax. Section 5232 provides for the collection of taxes on land which has escaped taxation for previous years by adding to the simple taxes of the current year all taxes due for preceding years with interest thereon. The tax lister listed land owned by plaintiff without his permission and in the name of another by him as agent. *Held*, that as the land was not described with any particularity, and as the listing was not in accordance with the statute, the listing was invalid and would not support an assessment; for, while the statute penalizes the owner's failure to list his land, such land must be listed in the manner prescribed, and, unless so listed, taxes levied are invalid, and the assessment will not support a tax sale.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 549, 550; Dec. Dig. § 329.\*]

**2. TAXATION (§ 332\*)—ASSESSMENT—TAX LIST—DESCRIPTION.**

The listing of land as a certain number of acres lying in a named township is too vague to support a valid assessment; the land being insufficiently described.

[Ed. Note.—For other cases, see Taxation, Dec. Dig. § 332.\*]

**3. TAXATION (§ 750\*)—TAX TITLES—DEEDS—VALIDITY.**

Revisal 1905, § 2903, provides that no purchaser of real estate for taxes shall be entitled to a deed until he shall have served written notice of his purchase, and of the date when the time for redemption shall expire, on every person in the actual possession or occupancy of the land, and on every person having a mortgage or deed of trust thereon recorded in the county, if by diligent inquiry he can be found, and notice by publication if actual service cannot be made. Section 2904 requires the purchaser to make affidavits to those facts before receiving a deed from the sheriff. *Held*, that a tax deed issued by the sheriff in the absence of such affidavit by the purchaser and of actual service of notice, even though notice was attempted by means of publication addressed to the owner, is invalid.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1497; Dec. Dig. § 750.\*]

**4. TAXATION (§ 750\*)—TAX TITLES—VALIDITY.**

The noncompliance of a purchaser under tax sale with Revisal 1905, §§ 2903, 2904, requiring him to give certain notice to those in possession, and to make affidavit to the giving of notice before receiving a deed, renders the deed void not only as to those interested persons who were not notified, but as to all.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1497; Dec. Dig. § 750.\*]

**5. TAXATION (§ 788\*)—TAX TITLES—DEEDS—PRESUMPTIONS.**

Under the direct provisions of Revisal 1905, § 2909, the presumption that land has been listed, raised by a sheriff's deed for land sold for taxes, is rebuttable.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1555, 1557, 1559-1569; Dec. Dig. § 788.\*]

**6. TAXATION (§ 788\*)—TAX TITLES—TAX DEEDS—PRESUMPTIONS.**

While Revisal 1905, § 2904, makes the affidavit of a purchaser of land sold for taxes prima facie evidence that the required notice has been given the owner, the sheriff's deed itself is not presumptive evidence that such notice has been given.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1555, 1557, 1559-1569; Dec. Dig. § 788.\*]

**7. TAXATION (§ 788\*)—TAX TITLES—TAX DEEDS—VALIDITY.**

One contesting the validity of a tax deed need not show that the land was exempt from taxation or that the taxes had been paid; that requirement of Revisal 1905, § 2909, applying only to valid tax deeds.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1555, 1557, 1559-1569; Dec. Dig. § 788.\*]

**8. TAXATION (§ 796\*)—TAX TITLES—CONTEST.**

Under Revisal 1905, § 2909, requiring a person questioning the title acquired by sheriff's deed to show that he had title to the property at the time of the tax sale, one claiming that the deed is a nullity need not show his title at that time; it being sufficient to show that his title is superior, unless the deed is valid.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1578-1581; Dec. Dig. § 796.\*]

**9. TAXATION (§ 831\*)—TAX TITLES—INVALIDITY.**

One who purchased land sold for taxes improperly assessed and taking a sheriff's deed which was void is entitled to be reimbursed by the owner upon the sheriff's deed being declared invalid.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1645; Dec. Dig. § 831.\*]

**10. TAXATION (§ 830\*)—COSTS ON APPEAL—REFUSAL OF TENDER.**

Defendant, who held an invalid tax title to the land in suit, having refused plaintiff's tender of reimbursement for taxes paid, is not entitled to costs, because the appellate court in affirming the judgment for plaintiff holds that defendant is entitled to reimbursement.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1645; Dec. Dig. § 830.\*]

Appeal from Superior Court, Graham County; Cline, Judge.

Action by C. H. Rexford and another against R. H. Phillips and others. From a judgment for plaintiffs, defendants appeal. Affirmed.

J. D. Murphy and Merrick & Barnard, for appellants. J. H. Merrimon, Stevens & Anderson, J. H. Tucker, and Adams & Adams, for appellees.

**WALKER, J.** This action was brought, under Revisal, § 1589, to determine the title to a certain tract of land, of which the plaintiff claims to be the owner, and which defendant claims under a tax deed executed by the sheriff to him in 1910. The action

was tried by the judge upon a case agreed, which is quite lengthy, and for that reason we will not set it out in full, but instead refer to the material facts in the course of this opinion. The case involves the validity of the tax deed, which plaintiff attacks upon several grounds, which we will consider in their order.

[1, 2] First. The land, we will assume for the present, belonged to C. H. Rexford, and he claimed it, in part at least, under a deed from A. C. Avery and others to J. S. Bailey and a deed from J. S. Bailey to himself, which describe the land by metes and bounds as containing 13,625 acres, with the exception of several tracts therein particularly described, the number of acres in which is not stated. On September 26, 1906, C. H. Rexford executed a deed in trust on part of the land to J. E. Rankin, to secure a debt of \$20,000 due to J. S. Bailey. In November, 1906, C. H. Rexford contracted with J. W. Kitchin to sell to him all of the said land, and this contract was assigned by Kitchin to a corporation known as the Kitchin Lumber Company. The deeds, the contract of sale, and the assignment were duly registered in Graham county, at and before the time of the transactions hereinafter set forth. C. H. Rexford did not list the land for taxation in 1907; but the tax lister for Yellow Creek township listed 6,587 acres of land in the name of J. W. Kitchin by him as agent, but without any authority so to do, as far as appears, and the number of acres was reduced on application of the tax lister, but without the knowledge or authority of Kitchin, to 4,352, that having been stated by him to be the correct number of acres by actual survey. The taxes for 1907-08 were paid by the son of Rexford with the latter's check. It is said in the case that the land was not listed in June, 1908, by any one, but the list taker merely copied the entry from the former tax book, and thus listed the same number of acres in the name of Kitchin for that year. It does not appear that he had any authority to do so. So it is the fact, as stated in the complaint, that C. H. Rexford did not list the land, nor did Kitchin, and the question, therefore, is whether what was done by the list taker in 1908 was a compliance with the statute. We do not think it was. There were two ways at that time for listing land for taxes. Revisal, §§ 5217, 5222, and 5227, provide that the owner, in person, shall list his property under oath, setting forth in detail how it shall be done, and section 5218 provides that certain persons may appoint agents to list for them. Section 5233 provides that, if the owner fails to list at the appointed time, the chairman of the board of commissioners shall list the same, in the name of the owner, by inserting in the tax list the description and valuation of all property not listed by him, and shall charge him with a double tax, and section 5232 provides for the collection of

taxes on land which has escaped taxation for previous years, by adding to the simple taxes of the current year all taxes due for preceding tax years, with 25 per cent. interest thereon. There is no provision in the law for the listing of land by a township tax lister, or in any other way than the one prescribed. It cannot be disputed that, under the statute authorizing the sale of land for taxes, it is necessary to show that the land has been listed for taxes. That is made by the law the first step in the process of assessment. It is the fundamental fact upon which the whole structure of taxation, in its various stages, must rest, and this listing must be done in the manner prescribed by the statute. If any argument were required to demonstrate this proposition, it is to be found in the provisions of the statute itself. If the owner or any other person or officer authorized to list the property should give a mistaken description of the same, the statute provides that the irregularity may be cured, or in certain cases disregarded, if the description is sufficiently definite "for any interested person to determine what property is meant or intended by the description," in which case the defective description may be perfected in the sheriff's deed. But this provision applies only when there has been a listing by the owner or some other person designated by the statute, and not where it is done officiously by a stranger. The Legislature has never provided that a person without authority in law or in fact may enter on the lists an indefinitely described number of acres in a township containing many thousand acres, not in the name of the owner but of some one else, and thereby confer authority to sell lands thus listed, and by the sheriff's deed pass the title to the lands of another person whose name does not appear in the list, and whose lands are not described therein, and who has never authorized the listing of his land by another, and whose land has not been listed by the chairman of the county commissioners, as required by law in case of the owner's default. Such a description of land as we have in this case is too vague to give to any one notice of the land assessed for taxation—it is no description at all, as it could be applied to any land in the township. *Holmes v. School District*, 11 Or. 332, 8 Pac. 287. The law penalizes a taxpayer for not listing his land by doubling his tax, but not by divesting his title. If he lists his land, or it is done by the proper officer, and then he fails to pay his taxes, he may lose the title in the manner prescribed by the statute. He does not forfeit it by not listing, but by not paying. There was no listing in this case, because authority is nowhere given to a list taker to enter property on the lists for assessment. The Legislature provided these safeguards for the just protection of the taxpayer, and law must be enforced as it is written. *Black on Tax Titles* (2d Ed.) § 105;

Whitney v. Thomas, 23 N. Y. 281; Desmond v. Babbitt, 117 Mass. 233; Bell v. Fry, 5 Dana (Ky.) 341; Martin v. Mansfield, 3 Mass. 419; Pearson v. Creed, 78 Cal. 144, 20 Pac. 302; Dubois v. Webster, 7 Hun, 371. The provisions of the law are adequate for the proper listing of property and the collection of taxes, and the Legislature did not intend that it should be confiscated without notice. The facts stated in the record present a strong case for the application of the rule and the enforcement of these plain provisions of the statute, for it is agreed by the parties that the sheriff and the defendant knew before the sale that they were attempting to sell C. H. Rexford's land; whereas, authority was only given to sell 4,352 acres, listed in the name of J. W. Kitchin.

[3] Second. But there are other fatal defects in the proceedings which invalidate the sheriff's deed. The statute (Revisal, § 2903) requires that the purchaser at the sheriff's sale shall serve written notice of his purchase, and of the date when the time of redemption will expire, "on every person in actual possession or occupancy of the land," and also "upon every person having a mortgage or deed of trust thereon, recorded in the county, if by diligent inquiry he can be found," and publication of the notice is required if actual service of the notice cannot be made. It appears that W. C. Heyser, representing the Brunswick-Balke-Collender Company, which claimed certain rights in the timber on the land, was in possession of a part of the land in controversy from December 25, 1909, to June 1, 1910, and that E. E. Deputy was in possession of the land, as tenant of C. H. Rexford, from the year 1904 until December 24, 1909. No notice was served by the defendant, as purchaser, on either of these persons. The defendant requested a finding that W. C. Heyser occupied land within one of the exceptions of the deed, but the court expressed its inability to so find, under the evidence. Defendant served a notice on Lampkin Farley, who occupied a part of the land near the Tennessee river, known as the Rymer boundary. No personal service of the notice was made on J. E. Rankin, trustee of J. S. Bailey, and no publication of a notice addressed to them by their names. There was published a notice to J. W. Kitchin, C. H. Rexford, "and whomsoever it may concern." There seems to be no provision in the statute for service or publication of the notice, except as to the person in whose name the land is listed, persons in actual possession of it, and persons having a mortgage or deed of trust upon it. No purchaser is entitled to a deed until the proper notice is given (Revisal, § 2903), and until he shall have made an affidavit that he has complied with the requirements as to notice, setting forth therein particularly the facts showing such compliance. Section 2904. This affidavit must be delivered to the sheriff before he executes the deed, and

he must file it with the register of deeds for registration. It then, and not until then, becomes prima facie evidence that the notice has been given. But the facts are before us in this case, and from them it appears that the notice was not served or published as the statute requires. It can make no difference under what claim or right W. C. Heyser held the possession. We are not concerned with that, as the statute directly, plainly, and positively provides that it shall be served, not upon any party in possession, or upon one or more of the parties, but "on every person in actual possession or occupancy of the land" (section 2903), and this without any qualification as to the character of the possession or the claim of the occupant. It will not be doubted, we suppose, that E. E. Deputy, tenant of Rexford, was a proper person to be notified. But the defendant, as purchaser, also failed to serve the notice personally on J. E. Rankin, trustee, or J. S. Bailey, for whom he held in trust, and he cannot be excused because he did not search for the trustee, because it is one of the facts in the case agreed that Rankin had lived in Asheville, N. C., for 35 years and could have been found by diligent inquiry, and in such a case it is provided that the notice shall be served upon him, and the publication of it as to him, if it had been made in this case, would not be sufficient. This is so because the statute says so, and no strict or liberal construction can make it otherwise. We have held that the giving of the notice by the purchaser in the manner prescribed by the statute is a condition precedent to the execution of a valid deed, and no presumption arises from the sheriff's deed that the proper notice had been given, but that the purchaser must show it. The present Chief Justice demonstrated this in *King v. Cooper*, 128 N. C. 347, 38 S. E. 924, and the case was approved in *Matthews v. Fry*, 141 N. C. 582, 54 S. E. 379, and *Warren v. Williford*, 148 N. C. 474, 62 S. E. 697. It appears also in the case that the defendant, as purchaser, has not presented his certificate of purchase or delivered any affidavit to the sheriff before or since he demanded or received the deed from him, nor has any such affidavit been filed with the register of deeds by the sheriff, as required by the statute. In these respects, therefore, defendant failed to comply with the statute. It is further stated as a fact that the sheriff did not read the deed before executing it, and did not know how the lands were described therein. He only knew he was conveying to defendant the lands he had purchased at the sale; that is, the 4,352 acres listed in the name of J. W. Kitchin. There are other departures from the statutory requirements; but, as those already mentioned are sufficient to invalidate the tax deed, we need not refer to them more particularly.

[4] The defendant contends, though, that

as to Rankin, trustee, the deed is void, if at all, only as to him; but this is not what the statute says, and we must execute the intention of the Legislature as it is expressed in its own words. The language is "that no purchaser at a tax sale, or his assignee, shall be entitled to a deed" until he shall have served the required notice "on any person having a mortgage or deed of trust upon the land," not that the deed shall be good in part, but that it shall be void as a whole; the apparent purpose being to notify the mortgagee and, through him, the owner of the land, so that they may save their rights, if it be necessary to inquire as to the purpose.

[5] It is also urged that Revisal, § 2909, makes the deed "presumptive evidence of certain facts," and, among others, that the land had been listed; but this is only a rebuttable presumption and is fully rebutted by the facts agreed upon, as we have shown. The conclusive presumption relates only to the official acts of the sheriff and others.

[6] The requirement as to the notice to be given by the purchaser is not embraced by that section; but section 2904 provides that his affidavit of notice, if properly filed with the register of deeds, shall be prima facie evidence that notice has been given. He has not shown a compliance with the statute, and besides, if he had, the prima facie case is overcome by the facts admitted, which show that notice was not properly given. *King v. Cooper*, supra.

[7] Nor is the plaintiff required to show that the land was not subject to taxation, or that the taxes had been paid, in order to contest the validity of the tax deed. There is no substantial change in the law construed in *Warren v. Williford*, supra, which expressly holds that those provisions apply only when the tax deed is valid and has passed a title, and not when, being void, it has conveyed no title. Discussing substantially the same provision, Justice Connor said, in *Warren v. Williford*, 148 N. C. at page 479, 62 S. E. at page 699: "We do not think that this case comes within the language of section 20, Laws 1901 (Revisal, § 2909). It is true that, construing this section, this court said, in *McMillan v. Hogan*, 129 N. C. 314, 40 S. E. 63: 'The taxes due must be paid, which the law requires as a condition precedent to contesting the title carried by the deed by authority of the statute.' The defendant, having obtained his deed in violation of the express terms of the statute, acquired no title. As was said in *Matthews v. Fry*, supra: 'As the making of a proper affidavit was a condition precedent to the defendant's right to call for a deed, with which he has not complied, he has not acquired title to the land.' The deed was simply void, and defendant was not entitled to avail himself of the provisions of the stat-

ute intended to protect purchasers at tax sales." *Jones v. Schull*, 153 N. C. 521, 69 S. E. 498.

[8] The same principle must apply, as the language is the same, to the subsequent provision of Revisal, § 2909, that the person who questions "the title acquired by the sheriff's deed" must first show that he had title to the property at the time of the sale. *Dames v. Armstrong*, 146 N. C. 5, 59 S. E. 163, 125 Am. St. Rep. 436. Revisal, § 2909, corresponds with Acts 1901, c. 558, § 20, which was construed in *Warren v. Williford*. Besides, the defendant is claiming under J. W. Kitchin, who claims under C. H. Rexford, and, as decided in the case just cited, this shows title sufficiently in Rexford, unless the tax deed is valid as to him, or, in other words, unless defendant has acquired the superior title by it.

[9, 10] We have gone into this case quite fully because of its importance to the litigants and to the public, and have considered the principal questions presented in the record. It appears that the plaintiff tendered payment of the amount of taxes, interest, and costs, which tender was rejected. The defendant C. H. Thompson contracted to purchase the land from his codefendant, R. L. Phillips, and for that reason was made a party to this action, and will be bound by the judgment. The judge, upon the admitted facts, held that the defendants have acquired no title to the land, and entered judgment accordingly. In that opinion and judgment we concur. The state and county have not lost the tax which should have been assessed upon this land if it had been properly listed in the name of Rexford, as it has been paid to the sheriff by the defendant, and he should be reimbursed the amount of the tax and interest by the plaintiff. This is nothing but right, and is no more than the plaintiff should be required to do in order that his delinquency may not inure to his benefit, and that justice may be done to the defendant, who has relieved the land of a charge which would have rested upon it if the plaintiff had performed his duty by listing his property for taxation. The plaintiff will therefore be ordered to pay the said amount to the defendant or deposit it in court for his use, if the matter has not already been adjusted; but this order shall not affect the costs, which will be taxed against the defendant, as he rejected the tender of the amount when it was made to him.

Affirmed.

(159 N. C. 475)

#### STATE v. JERNIGAN.

(Supreme Court of North Carolina. March 27, 1912.)

#### 1. CRIMINAL LAW (§ 1119\*)—APPEAL—QUESTIONS PRESENTED FOR REVIEW.

Where nothing appears from the record, except what was said, a contention that the

demeanor of the trial judge deprived the accused of his right to trial by jury cannot be considered; the manner of the judge not appearing from the record.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2927, 2930; Dec. Dig. § 1119.\*]

## 2. HOMICIDE (§ 15\*)—MURDER—SELF-DEFENSE.

In a prosecution for homicide, it appeared that accused provoked the difficulty by calling deceased a thief, and that, after deceased indicated that he would resent the insult, accused opened his knife and repeated the charge; whereupon deceased attacked accused with his fists, but was pulled away and held by other persons, when accused mortally stabbed him. *Held*, that accused was guilty of murder; there being no question of self-defense and only a bare possibility of the jury reducing the offense to manslaughter.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 21; Dec. Dig. § 15.\*]

## 3. CRIMINAL LAW (§§ 1056, 1053\*)—APPEAL—EXCEPTIONS—NECESSITY.

Where the only exception taken was during a colloquy between the judge and one of accused's counsel, in which the judge was requested to note an exception to his remark, the remarks and charges of the court cannot be reviewed.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2668, 2670, 2661, 2665; Dec. Dig. §§ 1056, 1053.\*]

## 4. CRIMINAL LAW (§ 1129\*)—APPEAL—ASSIGNMENTS OF ERROR.

Matters complained of by accused cannot be reviewed, unless assigned as error.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2954-2964; Dec. Dig. § 1129.\*]

## 5. CRIMINAL LAW (§ 1048\*)—APPEAL—EXCEPTIONS—EXCUSE FOR FAILURE TO RESERVE.

The failure of accused to reserve exceptions to the charge and remarks of the trial court cannot be excused, so as to warrant review of such matters, by the contention that his counsel were not given an opportunity to note their exceptions, and that the case settled is not a correct narrative of the trial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2656, 2657, 2670; Dec. Dig. § 1048.\*]

Appeal from Superior Court, Johnston County; Peebles, Judge.

Alex Jernigan was convicted of murder in the second degree, and appeals. Affirmed.

The defendant was convicted of murder in the second degree, and sentenced to serve a term of 25 years at hard labor in the state's prison.

The evidence of the principal witness for the state, George D. Langley, was as follows: "July 1st, lived in Wendell. I knew Albert Todd, G. N. Langley, Harrison Pittman, Lewis Jernigan. Todd and myself went to millpond two miles from Wendell; went just before night; went to set nets, but did not fish any. Bought cider, sardines, etc. Stayed there two hours. Drank pint of liquor on our way. Went in one-horse wagon, flat bottom, but no sides. I was sitting on right-hand side of wagon; Todd was on the other side, feet hanging down. Fa-

ther, Lewis, and Pittman were in front of wagon. Defendant was lying down on his back, feet hanging out at rear end of wagon. Did not see anything in hand of defendant. One-half mile after leaving mill, defendant said some one had stolen his money. Todd asked who he thought got it. He said some one on the wagon got it. Todd said, 'You don't believe I got it, do you?' Defendant said, 'Yes, I think you got it,' or, 'I had as soon believe you got it as any one.' Todd got off the wagon and started around the wagon towards Jernigan. I got off and met Todd before he got to Jernigan, and got him back on the wagon, and I got on and we went about 50 yards, when defendant said, 'Albert, you have got my money, and I want you to give it to me.' Defendant had a knife open in his hand. Todd got off the second time, and I got him back second time; caught hold of him and told him to get back on wagon, and he did so. Fifty yards farther defendant said, 'No son of a bitch can take my money and get off easy.' Todd said: 'Don't let us have any more words about the money. I will not say anything more about it if you don't.' Defendant said, 'It was my money, and you taken it from me.' Todd got off the third time and went to him. When I got there, he was standing behind the wagon, reaching over and hitting Jernigan with his fists. I saw him have nothing else. Two or three times; missed him a time or two and hit wagon beside him. I went behind Todd and put my arm around him and pulled him away, about three steps backwards. Defendant got off the wagon and went to Todd and cut him in breast and left side with pocketknife, and cut me on arm with same lick. Defendant then left road and went in woods. Todd ran back towards mill and called me. I told him I could not go—I was cut—but to come on and let us go home. Saw Jernigan next Sunday evening. It was a big, new knife. I saw the blade. (Blade of knife exhibited.) The one I saw. I and father told defendant to shut up his knife. Todd is about 25 or 30. He was logging for mill, and I was working at the mill, running edger. Todd was a small man, weighing about 150 pounds, about 5 feet 4 inches high. Everybody took a drink of whisky. Todd and defendant seemed to be friendly. I drank three glasses of cider. I don't know how much others drank. Defendant loaned Todd some money at the mill. Starlight night; think moon was not shining. Road through woods where cutting took place; woods on both sides. The licks that hit the bed of wagon seemed loud. Defendant never fell or got between wagon and wheels. Did not see Jernigan after he ran in woods. I stated on former trial that Jernigan got off wagon and went to Todd. I did not see him eating apples. I have been indicted for fighting."

At the conclusion of the evidence offered

by the state, counsel for the defendant announced that the defendant would not introduce evidence.

As counsel for the defendant were about to address the jury, his honor said: "You may speak three hours, if you wish; but I am going to charge, if the jury believed the evidence beyond a reasonable doubt, they will find the defendant guilty of murder in the second degree." Thereupon one of the counsel for the defendant announced to the court that, in view of his honor's statement, he would not address the jury. His honor then proceeded to charge the jury, and defined the crimes of murder in the first degree, murder in the second degree, manslaughter, and justifiable homicide, and charged, in part: "If the jury are satisfied, beyond a reasonable doubt, that the facts are as testified by the witnesses for the state, you will find the defendant guilty of murder in the second degree." After his honor concluded his charge to the jury, one of the counsel for the defendant stated to his honor that he had not charged as he said he would. His honor replied: "Of course, I did not use the exact language, because the Supreme Court has suggested a better formula, but the effect of my charge is the same; and now that you know what my charge is, if you wish to address the jury, you can do so, and I will again charge the jury after you have made your speech." The counsel then said that he would not address the jury, and asked the court to note an exception to the remarks made by the court; whereupon his honor directed the jury to retire and make up their verdict.

Ray & Harris, for appellant. Attorney General Bickett and T. H. Calvert, for the State.

ALLEN, J. [1, 2] We cannot consider the contention that the manner of the judge was such as to deprive the defendant of his right to a trial by jury, because we are confined to the record, and nothing appears therefrom, except what was said. Upon consideration of the evidence, it is certain that the defendant could not have been acquitted on the ground of self-defense in any aspect of it, and there was only a bare possibility of reducing the offense to manslaughter. The defendant not only provoked the difficulty by calling the deceased a thief, but, after the deceased indicated that he would resent the insult, he opened his knife and repeated the charge, and, after the deceased was pulled away from him, and was being held, he advanced upon him and inflicted the mortal wound with his knife.

[3] When his honor told counsel that he would charge the jury to return a verdict of guilty of murder in the second degree, if they believed the evidence beyond a reasonable doubt, and counsel replied that, in view of his honor's statement, he would not address

the jury, this could only mean that the truth of the evidence could not be contested; otherwise he would have discussed the credibility of the witness before the jury. It does not, however, appear that any exception was taken by the defendant to this statement of the judge, and, so far as the case on appeal discloses, there was no exception to the charge to the jury. It is true that after the charge was delivered, and a colloquy ensued between the judge and one of the counsel, that the judge was requested to note an exception to his remarks; but the remarks excepted to are not pointed out, and those immediately preceding were that counsel could address the jury, if they desired to do so.

[4, 5] It also appears that there is no assignment of error in the record. It is possible, as suggested by counsel, that they had no opportunity to note their exceptions, and that the case is not a correct narrative of the trial; but, however reluctant we may be to affirm a judgment for a long term of imprisonment when such complaints are made, we cannot base our judgment on them.

We find no error.

No error.

(158 N. C. 322)

# SKIPPER v. KINGSDALE LUMBER CO. et al.

(Supreme Court of North Carolina. March 27, 1912.)

## 1. APPEAL AND ERROR (§ 561\*)—CASE ON APPEAL—FORM.

In view of Revision 1905, § 591, requiring appellant to prepare a concise statement of the case on appeal, it is improper to submit as a prepared case the stenographer's notes in the form of question and answer, though plaintiff sued in forma pauperis.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2494; Dec. Dig. § 561.\*]

## 2. MASTER AND SERVANT (§ 286\*)—INJURIES TO SERVANT—NEGLIGENCE—RES IPSA LOQUITUR.

A showing that an employé was killed by the derailment of a logging car established a prima facie case of negligence, making a non-suit improper.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1001, 1006, 1010-1050; Dec. Dig. § 286.\*]

## 3. COURTS (§ 106\*)—PURPOSE OF OPINIONS.

The purpose of a judicial opinion is to state a rule for the guidance of trial judges and the bar in future cases, and matters which have already been repeatedly decided in prior opinions should not be passed upon.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 359; Dec. Dig. § 106.\*]

Appeal from Superior Court, Robeson County; Carter, Judge.

Action by Sarah Skipper, administratrix, against the Kingsdale Lumber Company and another, in which the defendants appeal from an adverse judgment. On motion to dismiss appeal judgment affirmed. The action was for the death of a switchman employed by the logging company caused by the derailment of a logging car.

Rountree & Carr, R. C. Lawrence, and McLean, Varner & McLean, for appellants. Thomas L. Johnson and H. F. Seawell, for appellee.

CLARK, C. J. [1] The plaintiff moves to dismiss because the case on appeal has not been settled in the manner required by Revisal, § 591, which requires that the appellant "shall cause to be prepared a concise statement of the case on appeal." Instead of that, the entire evidence from the stenographer's notes, covering 157 printed pages, has been dumped into the record in the form of question and answer, though this has been condemned in repeated decisions of this court. *Cressler v. Asheville*, 138 N. C. 486, 51 S. E. 53, and numerous other cases. In *Buckner v. Railroad*, 157 N. C. 443, 73 S. E. 137, Brown, J., said: "At the end of the stenographer's notes is this entry: 'It is agreed that the record proper and stenographer's notes shall constitute the case on appeal.' There is no other attempt to make out a case on appeal as required by law. This is in direct violation of the rule of this court (No. 22 [86 S. E. vii]) and of its express decision in *Cressler v. City of Asheville*, 138 N. C. 483 [51 S. E. 53]. That such of the evidence as is necessary to present the assignment of errors could easily have been stated in condensed narrative form is manifested by the fact that the counsel for plaintiff and defendants have set out in their respective briefs very clear and brief statements of the evidence, which substantially agree. Under the circumstances of the case, we will make an exception, and not dismiss the appeal, but we will be compelled to so do in future, unless our rule is observed."

The defendant seeks to excuse itself upon the ground: (1) That, this being a nonsuit, it was necessary to set out all the evidence. Even if it were so, that would not excuse setting out the evidence in the form of question and answer.

[2] Besides the intestate of the plaintiff having been killed in a derailment, a prima facie case of negligence was made out and a nonsuit could not have been ordered. *Wright v. Railroad*, 127 N. C. 229, 37 S. E. 221; *Marcom v. Railroad*, 126 N. C. 200, 35 S. E. 423; *Kinney v. Railroad*, 122 N. C. 961, 30 S. E. 313; *Grant v. Railroad*, 108 N. C. 470, 13 S. E. 209; *Bird v. Leather Co.*, 143 N. C. 284, 55 S. E. 727. (2) The defendant contends that, as the plaintiff sues in forma pauperis, the costs of the extra record and printing could in no event be taxed against the plaintiff. But this does not excuse the nonobservance of the rules of the court, nor justify dumping an unnecessary volume of matter upon the court and the opposite counsel for examination. In accordance with what was laid down in *Buckner v.*

*Railroad* at last term, we must dismiss the appeal, or rather affirm the judgment, there being no error on the face of the record proper; but, nevertheless, at the request of counsel for defendant, we have carefully examined the entire record and the assignments of error. There were 77 exceptions taken, which in the assignments of error are reduced to 52 and in the defendant's brief are still further reduced to 21. Forty-seven of the exceptions were to the admission of evidence, some of which are based upon objections entered by plaintiff, and not by defendant. We do not find that any of them require discussion. The exceptions for failure to nonsuit and to set aside the verdict were properly abandoned. The six exceptions for refusal of the court to instruct the jury as requested by defendant cannot be sustained. *McNeill v. Railroad*, 130 N. C. 256, 41 S. E. 383. If granted, they would have required of the plaintiff an unusual and highly technical proof of the negligence of the defendant. The 18 exceptions to the charge of the court are also without merit.

[3] The object of an opinion is to lay down a rule for the guidance of trial judges and of counsel in other cases. There can be no benefit in cumbering our reports with the discussion of exceptions in matters that are plain, or that have already been repeatedly passed upon by the court. Such exceptions bear testimony to the earnestness and zeal of counsel, but when we find, upon careful examination, that the discussion of the assignments of error set out in the record would present no new principle nor a new application of an old one, but will be merely a recognition of what has already been often decided, we feel that it is our duty to refrain. Counsel have done all in this case that their well-known ability could accomplish for their client. The intestate of the plaintiff was killed in a derailment which, if the evidence was believed, was caused by a loose chain on a car which caught an obstruction as the train was in rapid motion, pulling out a sway-bar, which threw the car from the track, causing the wreck in which the decedent was instantly killed. There was no other theory advanced in the pleadings or on the trial, and the investigation, aside from well-settled principles of the law, presented only issues of fact which the jury have determined.

Affirmed.

(158 N. C. 436)

#### MARTIN & GARRETT v. MASK.

(Supreme Court of North Carolina. March 27, 1912.)

1. PRINCIPAL AND AGENT (§ 183\*)—PLAINTIFFS—REAL PARTY IN INTEREST.

Under Revisal 1906, § 400, providing that every action must be prosecuted in the name of the real party in interest, except as other-

wise provided, and section 404, providing that an administrator or executor and trustee of an express trust, or a person expressly authorized by statute, may sue without joining with him the person for whose benefit the action is prosecuted, the trustee of an express trust including a person with or in whose name a contract is made for the benefit of another, an agent, who is the payee of a note given for rent, cannot maintain an action in his own name, unless it is made to appear that the note was payable to him with the consent of the principal, and for his benefit, the burden being on the agent to prove those facts; for the mere description of the payee as agent does not show him to be a trustee of an express trust, or a person with whom a contract is made for the benefit of another.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 691-700; Dec. Dig. § 183; Bills and Notes, Cent. Dig. § 1394.]

## 2. ASSIGNMENTS (§ 121\*)—ACTIONS—IN NAME OF ASSIGNEE.

Where a claim is assigned solely for the purpose of collection, the assignee cannot sue in his own name.

[Ed. Note.—For other cases, see Assignments, Cent. Dig. §§ 200-205; Dec. Dig. § 121.\*]

## 3. DISMISSAL AND NONSUIT (§ 48\*)—PLAINTIFFS—REAL PARTY IN INTEREST—MOTION TO DISMISS.

In an action by the payee of a note, who was designated as an agent, plaintiff's motion to dismiss before the introduction of the evidence was properly denied; for the agent might show that the note was made payable to him with the consent of his principal, and for his benefit.

[Ed. Note.—For other cases, see Dismissal and Nonsuit, Cent. Dig. § 96; Dec. Dig. § 48.\*]

## 4. EVIDENCE (§ 441\*)—ACTIONS—EVIDENCE.

In an action on a note for rent yet to become due, evidence that the note was executed with the agreement that, if the lessee was to leave the city, he might surrender the premises and receive back the note was improperly excluded.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1719-1845, 2030-2047; Dec. Dig. § 441.\*]

## 5. LANDLORD AND TENANT (§ 231\*)—ACTIONS—EVIDENCE.

In an action on a note for rent yet to become due, evidence that the lessee surrendered the premises before the rent became due, and that plaintiff relet them, was admissible to show an entire failure of consideration.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 926-934; Dec. Dig. § 231.\*]

## 6. LANDLORD AND TENANT (§ 231\*)—ACTIONS—EVIDENCE—ADMISSIBILITY.

In an action on a note for rent yet to become due, evidence that defendant surrendered the premises before the rent became due, and that plaintiff relet them, was admissible for the purpose of charging the plaintiff with the rents and reducing recovery.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 926-934; Dec. Dig. § 231.\*]

Appeal from Superior Court, Wayne County; Peebles, Judge.

Action by Martin & Garrett, agents, against George M. Mask. From a judgment for defendant in the justice court, plaintiffs ap-

peal to the superior court, and from a judgment for plaintiffs, defendant appeals. Reversed and remanded.

This action was commenced by Martin & Garrett, agents, before a justice of the peace to recover the sum of \$166.65 and interest on \$166.65 from December 14, 1910, due by five notes for \$33.33 each, given for rent of house No. 307, Third street, Augusta, Ga.; said notes being due March 1, 1911, April 1, 1911, May 1, 1911, June 1, 1911, and July 1, 1911. The form of the notes was as follows: "\$33.33. Augusta, Ga., Dec. 14, 1910. After date the undersigned promises to pay to the order of Martin & Garrett, agents, thirty-three and 33-100 dollars at any bank in the city of Augusta, Ga. For value received in rent, with interest from maturity at the rate of eight per cent. per annum, with all costs of collection, including ten per cent. attorney's fees. And each of us, whether maker or endorser, hereby severally waives and renounces for himself and family, any and all homestead or exemption rights he may have under or by virtue of the Constitution or laws of the state of Georgia or of any state or of the United States, as against this note or any renewal thereof. Geo. M. Mask. [L. S.] Rent of house No. 307, 3rd St." On the left end of the said note were the following words and figures: "Martin & Garrett, Real Estate and Renting Agents. 137 8th St., Ground Floor, Dyer Building." The defendant denied any liability to the plaintiffs. Judgment was rendered by the justice in favor of the defendant, and the plaintiff appealed. In the superior court, the defendant moved to dismiss the action, on the ground that it appeared upon the face of the summons, and also from the notes, that the plaintiffs were agents, and that the action should have been brought in the name of their principal, the real party in interest. The motion was denied, and the defendant excepted.

The defendant offered to prove that he was, at the time of making said contract, the agent of the Metropolitan Life Insurance Company, and he did not know how long he would reside in the city of Augusta, his residence there being entirely dependent upon his employment by the company at that point; and, in consequence thereof, there was a separate and distinct contract made with the plaintiffs at the time of the signing of the said notes, by which it was agreed and understood that the defendant would pay said notes which were given for the house in which he was to reside and did reside during his stay in Augusta, but that if he was required to leave the city of Augusta that he was to pay no other note, and that he would surrender the possession of the house to the plaintiffs; that, in accordance with the contract, the defendant did pay to the plaintiffs the rent on said house



during his stay in Augusta; that, under instructions from his employer, he left Augusta during the month of January, 1911, and paid the plaintiff the note that was due February 1, 1911, for the rent of said house for the month of January, 1911, and delivered the possession of said house and lot to the plaintiffs, and that the plaintiffs took possession of and rented said house out to other parties; that, by reason of said contract, the said notes sued on, all being given for the rent of the house for months subsequent to February 1, 1911, were not to be paid, and the defendant was under no obligation on said notes to the plaintiffs or their principal. This evidence was excluded, and the defendant excepted. There was judgment in favor of the plaintiffs, and defendant excepted and appealed.

Geo. E. Hood, for appellant. Wentworth W. Pierce, for appellees.

ALLEN, J. The record presents two questions: (1) Was it error to refuse to dismiss the action, because the plaintiffs are named as agents, and sue on notes payable to them as agents? (2) Was it error to exclude the evidence offered by the defendant?

[1, 2] 1. The first question must be solved by adopting a correct interpretation of section 400 of the Revisal, providing that "every action must be prosecuted in the name of the real party in interest, except as otherwise provided," and Rev. § 404: "An executor or administrator, a trustee of an express trust, or a person expressly authorized by statute, may sue without joining with him the person for whose benefit the action is prosecuted. A trustee of an express trust, within the meaning of this section, shall be construed to include a person with whom, or in whose name, a contract is made for the benefit of another."

It is clear that the plaintiffs, being agents, are not the real parties in interest under section 400, and, in order to maintain their action, it must appear that they are trustees of an express trust, under section 404, and within that term are included those in whose name a contract is made for the benefit of another.

The clearest and most comprehensive discussion of the language used in this section we have been able to find is in *Pomeroy's Code Remedies*, § 99 et seq., from which we quote at length:

"The only difficulties of interpretation presented by this section are the determining with exactness what persons are embraced within the three classes, described as 'trustees of an express trust,' 'persons with whom or in whose name a contract is made for the benefit of another,' and 'persons expressly authorized by statute to sue.' It is plain that there are substantially three classes. The second and better form of the provision actually separates them, and does

not represent one as a subdivision of the other. The first form in terms speaks of 'the person with whom or in whose name a contract is made for the benefit of another' as an instance or individual of the wider and more inclusive group, 'trustees of an express trust.' It should be carefully noted, however, that these two expressions are not stated to be synonymous; the former is not given as a definition of the latter. The section does not read, 'a trustee of an express trust shall be construed to mean a person with whom or in whose name a contract is made for the benefit of another,' but simply that the latter shall be regarded as one species of the genus. There is here no limitation, but rather an extension, of the meaning, and the clause, of course, recognizes other kinds of trustees besides the party to the special form of contract, who is not very happily termed a 'trustee.'"

"We must find the true legal definition of 'trustees of an express trust,' and add to this the 'persons with whom or in whose name contracts are made for the benefit of others'; the combined result will be the entire class intended by the Legislature. \* \* \* An *express* trust assumes an intention of the parties to create that relation or position, and a direct act of the parties by which it is created in accordance with such intention, outside of the mere operation of the law. \* \* \* It primarily assumes three parties: The one who, by proper language, creates, grants, confers, or declares the trust; the second, who is the recipient of the authority thus conferred; and the third, for whose benefit the authority is received and held. It is true that in many instances the first-named parties are actually but one person—that is, the same individual declares, confers, receives, and holds the authority for the benefit of another—but the theory of the transaction is preserved unaltered; for the single person who creates and holds the authority acts in a double capacity, and thus takes the place of two persons. \* \* \* In the light of this analysis of the expression as a term of legal import, it is plain that 'a person with whom or in whose name a contract is made for the benefit of another' is not necessarily a trustee. He may be; and whether he is or is not must depend entirely upon the nature and subject-matter of the contract itself. The contract may be of such a kind, stipulating concerning property in such a manner, that the contracting party will be made a trustee. On the other hand, it may be of such a kind, having no reference, perhaps, to property, or stipulating for personal acts alone, that the contracting party will not be a trustee in any proper sense of the word, but will be at most an agent of the person beneficially interested. There are numerous instances, therefore, in which an agent, who enters into an agreement for either a known or for an unknown principal, is permitted, in accordance with the par-

ticular clause under consideration, to sue in his own name."

"In a case where a contract in the nature of a lease was effected by a person describing himself in the instrument as agent of the owners, but who had no interest whatever in the premises leased, and did not execute the instrument, and to whom no promise was made as the lessor, it was held that he could not maintain an action for the rent or for possession of the land forfeited by non-payment of the rent. He could not sue as the 'person with whom or in whose name a contract is made for the benefit of another,' because no promise at all was made to him, and he was not 'a trustee of an express trust.' 'One who contracts merely as the agent of another, and has no personal interest in the contract, is not the trustee of an express trust, within the meaning of the statute, and cannot, under the Code, sue upon such contract in his own name.' Of course, this last expression must be taken in connection with the facts of the case—namely, that no promise was made to the plaintiff individually."

"It is fully established by numerous decisions that when a contract is entered into expressly with an agent in his own name, the promise being made directly to him, although it is known that he is acting for a principal, and even although the principal and his beneficial interest in the agreement are fully disclosed and stipulated for in the very instrument itself, the agent in such case is described by the language of the statute, and may maintain an action upon the contract in his own name, without joining the person thus beneficially interested."

"The rule is the same, and even more emphatically so, if the principal or beneficiary is, at the time of the contract, unknown or undisclosed, or not mentioned in the instrument. When a contract, even in writing, is made with and by an agent, and no mention is made of any principal or beneficiary, but the other contracting party supposes he is dealing with the former on his own private account, but in fact such person is an agent for an undisclosed principal, and enters into the agreement in the course of his agency, actually effecting the contract on behalf of that superior behind him, the rule is well settled that the one who was thus a direct party to the agreement—the actual agent—may bring an action upon it in his own name, or the principal may sue in his name."

[3] We deduce from this construction of the statute the principle that an agent, as such, has no right to require that promises to pay be made to him, and when contracts are so made, and nothing else appears, he cannot maintain an action, as agent, to enforce them, and that he may maintain such action if the promise is made to him, as agent, by the authority of the principal, and for his benefit.

Note that we speak of contracts made payable to the agent with the consent of the principal, and that we have no reference to the assignment of a claim for the purpose of collection, in which case the assignee cannot sue in his own name. *Abrams v. Cureton*, 74 N. C. 527; *Boykin v. Bank*, 118 N. C. 568, 24 S. E. 357; *Morefield v. Harris*, 126 N. C. 628, 36 S. E. 125.

Many illustrations of the principle may be found in our reports. It has been held that an action cannot be maintained by the administrator of a deceased guardian on a note payable to the guardian (*Alexander v. Wriston*, 81 N. C. 194); by an agent for collection (*Boykin v. Bank*, 118 N. C. 568, 24 S. E. 357); by an assignee of a note assigned for the purpose of collection (*Abrams v. Cureton*, 74 N. C. 527; *Morefield v. Harris*, 126 N. C. 628, 36 S. E. 125); by an attorney who, pending a motion for a receiver, had been ordered to collect certain insurance (*Boyd v. Insurance Co.*, 111 N. C. 374, 16 S. E. 389); by a contractor authorized to collect the amounts due to those who had furnished materials (*Perry v. Swanner*, 150 N. C. 141, 63 S. E. 611); by an agent who sold guano on a *del credere* commission, but to whom the claim sued on was not made payable (*Chapman v. McLawhorn*, 150 N. C. 166, 63 S. E. 721).

On the other hand, it has been held that an action may be maintained by one to whom a note is handed, with authority to collect and pay a debt due him (*Willey v. Gatling*, 70 N. C. 421); by an attorney to whom a claim was transferred, with authority to collect and apply to claims held by him for collection (*Wynne v. Heck*, 92 N. C. 414); by the cashier of a bank to collect collaterals deposited to secure a note, payable to him as cashier (*Jenkins v. Wilkinson*, 113 N. C. 533, 18 S. E. 696); and it is said in *Winders v. Hill*, 141 N. C. 703, 54 S. E. 440, that if the contract is in the name of one, but really for the benefit of another, that the person in whose name it is made is to be regarded as the trustee of an express trust, whether the name of the beneficiary is disclosed or not.

Applying these principles, we are of opinion that one cannot maintain an action in his own name, when nothing appears except that he is agent, and that this designation is not, *ex vi termini*, included within the meaning of the words of the statute "trustee of an express trust," or "a person with whom a contract is made for the benefit of another," but that, if it is made to appear that the contract was made payable to the agent with the consent of the principal, and for his benefit, he may do so, and that the burden is on the agent to prove these facts.

It follows, therefore, that his honor properly denied the motion to dismiss the action, upon the ground that the plaintiffs were nam-

ed as agents in the summons, because the motion was made before the introduction of evidence; but, if it had been renewed at the conclusion of the evidence, it could have been allowed, as the plaintiffs failed to prove that the note was made payable to them by the authority of their principal and for his benefit. This is the proper course, as indicated in *Perry v. Swanner*, 150 N. C. 142, 63 S. E. 611, in which Justice Brown says: "It is not a question of parties, as we understand the matter, that is raised by the motion to nonsuit, but a question as to whether or not the plaintiff has made out a cause of action upon which he personally can recover." We are not inadvertent to the line of authorities holding that the production of a negotiable paper is prima facie evidence of ownership; but they are not applicable here, because the plaintiffs do not claim to be the owners, except as agents, and the question involved is whether they have shown a title to sue as agents.

2. The evidence offered by the defendant was, in our opinion, clearly competent, and for several reasons:

[4] (1) It tended to prove a separate parol agreement, entered into at the time of the execution of the notes, which was to be a part of the contract, and which is not distinguishable in principle from agreements admitted in evidence under the authority of several cases in our reports.

In *Braswell v. Pope*, 82 N. C. 57, it was held competent to prove that notes given for money were to be surrendered upon the maker signing a judgment and a certain mortgage as security for the money.

In *Penniman v. Alexander*, 111 N. C. 427, 16 S. E. 408, that "the maker of a promissory note or other similar instrument, if sued by the payee, may show, as between them, a collateral agreement, putting the payment upon a contingency."

In *Evans v. Freeman*, 142 N. C. 61, 54 S. E. 847, that the maker of a note for the purchase money of a stock feeder could prove by parol that, at the time the note was given, it was agreed that it should be paid only out of the sales of the stock feeder; and in *Kernodle v. Williams*, 153 N. C. 475, 69 S. E. 431, 34 L. R. A. (N. S.) 934, that it was competent to prove a parol agreement that the children should pay only so much of notes given their father as was necessary to pay his debts, and that the balance should be accounted for as an advancement.

[5] (2) The evidence, if believed, proved a total failure of consideration as to the notes sued on. *Carrington v. Waff*, 112 N. C. 118, 16 S. E. 1008.

[6] (3) If the defendant could not avoid the payment of the notes, it was competent to prove that he surrendered the house, for the rent of which the notes were given, and that the plaintiffs accepted it, for the pur-

pose of charging the plaintiffs with the rents.

For the error pointed out, a new trial is ordered.

New trial.

(159 N. C. 226)

# LOCKLEAR v. SAVAGE et al.

(Supreme Court of North Carolina. March 27, 1912.)

1. ADVERSE POSSESSION (§ 13\*)—REQUISITES. "Adverse possession" consists in actual possession with intent to hold to the exclusion of others and is denoted by making the ordinary use of which the property is susceptible and taking the usual profits.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 65-76; Dec. Dig. § 13.\*]

For other definitions, see Words and Phrases, vol. 1, pp. 227-235; vol. 8, p. 7568.]

2. ADVERSE POSSESSION (§ 28\*)—NOTORIETY. Adverse possession must be as notorious as the nature of the property permits unequivocally indicating to all persons that claimant is exercising dominion over the land.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. § 123; Dec. Dig. § 28.\*]

3. ADVERSE POSSESSION (§ 13\*)—ESSENTIALS. Adverse possession must be open, notorious, and continuous, and its extent must be shown by known and visible boundaries.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 65-76; Dec. Dig. § 13.\*]

4. APPEAL AND ERROR (§ 927\*)—REVIEW—NONSUIT.

In reviewing a judgment of nonsuit, all of the admitted evidence should be considered in the light most favorable to plaintiff.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2912, 2917, 3748, 4024; Dec. Dig. § 927.\*]

5. ADVERSE POSSESSION (§ 115\*)—SUFFICIENCY OF EVIDENCE.

Evidence, in an action to recover damages for trespass in cutting timber, held to make it a jury question whether plaintiff's intestate had acquired the land by adverse possession.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 691-701; Dec. Dig. § 115.\*]

6. ADVERSE POSSESSION (§ 112\*)—BURDEN OF PROVING.

The burden is upon one suing for damages for timber cut to prove her ownership of the land by adverse possession.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 651-668; Dec. Dig. § 112.\*]

7. APPEAL AND ERROR (§ 274\*)—ASSIGNMENTS OF ERROR—SUFFICIENCY.

An exception merely to a judgment of nonsuit sufficiently assigns the error in granting a nonsuit.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1631-1645; Dec. Dig. § 274.\* Trial, Cent. Dig. §§ 258, 375, 406, 691-693.]

8. APPEAL AND ERROR (§ 515\*)—RECORD.

The evidence should not be incorporated in the record on appeal in the form of question and answer, or by a transcript of the

stenographer's notes, but should be in narrative form.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2322-2325; Dec. Dig. § 515.\*]

Brown, J., dissenting.

Appeal from Superior Court, Robeson County; Whedbee, Judge.

Action by Katie Ann Locklear, administratrix, against W. A. Savage and others. From a judgment for defendants, plaintiff appeals. Reversed, and new trial granted.

Britt & Britt and McNeill & McNeill, for appellant. McLean, Varner & McLean, and McIntyre, Lawrence & Proctor, for appellees.

WALKER, J. This is an action to recover damages for a trespass on land, in cutting and removing timber therefrom. The plaintiff claims title under John Locklear, being his administratrix. It is not pretended that he had any paper title for the land, or color of title; but to show title in him the plaintiff relied solely upon John Locklear's adverse possession of the land for more than 30 years, under a claim of right, to take the title out of the state and vest it in him, and the real question in the case is whether he had such a possession of the land for a sufficient length of time to produce that result.

[1] What is "adverse possession" within the meaning of the law has been well settled by our decisions. It consists in actual possession, with an intent to hold solely for the possessor to the exclusion of others, and is denoted by the exercise of acts of dominion over the land, in making the ordinary use and taking the ordinary profits of which it is susceptible in its present state; such acts to be so repeated as to show that they are done in the character of owner, in opposition to right or claim of any other person, and not merely as an occasional trespasser.

[2] It must be decided and notorious as the nature of the land will permit, affording unequivocal indication to all persons that he is exercising thereon the dominion of owner. *Loftin v. Cobb*, 46 N. C. 406, 62 Am. Dec. 173; *Montgomery v. Wynns*, 20 N. C. 667; *Williams v. Buchanan*, 23 N. C. 535, 35 Am. Dec. 760; *Burton v. Carruth*, 18 N. C. 2; *Gilchrist v. McLaughlin*, 29 N. C. 310; *Bynum v. Carter*, 26 N. C. 310; *Simpson v. Blount*, 14 N. C. 34; *Tredwell v. Riddick*, 23 N. C. 56. So in *Loftin v. Cobb*, supra, it was held that cutting timber and making shingles in a swamp unfit for cultivation, continuously for seven years, is a good possession under the statute. "It is exercising that dominion over the thing and taking that use and profit which it is capable of yielding in its present state. It is all that can be done until the subject shall be changed. It is like the case stated in the books of cutting rushes from a marsh. This is sufficient, though it might appear that dykes

and banks would make the marsh arable." Again, it was held in *Williams v. Buchanan*, 23 N. C. 535, 35 Am. Dec. 760, that, as to a stream not navigable, keeping up fish traps therein, erecting and repairing dams across it, and using it every year during the entire fishing season for the purpose of catching fish, constitute an unequivocal possession thereof.

[3] The possession must, of course, be not only adverse, as we have defined it, but open, notorious, and continuous, and the extent of it must be shown by known and visible boundaries. The doctrine was explained and illustrated in the recent case of *Coxe v. Carpenter*, 157 N. C. 557, 73 S. E. 113, in which we said, referring to the evidence in that case: "The jury may well infer that these acts were those of ownership, and not those of an occasional trespasser; and that they were repeated and continuous for a considerable period of time. The possession was as decided and notorious as the nature of the land would permit, and offered unequivocal indication that plaintiff and his father were exercising the dominion of owners, and were not pillaging as trespassers. *Williams v. Buchanan*, 23 N. C. 535, 35 Am. Dec. 760; *Tredwell v. Riddick*, 23 N. C. 56; *Hamilton v. Icard*, 114 N. C. 538, 19 S. E. 607; *Simpson v. Blount*, 14 N. C. 34; *Baum v. Shooting Club*, 96 N. C. 310, 2 S. E. 673. It is true that, in proving continuous adverse possession under color of title, nothing must be left to mere conjecture. The testimony must tend to prove the continuity of possession for the statutory period, either in plain terms or by 'necessary implication.' *Ruffin v. Overby*, 106 N. C. 83, 11 S. E. 251. This possession need not be unceasing, but the evidence should be such as to warrant the inference that the actual use and occupation have extended over the required period, and that during it the claimant has, from time to time, continuously subjected the disputed land to the only use of which it was susceptible. *Ruffin v. Overby*, supra; *McLean v. Smith*, 106 N. C. 172, 11 S. E. 184; *Hamilton v. Icard*, supra. While the evidence offered is not necessarily conclusive, if taken to be true, as to the fact of possession, we think it is sufficient to be submitted to the jury, under appropriate instructions, that they may draw such inference as they see proper, bearing in mind that the burden of proof is on the plaintiff to establish the fact of possession for the statutory period by a preponderance in the proof." The evidence in this case may not be as strong as it was in the *Coxe* Case, but we are unable to say that there was absolutely none.

[4] We are passing upon a judgment of nonsuit, and it is a familiar principle that the evidence is to be viewed in the light most favorable to the plaintiff.

[5] The facts which the testimony tended

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

to establish in support of the plaintiff's contention may be thus briefly stated: John Locklear was 80 years old when he died, and had lived on the land nearly all his life. He first built a hut on it, which was his home so long as fit for habitation. In 1853 he left this part of the land—the lower end—and built, on the same premises, at a different place and near the public road, the house in which he lived until 1897, the year of his death. He cleared and cultivated 10 or 15 acres of the land around his house, boxed the pine trees on the tract for turpentine, cut wood and cross-ties, ditched the land, and cut paths through it for the purpose of boxing the trees and cutting the timber. One witness testified: "I knew the bounds he worked up to and cultivated all of my lifetime—the lands where John Locklear lived. I can tell you the bounds." He then stated the names of the adjoining proprietors, and also that the land Locklear lived on and used was bounded by Batrrix Bay, Mill Swamp, the Fayetteville and Lowrie roads. The turpentine boxes were cut and the trees "worked for turpentine" as far back as 35 years ago—about 1876. This suit was commenced April 9, 1910. There was also evidence that John Locklear had forbidden people to come upon the land for the purpose of boxing the trees, and driven them away on occasions at the point of his gun. There was much testimony of the kind we have stated, and some other facts and circumstances of more or less value in determining the character of the possession. There was evidence, it is true, tending to show that John Locklear's possession was not adverse or continuous; but upon a nonsuit we cannot consider it. It may be that the jury will find, upon the evidence now before us, or upon that and additional evidence at another trial, when the facts are more fully developed, and that there was neither an adverse nor a continuous possession. We must now infer everything from the testimony, in favor of the plaintiff, which it tends to prove.

[6] This rule will not be the one for the guidance of the jury, when the issue of fact is submitted to them, but rather a contrary one, for the burden will then be upon the plaintiff to establish her case by a preponderance of the evidence. There is enough evidence in the record to carry the case to the jury, and the issue must be tried by them, under proper instructions of the court with reference to the real facts as they may find them to be.

Without stating it, we think there was some evidence to the effect that the defendants had cut timber from the land and sawed it into lumber, under such circumstances as to make them liable for the same, if John Locklear was the owner of the land.

[7, 8] The motion to dismiss the appeal because the exceptions are not grouped is

overruled. There was only one exception, which was taken to the judgment of nonsuit, and the error is thus sufficiently assigned. We so decided at the last term. There is no irrelevant or superfluous matter in the record. On a motion to nonsuit, we must review the whole of the evidence. This should not be set out by question and answer, or by a full transcript of the stenographer's notes, but in narrative form.

On account of the peculiar nature of this appeal and the question presented, there has been no sufficient departure from the rules of this court and statutory provisions to call for an affirmance of the judgment without considering the case on appeal.

New trial.

BROWN, J., dissenting.

(159 N. C. 227)

**BEVILL & VANSTORY v. ATLANTIC COAST LINE R. CO.**

(Supreme Court of North Carolina. March 27, 1912.)

**1. WITNESSES (§ 77\*)—EXECUTION OF INSTRUMENTS—PRELIMINARY EXAMINATION.**

The competency of a witness to testify to an instrument being the bill of lading for the shipment, for injury to which the action is brought, must be tested by a preliminary examination, and is not raised by objection to admission of the bill that there was no proof of its execution; a plaintiff having testified it was such bill.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 195-200; Dec. Dig. § 77.\*]

**2. APPEAL AND ERROR (§ 1057\*)—INJURY TO SHIPMENT—PROOF OF BILL OF LADING.**

There being evidence in an action against a carrier for injury to a shipment of live stock that defendant was in possession of the stock as a common carrier, it is immaterial whether plaintiff offered competent evidence of the bill of lading.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4194-4199, 4205; Dec. Dig. § 1057.\*]

**3. APPEAL AND ERROR (§ 1057\*)—INJURY TO SHIPMENT—EVIDENCE.**

There being evidence in an action for injury to a shipment of live stock that plaintiff sustained damages to the amount of \$350, it is immaterial whether defendant's agent had authority to agree, as plaintiff claims he did, to a settlement for that amount.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4194-4199, 4205; Dec. Dig. § 1057.\*]

**4. CARRIERS (§ 230\*)—INJURY TO SHIPMENT—CONNECTING CARRIERS—NONSUIT.**

There being evidence, including the presumption, that the injury to a shipment was while it was in the hands of the last of connecting carriers, a nonsuit should not be granted, notwithstanding evidence to the contrary.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 961, 962; Dec. Dig. § 230.\*]

Appeal from Superior Court, Cumberland County; Whedbee, Judge.

Action by C. A. Bevill and another, partners as Bevill & Vanstory, against the At-

lantic Coast Line Railroad Company. From a judgment of nonsuit, plaintiffs appeal. Reversed, and new trial granted.

Plaintiffs offered evidence that, before they would receive the shipment from defendant, its agent at Fayette promised to pay them \$350 agreed on as the amount of damages to plaintiff's shipment; and defendant denied the agent's authority to bind it in an amount exceeding \$25.

Sinclair & Dye, for appellants. Rose & Rose, for appellee.

**WALKER, J.** This action was brought to recover damages for injury to live stock alleged to have been shipped from Kansas City, Mo., and consigned to the plaintiff at Fayetteville, N. C. There was judgment of nonsuit upon the evidence, and plaintiff appealed. The stock was received at its final destination and delivered to the plaintiffs by the defendant, the last of the carriers, in a badly damaged condition, and there was evidence that the damage amounted to, at least, \$350.

[1] Plaintiffs handed to their witness W. A. Vanstory, one of the plaintiffs, a paper, and asked him if it was the bill of lading for this shipment, and he said that it was, and that the bill of lading had been filed with the defendant, when the plaintiffs made the claim for damages and as a part thereof. The case states that the plaintiffs proposed to introduce the bill of lading as evidence, and defendant objected, because there had been no proof of its execution, and for this reason it was excluded by the court. But we do not see why it had not been sufficiently shown by the witness Vanstory to be the bill issued to the plaintiffs, and therefore admissible as evidence. If the defendant wished to test the competency of the witness to speak in regard to it, the proper method was by a preliminary examination. As the evidence now stands, the bill should have been admitted.

[2] We do not see, though, that it is material to decide whether it was competent or not. There is evidence tending to show that the defendant was in possession of the stock as a common carrier. Its conduct and dealings with the plaintiffs with reference to the shipment is some proof of this; and there was abundant evidence upon the question of damages.

[3] It was not necessary to inquire as to the authority of the defendant's agent at Fayetteville, N. C., to settle with plaintiffs upon the basis of \$350, there being other proof that the plaintiffs had sustained loss to that amount. Upon a nonsuit, this is sufficient to carry the case to the jury.

[4] Reasonable inferences to be drawn from the testimony tend to show that the defendant received the stock en route at

Augusta, Ga., after they had been unloaded, watered, and fed, and that they were then in good condition, for the witness Champlin testified that he was the defendant's yardmaster at Augusta, and that "no exception was made to the stock," and "the car was accepted and forwarded in apparently good condition." There was evidence tending to show the contrary, and that the stock was not injured while in the possession of the defendant. But all this conflicting evidence was for the jury to pass upon, and not for the court by a judgment of nonsuit. It should have been considered most favorably for the plaintiffs, there being a presumption that the injury occurred on defendant's line. *Manufacturing Co. v. Railroad*, 121 N. C. 514, 28 S. E. 474; *Id.*, 128 N. C. 284, 38 S. E. 894; *Mitchell v. Railroad*, 124 N. C. 236, 32 S. E. 671, 44 L. R. A. 515; *Meredith v. Railroad*, 137 N. C. 483, 50 S. E. 1; *Furniture Co. v. Express Co.*, 144 N. C. 639, 57 S. E. 458. It is a rule of law that, when a particular fact, necessary to be proved, is peculiarly within the knowledge of one of the parties, upon him rests the burden of proof as to it, and the rule has been applied to a shipment of goods by connecting lines of carriers, when a presumption arises that the carrier, in whose possession the goods are found in a damaged condition, caused the damage, it being all the proof the nature of the case permits to the plaintiff, and proof in exoneration of the carrier being more accessible to him than to the plaintiff. *Furniture Co. v. Express Co.*, *supra*; *Brintnall v. Railroad*, 32 Vt. 665; *Moore on Carriers*, pp. 490, 491; *Dixon v. Railroad*, 74 N. C. 538; *Lindley v. Railroad*, 88 N. C. 547. We think there was sufficient evidence in the case, if found to be true, to fasten liability on the defendant, as the carrier responsible for injury to the stock. There was error in ordering a nonsuit. It will be set aside, and a new trial granted.

New trial.

(158 N. C. 317)

#### JACKSON v. AYDEN LUMBER CO.

(Supreme Court of North Carolina. March 27, 1912.)

#### 1. MASTER AND SERVANT (§ 278\*)—INJURIES TO SERVANT—ACTIONS—EVIDENCE—SUFFICIENCY.

In an action by a servant for personal injuries, evidence held to support a finding of the master's negligence.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 954-972, 977; Dec. Dig. § 278.\*]

#### 2. MASTER AND SERVANT (§ 232\*)—INJURIES TO SERVANT—SCOPE OF EMPLOYMENT.

A servant engaged in running an engine in connection with a logging railroad is acting in the scope of his employment when consulting the superintendent.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 678-680; Dec. Dig. § 232.\*]

### 3. MASTER AND SERVANT (§ 180\*)—INJURIES TO SERVANT—FELLOW SERVANT ACT—RAILWAYS.

The fellow servant act, applying to employes of a railroad company, extends to those employes of a lumber company which operates a logging railway, who are engaged in transporting the logs, and includes those servants whose duties are to load logs on the train.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 359-361, 363-368; Dec. Dig. § 180.\*]

### 4. APPEAL AND ERROR (§ 730\*)—ASSIGNMENTS OF ERROR—SPECIFIC ASSIGNMENTS.

An assignment of error that the trial judge failed to state the evidence given in the case and declare and explain the law arising thereon is too general to be reviewed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3013-3016; Dec. Dig. § 730.\*]

Brown and Walker, JJ., dissenting.

Appeal from Superior Court, Washington County; Cline, Judge.

Action by R. C. Jackson against the Ayden Lumber Company. From a judgment for plaintiff, defendant appeals. Affirmed.

F. C. Harding and Davis & Davis, for appellant. Ward & Grimes, for appellee.

OLARK, C. J. The defendant in operating its railroad for hauling out logs used two kinds of machines—one a skidder to draw in the logs, and the other a loading machine to lift them up on the cars. The plaintiff's duties were to look after the engines of both these machines, to keep them in repair, and to operate the loading engine. The superintendent came through the woods across the railroad in front of the operations. The plaintiff stopped his engine and went up the track a few yards to meet and confer with him about repairs on one of the engines. They sat down together on a log on the opposite side of the track. The plaintiff had notified the skidder engineman where he was going. The skidder kept up its operations to bring in a gum log. In order to get a log to the car which it could not draw along the track for fear of tearing up the cross-ties, it had to be swung to a side position by a rope from the skidder around a fulcrum stationed to one side of the track. This rope was a wire cable, and wound around a drum 25 or 30 feet above the floor of the skidder. From this elevation the cable was placed over a stump about 2 feet high, 25 feet from the track, and carried around the gum log to which it was attached by grab-irons, so that the power of the engine would swing the log around the stump, whence it would be dragged straight to the side of the skidder. When the power was put on the engine, the rope slipped over the stump, and the cable in its rebound struck a small elm tree, which it broke, and hurled across the track on plaintiff's back and neck, seriously injuring him. The exceptions are for the refusal to nonsuit and for errors in the charge. But

they all present practically the same questions, to wit: (1) Was there evidence of negligence on the part of the defendant? (2) Was the plaintiff guilty of contributory negligence? (3) Was the plaintiff within the scope of his employment at the time?

[1] There was evidence which, if believed, tended to show negligence on the part of the defendant. The rope was thrown around a stump less than 2 feet high, standing 25 feet from the skidder. This rope went to the skidder at an angle of about 90 degrees. Such a situation was liable to cause the cable to slip over the stump, unless a notch was cut in it deep enough to prevent this. There was also evidence that a tree had been left near by for the purpose of being used as a fulcrum, but this stump was used instead, probably because it was less trouble to lift the wire over the top of the stump. From this evidence the jury might well find that the defendant was negligent. Upon the evidence the jury found that the plaintiff was not guilty of contributory negligence. He was talking to the superintendent about the business and on the opposite side of the track. There was evidence that it was usual to blow a signal when the engine began to pull on a log under such circumstances and testimony tending to show that such signal was not given.

[2] The plaintiff was at the scene of operations and engaged in consulting the superintendent, and was therefore in the scope of his employment.

[3] The defendant relies strenuously upon *Twiddy v. Lumber Co.*, 154 N. C. 237, 70 S. E. 282, which held that the fellow servant act does not extend to employes of a lumber company who are not connected with the operation of a railroad of the company. In that case there was "no evidence that the plaintiff was part of the train crew or directly engaged in operating the skidder or the loader." In that case it was further said, quoting with approval from *Nicholson v. Railroad*, 138 N. C. 516, 51 S. E. 40: "In *Mott v. Railroad*, 131 N. C. 237 [42 S. E. 601], it was sought to curtail and restrict the act so that it should apply only to railroad employes engaged in operating trains, but the court held to the contrary, and said 'the language of the statute is both comprehensive and explicit.' It embraces injuries sustained by (quoting the act) 'any servant or employe of any railroad company \* \* \* in the course of his services or employment with said company.' *Priv. Laws 1897, c. 56*. The plaintiff was an employe, and was injured in the course of his services or employment." In *Mott's Case* the plaintiff working in the repair shops recovered damages for the negligence of a fellow servant while removing a red-hot tire from an engine. In *Sigman v. Railroad*, 135 N. C. 184, 47 S. E. 420, it was held that a railroad employe injured in the

course of his service or employment with such corporation is entitled to recover under the fellow servant act, whether running trains or rendering any other service. These and other like cases are cited in *Twiddy v. Lumber Co.*, supra. In that case it was held that Twiddy could not recover because it was not shown that he was "a part of the train crew, nor that he was directly engaged in operating either the skidder or the loader," and "could in no proper sense be considered an employé of the railroad or in any department of it." In the present case, the plaintiff was directly engaged in the operation of the railroad for the purpose of hauling logs which was its business, and while so engaged, and in the scope of his employment, he was injured, as the jury finds, by the negligence of a fellow servant.

[4] The last assignment of error, that his honor "failed to state in a plain and correct manner the evidence given in the case and declare and explain the law arising thereon as required in the statute (Rev. 535)," is too general, and cannot be sustained. *Davis v. Keen*, 142 N. C. 496, 55 S. E. 359.

No error.

**BROWN, J. (dissenting).** I am of opinion upon examination of the evidence in this case that the injury of the plaintiff cannot fairly be attributed to any negligent act upon the part of the defendant company. On the contrary, I think it was a pure accident, which reasonable foresight could not guard against. At the time plaintiff was struck by the cable, he was away from his place of duty, and the evidence does not show any reason or justification for it. The plaintiff was the engineer in charge of the skidder engines on the platform. On the occasion when the plaintiff was hurt by the slipping of the rope over the stump, he had left his post of duty, and had walked up the track a distance of 40 yards to meet one Robertson, and they were sitting upon a log six feet from the track, and on the opposite side of the track from where the log was being "snaked" in. There is no evidence whatever that the plaintiff left his post of duty in the company's service, or to perform any duty for it. *Holland v. Railroad Co.*, 143 N. C. 437, 55 S. E. 835; *Patterson v. Lumber Co.*, 145 N. C. 42, 58 S. E. 437.

Assuming that the evidence discloses that the plaintiff was injured by the negligent act of some one, it is plain to my mind that it was the act of a fellow servant, for which the defendant is not responsible. The plaintiff was not injured in the conduct of any railroad operations. It is well known that a log skidder is no part of a railroad outfit. It is used and operated by lumber companies that have no railroad tracks and transport their logs by water. At the time of the injury the witness Corey says that the men gave him the signal to take up the slack in

the rope, which he did, and then Ellis flagged Corey to go ahead. Then Corey started the engine again, and drew the rope tight, which caused it to slip over the top of the stump and strike the elm tree, about 8 inches in diameter, and threw the tree over on the plaintiff, who was 20 or 25 feet from it. No human foresight could guard against such an accident as this; but, if it was any one's duty to do it, it was Corey's, and he was the fellow servant of Robertson.

This court has held in many decisions that these lumber roads to the extent that they operate railroads are to be considered as railroads, and that the statute denies them the benefit of the fellow servant doctrine, but this ruling does not extend to employes of lumber companies while they are engaged in the operation of their logging and lumbering plants. This question is discussed at large by Mr. Justice Hoke in the case of *Twiddy v. Lumber Company*, 154 N. C. 237, 70 S. E. 282, which is on all fours with the case at bar, and should govern its decision.

I am authorized to say that Justice WALKER concurs in this dissent.

(158 N. C. 445)

**IPOCK v. ATLANTIC & N. C. R. CO.** et al.  
(Supreme Court of North Carolina. March 27, 1912.)

**1. INSANE PERSONS (§ 73\*)—CONTRACTS—VALIDITY.**

Executed contracts of an insane person before his condition has been formally ascertained are voidable and not void.

[Ed. Note.—For other cases, see *Insane Persons*, Cent. Dig. §§ 125, 132-138; Dec. Dig. § 73.\*]

**2. INSANE PERSONS (§ 73\*)—CONTRACTS—ACTION TO SET ASIDE—BURDEN OF PROOF.**

Where one seeking to set aside a contract upon the ground of the insanity of one party to it sustains the burden resting on him to prove such insanity, the contract will be set aside unless the sane party to it proves that he acted in ignorance of conditions, that no unfair advantage was taken, and that the insane person is not able to restore the consideration or make adequate compensation therefor.

[Ed. Note.—For other cases, see *Insane Persons*, Cent. Dig. §§ 125, 132-138; Dec. Dig. § 73.\*]

**3. RELEASE (§ 15\*)—CONTRACTS.**

Where an employé while mentally incompetent was induced by one chargeable with knowledge of his condition to execute, for a consideration of \$150, a release for an injury caused by his employer's negligence, the damages amounting to \$1,500, the release was not a bar to a recovery therefor.

[Ed. Note.—For other cases, see *Release*, Cent. Dig. § 30; Dec. Dig. § 15.\*]

**4. RELEASE (§ 24\*)—INJURY TO SERVANT—AMOUNT OF RECOVERY—DEDUCTION—CONSIDERATION FOR RELEASE.**

Where an employé, while mentally incompetent, and for an inadequate consideration, executed a release of liability for an injury caused by his employer's negligence, and subsequently recovered in an action for the injury, equity required that the consideration



paid for the release should be deducted from the full amount of the damages.

[Ed. Note.—For other cases, see Release, Cent. Dig. §§ 41-46; Dec. Dig. § 24.\*]

Appeal from Superior Court, Craven County; Whedbee, Judge.

Action by D. M. Ippock against the Atlantic & North Carolina Railroad Company and others. From judgment for plaintiff, the defendants appeal. Modified and affirmed.

There was evidence, on part of plaintiff, tending to show that he was an employé as section boss of the defendant companies, and on August 24, 1908, he was seriously and permanently injured by the derailment of a hand car he was then using in the course of the employment; the derailment being caused by a defective wheel, attributable to negligence of defendants. The defendants denied the negligence and set up, by way of defense, a voucher, issued in plaintiff's favor, on October 24, 1908, for \$150, purporting to be in "full settlement of all claims against the railroad companies on account of the injuries," indorsed by plaintiff, making his mark, and the proceeds of which were shown to have been received and spent for plaintiff's benefit. Plaintiff made formal reply, alleging that, at the time the voucher was issued and indorsed, and at time of proceeds received and used, and, owing to his injuries, he was incapable, mentally, of making any binding contract affecting his interests, and was utterly unable to understand or appreciate the character of the transaction or its effect upon his rights, and offered evidence in support of his allegation. On issues submitted, the jury rendered the following verdict: "(1) Did the plaintiff indorse the voucher or release introduced in evidence and marked Exhibit A? Answer: Yes; by consent of plaintiff. (2) Was the plaintiff, by reason of bodily pain, mental anguish, or mental incapacity, unable to comprehend the effect of such release indorsed by him, and was such release signed and indorsed by him without knowledge that the same was a release for his injury? Answer: Yes. (3) Did the plaintiff draw the money upon said voucher from the bank without knowledge that it was in full payment and release by him for all injuries sustained? Answer: Yes. (4) Was the plaintiff injured by the negligence of the defendant as alleged? Answer: Yes. (5) If so, what damages has plaintiff sustained thereby? Answer: \$1,500."

Judgment on the verdict for \$1,500, and defendants excepted and appealed.

Larry I. Moore, for appellants. D. L. Ward and Gulon & Gulon, for appellee.

HOKE, J. (after stating the facts as above). There was ample evidence to support the verdict on the issues as to defendants' negligence and the amount of damages awarded; the testimony of plaintiff tend-

ing to show that on the derailment he received a blow on the back of the head from one of the handles of the car, rendering him unconscious at the time, causing partial paralysis of his limbs, and seriously affecting his mental capacity for several months after the occurrence; one of the physicians testifying further that in some of the effects the injuries were likely to be permanent, and it was chiefly urged, against the validity of the recovery, that plaintiff's demand was barred by reason of the terms and effect of the voucher issued in his favor, and the use of the proceeds by him or for his benefit.

[1] On this question, and in view of the facts in reference to plaintiff's mental condition established by the verdict on the first and second issues, it is held with us that the executed contracts of an insane person and before office found, before such condition has been formally ascertained and declared, are voidable and not void, and it is also recognized that such contracts are usually voidable at the election of the lunatic or person properly appointed to act in his behalf, unless it is made to appear that the other party to the agreement acted without knowledge of the insanity or notice of such facts in reference thereto as would put a reasonably prudent person upon inquiry; that no unfair advantage was taken, and the consideration passed cannot be restored or adequate compensation made therefor. *West v. Railroad*, 154 N. C. 24, 69 S. E. 676; s. c., 151 N. C. 231, 65 S. E. 979; *Godwin v. Parker*, 152 N. C. 673, 68 S. E. 208; *Sprinkle v. Wellborn*, 140 N. C. 163, 52 S. E. 666, 8 L. R. A. (N. S.) 174, 111 Am. St. Rep. 827; *Odum v. Riddick*, 104 N. C. 515, 10 S. E. 609, 7 L. R. A. 118, 17 Am. St. Rep. 686; *Riggan v. Green*, 80 N. C. 236, 30 Am. Rep. 77; *Gribben v. Maxwell*, 34 Kan. 8, 7 Pac. 584, 55 Am. Rep. 233; *Eaton v. Eaton*, 37 N. J. Law, 108, 18 Am. Rep. 716; *Flach v. Gottschalk Co.*, 88 Md. 368, 41 Atl. 908, 42 L. R. A. 745, 71 Am. St. Rep. 418; *Hosler v. Beard*, 54 Ohio St. 398, 43 N. E. 1040, 35 L. R. A. 161, 56 Am. St. Rep. 720; *Clark on Contracts*, pp. 178 and 183. The general rule which prevails under ordinary conditions, in such cases, is very well stated in *Clark on Contracts*, as follows: "As a rule, a contract entered into by an insane person or person non compos mentis, is voidable at his option, but the rule is subject to exceptions as follows: \* \* \* (2) In most but not all jurisdictions where the sane party acted fairly and in good faith, without actual or constructive knowledge of the other's insanity, and the contract has been so far executed that he cannot be placed in statu quo. \* \* \*"

[2] From the form in which this rule is here given and the authorities applicable, we hold it to be the correct principle that, while one who seeks to avoid a contract on the ground of insanity has the burden of prov-

ing his position, when it is established that the contract has been made with a person mentally incapable of making a contract, the burden is so far shifted that the agreement will be set aside unless the same party, by proper proof, brings his case within the rule, as stated, to wit, that he acted in ignorance of conditions; that no unfair advantage was taken; that the insane person is not able to restore the consideration or make adequate compensation therefor. *Sprinkle v. Wellman*, supra; *Hosler v. Beard*, 54 Ohio St. 398, 43 N. E. 1040, 35 L. R. A. 161, 56 Am. St. Rep. 720; *Bigelow on Finance*, p. 378; *Eaton's Equity*, p. 317. In the Ohio case, just cited, it was held, as appears from the digest of the case in 56 Am. St. Rep.: "Plaintiff suing upon a negotiable instrument or other contract made by an insane person must assume the burden of proving that it was given for necessities or during a lucid interval, or while the insane person was apparently of sound mind and not known to be otherwise, and for property purchased by him under a fair and bona fide contract, and which he has received and fully enjoyed, so that the parties can no longer be put in statu quo."

[3] This being the correct principle, on the facts established by the verdict and admission of the parties, that the plaintiff, at the time, was mentally incapable of making the contract or understanding its full effect and meaning, and, under such conditions, a contract was obtained, on consideration of \$150, purporting to be in full settlement for an injury amounting to \$1,500, the right of plaintiff to recover is undoubted. We are not inadvertent to a verdict very similar, appearing in the West Case, 151 N. C. 231, 65 S. E. 979, and to some expressions in the opinion having a tendency to declare that the facts therein established are insufficient to support the judgment, but a judge's opinion, as a rule, must be considered in reference to the facts of the case before him, and a careful perusal of the facts and the opinion in that well-sustained case will disclose that recovery was denied, because there were no facts in evidence sufficient to show mental incapacity on part of plaintiff, or that defendant had any knowledge or notice of mental weakness which would disable plaintiff from taking proper and intelligent care for his own interest, or that any unfair advantage was taken of plaintiff, under facts and conditions as they reasonably appeared to both parties when the adjustment and payment was made, and this is the time by which the fairness of the transaction must be tested. See same case, 154 N. C. pp. 29 and 30, 69 S. E. 676.

When the \$1,511.61 was paid plaintiff, in that case, he was apparently in perfect possession of his mental faculties and with full prospects of permanent recovery, and under all the circumstances of the case, as they then appeared, the amount given him was a fair and full allowance for the injuries re-

ceived. It turned out that, unknown to defendant or plaintiff, his injuries were progressive in their ill effects, and that the amount paid him was insufficient as compensation, but this should not be allowed to affect bona fides of the settlement, which, as stated, must be determined under conditions as they then were or as they reasonably appeared. The nonsuit was ordered in the West Case, therefore, not on the ground that the verdict was insufficient, but that the facts in evidence were not sufficient to support the verdict. But no such conditions are present in the case before us, where it appears that plaintiff was injured by a blow on the back of his head, which rendered him unconscious at the time; that it was followed by partial paralysis; that he acted throughout with the aid of others; and that the attendant conditions were to a great extent known to defendant's agents who looked after the adjustment. While it is not established, nor is there sufficient reason to conclude, that these agents had any design or purpose to circumvent plaintiff, there were sufficient facts observable to notify them that \$150 was not a fair compensation for the injuries, and that it was not improbable that plaintiff's mental capacity was affected.

[4] We hold, therefore, that plaintiff's right to recover, in the present case, must be sustained, but, on the facts established and admitted that the \$1,500 awarded as the full value of the plaintiff's injury, should be credited with the \$150 received by him or used for his benefit. Although the authorities are to the effect that the contract, under the circumstances of the present case, is voidable at the option of the plaintiff, and it is not regarded as essential that plaintiff should restore the consideration, when it appears that he is unable to do so, the action in this aspect of the case is in the nature of an equitable proceeding to set aside the voucher or avoid the effect of the payment had, pursuant to an adjustment between the parties, and, in the absence certainly of positive as distinguished from constructive fraud, is in no wise exempt from the wholesome maxim that he who seeks equity must do equity. This principle was fully recognized with us in the well-considered case of *Odom v. Riddick*, 104 N. C. 523, 10 S. E. 609, 7 L. R. A. 118, 17 Am. St. Rep. 686, and the ruling in accord with authoritative decisions here and elsewhere. *Creekmore v. Baxter*, 121 N. C. 31, 27 S. E. 994; *Coburn v. Raymond*, 78 Conn. 484, 57 Atl. 116, 100 Am. St. Rep. 1000; *Rea v. Bishop et al.*, 41 Neb. 202, 59 N. W. 555; *Ricketts v. Jolliff*, 62 Miss. 440. In the present case, it appears that the \$150 has been paid plaintiff on account of this injury, and same has been used by him or applied for his benefit, and, the amount of the recovery being under the control of the court, it is in accord with good reason and well-considered precedent that the amount awarded as damages

for the injuries received by plaintiff should be reduced by the sum received and used by him.

The judgment will be reduced by crediting the \$150, and, so modified, the recovery is affirmed.

Modified and affirmed.

(158 N. C. 432)

**SEDBURY v. DUFFY et al.**

(Supreme Court of North Carolina. March 27, 1912.)

**1. USURY (§ 81\*)—DISCOUNT OF NOTE—PARTIES AFFECTED.**

The sale of a note by the holder for greatly less than its face value is usurious only as to the immediate parties to the sale, and does not affect the liability of the makers of the note.

[Ed. Note.—For other cases, see Usury, Cent. Dig. § 161; Dec. Dig. § 81.\*]

**2. BILLS AND NOTES (§ 296\*)—WARRANTIES OF INDORSEMENTS.**

The warranties referred to in Negotiable Instrument Law (Revisal 1906, § 2215), providing as to the warranties which prevail in case of an unqualified indorsement of commercial paper, refer only to lawful transactions, and the statute does not withdraw contracts of that nature from the operation of the usury laws.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 667-679; Dec. Dig. § 296.\*]

**3. USURY (§ 26\*)—WHAT CONSTITUTES—DISCOUNT OF NOTE.**

Where a note of \$4,000 was sold by the payee for \$3,200, and the purchaser required the indorsement of the payee and another as a guaranty of payment, the transaction was usurious as to them.

[Ed. Note.—For other cases, see Usury, Cent. Dig. §§ 57, 58, 62; Dec. Dig. § 26.\*]

Appeal from Superior Court, Craven County; Whedbee, Judge.

Action by V. Sedbury against R. N. Duffy and others. From a judgment for plaintiff, part of the defendants appeal. Error.

It appeared that on March 3, 1909, defendants R. N. Duffy and A. C. Burnett executed their note to D. H. Green for \$5,000; that there had been a payment thereon of \$1,000, and the remainder, or \$4,000, was due at the time of suit brought; that some time prior to institution of action, D. H. Green sold the note to plaintiff for \$3,200 and the purchaser required the indorsement of the payee and Green and H. T. Pratt as guarantee of payment. The indorsers having plead that as to them this was an usurious transaction, issues were submitted. The court charged the jury if they believed the evidence to answer the issue as to usury, "No." There was judgment for full amount due on note and interest against all of the parties served with process, and the indorsers, Green and Pratt, excepted and appealed.

Simmons & Ward, for appellants. Green & Pratt, D. E. Henderson and K. C. Sedbury, for appellee.

HOKE, J. (after stating the facts as above). It has been repeatedly held in this state that while one may buy a note from another, at any price that may be agreed upon, the bargain being free from fraud or unlawful imposition, if the purchaser requires the indorsement of the seller as a guaranty of payment, the transaction, as between the immediate parties thereto, is in effect a loan and will be so considered, within the meaning and purport of our laws against usury. *Bynum v. Rogers*, 49 N. C. 399; *Ballinger v. Edwards*, 39 N. C. 449; *McElwee v. Collins*, 20 N. C. 350. In the *McElwee* Case it was held: "Where an indorsee takes a bill or note with the indorsement or guaranty of the indorser, and advances therefor less than the real value of the bill or note, the transaction is, in effect, a loan between the indorsee and indorser, and is usurious as between those parties." In *Ballinger's* Case, Chief Justice Ruffin, delivering the opinion, said: "Now that is a case of plain usury, and the contracts of Edwards touching it are void by the statute. The bill, indeed, does not enter into the particulars of the contract, but the plaintiff is content to state, in general, that Lane 'purchased' Boykin's bond, and it is laid down that a purchase of a negotiable security for less than the real value is valid. But that is subject to this qualification that it must be merely a purchase of the security and at the risk of the purchaser and therefore, if the person who claims to be such purchaser holds the person to whom the money is advanced responsible for the payment of the debt, it is not in law and fact a purchase of the security, but a loan of money upon the security; and if the sum advanced be less than the amount of it, deducting the legal interest for the time until maturity, the loan is usurious. *Collier v. Nevill*, 14 N. C. 30; *McElwee v. Collins*, 20 N. C. 350. The latter case expressly and correctly lays down the rule that the ordinary case of discounting a note, with an indorsement or guaranty of the receiver of the usury, is a lending within the statute." The principle is established by statute in reference to the discounting of notes by national banks. Page on Contracts, § 477, citing *Gloversville Bk. v. Johnson*, 104 U. S. 271, 26 L. Ed. 742, and is enforced in other jurisdictions by courts of recognized authority. *Whitworth v. Yancey & Adams*, 26 Va. 383; *Cowles v. McVickar*, 3 Wis. 725.

In the Wisconsin case cited, the court said: "The indorsement or guaranty of a bill or note, by which the party renders himself liable for its payment, is incompatible with a simple sale. It is a contract essentially different from that of bargain and sale. And herein is the distinction clearly perceptible and well established. The simple sale of a note or bill for less than its face

is not in itself usurious. But if the vendor indorses or guarantees or otherwise becomes liable for the payment of the bill or note, the transaction is usurious. The bill or note may be of doubtful character, and its value a fair subject of calculation; but when the vendor indorses it or guarantees its payment, and thereby makes himself liable, he then fixes its value (as between him and the vendee) at its face, and there is no room for difference of opinion, or the exercise of skill and judgment. If the transaction between the plaintiffs and defendant was a mere sale of the notes for their market or estimated value, why seek to hold the defendant liable on his contract of indorsement? \* \* \* The only purpose which the indorsement could serve in such a transaction would be to pass the legal title to the plaintiffs. If the contract was merely one of bargain and sale, the passing of title was all that was requisite. If it was not one of mere bargain and sale, but a contract of indorsement, its legal effect was to create a different relation between the parties than that of vendor and vendee, viz., that of drawer and payee of a bill of exchange, and hence the amount of consideration received, and the amount stipulated to be paid or secured, are such that mere computation brings the transaction within the usury act of 1851."

[1] A proper consideration of these and other authorities sustaining the position will show that a discount of the kind in question does not render the note usurious nor affect the rights and obligations otherwise arising on the instrument. It is only as between the immediate parties that the transaction is regarded as a loan of money and to be so considered and dealt with. *Cowles v. McVickar*, supra.

[2] The principle is not changed nor affected by our statute on Negotiable Instruments, § 2215, making provision as to the warranties which prevail in case of an unqualified indorsement of commercial paper. By correct interpretation, these warranties refer to lawful transactions, and the statute in no wise intended to withdraw contracts of that nature from the effect and operation of our laws against usury. *Eaton & Gilbert*, *Commer. Paper*, § 86.

[3] Under our authorities, therefore, the court below was in error in holding that, as to indorsers, the transaction was free from usury, and we would remand the case for further hearing but for an agreement between the parties that if the court should hold the transaction usurious, judgment should be entered against the indorsers for the amount received by them with interest. This will be certified that judgment shall be entered against the principal of the note who was served with process for amount due on the face of the note with interest, and against the indorsers for \$3,200, with

interest thereon at 6 per cent. from the time this amount was received by them.

Error.

**BROWN, J. (concurring).** I concur in the disposition made of this appeal. But I think, as between the indorser of the note and the purchaser, the transaction is not technical usury.

A. owns a note for \$1,000 signed by B., due 12 months after date. C. purchases it for \$800, and A. indorses it. C. is entitled to collect the face of the note from B., but, as between A. and C., the transaction is held to be a loan of \$800, which legitimately bears interest from the date of the indorsement. I think it a misnomer to call the transaction usurious, unless it can be shown that A. agreed specifically to pay the \$1,000 at the time he indorsed it in order to obtain the \$800 from C.

The law fixes A.'s liability at \$800 and interest, and, in the absence of proof of an agreement upon his part to pay more, there is no evidence of intent to charge or pay usurious interest.

(158 N. C. 627)

#### STATE v. HEWETT.

(Supreme Court of North Carolina. March 27, 1912.)

#### 1. RAPE (§ 34\*)—ASSAULT WITH INTENT TO RAPE—INDICTMENT—SUFFICIENCY.

An indictment which alleges that accused with force and arms unlawfully and feloniously did assault prosecutrix, and did feloniously attempt to ravish and carnally know her, forcibly and against her will, charges an assault with intent to rape, though the words "with intent" are omitted, since the words used import an intent to commit rape.

[Ed. Note.—For other cases, see *Rape*, Cent. Dig. §§ 37-41; Dec. Dig. § 34.\*]

#### 2. CRIMINAL LAW (§ 44\*)—"ATTEMPT."

An "attempt" in criminal law is an effort to accomplish a crime amounting to more than mere preparation and planning for it, and which, if not prevented, will result in the consummation of the act attempted.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 51; Dec. Dig. § 44.\*]

For other definitions, see *Words and Phrases*, vol. 1, p. 621; vol. 8, p. 7586.]

#### 3. CRIMINAL LAW (§ 44\*)—ATTEMPT TO COMMIT CRIME—OFFENSES.

One cannot be indicted for an attempt to commit a crime where the crime attempted is in its very nature an attempt.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 51; Dec. Dig. § 44.\*]

Appeal from Superior Court, Brunswick County; Whedbee, Judge.

I. A. Hewett was convicted of an assault with intent to commit rape, and he appeals. Affirmed.

The following is the indictment: "The jurors for the state, upon their oaths, present that I. A. Hewett, late of the county of Brunswick, on the 20th day of July, 1911, with force and arms, at and in the county

aforesaid, unlawfully, willfully, and feloniously did assault, beat, and wound one Lundie Bozeman, and her, the said Lundie Bozeman, did feloniously then and there attempt to ravish and carnally know, forcibly and against her will, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the state."

Cranmer & Davis, for appellant. Attorney General Bickett and Assistant Attorney General Calvert, for the State.

BROWN, J. [1] The bill is in the usual form, but omits the words "with intent." After charging a felonious assault upon Lundie Bozeman, the bill concludes, "and her, the said Lundie Bozeman, did feloniously then and there attempt to ravish and carnally know forcibly and against her will," etc. There are two decisions of this court which sustain the contention of the defendant—*State v. Martin*, 14 N. C. 329, and *State v. Goldston*, 103 N. C. 323, 9 S. E. 580—but with perfect deference we must say we are not impressed with the reasoning upon which they are based, and we are no longer willing to follow them as controlling precedents. No rule of property is involved, but solely a question of criminal pleading. The Goldston Case followed the precedent of the Martin Case, and, while not expressly overruled, the authority of both is very much shattered, if not practically destroyed, by the opinion of the court in *State v. Barnes*, 122 N. C. 1034, 29 S. E. 381. In that case the bill did not charge any "attempt," and omitted the words "with intent" altogether, but the court held that the words "with the intent" are not "sacramental," but that words are sufficient if they are tantamount to the charge of a felonious assault with the design or purpose to commit rape. In that case the bill of indictment is in part as follows: "Did make an assault and her, the said, \* \* \* then and there forcibly, violently, and against her will, then and there feloniously to abuse, ravish, and carnally know." The court held that the words were sufficient to charge the intent. In the bill in this case the felonious assault is specially charged, and that this assault was made in an attempt to commit rape. The basis of the decision in Martin's Case is that an attempt to do a thing is expressive of the overt act of moving towards its accomplishment, rather than of the purpose or intent itself. We cannot appreciate the distinction. It is too subtle. We are unable to see how a man can commit a felonious assault upon a female, and attempt to ravish her, without intending it. The words used in the bill, *ex vi termini*, necessarily import an intent to commit rape, and are amply sufficient to give the defendant full notice of the crime with which he stands charged,

and that is the chief purpose of a bill of indictment.

[2] An "attempt" in criminal jurisprudence is an effort to accomplish a crime, amounting to more than mere preparation or planning for it, and which, if not prevented, would have resulted in the full consummation of the act attempted. Mr. Bishop defines an attempt as "an intent to do a particular criminal thing combined with an act which falls short of the thing intended." 1 Bishop, *Crim. Law*, § 728. It is defined by others as "an endeavor to commit an offense, carried beyond mere preparation to commit it, but falling short of actual commission." Burrill on *Circ. Ev.* 365; Burrill, *Law Dict.* 175; Bouvier's *Law Dict.* 205. In *Regina v. Collins*, L. & C. 471, 9 Cox C. C. 497, it is defined "as that, which, if not prevented, would have resulted in the full consummation of the act attempted." *Rex v. Higgins*, 2 East, 20; Robinson's *Elementary Law* § 472. Thus we see that practically all definitions of an attempt to commit a crime, when applied to the particular crime of rape, necessarily imply and include "an intent" to commit it. There may be offenses when in their application to them there is a distinction between "attempt" and "intent," but that cannot be true as applied to the crime of rape. There is no such criminal offense as an "attempt to commit rape." It is embraced and covered by the offense of "an assault with intent to commit rape" and punished as such.

[3] As held by the Supreme Court of California, one cannot be indicted for an attempt to commit a crime where the crime attempted is in its very nature an attempt. *People v. Thomas*, 63 Cal. 482; 3 Am. & Eng. Ency. p. 251, note 5.

The judgment is affirmed.

(158 N. C. 578)

CHEWNING et al. v. EASON et al.

(Supreme Court of North Carolina. April 3, 1912.)

WILLS (§ 616\*)—CONSTRUCTION—ESTATE DEVISED—LIFE ESTATE WITH POWER OF DISPOSITION.

Testator by will devised and bequeathed all his property to his wife for life, and then to dispose of as she thought proper. Held, that such devise created a life estate only, to which was annexed a power of disposition of the reversion, and not a devise in fee, and that, on the wife's failure to exercise her power of disposition, the reversion passed to the testator's heirs.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1418-1430; Dec. Dig. § 616.\*]

Appeal from Superior Court, Anson County; Whedbee, Judge.

Action by E. H. Chewning and others against F. C. Eason and others. Judgment for plaintiffs, and defendants appeal. Affirmed.

Gulledge & Boggan, F. J. Coxe, and W. E. Brock, for appellants. Robinson & Caudle, for appellees.

**WALKER, J.** This is a controversy between the parties to this action, arising out of the following facts: Plaintiffs, who are the heirs of Thomas Chewning, claim that they are the owners of the tract of land, which is the subject of the controversy; and defendants, who are the heirs of Martha Chewning, dispute this claim and assert ownership in themselves. The land was owned by Thomas Chewning, who, by his will, devised it to his wife, Martha Chewning, in these words: "I give and bequeath (after all my just debts shall have been paid) all of my real and personal property, together with all debts owing my estate, to my wife, Martha Chewning, during her natural life, and then to dispose of as she sees proper." If, under this clause of the will, Martha Chewning acquired a life estate only, with power of disposal, the plaintiffs are entitled to the land, as she failed to exercise the power; but if the grant of the power enlarged the estate for life, which is expressly given, into an estate in fee, then the defendants are the owners of the land. The court below was of opinion with the plaintiffs, and rendered judgment accordingly, from which the defendants appealed.

There is a marked distinction between property and power. The estate devised to Mrs. Chewning is property, the power of disposal, a mere authority which she could exercise or not, in her discretion. She had a general power annexed to the life estate, which she derived from the testator under the will. If she had exercised the power by selling the land, the title of the purchasers would have been derived, not from her, who merely executed the power, but from the testator or the donor of the power. "The appointer is merely an instrument; the appointee is in by the original deed. The appointee takes in the same manner as if his name had been inserted in the power, or as if the power and instrument executing the power had been expressed in that giving the power. He does not take from the donee, as his assignee." 2 Wash. R. P. 320; 1 Sugden on Powers (Ed. 1856) 242; 2 Sug. Pow. 22; Doolittle v. Lewis, 7 Johns. Ch. (N. Y.) 45, 11 Am. Dec. 389. "In the execution of a power, there is no contract between the donee of the power and the appointee. The donee is the mere instrument by which the estate is passed from the donor to the appointee, and, when the appointment is made, the appointee at once takes the estate from the donor as if it had been conveyed directly to him." Norfleet v. Hawkins, 93 N. C. 392. It does not follow, because she could sell and convey the land under the power, that she thereby became the owner in fee. We must ascertain the intention of the testator, for that is the prevailing consideration and the supreme rule of interpretation, keeping

in mind, of course, the rules of construction as our guide, and looking at the will in its entirety. If the testator, in this case, intended to devise the fee to his wife, it is strange that he should have expressly and definitely limited the estate to one for her life. Naturally, he would have given it to her without restriction. The reasonable meaning of the clause is that she should have and enjoy the property for the term of her life, with a general power of appointment or disposal of the reversion by her will, or, at least, subject to her life estate, if she chose to exercise it, and the great weight of authority sustains this construction. The doctrine was clearly expressed by Chancellor Kent: "If an estate be given to a person generally or indefinitely, with a power of disposition, it carries a fee, unless the testator gives to the first taker an estate for life only, and annexes to it a power of disposition of the reversion. In that case the express limitation for life will control the operation of the power, and prevent it from enlarging the estate to a fee." 4 Kent. Com. 520, 521; Jackson v. Robins, 16 Johns. (N. Y.) 537. It has been held that a devise to A., with power to dispose at pleasure, is considered as conveying *property*, not as conferring *power*; for the words of power will not be permitted to take away what, without them, is expressly given. 2 Prest. on Est. 81, 82; 13 Ves. 453. But where there is an express and inconsistent estate for life given, the construction of the instrument is altogether different; for the express estate for life negatives the intention to give the absolute property, and converts these words into words of mere power, which, standing alone, would have been construed to convey an interest. This appears to be very clearly established by the cases which further lay it down, that where an *interest*, and not a mere *power*, is conferred, the absolute property is vested, without any act on the part of the legatee; but, where a power only is given, the power must be executed, or it will fail. We may therefore take the rule to be settled that where lands are devised to one generally, and to be at his disposal, this is a fee in the devisee; but where they are devised to one expressly for life, and afterwards to be at his disposal, only an estate for life passes to the devisee, with a bare power to dispose of the fee. Anonymous, 3 Leon. 71; Leefe v. Saltingstone, 1 Mod. 189; Tomlinson v. Dighton, Salk. 239, 1 Peere Wms. 149; Burleigh v. Clough, 52 N. H. 267, 13 Am. Rep. 23 (where many of the cases are collected and reviewed and there is a learned discussion of the question); Stuart v. Walker, 72 Me. 145, 39 Am. Rep. 311; Collins v. Wickwire, 162 Mass. 143, 38 N. E. 365; 31 Cyc. 1089; 22 A. & E. Enc. of Law, 1097; Steff v. Seibert, 128 Iowa, 746, 105 N. W. 328, 6 L. R. A. (N. S.) 1186.

The text-writers thus state the general rule: "A devise of a life interest in express terms, coupled with a power in the life ten-

ant to dispose of the fee simple in the property by his will, either absolutely and at his full discretion among a class of objects to be selected by him, or among a class of objects pointed out by the testator, gives the first taker a life estate only, but with a power to appoint the fee simple by his will." 2 Underhill on Wills, § 688. "A general power of disposition includes a power to dispose of the property by deed or will, and practically clothes the donee with all functions of ownership. In view of this fact, it has occasionally been provided by statute, and a few courts have reached the conclusion, without the help of the Legislature, that the devisee of a life estate, with a general power of disposition, takes a fee simple, and that a limitation over is void. But, by the overwhelming weight of authority, no fee results from the union of the life estate and the power, but both remain distinct, and the limitation over is good unless defeated by the exercise of the power by the life tenant." Gardner on Wills, p. 476. This doctrine has been adopted and applied by this court in several cases. It is stated in Patrick v. Morehead, 85 N. C. 62, 39 Am. Rep. 684, to have been settled upon unquestionable authority that, if an estate be given by will to a person generally, with a power of disposition or appointment, it carries the fee; but if it be given to one for life only, and there is annexed to it such a power, it does not enlarge his estate, but gives him only an estate for life. The case of Long v. Waldraven, 113 N. C. 337, 18 S. E. 251, seems to be directly in point. The property, in that case, was given to the testator's wife during her natural life, and after her death to be divided among the heirs of her brothers and sisters, except as to one-third thereof, which was left "at the disposal of his wife, to be left as she may will." The court held that she acquired but an estate for life, and "that an express estate for life to the wife, with a power to dispose of the fee, shall not turn her estate for life into a fee," citing *Shermer v. Shermer*, 1 Va. 268, 1 Am. Dec. 460, *Bass v. Bass*, 78 N. C. 374, *Patrick v. Morehead*, supra, and *Church v. Disbrow*, 52 Pa. 219, and stating that the principal case should be added to the long line of those which established the same doctrine. See, also, *Harrison v. Battle*, 21 N. C. 214; *Alexander v. Cunningham*, 27 N. C. 433; *Parks v. Robinson*, 138 N. C. 269, 50 S. E. 649; *Morgan v. Morgan*, 60 W. Va. 327, 55 S. E. 389, 9 Ann. Cas. 943; *Mansfield v. Shelton*, 67 Conn. 390, 35 Atl. 271, 52 Am. St. Rep. 288. Revisal, § 3138, manifestly has no application. It appears in our case that the testator intended to pass an estate of less dignity than a fee. That section only establishes a rule between the heir and the devisee, in respect to the beneficial interest of the latter. *Alexander v. Cunningham*, 27 N. C. 430.

The case of *Herring v. Williams*, 158 N. C.

—, 73 S. E. 218, decided at the last term, did not involve the question now presented. The question there was whether there was a power of appointment or a power of disposal, while here the question is, the power being conceded, whether it enlarged the life estate into a fee. In the *Herring Case*, the donee had sold and conveyed the land by deed, or attempted to do so, while in this case she failed altogether to exercise the power.

The reversion in the land belongs to the heirs of Thomas Chewning, and not to the heirs of the donee of the power, and the judgment of the court is therefore correct.

Affirmed.

(158 N. C. 654)

#### STATE v. DUNN.

(Supreme Court of North Carolina. April 3, 1912.)

#### INTOXICATING LIQUORS (§ 200\*)—UNLAWFUL SALE—SUFFICIENCY.

An indictment stating that accused, on a specified date, with force and arms in a specified county unlawfully sold intoxicating liquors, gin, and beer to persons whose names were unknown to the grand jurors, contrary, etc., sufficiently charged an offense.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. §§ 219, 220; Dec. Dig. § 200.\*]

Appeal from Superior Court, Cumberland County; Carter, Judge.

John Dunn was convicted of selling intoxicating liquors unlawfully, and he appeals. Affirmed.

Omitting caption and indorsements, the indictment is as follows:

"The jurors for the state upon their oath present that John Dunn, late of the county of Cumberland, on the 27th day of October, A. D. 1911, with force and arms at and in the county aforesaid unlawfully did sell intoxicating liquors, gin, and beer in said county to persons whose names are unknown to the jurors, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the state. Sinclair, Solicitor."

The defendant was convicted upon an indictment charging him with selling intoxicating liquors to persons unknown, and appealed from the judgment pronounced on the verdict.

E. G. Davis, for appellant. Attorney General Bickett and T. H. Calvert, for the State.

PER CURIAM. We have examined all of the exceptions of the defendant, and find no error which entitles the defendant to a new trial.

Many of the objections to evidence were entered as a matter of precaution, and in the earnest effort of counsel to protect the rights

of the defendant, but they present no new questions requiring discussion.

The indictment is fully sustained in *State v. Dowdy*, 145 N. C. 432, 58 S. E. 1002, and his honor followed *State v. McIntyre*, 139 N. C. 601, 52 S. E. 63, as to the effect of the statute, applicable to Cumberland county, making the possession of a certain quantity of intoxicating liquors prima facie evidence of guilt.

No error.

(158 N. C. 496)

**THOMAS et ux. v. ASHCRAFT.**

(Supreme Court of North Carolina. April 3, 1912.)

**TRIAL (§ 252\*)—ISSUES—SUBMISSION—SUPPORT IN TESTIMONY.**

In an action for assault, it was proper to refuse to submit an issue as to whether plaintiff was frightened by defendant's use of profane language, where the evidence showed that through familiarity with profanity she was not frightened thereby.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 505, 596-612; Dec. Dig. § 252.\*]

Appeal from Superior Court, Union County.

Action by J. H. Thomas and wife against F. W. Ashcraft. Judgment for defendant, and plaintiffs appeal. Affirmed.

The following issues were submitted by the court:

"(1) Did the defendant assault the plaintiff Mina Thomas as alleged in the complaint?"

"(3) What damage, if any, is the plaintiff entitled to recover?"

The jury answered the first issue, "No." There was a verdict and judgment for the defendant, and plaintiffs appealed.

Redwine & Sikes, for appellants. Williams, Lemmond & Love and Stack & Parker, for appellee.

**BROWN, J.** The plaintiff requested the court to submit the following issue: "Did the defendant use profane language towards the plaintiff, Mina Thomas, and thereby frighten her, as alleged in the complaint?" Plaintiff further requested the court to instruct the jury: "If the jury should find from the evidence that the defendant used profane language towards the plaintiff, and did this in an angry and mad manner, and this conduct frightened the plaintiff, then the jury should answer the second issue, Yes." His honor refused to submit the said issue, and to give the said instruction. The plaintiff excepted. There is abundant evidence upon the part of the feme plaintiff to prove that the defendant assaulted her, all of which is flatly denied by him, and the jury have taken this version of the matter.

It is unnecessary to discuss the propriety of the second issue as tendered by the plaintiff as a matter of law, for there is no evidence whatever in the record tending to

prove that Mrs. Thomas was either frightened or injured by the defendant's "cussing." On the contrary, we judge from reading the evidence in this case that the feme plaintiff would be quite a match for the defendant, or any other ordinary man. She says that she has always been a stout woman, that she has never taken but one dose of medicine in her whole life, and that she never had a doctor to attend her except at the birth of her children, and that she did all of her housework, cooking, washing, ironing, etc. That "cuss" words were not at all unfamiliar to her, and not calculated to frighten her, is manifested by her own testimony. She says: "I have often heard my brother, Josh, and my other brothers and all of my sisters curse. I have, also, heard my mother curse. It does not scare me to hear people curse. It was Mr. Ashcraft's jumping at me that scared me so bad, and caused me to give way." Now the jury have negatived the fact that Mr. Ashcraft jumped at her, for that was the sole basis of an assault. We think under the testimony his honor very properly refused both the issue and the instruction.

No error.

(91 S. C. 245)

**GORDON v. GORDON.**

(Supreme Court of South Carolina. April 4, 1912.)

**1. DIVORCE (§ 214\*)—TEMPORARY ALIMONY AND SUIT MONEY—APPLICATION—BURDEN OF PROOF.**

If a wife who applies for temporary alimony and suit money has voluntarily left her husband's home, she has the burden to show prima facie that he inflicted upon her such physical violence or personal indignity as would make her living with him intolerable, and even then she is not entitled to an allowance, if she has violated any of her important marital obligations; but, if the husband has driven the wife from home, the burden is on him to justify his refusal of support.

[Ed. Note.—For other cases, see *Divorce*, Cent. Dig. §§ 626-631; Dec. Dig. § 214.\*]

**2. DIVORCE (§ 286\*)—TEMPORARY ALIMONY AND SUIT MONEY—ALLOWANCE—DISCRETION.**

Since an allowance of temporary alimony and suit money is largely discretionary with the trial judge, his conclusion will not be disturbed, unless clearly against the evidence.

[Ed. Note.—For other cases, see *Divorce*, Cent. Dig. §§ 769, 770; Dec. Dig. § 286.\*]

**3. DIVORCE (§ 280\*)—TEMPORARY ALIMONY AND SUIT MONEY—RIGHT TO APPEAL FROM ORDER.**

An order allowing temporary alimony and suit money is appealable.

[Ed. Note.—For other cases, see *Divorce*, Cent. Dig. § 764; Dec. Dig. § 280.\*]

Appeal from Common Pleas Circuit Court of Williamsburg County; S. W. G. Shipp, Judge.

"To be officially reported."

Action by Fanny O. Gordon against Samuel B. Gordon. From an order allowing



temporary alimony and counsel fees, defendant appeals. Affirmed.

Stoll & Stoll, for appellant. Lee & Fishburne, for respondent.

WOODS, J. In this action brought by Fanny O. Gordon against her husband, Samuel B. Gordon, for permanent alimony and the custody of their children, Judge Shipp made an order for the payment of \$25 a month as a temporary allowance to the wife for her support, and of \$200 as reasonable counsel fees. The defendant has appealed on the ground that the plaintiff failed to make a prima facie showing that the separation was due to her husband's misconduct, and not her own.

[1] On the part of the wife, affidavits were introduced to the effect that the husband, actuated by unfounded suspicion and unreasonable jealousy, had driven his wife from his home. On the part of the husband there was his own affidavit that he had witnessed the unfaithfulness of his wife with one West, and the affidavits of other persons of like tenor. The pleadings and these affidavits make sharp issues to be decided at the trial as to the chastity of the wife, and as to the veracity of both husband and wife. Any discussion here of these issues might tend to influence the result of the trial, and it therefore seems proper that we should go little beyond a statement of our conclusions. The allowance of temporary alimony and suit money is a mere provisional remedy—a temporary provision for a wife living apart from her husband, because the circumstances prevent her from receiving support from him in the family home. If the wife voluntarily leaves her husband's home, as a condition of obtaining even temporary alimony and suit money, she must assume the burden of showing prima facie that her husband has inflicted on her such physical violence or personal indignity as would make her living with him as a wife intolerable. Even that showing will not entitle her to the provision if, on the whole showing from both sides, it appears prima facie that she committed adultery or violated or omitted to discharge any of the important hymeneal obligations assumed by her. *Hair v. Hair*, 10 Rich. Eq. 173; *Levin v. Levin*, 68 S. C. 123, 46 S. E. 945. But where it is admitted, or conclusively shown, as in this case, that the husband has driven his wife from his home and thus actively deprived her of support there, the burden then falls on him to justify his refusal to perform the duty of supporting his wife which the law imposes on him.

[2, 3] The conclusion to be drawn from the evidence presented, considered in the light of these rules, is largely in the discretion of the circuit judge. His order is appealable (*Messervy v. Messervy*, 79 S. C. 59, 60 S. E. 692), but his conclusion will not be disturb-

ed unless clearly opposed to the weight of the evidence. As the affidavits do not lead to a clear conviction that the circuit judge was in error, the judgment will not be disturbed.

It is the judgment of this court that the judgment of the circuit court be affirmed.

GARY, C. J., and HYDRICK, J., concur.

(91 S. C. 163)

J. H. WILKES & CO. et al. v. ARTHUR  
et al.

(Supreme Court of South Carolina. March 27, 1912.)

1. APPEAL AND ERROR (§ 204\*) — RECORD—CONCLUSIVENESS.

In the testimony taken before a master in an action by depositors of an insolvent bank against stockholders, it was stated that it was agreed that claims might be proved by merely filing a statement of the claim, subject to verification by reference to the bank books. *Held* that, without taking some action to correct the record, defendants could not question the sufficiency of proof of this character on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1258-1280; Dec. Dig. § 204.\*]

2. REFERENCE (§ 65\*)—OBJECTIONS—WAIVER.

A question having arisen as to the manner of proving claims of depositors of an insolvent bank in an action against stockholders, defendants' counsel stated that anything which the master thought was proper was acceptable to him. *Held*, that this constituted a waiver of objections to the manner of proving the claims, and that its force was not destroyed by counsel adding that he thought they should be formally proved.

[Ed. Note.—For other cases, see Reference, Cent. Dig. §§ 97, 98; Dec. Dig. § 65.\*]

3. BANKS AND BANKING (§ 47\*)—STOCKHOLDERS' LIABILITY—"DEPOSITOR."

The holders of certificates of deposit are depositors in the bank within Const. art. 9, § 18, providing that stockholders of banks shall be liable to depositors in a sum equal to the amount of their stock over and above its face value.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 62, 64-68, 341; Dec. Dig. § 47.\*]

For other definitions, see Words and Phrases, vol. 3, p. 2003.]

Appeal from Common Pleas Circuit Court of Union County; R. C. Watts, Judge.

"To be officially reported."

Action by J. H. Wilkes & Co. and others against B. F. Arthur and others. From a judgment confirming the master's report, certain defendants appeal. Affirmed.

W. W. Johnson, Mitchell & Smith, and J. P. K. Bryan, for appellants. J. K. Hamblin, H. K. Osborne, Stanyarne Wilson, J. G. Hughes, J. F. Walker, Jr., and J. A. Sawyer, for respondents.

GARY, C. J. This is an action by J. H. Wilkes & Co., King Hardware Company, and Lady Schumpert as plaintiffs (of whom Lady Schumpert is the only party respondent)

against B. F. Arthur and numerous other parties named as stockholders of the People's Bank, an insolvent corporation heretofore doing business at Union, S. C. The action was brought by the plaintiffs in behalf of themselves and all other depositors of the People's Bank who might join with them and contribute to the expenses of the suit to enforce the statutory liability of said stockholders. There was an order of reference to the master to take the testimony, and report upon all issues involved, from which order there was an appeal, but the appeal was dismissed. 85 S. C. 300, 67 S. E. 297. The master made his report, which was confirmed by the circuit court, except in certain particulars therein mentioned, whereupon several of the parties defendant, represented by different attorneys, appealed to this court.

We will consider first, the questions raised by these appellants represented by Mr. Bryan, who, in his argument, states that the main question in the case is whether the claims of any of the depositors have been legally proved under the order of reference.

[1.] The sixteenth exception assigns error on the part of his honor the circuit judge "in overruling and not sustaining exception 16 to the report of the master as follows: 'The master erred in finding as matter of fact that at a reference on the 27th of July, 1910, it was agreed by counsel that the claims of all the depositors who were present or represented at the reference, or had heretofore proven their claims, or filed same with the master, should be established by the books of said People's Bank, and the accounts of the receivers, provided the accounts of the respective depositors shall not exceed the receivers' accounts and the bank books.'" The following statement appears in the testimony: "It is agreed that all further claims offered by Mr. Hamblin and his associates may be proven by filing a statement showing the names of the parties, and the amounts of the respective claims, the same, however, to be in accordance with the bank books, which are hereby offered in evidence for purposes of verification; and the said statement shall be sufficient proof of such claims when so filed. The same agreement is to apply to all claims heretofore filed or hereafter to be filed with the master." At a subsequent reference the record shows that the following took place: "Court: There have been some little claims, filed with me heretofore, quite a little number, and I don't think the parties have been notified of the condition of affairs. Mr. Bryan: My feelings about the matter is this: That whatever the master thinks is proper and fair is acceptable to my side; but I think they should be formally proven." There are no facts apparent upon the face of the record indicating that the statement

therein as to the manner in which the claims should be proved was not authorized and was not binding upon Mr. Bryan's clients. Therefore it was incumbent on him to take such proceedings as were necessary to correct the record while the reference was pending, or, if he did not have notice of the statement in the record until the report was filed, then to make a motion to be allowed to introduce testimony to show that the agreement was not binding on the parties represented by him. He, however, waived the right to object to the manner in which the claims were proved when he stated to the master that whatever he thought was proper and fair was acceptable to his side. The fact that Mr. Bryan stated that he thought the claims should be formally proved did not destroy the effect of his previous consent, that whatever the master thought was proper and fair would be acceptable to the parties represented by him.

[3] The next question that will be considered is whether his honor the circuit judge erred in ruling that the holders of time certificates were depositors of said bank within the meaning of the Constitution and statutes, making stockholders liable to depositors of banks. Section 18, art. 9, of the Constitution, is as follows: "The stockholders of all insolvent corporations shall be individually liable to the creditors thereof, only to the extent of the amount remaining due to the corporation, upon the stock owned by them: Provided, that stockholders in banks or banking institutions, shall be liable to depositors therein, in a sum equal in amount to their stock, over and above the face value of the same." The framers of the Constitution did not contemplate fine-spun distinctions between those depositing money in the bank, subject to draft, and those receiving time certificates for their deposits; nor the characteristics of a certificate of deposit and those of a promissory note. It makes no difference how much similarity there may be between a time certificate of deposit and a promissory note, it does not prevent the person receiving the certificate of deposit from still occupying the relation of a depositor. No authority has been cited, and we do not believe any can be found, sustaining the proposition that a party depositing money in a bank in the usual course of business, and accepting a time certificate, is not to be regarded as a depositor.

The other exceptions of these appellants involve questions of fact, and are overruled, as it has not been made to appear that they were erroneous.

In all other respects the judgment of the Circuit Court is affirmed, for the reasons therein stated.

WOODS, HYDRICK, and FRASER, JJ., concur. WATTS, J., disqualified.

(91 S. C. 161)

**STATE v. ROBINSON.**

(Supreme Court of South Carolina. March 27, 1912.)

**TRIAL (§ 29\*)—REMARKS OF COURT.**

The remark by the court that a witness looked to be fair-minded, when called for by a request of defendant's counsel that he be permitted to contradict his own witness, was not violative of the constitutional provision that judges shall not charge juries as to matters of fact.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 80-84, 508; Dec. Dig. § 29.\*]

Appeal from General Sessions Circuit Court of Anderson County; T. S. Sease, Judge.

"To be officially reported."

John Robinson was convicted of assault and battery with intent to kill, and he appeals. Affirmed.

A. H. Dagnall, for appellant. P. A. Bonham, Sol., for the State.

**HYDRICK, J.** Defendant was convicted of assault and battery with intent to kill, and from sentence of five years at hard labor he appeals.

Defendant's attorney put up a witness, whose testimony took him by surprise. Thereupon the following colloquy between defendant's attorney and the court took place: "May it please the court, I know that ordinarily the rules of evidence will not permit one to contradict his own witness, but the evidence of this witness is a complete surprise to me." The Court: "I don't see anything at all to indicate that his mind is prejudiced one way or the other." Mr. Dagnall: "This witness told me, before I had him summoned, that defendant asked his wife to get some hot supper for him, that the defendant had not abused her in any way, that defendant did not have a shotgun in the road when he met the Bells, that defendant was not to blame in any way for the difficulty, and that defendant acted in self-defense all through the difficulty, and was not the aggressor in any manner, and that he did not hear the old man (meaning Bell) say a word when he left the house." The Court: "The witness looks like a very fair-minded witness, is all I can say." Mr. Dagnall: "I would like to except to your honor's ruling, on the ground that the court has invaded the province of the jury in passing upon the facts of the case, as the weight of the evidence and the credibility of the witnesses is for the jury, and not for the court." The Court: "I am ruling this, that the witness has not shown any bias one way or the other, and seems to be fair, and I rule that counsel cannot contradict him." Mr. Dagnall excepts to the ruling, on the ground that the credibility of the witness is for the jury, and not for the court.

The sole point made by the exception is

that, in his remarks made in the presence of the jury, in the colloquy between counsel and the court above quoted, the presiding judge committed error, in that he violated that provision of the Constitution which says that "judges shall not charge juries in respect to matters of fact." In *Black v. Railway*, 87 S. C. 244, 69 S. E. 230, 31 L. R. A. (N. S.) 1184, this court said, in disposing of a similar ground of appeal: "While the remarks were made in the presence of the jury, they were not made to the jury, but to counsel in passing upon his request. This court has recently, in a number of cases, been called upon to consider such remarks made by judges during the progress of trials, and the general rule announced is that such remarks, made in passing upon the admissibility of evidence, or motions for nonsuit or direction of a verdict, do not fall within the inhibition of the Constitution against judges charging juries with respect to matters of fact, and become reversible error, unless they are made in such manner or under such circumstances as to so impress upon the jury the opinion of the judge as to some vital fact in issue that he thereby becomes a participant in the decision of such fact to the prejudice of appellant. *State v. Driggers*, 84 S. C. 530, 66 S. E. 1042 [137 Am. St. Rep. 855, 19 Ann. Cas. 1166]; *Lattimer v. Electric Co.*, 81 S. C. 379, 62 S. E. 438, and cases cited." The remarks of the judge were called forth by counsel, who asked to be allowed to contradict his own witness, which is not permissible. *State v. McKay*, 89 S. C. 234, 71 S. E. 858. There is nothing in the remarks of the judge which made him a participant in the decision of any issue of fact in the case.

Judgment affirmed.

GARY, C. J., and WOODS, J., concur.

(91 S. C. 129)

**BUNCH et al. v. CHARLESTON & W. C. RY. CO.**

(Supreme Court of South Carolina. March 28, 1912.)

**1. WITNESSES (§ 289\*) — EXAMINATION — CROSS-EXAMINATION—SCOPE.**

The cross-examination of a witness is not confined to the subject covered by his examination in chief.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 949-954; Dec. Dig. § 289.\*]

**2. APPEAL AND ERROR (§ 971\*) — REVIEW — DISCRETION OF TRIAL COURT.**

While the scope of the cross-examination of a witness rests largely in the discretion of the trial court, yet, when the question as to the propriety of the cross-examination depends on whether the evidence is relevant as a reply, the question is one of law and may be reviewed on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3852-3857; Dec. Dig. § 971.\*]

### 3. WITNESSES (§ 269\*)—PERSONAL INJURIES—EVIDENCE—RELEVANCY.

In an action against a railroad company for personal injuries where plaintiff alleged that the injury was physical and defendant contended that the trouble was mental, defendant's proof regarding hysteria and mental trouble was relevant and was improperly excluded though sought to be elicited on cross-examination.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 949-954; Dec. Dig. § 269.\*]

### 4. CARRIERS (§ 320\*)—CARRIAGE OF PASSENGERS—ACTION—QUESTION FOR JURY.

In an action by a passenger against a carrier for injuries caused by the falling of a window, evidence that almost immediately after leaving a terminal the latch was discovered to be in a broken condition justifies the submission to the jury of the question of the carrier's negligence in inspection.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1118, 1128, 1149, 1153, 1160, 1167, 1179, 1190, 1217, 1233, 1244, 1248, 1315-1325; Dec. Dig. § 320.\*]

### 5. CARRIERS (§ 316\*)—CARRIAGE OF PASSENGERS—INJURIES—PRESUMPTIONS.

Where a passenger is injured through any instrumentality or agency of the railroad company, a presumption of the carrier's negligence is raised.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1261, 1262, 1283-1294; Dec. Dig. § 316.\*]

### 6. TRIAL (§ 191\*)—INSTRUCTIONS—INSTRUCTIONS ON FACTS.

In an action by a passenger against a carrier for personal injuries where the court had repeatedly charged that if plaintiff was guilty of carelessness or negligence she would not be entitled to recover, an instruction charging, in estimating damages, that physical injury and mental anguish should be taken into account, and that the plaintiff is not only entitled to recover for past suffering, injury and pain, but also, if she is permanently disabled, any pain which she may undergo in the future, was not on the facts.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 420-431, 435; Dec. Dig. § 191.\*]

### 7. CARRIERS (§ 280\*)—CARRIAGE OF PERSONS—DUTY OF CARRIER.

A railroad company is bound to exercise the very highest degree of care to transport its passengers in safety.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1085-1092, 1098-1106, 1109, 1117; Dec. Dig. § 280.\*]

### 8. TRIAL (§ 131\*)—ARGUMENT OF COUNSEL—OBJECTIONS—WAIVER.

Improper argument of counsel not objected to at the time cannot be complained of later, the failure to object being a waiver.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 312-314; Dec. Dig. § 131.\*]

Gary, C. J., dissenting.

Appeal from Common Pleas Circuit Court of Spartanburg County; R. C. Watts, Judge. "To be officially reported."

Action by Mrs. M. T. Bunch and her husband against the Charleston & Western Carolina Railway Company. From a judgment for plaintiffs, defendant appeals. Reversed and remanded.

Nicholls & Nicholls, Bomar & Osborne, and F. Barron Grier, for appellant. John Gary Evans and C. C. Wyche, for respondents.

FRASER, J. This is an action for damages for personal injuries. The plaintiff Mrs. Bunch purchased a ticket and paid for the same from Augusta, Ga., to Clarks Hill, S. C. Plaintiff entered the car as a passenger and took her seat. She wanted the window raised, and says that the porter raised it for her. Very soon after the train started, the sash came down and caught her arm. The plaintiff claims that her arm is seriously injured, and that she has lost the use of the arm, and claims \$5,000 damages.

The defendant denies all the allegations of the complaint except the incorporation of the defendant; that its lines extended from Augusta, Ga., to Clarks Hill, S. C.; that the plaintiff bought and paid for her ticket and was a passenger on said train. The defendant pleads contributory negligence and asked that the complaint be dismissed with costs. The judgment and verdict was for \$2,000.

The errors alleged cover (1) denial of the right to cross-examination; (2) charge of the judge; (3) remarks of counsel. Appellant has consolidated his exceptions, and we will adopt his consolidation.

[1] 1. Cross-examination. We cannot adopt one view of appellant, that the judge ruled that the cross-examination is confined to the subject covered by the examination in chief. The rule is too well settled to the contrary for this court to so construe his honor's ruling, unless the ruling admitted of no other construction.

[2] The plaintiff was introducing evidence in reply to the evidence of the defendant, so that the question was: "Is the testimony in reply to the evidence of the defendant?" While it is true that the scope of the cross-examination is largely in the discretion of the trial judge, still, when the question is as to the relevancy of the evidence, or whether it is in reply or no, it becomes a matter of law upon which this court ought to pass.

[3] The plaintiff had alleged that the trouble was physical. The defendant answered in evidence the trouble is mental. The defendant then undertook to prove something about hysteria which might involve mental trouble and was directly in the line of the reply. In this view this exception is sustained.

[4] 2. The appellant's second grouping is as follows:

(a) "In charging the jury that they could consider certain allegations of the complaint, although not supported by testimony."

It would be well-nigh impossible to prove by direct evidence that there had been no inspection, as a matter of fact. The law does not require direct proof of those things which can rarely be proved. There was testimony that, almost immediately after leaving the terminal in Augusta, the latch was discovered to be in a broken condition. Was the latch defective? Was it defective in August-

ta? Would an inspection have disclosed the defect? These were questions for the jury. If the jury concluded that the defect existed and an inspection would have lead to the discovery of the defect, then the jury might conclude that no inspection was made. His honor could not take this question from the jury. There was no error in this, and this specification is overruled.

[5] (b) "That injury to a passenger, through any instrumentality or agency of the company, in law presumes that the company is careless and negligent."

In *Steele v. Railway*, 55 S. C. 392, 33 S. E. 510, 74 Am. St. Rep. 756, this court says: "By all the authorities proof of injury under such circumstances would raise a presumption of negligence (that is, where a passenger was injured through any instrumentality of the railroad company) casting upon the carrier the burden of explaining that the accident happened from a cause for which it is not responsible, or that it was not due to its negligence." There is no error here, and this specification is overruled.

[6] (c) "Charging on the facts, in violation of the Constitution."

In considering this specification, reference is made to defendant appellant's third exception which was to the charge, as follows: "In estimating damages, you take into consideration any physical injury and mental anguish and things of that sort, and, inasmuch as the suit is brought to recover actual damages, she is not only entitled to recover for past suffering, injury, and pain, but also, if she is permanently disabled, any suffering which she may have in the future." This was merely a statement as to what actual damages included and was not a charge on the fact, particularly when the oft-repeated statement was made: "Now if she was guilty of carelessness and negligence herself, and that carelessness and negligence on her part in any manner contributed toward the direct and proximate cause of her injury, then she would not be entitled to recover any damages at all." There is no violation of the constitutional prohibition here.

[7] (d) "Instructing the jury that the law imposed on the railroad company the very highest degree of care to see that its passengers were transported in safety."

In the case of *Steele v. Southern Railway Company*, supra, this court says: "Whatever the mode of conveyance, whether by passenger, mixed, or freight train, a carrier is liable for any negligence resulting in injury to the passenger, and in that sense the law requires the highest degree of care in all cases, but in applying this rule the jury should take notice of the particular mode of conveyance." This was a passenger train, and the statement was not too strong.

[8] 3. This assignment of error refers to the remarks of counsel in addressing the jury. The record does not show that the attention

of the court was called to the objectionable remarks at the time. Where counsel wishes to object to remarks which he deems improper, he must object at the time. Failure to object at the time is a waiver. *Crumpton v. U. S.*, 138 U. S. 361, 11 Sup. Ct. 355, 34 L. Ed. 958. "It is the duty of defendant's counsel at once to call attention of the court to the objectionable remarks, and request its interposition and, in case of refusal, to note an exception." This seems to be the general rule. The record does not show that any objection was made during the argument, and it is too late to do so afterwards. This specification of error is overruled.

The judgment of this court is that the judgment of the circuit court be reversed for the reason herein stated and the cause remanded to the circuit court for a new trial.

WOODS, J., concurs. HYDRICK, J., concurs in the result. WATTS, J., disqualified.

GARY, C. J. I dissent from the opinion of Mr. Justice FRASER in so far as it sustains the first exception. As we construe his ruling in sustaining this exception, it is based upon the proposition that the right of the defendant to cross-examine the witness in reply was not dependent upon the discretion of his honor, the presiding judge. The presiding judge did not deny the defendant the right to cross-examine generally, but only ruled that the testimony, which the defendant's attorney proposed to elicit from the witness, was not in reply. If the presiding judge had refused the defendant the right to cross-examine the witness generally, this would have been error; but the limit to which the cross-examination may be conducted is to be determined by the presiding judge, in the exercise of a sound discretion. The rule is thus stated in 8 Enc. of Pl. & Pr. 109-110: "The opportunity of examining the opposing party's witness is a matter of right, but the latitude allowed in cross-examination is very largely within the discretion of the trial court, and an appellate court will not interfere unless that discretion is oppressively abused."

In 8. Enc. of Pl. & Pr. 131, under the head of "Rebuttal and Surrebuttal," it is said: "The ordinary course of proceeding requires that the party who holds the affirmative of the issue shall introduce all the evidence in support of his case before he rests. The other party should then introduce the evidence upon which he relies, after which the party who opened may introduce evidence in rebuttal of the case made by the opposing party."

In the same volume on pages 133 and 134, under the head of "Evidence in Surrebuttal," it is also said: "The case at first made out by the plaintiff should apprise the defendant of the ground upon which the cause of action is finally to rest. Accordingly, if the plaintiff in reply puts new matter in evidence or

makes a new case different from that at first made out, it becomes the right of the defendant to call witnesses in surrebuttal. And it is within the discretion of the court to permit the introduction of evidence in surrebuttal, where the plaintiff in reply has not transgressed the proper bounds of evidence in rebuttal, though in that case the privilege cannot be claimed as a matter of right."

The record discloses the fact that the plaintiff in reply did not transgress the proper bounds of "evidence in rebuttal" nor was such an objection interposed by the appellant's attorney. Therefore, even under the principle just stated, the right of the defendant in the present case to introduce evidence in surrebuttal depended upon the discretion of the presiding judge. The court, however, decided in the case of *State v. Summer*, 55 S. C. 32, 32 S. E. 771, 74 Am. St. Rep. 707, that, even when the plaintiff in reply puts new matter in evidence, the right of the defendant to introduce evidence in surrebuttal was addressed to the discretion of the presiding judge.

In the case just mentioned, Mr. Justice (afterwards Chief Justice) Pope wrote the opinion of the court in which he announced the proposition that the defendant had the right to introduce evidence in surrebuttal when the plaintiff in the reply puts new matter in evidence, and relied upon the doctrine announced in 8 Enc. of Pl. & Pr. 133, 134, which we have just quoted. Mr. Chief Justice McIver took issue with him on this proposition, and quoted the following language from *State v. Clyburn*, 16 S. C. 375: "The conduct of a case in the circuit court, so far as it relates to the time when testimony may be introduced, must be left to the discretion of the circuit judge to be governed by the particular circumstances of each case." The two other members of the court concurred in the opinion of Mr. Chief Justice McIver.

It was not necessary for the presiding judge, in sustaining the objection interposed by the plaintiff's attorney, to state that he was exercising his discretionary powers.

In the case of *State v. Summer*, 55 S. C. 32, 32 S. E. 771, 74 Am. St. Rep. 707, Mr. Justice Pope was of the opinion that the circuit judge erred, "especially as his exclusion of the testimony was not based upon the exercise by him of discretion, but, on the contrary, the exclusion seemed to be made by the circuit judge upon the absence of power in him to admit it;" but this view did not prevail with the majority of the court.

Having reached the conclusion that the right of the defendant to cross-examine the witness rested upon the discretionary powers of the presiding judge, it is only necessary to refer to the record to show that his discretion was not erroneously exercised.

For these reasons, I think the judgment should be affirmed.

(91 S. C. 91)

# CITY NAT. BANK v. COOPER & GRIFFIN, Inc.

(Supreme Court of South Carolina. March 25, 1912.)

## 1. APPEAL AND ERROR (§ 263\*)—EXCEPTIONS—INSTRUCTIONS.

An instruction not excepted to is the law of the case, whether correct or not.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 1516-1532; Dec. Dig. § 263.\*]

## 2. BANKS AND BANKING (§ 171\*)—COLLECTIONS—SELECTION OF CORRESPONDENT—LIABILITY FOR NEGLIGENCE.

A bank receiving a draft for collection is liable for the negligence of its correspondent or his agents in collecting, irrespective of whether it used reasonable care in selecting the correspondent, in absence of any agreement varying such liability, and the rule is especially applicable where the bank credited the depositor with a check forwarded in payment of the draft to be collected by the correspondent bank.

[Ed. Note.—For other cases, see *Banks and Banking*, Cent. Dig. §§ 597-618; Dec. Dig. § 171.\*]

## 3. BANKS AND BANKING (§ 171\*)—COLLECTIONS.

A depositor, who unites with a bank in selecting an agent in collecting his commercial paper, as by giving the name of a certain bank in response to an inquiry as to how his draft shall be collected, and is given credit for the amount of the draft, cannot escape liability to the bank for the negligence of the bank selected in making the collection by claiming that the collecting bank was not his agent.

[Ed. Note.—For other cases, see *Banks and Banking*, Cent. Dig. §§ 597-618; Dec. Dig. § 171.\*]

## 4. BANKS AND BANKING (§ 175\*)—ACTIONS—JURY QUESTION.

In an action by plaintiff bank, which undertook to collect a draft for defendant through another bank, and which credited defendant with the amount of the check received from the correspondent bank, which afterwards became bankrupt without paying the check, to recover the amount thereof, evidence held to make it a jury question whether defendant did not ratify plaintiff's acceptance of the check of the collecting bank.

[Ed. Note.—For other cases, see *Banks and Banking*, Cent. Dig. §§ 634-652; Dec. Dig. § 175.\*]

Appeal from Common Pleas Circuit Court of Greenville County; John S. Wilson, Judge. "To be officially reported."

Action by the City National Bank against Cooper & Griffin, Incorporated. From a judgment for plaintiff, defendant appeals. Affirmed.

Cothran, Dean & Cothran, for appellant. Haynsworth & Haynsworth, for respondent.

WOODS, J. The defendants appeal from a judgment in favor of the plaintiffs founded on a verdict for \$2,866.10. On July 3, 1907, the defendants, Cooper & Griffin, deposited with the plaintiff, City National Bank of Greenville, their draft on Steele, Miller & Company, of Corinth, Miss., for \$2,476.23. The plaintiff bank immediately forwarded the draft with the usual collection indorse-

ment to the Tishomingo Savings Institution for collection, and on July 11, 1907, Steele, Miller & Co. paid the draft to that bank. On July 20, 1907, the Tishomingo Bank sent the City National Bank its check for \$2,476.23 on the National Bank of Commerce of St. Louis. Upon receiving the check, the City National Bank, on July 22, 1907, entered the amount of the check to the credit of Cooper & Griffin, and forwarded it for collection to its correspondent, the National State Bank of Richmond, Va.; and that bank, in turn, sent it to the Mechanics' National Bank of St. Louis for collection. Upon presentation of the check to the National Bank of Commerce, the drawee bank, on July 25, 1907, payment was refused for lack of funds. Notice of protest having been sent to the City National Bank, it extended the notice to Cooper & Griffin. When this notice was received, Mr. Steele, of Steele, Miller & Co., happened to be in Greenville, and at the request of Cooper & Griffin, and with the assent of the City National Bank, he made inquiry over the telephone of the Tishomingo Bank as to the dishonor of the check, and was assured that there was some mistake, and upon a second presentation it would be paid by the National Bank of Commerce. Cooper & Griffin made known this statement to the City National Bank, and it telegraphed to its Richmond correspondent to return the check to St. Louis for a second presentation. It appears, however, that the check was lost, and so was never again presented. The president of the Tishomingo Bank having failed in his promise to send a duplicate check, the City National Bank on October 11, 1907, made a draft on that bank for the amount. Payment of this draft was refused. About November 1, 1907, by agreement between the City National Bank and Cooper & Griffin, Mr. S. A. Cothran, an employé of Cooper & Griffin, was sent to Corinth with instructions to try to get the Tishomingo Bank to pay its draft. He received from the Tishomingo Bank about \$38 in cash and a duplicate of the check which had been sent by it to the City National Bank on July 20, 1907. Payment of this check was refused, and the paper was returned to the City National Bank. In December, 1907, the Tishomingo Bank suspended payment and went into bankruptcy. The City National Bank having made an unsuccessful effort to collect from the assets of the bankrupt \$2,476.23 and interest, less the payment of \$38, brought this action to recover the amount from Cooper & Griffin.

The foregoing is a statement of the material undisputed facts. At other points in the evidence there were distinct issues of fact. Johnson, the cashier of the plaintiff bank, testified that the draft of Cooper & Griffin on Steele, Miller & Co. was sent to the Tishomingo Bank for collection at the express request of Lively, the agent of the defendants by whom it was deposited. Lively testified

on this point as to the interview with Johnson: "When I took it in, he asked me how he should send it, and I told him that it didn't make any difference; it was drawn with exchange. And he asked me if I knew the name of a bank that he could direct it to, and I gave him the name of this bank at Corinth, and mentioned to him that Steele, Miller & Co. did business with them, and told him that I remembered the name of this bank."

The evidence on the part of the defendants was that they participated in sending Mr. Cothran to Corinth, and in other efforts looking to collection from the Tishomingo Bank, merely aiding gratuitously the City National Bank, that Mr. Cothran was not their agent, but the agent of the City National Bank, and that they assumed no authority in the matter, considering their liability on the paper at an end when the draft was paid by Steele, Miller & Co. The undisputed testimony tended to show that there had been delay in pressing the claim against the Tishomingo Bank, and for this alleged negligence the defendants contended the plaintiff was solely responsible, and that by it they had been relieved even if before they had been liable. On this point the plaintiff's testimony tended to show that its officers acted in concert with the defendants in sending Mr. Cothran, and in taking other means to collect the draft from the Tishomingo Bank. The plaintiff contended that there had been no negligence, but reasonable and concerted effort to collect on the part of the plaintiff and the defendants.

[1] The first position taken in argument by defendant's counsel is that, although the circuit judge charged all but one of his requests and refused all but two of the requests of the plaintiff's counsel, yet the instruction was given to the jury that they might find for the plaintiff without respect to whether the plaintiff had failed to use due diligence in trying to collect from the Tishomingo Bank. The argument of defendant's counsel on the point is impressive; but a statement of the law and an analysis of the charge, we think, will show it to be unsound. At defendant's request, the circuit judge charged the jury: "Where a bank, as a collection agent, receives a draft from one of its customers for collection, its position is that of an independent contractor, and the instruments employed by such bank in the business contemplated are its agents, and not the subagents of the owner of the draft. A bank which receives a draft for collection and sends it to a correspondent in another city to present for payment, collect, and remit the proceeds, is not justifiable in receiving from such other bank the proceeds of collection in the form of a check drawn by such other bank on another bank. If the collecting bank has received money for the draft, it should remit money, and the original bank in accepting

anything else assumes responsibility for such other medium, unless the owner of the draft has authorized or ratified such departure from the requirements of the case." As there was no exception to the charge on this point, it must be regarded the law of the case whether correct or not. But inasmuch as this point, vital in the trial of the case, is very important and has never been decided in this state, we shall not pass over it.

The rule which is supported by much judicial authority and strong reasoning in this country, as will be seen by reference to the cases cited below, is that, when a bank receives paper for collection at a distant point, it engages to use reasonable efforts to collect and to pay its customer. The necessity of using other agencies being manifest, the bank is responsible only for reasonable care in the selection of such agencies, and if such care is exercised it will not be held liable for default on the part of the collecting bank. *Fabens v. Merchants' Bank*, 23 Pick. (Mass.) 330, 34 Am. Dec. 59; *Lord v. Hingham Nat. Bank*, 186 Mass. 161, 71 N. E. 312; *Guelich v. Nat. State Bank*, 56 Iowa, 434, 9 N. W. 328, 41 Am. Rep. 110; *Bank v. Cummings*, 89 Tenn. 609, 18 S. W. 115, 24 Am. St. Rep. 618; *First Nat. Bank v. Sprague*, 34 Neb. 318, 51 N. W. 846, 15 L. R. A. 498, 33 Am. St. Rep. 644; *Daly v. Butchers' & Drovers' Bank*, 56 Mo. 94, 17 Am. Rep. 663; *Wilson v. Carlinville Nat. Bank*, 187 Ill. 222, 58 N. E. 250, 52 L. R. A. 632; *Farmers' Bank & Trust Co. v. Newland*, 97 Ky. 464, 31 S. W. 38; *Irvin v. Pulley Co.*, 20 Ind. App. 101, 48 N. E. 601; *Bank of Rocky Mount v. Floyd*, 142 N. C. 187, 55 S. E. 95; *San Francisco Nat. Bank v. American Nat. Bank*, 5 Cal. App. 408, 90 Pac. 558; *Tiernan v. Commercial Bank*, 7 How. (Miss.) 648, 40 Am. Dec. 83; note, 38 Am. St. Rep. 777; note, 77 Am. St. Rep. 625.

[2] On the other hand, in 1884, the Supreme Court of the United States adopted the English rule that a bank receiving a draft or bill of exchange for collection is liable for neglect of duty occurring in its collection, whether arising from the default of its own officers, or from that of its correspondent, or an agent employed by such correspondent, in the absence of any express or implied contract varying such liability. *Exchange Nat. Bank v. Third Nat. Bank*, 112 U. S. 278, 5 Sup. Ct. 141, 28 L. Ed. 722. The following cases show that this doctrine has grown in favor with the progress of modern commercial life: *Martin v. Hibernia Bank*, 127 La. 301, 53 South. 572; *Brown v. People's Bank*, 59 Fla. 163, 52 South. 719; *Simpson v. Waldby*, 63 Mich. 439, 30 N. W. 199; *Siner v. Stearne*, 155 Pa. 62, 25 Atl. 826; *Power v. First National Bank*, 6 Mont. 251, 12 Pac. 597; *Baillie v. Augusta Bank*, 95 Ga. 277, 21 S. E. 717, 51 Am. St. Rep. 74; *National Revere Bank v. Nat. Bank of Republic*, 172 N. Y. 102, 64 N. E. 799; *Second Nat. Bank v. Bank of Alma*

(Ark.) 138 S. W. 472; *Streisguth v. Nat. German-American Bank*, 43 Minn. 50, 44 N. W. 797, 7 L. R. A. 363, 19 Am. St. Rep. 213.

We adopt this rule as the just one, because it is in accord with the common understanding of bank and customer in their dealings. In depositing his paper, the customer ordinarily surrenders all control of it, and has nothing to do with the means taken to collect. On the other hand, the bank undertakes the collection for its own profit, takes its own methods, and selects its own agents. It seems, therefore, illogical to regard the collecting bank or any of the intermediate banks as agents of the depositor, or to put upon him loss due to their default. But, even if this were not so, it is more important that the law affecting commercial transactions of the entire country should be uniform and certain than that it should be logical; and for that reason, on questions like this, it is better to follow the rule laid down by the Supreme Court of the United States. The reason for applying this rule is strengthened when, as in this case, the bank gives credit to the depositor for the paper sent in payment of his draft by the collecting bank. *Kirkham v. Bank of America*, 165 N. Y. 132, 58 N. E. 753, 80 Am. St. Rep. 714. And if this were all, it would be fatal to this action, and the verdict for the plaintiffs would have been contrary to the law as correctly laid down by the presiding judge. But there was evidence that the defendants expressly directed, or at least influenced, the plaintiff bank to send their draft to the Tishomingo Bank. Indeed, the defendant's representative who made the deposit admitted that, in answer to an inquiry of the cashier as to how the draft should be collected, he gave the name of the Tishomingo Bank, thus indicating that bank as a proper agent for collection and influencing the cashier to use it. This we think placed the case without the rule above set out.

[3] When the depositor takes part in selecting the agent to be used in collection of his paper, and thus acts in conjunction with the bank, or influences it in the transaction of the business, it does not lie in his mouth to say that the bank selected to make the collection at his instance or by his conscious influence was not his agent. *Exchange Nat. Bank v. Third Nat. Bank*, supra; *First Nat. Bank v. Quinby* (Tex. Civ. App.) 131 S. W. 429.

Having in view the evidence of an indication or request by the defendants that the plaintiffs should send the draft to the Tishomingo Bank, the circuit judge instructed the jury as to the effect of such request or indication in accordance with the principle we have stated in these words: "If Cooper & Griffin turned over to the City National Bank of Greenville a draft on Steele, Miller & Co., payable at Corinth, Miss., they



must be presumed to have contemplated that this draft would be collected by presentation at Corinth, and if Cooper & Griffin indicated the Tishomingo Savings Institution as the bank to which they desired that the draft should be transmitted for collection, *and requested or directed it*, and if in pursuance of such indication, *request, or direction*, the City National Bank did send the draft to the Tishomingo Savings Institution for collection, then the City National Bank discharged its duty, and Cooper & Griffin cannot hold it liable for any default or failure of the Tishomingo Savings Institution, and if that bank (the Tishomingo Savings Institution) collected the money and failed to pay it over, the loss would fall on Cooper & Griffin." This instruction was given at the request of the plaintiff, except that the italicized words were inserted by the circuit judge. It is true that the instruction was not given in this connection that even under the facts stated in this charge the loss would not fall on the defendants, if it was due to the negligence of the plaintiff bank. But the omission was very clearly supplied by the following, which was the last instruction to the jury: "If the plaintiff was guilty of negligence in enforcing the collection of the checks taken by it from the Tishomingo Bank in payment of the collection of the defendants' draft, or of enforcing claim against same, and such negligence caused a failure to collect such checks, or to accomplish a settlement of the matter, the plaintiff must bear the loss."

The next position to be noticed is that taken by the defendants' counsel that a new trial should have been ordered on the ground that, if the charge had been regarded by the jury, the verdict must have been for the defendants. As we understand, this position rests upon these instructions: First, that the defendants were absolved from liability after their check had been paid to the Tishomingo Bank, unless they had authorized or sanctioned the action of the plaintiff bank in taking the check of the Tishomingo Bank instead of money; and, second, that the defendants would be absolved from liability if the plaintiff bank was guilty of negligence in enforcing the payment of the debt due by the Tishomingo Bank for the money it had collected.

[4] We do not think the conclusion was inevitable that the verdict should have been for the defendants under the instruction first mentioned; for the record does not warrant the inference that there was no evidence of ratification by the defendants of the plaintiff's acceptance of the check of the collecting bank. When informed that a check had been sent instead of money, the defendants made no objection, and there was evidence that, when they received notice of the dishonor of the check, they not only failed to repudiate the course the bank had

taken, but actively participated in some of the steps looking to collection afterwards taken. The same evidence, taken in connection with other testimony, made an issue of fact as to whether the loss was attributable to the negligence of the City National Bank. The cashier of that bank testified as to communication to the defendants: "We told them that it was their item, that it belonged to them, and that we were simply acting as their agent, and that we would be glad to do anything to collect it for them, but we would have to look to them for full payment." This evidence, considered in connection with the evidence of the active response of the defendants to the notice of dishonor of the check, in suggesting plans for its collection, and of their subsequent active participation in sending Mr. Cothran to collect from the Tishomingo Bank, must be regarded at least a scintilla of evidence that the defendants so entered into the plans for collecting from the Tishomingo Bank that whatever negligence there was might be imputed to the defendants as well as the plaintiff. But, laying that to one side, another and stronger reason why the court could not say that the jury disregarded the charge on the subject of negligence in finding for the plaintiff is that the evidence leaves room for much doubt whether the loss was due to negligence at all. The sequel showed the Tishomingo Bank to be utterly insolvent, and it is by no means certain that the utmost diligence in pressing the claim against it would have brought payment. Indeed, the evidence furnished good ground for the jury to infer that harder pressure would have had no other effect than to precipitate bankruptcy. Our conclusion is that, under the evidence and the charge of the circuit judge in which the law was correctly applied, the verdict depended on difficult issues of fact which the jury might have decided either way.

It is the judgment of this court that the judgment of the circuit court be affirmed.

GARY, C. J., and HYDRICK, J., concur.

(91 S. C. 121)

# BINGHAM v. HARBY.

(Supreme Court of South Carolina. March 28, 1912.)

## 1. CHATEL MORTGAGES (§ 170\*) — CROPS — PRIOR MORTGAGE — RIGHTS — CONVERSION.

Where plaintiff held a prior mortgage on certain cotton to secure a debt of the grower, which mortgage was properly recorded, the subsequent holder of a second crop mortgage was charged with notice of plaintiff's rights under the prior mortgage, and was liable in conversion for the seizure and sale of cotton covered thereby, though he had no actual knowledge of the existence of plaintiff's prior lien.

[Ed. Note.—For other cases, see *Chattel Mortgages*, Cent. Dig. § 305; Dec. Dig. § 170;\* *Trover and Conversion*, Cent. Dig. § 140.]

## 2. CHATTEL MORTGAGES (§ 174\*)—SALE OF MORTGAGED PROPERTY—RIGHTS OF MORTGAGEE.

While a prior chattel mortgagee was entitled to follow the mortgaged property into the hands of a purchaser, under a sale by a junior mortgagee, the sale being insufficient to divest the prior mortgagee's title, he was not bound to pursue such remedy.

[Ed. Note.—For other cases, see *Chattel Mortgages*, Cent. Dig. §§ 327-329; Dec. Dig. § 174.\*]

Watts, J., dissenting.

Appeal from Common Pleas Circuit Court of Sumter County; J. W. De Vore, Judge.

"To be officially reported."

Action by R. H. Bingham against H. J. Harby. Judgment for defendant, and plaintiff appeals. Reversed and remanded.

L. D. Jennings, for appellant. Lee & Moise, for respondent.

GARY, C. J. This is an action for damages alleged to have been sustained by the plaintiff through the wrongful act of the defendant in seizing and converting to his own use the proceeds of two bales of cotton, which he had sold and placed beyond the reach of the plaintiff, under a mortgage, subsequent to a mortgage in favor of the plaintiff, covering said property, which was duly recorded.

It appears that on the 14th of February, 1910, the plaintiff entered into an agreement with Aaron Sumter, who was then indebted to him in the sum of \$79, whereby it was agreed that the plaintiff would make advances to Aaron Sumter during that year to enable him to make a crop on his own land, which advances were made by the plaintiff; that, in order to secure the indebtedness of \$79 and the said advances, Aaron Sumter executed to the plaintiff a mortgage on all crops to be raised on said land during the year 1910, which was recorded on the 18th of February, 1910. At the time of the said seizure, the condition of this mortgage had been broken. His honor, the presiding judge, directed the jury to render a verdict in favor of the defendant, on the ground that he was not liable, unless he had actual notice of the plaintiff's mortgage, of which fact there was no evidence, whereupon the plaintiff appealed.

[1] The practical question raised by this appeal is whether there was error on the part of his honor, the presiding judge, in applying the principle recognized in the case of *Graham v. Seignious*, 53 S. C. 132, 31 S. E. 51, to the fact of the case under consideration. In that case, the court said: "If the defendant received and disposed of the cotton mentioned in the complaint, having actual notice of the plaintiff's prior lien for rent, then he became liable, not for the value of the cotton or its proceeds, but for the damages which the plaintiff sustained by reason of the impairment of the security which the

plaintiff had for enforcing payment of his lien for rent."

There are, however, material differences between an agricultural lien and a chattel mortgage, which are pointed out in the case of *Sternberger v. McSween*, 14 S. C. 35, as follows: "One who attempts to enforce his rights under a lien, which is the creature of a statute, must confine himself to the remedy furnished by the statute. The right derived is solely from the statute, and the remedy resorted to must be that furnished by the statute. The attempt to invest an agricultural lien with the qualities of a chattel mortgage is an attempt to incorporate into the statute provisions which the Legislature has not seen fit to adopt; for certainly, if that body had designed to give an agricultural lien the qualities of a chattel mortgage, it would have been very easy to have said so. On the contrary, however, the agreement provided for by the statute, which creates the lien, lacks one of the qualities of a chattel mortgage which has been held (*Green v. Jacobs*, 5 S. C. 283) to be essential to invest the mortgagee with the right to the possession of the property, in that it does not contemplate any provision whatever for the transfer of title; and, as we have seen, the remedy provided by the statute manifestly contemplates no change in the title, but, on the other hand, presupposes the continuance of the title in the lienor, subject, however, to the lien until it is transferred by the execution of the process of the law, just as, in the case of property covered by the lien of a judgment or execution, the title of the property remains in the judgment debtor until it is transferred by a sale under process of law, and one who purchases from the judgment debtor takes subject to the lien, which follows the property into whosoever hands it may go; but the purchaser, after he has disposed of it, cannot be made liable for the value of the property, or for the proceeds of its sale." This language is quoted with approval in the case of *Kennedy v. Reames*, 15 S. C. 548.

The language hereinbefore quoted from *Graham v. Seignious*, 53 S. C. 132, 31 S. E. 51, was used for the purpose of showing that, although a person wrongfully disposing of property covered by an agricultural lien would not be liable for the value of the property, or for the proceeds of its sale, he would nevertheless be liable for the damages which the plaintiff sustained by reason of the impairment of the security he had for enforcing payment of his lien. The question now under consideration was not involved in that case.

[2] In the case of *Williams v. Dobson*, 28 S. C. 110, 1 S. E. 421, a creditor recovered judgment against his debtor, who subsequently executed mortgages on certain chattels to a third party, which were duly recorded. Thereafter the judgment creditor caused the mortgaged property to be seized and sold under

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

execution, whereupon the mortgagee brought an action against the judgment creditor and the constable. Judgment was in favor of the plaintiff, and on appeal this court said: "There is no doubt that after condition broken in a mortgage of personal property the title to said property becomes vested in the mortgagee. \* \* \* It is not denied here that the condition of plaintiff's mortgages had been broken before the levy and sale. The mortgages were on record. The defendants then must have known, when the levy and seizure of the property was made, that they were seizing the property of plaintiff, instead of the execution debtor, and that they were invading the plaintiff's rights. True the plaintiff's title to the mortgaged property was not divested by the sale, and he might have followed it in the possession of the purchaser; but we do not know that he was bound to do so. The defendants are the parties who committed the injury of which he complains; and he is certainly entitled to recover of them to the extent of that injury."

The principle is thus stated in the case of *Harris v. Saunders*, reported as a note in 2 Strob. Eq. 370: "The argument is that, inasmuch as the defendant was not aware of the plaintiff's title, he is not liable after the sale. It is not denied that he would be liable if he had retained the property and refused to give it up. Can the sale make any difference, when he thereby made property of it, and has the proceeds in his pocket? The sale was an act by which the plaintiff was wholly deprived of his property; and it was not the less his property because the defendant was not aware of his title, and purchased from another." This language is quoted with approval in *Ladson v. Mostowitz*, 45 S. C. 388, 23 S. E. 49, and in the concurring opinion in *Holliday v. Poston*, 60 S. C. 103, 38 S. E. 449.

It is the judgment of this court that the judgment of the circuit court be reversed, and the case remanded for a new trial.

WOODS, HYDRICK, and FRASER, JJ., concur.

WATTS, J. I dissent to the opinion of the court.

The first exception alleges that there was error in holding that there was no evidence to show that the defendant had actual notice of the rights of the plaintiff. A careful examination of the testimony satisfies me that there was no testimony to go to the jury which would warrant them in inferring that the defendant had any notice of the existence of plaintiff's mortgage until after he had sold the cotton and parted with the possession of it, and no testimony by which the jury could infer that the defendant had such notice that would put him on guard and make some inquiry; but, on the contrary, the only conclusion that could be arrived

from the testimony was that defendant, when he sold the cotton, had no knowledge or notice whatsoever of plaintiff's mortgage, and did not have such knowledge or notice until some time after he had sold the cotton in due course of business; "that he had no knowledge of the existence of the mortgage of plaintiff, or of such facts which, pursued, would have disclosed the fact."

The other exceptions question the court's ruling in not holding that the recording of plaintiff's mortgage within the time prescribed by law was sufficient notice to defendant, and that after condition broken the defendant, by seizing the property covered by mortgage and selling and converting it to his own use under a junior mortgage, was liable in damages; that after the condition of plaintiff's mortgage was broken title vested in plaintiff. The exceptions should be overruled, as the testimony shows defendant had no actual notice of the existence of plaintiff's mortgage when he sold the cotton. It is true that plaintiff's mortgage is on record; but that is not sufficient. Defendant must have actual notice or knowledge of such facts as would put him on inquiry, and, if pursued, would have disclosed such facts before he sold the cotton, to be made liable. *Graham v. Seignious*, 53 S. C. 137, 31 S. E. 51; *Link v. Barksdale*, 70 S. C. 487, 50 S. E. 189.

While it is the law that a recording of a mortgage in the county that the mortgagor resides in is constructive notice to the world, and would entitle the holder of the mortgage, after condition broken, to seize the mortgaged property wheresoever found, this only gives the right to seize the mortgaged property, and does not give the holder of the mortgage the right to recover from any one who has innocently purchased and disposed of the property without knowledge or notice of the existence of the mortgage, or notice of such facts as should put him on inquiry. There is no doubt but the plaintiff here could have recovered from the defendant the property while in his possession; but I do not think, under the facts as testified to, that he can recover for a conversion. I do not think there is any difference between the lien of a chattel mortgage and a lien on crops, except as to manner of enforcement provided by law. Both as to crops are created by statute. I think the circuit judge was right.

(91 S. C. 159)

#### STATE v. BEASLEY.

(Supreme Court of South Carolina. March 27, 1912.)

INDICTMENT AND INFORMATION (§ 110\*)—LANGUAGE OF STATUTE—SUFFICIENCY—LARCENY. Under Cr. Code 1902, § 56, providing that an indictment which charges the crime substantially in the language of the statute shall be sufficient, an indictment alleging that accused, being in possession of \$50 of proceeds, the \$50 being the proceeds of the sale of an

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

animal of prosecutor of the value of \$50, unlawfully appropriated to his own use the \$50 with intent to defraud, whereby accused committed a breach of trust with fraudulent intent, and by force of the statute committed larceny, against the form of the statute, charges a violation of section 154, declaring that any person committing a breach of trust with a fraudulent intention shall be guilty of larceny.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 289-294; Dec. Dig. § 110.\*]

Appeal from General Sessions Circuit Court of Lee County; S. W. G. Shipp, Judge. "To be officially reported."

B. S. Beasley was indicted for crime. From an order quashing the indictment for insufficiency, the State appeals. Reversed.

Philip H. Stoll, Sol., for the State. C. M. Aman, for respondent.

HYDRICK, J. This is an appeal from an order quashing an indictment for insufficiency. The indictment charges: "That B. S. Beasley, \* \* \* being in possession of fifty dollars, the property of B. McLaughlin, the said fifty dollars being the proceeds of the sale of a certain cow of the said B. McLaughlin, of the value of fifty dollars, did willfully and unlawfully convert and appropriate the said money of the said B. McLaughlin, to wit, fifty dollars, to his own use, with intent to defraud the said B. McLaughlin, whereby the said B. S. Beasley committed breach of trust with fraudulent intent, and by force of the statute in such case made and provided, committed grand larceny, against the form of the statute in such case made and provided, and against the peace and dignity of the state." The court held that the indictment contained no allegation of trust, and that such an allegation was essential in an indictment for breach of trust.

Section 154 of the Criminal Code of 1902 says that "any person committing a breach of trust with a fraudulent intention shall be held guilty of larceny." Section 56 of the Criminal Code reads: "Every indictment shall be deemed and judged sufficient and good in law which, in addition to allegations as to time and place, as now required by law, charges the crime substantially in the language of the common law or of the statute prohibiting the same, or so plainly that the nature of the offense charged may be easily understood; and if the offense be a statutory offense, that the same be alleged to be contrary to the statute in such case made and provided." The indictment in plain and unmistakable language charged that the defendant, being in possession of \$50, the property of B. McLaughlin, did convert and appropriate it to his own use with intent to defraud the said B. McLaughlin, whereby he committed a breach of trust with fraudulent intent. The crime is charged in the language of the statute, and "so plainly that the nature of the offense charged may be easily understood."

It therefore satisfies the requirements of section 56 above quoted.

Judgment reversed.

GARY, C. J., and WOODS, J., concur.

(91 S. C. 187)

SPIGENER et al. v. SPIGENER et al.

(Supreme Court of South Carolina. March 28, 1912.)

# 1. WILLS (§ 585\*)—IMPLIED REVOCATION.

Where item 2 of a will bequeathed the testatrix's estate to her children from and after the determination of the interest given her husband by his death, and item 3 gave testatrix's husband absolute power and authority to sell and dispose of any of the estate he might deem advisable, and to reinvest any proceeds from such sale in any manner that he might deem for the best interest of the estate, a codicil providing that, after the determination of the interest given the husband by his death, all her real estate as left at her death should remain unsold until all her children should become of age, and further providing that she revoked item 2, related only to item 2, and in no way affected the discretionary power given the husband by item 3.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1274-1278; Dec. Dig. § 585.\*]

# 2. WILLS (§ 585\*)—CODICIL—CONSTRUCTION.

The effect of such codicil was merely to postpone and modify item 2; the word "revoke" being misused.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1274-1278; Dec. Dig. § 585.\*]

Appeal from Common Pleas Circuit Court of Richland County; John S. Wilson, Judge.

"To be officially reported."

Action by M. R. Spigener in his own right and as executor against M. R. Spigener, Jr., and others. From a judgment for plaintiffs, certain defendants appeal. Affirmed.

The following is the decree of the circuit court:

"This is an action for the specific performance by the defendants Alfred B. Owings and W. D. Meehan of a contract of purchase, which is set forth in the complaint, of a lot in the city of Columbia, on the west side of Main street, between the Stork property on the north and the Palmetto National Bank building on the south, measuring on Main street 33½ feet, more or less, and running back 208 feet, more or less, now known as Nos. 1327 and 1329 Main street, the price to be \$1,250 per front foot, one-third to be paid in cash and the balance to be secured by bond and first mortgage of the premises, bearing 6 per cent. interest, and to run for 5 years, with the privilege of paying all cash or to anticipate the deferred payment upon 90 days written notice.

"The action involves the construction of the will of Mrs. Sallie F. Spigener, deceased, with reference to the power of sale conferred upon the plaintiff (her husband) by item 3 of the will, and whether that power is abrogated or affected by the codicil to the said

will. The said two defendants by their answer admit the contract of purchase, and set up as their defense for not performing the same certain contentions and questions as to the interpretation of the will and codicil, to the effect that the plaintiff cannot give good and marketable title; all of which will more fully appear by reference to the said answer.

"All the parties necessary to a final determination of the questions at issue are regularly and properly before the court as parties to this action. The ten children of the deceased, her only living children or descendants, have all been regularly served personally, and have answered. The six adult children accepted personal service by their written acknowledgment of the same, and filed an answer, signed by each of them, admitting the allegations of the complaint and consenting to judgment, as prayed. The four infant defendants, the remaining children of the testatrix, Jennie S., Sarah F., J. Victor, and Philip S. Spigener, after due personal service upon them of the summons and complaint, and proper applications for the appointment of guardian ad litem, and due and regular appointment of Edward L. Craig, Esq., an attorney of Columbia, S. C., as their guardian ad litem, by orders of the clerk of this court, were represented by their said guardian ad litem at the hearing of the cause, as well as at the references held by the master, the said guardian ad litem having filed an answer for the said infant defendants, submitting their rights to the protection of this court. The defendants, Owings and Meehan, were represented at the hearing by R. Beverley Sloan, Esq., their attorney. All the defendants reside in this state. The 10 children of the testatrix reside with their father, on Sumter street, except that M. R. Spigener, Jr., was at the beginning of the action residing or temporarily absent at Barnwell, S. C., and Marion E. Spigener and the two infant daughters were, at the beginning of the action, and are at present, temporarily out of the state, being at the Virginia Institute, in the city of Bristol, in the state of Virginia (they being in the part that is not in Tennessee), the former being a teacher in said institute and the latter being students there, but all returning to their father's home in Columbia, their home, in the summer. An order for the service of these three defendants by publication was duly taken, and they were thereafter regularly and properly served personally and made parties to the action. The three infants, Jennie S., Sarah F., and J. Victor Spigener, were, at the beginning of the action over 14 years of age, and they duly petitioned the clerk of this court to appoint Edward L. Craig, Esq., an attorney of this bar, their guardian ad litem, and he was duly appointed, and answered and appeared for them. The remaining infant defendant, Philip S. Spigener, was under 14 years of age, and his father, with whom he resides,

the plaintiff herein, duly petitioned for the appointment of a guardian ad litem for the said infant, Philip S. Spigener, and Edward L. Craig, Esq., was duly appointed by the clerk of this court, and answered and appeared for said infant defendant.

"Order of reference was taken, referring it to the master to take the testimony and report the same. The master's report and all the papers in the cause are before the court. The allegations of the complaint are proven by the evidence. The agreed price is adequate, and the sale will be advantageous to the estate. The plaintiff is competent to reinvest the proceeds and manage the same profitably and to the best interest of the estate, as contemplated in item 3 of the will.

"The will and codicil alleged in the complaint are in evidence (Judgment roll No. 5161, box 171, of the probate court of Richland county). The plaintiff has qualified as executor and administered the estate. He is in possession of all the estate of the testatrix, for his own especial use and benefit for his life, under and by virtue of item 1 of the will.

"[1] By item 3 he clearly has 'absolute power and authority to sell and dispose of any of the 'said estate as he may see fit or deem advisable,' and to 'reinvest from any proceeds from any such sale in any way that he may deem advisable for the best interest of' the 'said estate.' There is nothing in the codicil to abrogate or in any way modify this power conferred upon him by the said item third. The codicil is designed and intended solely to change the provisions of item second, by which the testatrix had vested all her estate in her living children (the children of a deceased child to represent the deceased parent) immediately upon the death of her husband, this plaintiff. By the codicil she postpones the distribution or sale of her estate, after the death of her husband, until all her children become of age. 'Until then' she devotes the 'uses, rents and profits of all' her 'estate, real and personal,' to the provision of a home and of support and education for all her minor children and her unmarried daughters, depriving her sons, as they become of age, and her daughters, as they marry, of any interest in said uses, rents and profits, 'until the final division of the estate'; that is, until the youngest living becomes of age. Everything in the codicil has reference to a time after the death of her husband, 'after the determination of the interest herein given to my husband by his death.' The time when this (codicil) provision of the will applies being thus fixed as beginning upon the death of her husband, she had no reference to a period during the life of her husband, when in the same sentence (which constitutes said codicil) she used the clause which is brought to the attention of the court by the complaint for interpretation and is relied upon as a defense by the defendants Owings and Meehan, to wit, 'as I shall leave

it at my death' (real estate). It is only 'after the determination of the interest herein given to my husband by his death' that she directs that her real estate shall 'remain unsold until' her children all become of age. She makes no provision for her children during the life of her husband. The clause, 'as I shall leave it at my death' (referring to 'all my real estate'), is reconciled with the remainder of the sentence by construing the words 'as it' to be the relative 'which,' the sentence (codicil) then reading: 'I will direct that, *after the determination* of the interest herein given to my husband *by his death*, all my real estate *which* (as) *I shall leave* (it) *at my death* shall remain unsold until all my children shall become of age; and until then,' etc. This clause was unnecessary to the sentence, though it is an emphasis of the idea that the corpus of her estate is to be kept intact by her husband for her children; he using the income only. It is entirely consistent with her previous direction (item 3) that he should sell and reinvest at will. It in no way modifies that full discretionary power.

"[2] This necessary construction of the will and codicil, from the language of both, is further borne out by the explicit words with which the codicil concludes, to wit: 'This item revokes item (2) of the within will.' This is a definite limitation of the effect of the codicil, and is consistent with its subject-matter, which is the same as the subject-matter of item second and different from that of item third. The word 'revokes' is misused. The codicil merely postpones and modifies item 2.

"This conclusion is reached solely from the language of the will and codicil. The testimony of Mr. N. W. Brooker, who drew and wrote the will and codicil, was by agreement ruled out as incompetent.

"It is agreed that the action being necessary to prevent any cloud on the title of the purchasers and for the construction of the will, of which plaintiff is executor, the costs of the action should be paid out of the estate; that is, out of the corpus, the plaintiff being entitled to the income for life. It is agreed that \$25 is a moderate fee for the guardian ad litem of the four infants, Edward L. Craig, Esq., who consents to this figure. The objections of the defendants Owings and Meehan set up in their answer are all overruled. The plaintiff makes title individually, under the power conferred by the will.

"It is, therefore, ordered, adjudged, and decreed that the plaintiff have judgment against the defendants Alfred B. Owings and W. D. Meehan for specific performance of their contract of purchase of the lot described in the complaint, devised by the will of Sallie F. Spigener, deceased, and that they pay to the plaintiff, M. R. Spigener, one-third of the price agreed upon, less \$250 already

paid; that is \$13,708.33, and deliver a bond and first mortgage of the premises for the balance—that is, \$27,916.67, to run for five years, at 6 per cent. interest, with the privilege of paying all cash at the delivery of the deed or of anticipating the deferred payment upon 90 days written notice, in accordance with the agreement set out in the complaint, upon the delivery by the plaintiff of his deed in fee simple of the said lot to the said two defendants.

"It is further ordered, adjudged, and decreed that the costs of the action, including a fee of \$25 to the guardian ad litem, Edward L. Craig, Esq., and also the plaintiff's attorney's fees, and other expenses or costs incurred by reason of the said action, be paid out of the estate of the testatrix, and that the receipts of the persons to whom such payments are made shall be sufficient for the protection of the plaintiff."

Beverly Sloan, for appellants. John J. McMahan, for respondents.

WOODS, J. The judgment of this court is that the judgment of the circuit court be affirmed for the reasons therein stated.

GARY, C. J., and HYDRICK and WATTS, JJ., concur.

FRASER, J. I concur in the result. It seems to me that "revokes" means revokes just as "item 2" means item 2. That it is clear that the codicil affects item 2 alone and is a substitute for it, and, in order to make the substitution complete, revokes it. Now, read the will and codicil as one, and, if there be a conflict between item 2 and item 3, then, under the well-known rule, item 3 governs.

For these reasons, I concur in the result.

(91 S. C. 300)

#### PORTER et al. v. LANCASTER.†

(Supreme Court of South Carolina. March 30, 1912.)

#### 1. DEEDS (§ 124\*)—CONSTRUCTION—ESTATE—FEE.

A deed to the wife of the grantor "and the issue of her body" by him begotten, to have and to hold unto her "and the issue of her body, as aforesaid, their heirs and assigns forever," conveyed a title in fee at the date of its execution.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 345-355, 416-428, 434, 435, 439, 452; Dec. Dig. § 124.\*]

#### 2. DEEDS (§ 136\*)—CONSTRUCTION—TITLE OF GRANTEES.

Under such deed, the wife and their issue then living took title as tenants in common.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 372, 431-433; Dec. Dig. § 136.\*]

#### 3. ADVERSE POSSESSION (§ 105\*)—EFFECT.

The grantees of a deed in fee cannot recover land which had been held openly, notori-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

†Rehearing denied April 18, 1912.

ously, and adversely against them for more than 20 years.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. § 603; Dec. Dig. § 105.\*]

Appeal from Common Pleas Circuit Court of Barnwell County; J. W. De Vore, Judge.

Action by Sarah Porter and others against Lella L. Lancaster. From a judgment for defendant, plaintiffs appeal. Affirmed.

G. M. Greene, for appellants. J. A. Willis and W. H. Townsend, for respondent.

FRASER, J. This case was heard in the circuit court on an agreed statement of facts. It appears that on the 14th day of December, 1875, Charles Smith, for a valuable consideration, conveyed a certain tract of land to his wife, Priscilla Smith, "and the issue of her body by me Charles Smith begotten, \* \* \* To Have and To Hold all and singular the premises before mentioned unto the said Priscilla Smith and the issue of her body, as aforesaid, their heirs and assigns forever." At that time there were three of such issue alive—Sarah Porter, W. H. Smith, and J. W. Smith. Afterwards there were three more—C. M. Smith, Ogretto Mock, and J. L. Smith. Mrs. Priscilla Smith mortgaged the land. The mortgage was foreclosed, and the land sold to Mrs. Wilson, the mother of the respondent. Mrs. Wilson has since died, and Mrs. Lancaster, the respondent, takes as one of her heirs. Mrs. Priscilla Smith and Mr. Charles Smith are also dead. It is admitted that Mrs. Wilson and the respondent have been "in open, notorious, and exclusive possession" of said land "claiming as owner adversely to the world" since May 4, 1885. The appellants claim that two of the issue of Charles and Priscilla Smith are not barred by the statute; hence the statute is kept open to all.

His honor says: "The plaintiffs contend that under the above-mentioned deed Mrs. Priscilla Smith took either (1) a life estate with remainder to her children as purchasers, or (2) as a tenant in common with her children as purchasers of the land in question," to which must be added that the word "issue" opened to admit after-born issue. "The defendant contends that Mrs. Priscilla Smith took under said deed a fee conditional special, and, having alienated the land by way of mortgage and the subsequent sale under proceedings in foreclosure after the birth of such special issue, the purchaser at the foreclosure sale and the defendant, her heir, have good title in fee to the land in question." His honor decrees: "Under no view of the case are the plaintiffs entitled to recover possession of the land in dispute"—and dismisses the complaint. There are seven exceptions, but the appellant consolidated as follows: "The only question involved in this case is whether Priscilla Smith

took a fee conditional under the deed of Charles Smith to Priscilla Smith and the issue of her body by me the said Charles Smith begotten, or did Priscilla take with the issue of her body by Charles Smith begotten as tenants in common." Appellant later explains that issue means issue alive at the death of Priscilla. Much is said about "conditions special" and "the rule in Shelley's Case."

[1] This is not a will that speaks after the execution and at the time of the death. This is a deed and speaks on the 14th day of December, 1875. It will be observed that there is no life estate and no remainder. The rule in Shelley's Case has no application. The word "issue" does not occur in the habendum alone. Substitute for the words "Priscilla Smith and the issue of her body by me the said Charles Smith begotten," the letter A., and you have a conveyance to A. and an habendum to A. and his (their) heirs and assigns forever. It is just an ordinary, plain deed in fee to A. On that day there was no doubt as to who were included in the term "issue," and it was as if he had named them, Sarah Porter, W. H. Smith, and J. W. Smith.

[2, 3] Mrs. Smith and her three children took as tenants in common. The land having been held openly, notoriously, and adversely against them for more than 20 years, they cannot recover. The admission of an adverse holding carries with it an ouster. *Mendenhall v. Mower*, 16 S. C. 311. "The word 'issue' is susceptible of three meanings: (1) It may describe a class of persons who are to take as joint tenants with the parties named. (2) It may be descriptive of a class who are to take at a definite and fixed time as purchasers. (3) It may denote an indefinite succession of lineal descendants who are to take by inheritance. Whenever this word is used, either in a deed or will, it must be used in one of these senses." This case falls within class No. 1. In the case of *Robinson v. Harris*, 73 S. C. 469, 53 S. E. 755, the testator devised to A. and her own children and to B. and his own children a tract of land. B. had no children at the date of the death of the testator, but left a son born afterwards, who claims an interest in the land. The circuit judge held that, as the will fixed no time for the vesting of the interest of the devisees, it vested at the death of the testator, and an after-born child did not take. This court affirmed the circuit decree. In *Johnson v. Johnson*, 6 McMul. Eq. 347: "As is said in *Wild's Case*, 6 Coke, 16, which has been followed as familiar law ever since, that if lands are devised to A. and his children, who have children living at the time, they take as joint tenants or tenants in common." In *Wallace v. Craig*, 27 S. C. 524, 4 S. E. 80, the rule is thus stated: "In *Wild's Case*, 6 Coke, 16, as follows: If A. devises his lands to B. and his children

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

or issue and he then have children or issue of his body, then his express intent may take effect according to the rule of the common law, and no certain and manifest intent appears in the will to the contrary. Therefore in such case they shall have but a joint estate." This case is followed in *Foster v. Glover*, 48 S. C. 540, 24 S. E. 100, and elsewhere. See also, the case of *Reeves v. Cook*, 71 S. C. 275, 51 S. E. 93. In that case after-born children were provided for. In this case they were not.

The judgment of this court is that the judgment of the circuit court is affirmed.

GARY, C. J., and HYDRICK, WOODS, and WATTS, JJ., concur.

(91 S. C. 175)

**BURNETT & JOHNSTON v. SENN.**

(Supreme Court of South Carolina. March 30, 1912.)

**TENDER (§ 26\*)—PROCEEDING TO FORECLOSE—JUDGMENT.**

Where, in a suit to foreclose a mechanic's lien against the owner, he claimed that the largest part of the materials for which a lien was claimed had been sold to a contractor, but admitted liability for materials of the value of \$37.51, which was tendered in court together with costs, refusing however, to admit that plaintiff was entitled to judgment for that amount, plaintiff was at least entitled to a judgment for such sum on the return of a verdict for defendant and to enforce the same, if not paid, by a sale of the property, it appearing that there was a bona fide dispute on reasonable grounds as to the amount due on the statutory lien.

[Ed. Note.—For other cases, see *Tender*, Cent. Dig. §§ 88-92, 95; Dec. Dig. § 26.\*]

Fraser, J., dissenting.

Appeal from Common Pleas Circuit Court of Spartanburg County; R. C. Watts, Judge. "To be officially reported."

Proceedings to foreclose a mechanic's lien by Burnett & Johnston against J. H. Senn. Judgment for defendant, and plaintiff appeals. Reversed.

Stanyarne Wilson, for appellant. Johnson, Nash & Daniel, for respondent.

WOODS, J. The issues made by the appeal are fully set out in the opinion of Mr. Justice Fraser and need not be repeated. There are only two points on which there is a difference of opinion.

I agree with Mr. Justice Fraser that the testimony of Senn as to what he heard Stover say at the telephone after calling for the office of plaintiffs was not competent as evidence against plaintiffs, in the absence of evidence that the call had been answered from the office of the plaintiffs, and that some one in the office had agreed to sell the material to Stover.

But it seems to me that the record makes it clear that the error was not material.

The case depended on the most direct and positive contradictions; evidence on one side that Senn had gone to the place of business of the plaintiffs and purchased the building material, on the other that Senn had an independent contract with Stover to build a house, and that he did not agree to pay for any material except a small quantity of the price of \$37.51, which he had purchased after Stover had defaulted in his contract. The verdict shows that the jury believed the defendant's testimony and rejected that of plaintiffs. The statement of Senn with respect to what he heard Stover say at the telephone was a circumstance too small to be regarded a significant factor in the finding of the jury on the issues submitted to them. I concur in the view that all the other exceptions should be overruled, but I think the plaintiffs should have judgment for \$37.51, the sum admitted to be due, with the costs which had accrued at the date of the tender.

The record shows that there was a bona fide dispute upon reasonable grounds as to the amount due on the statutory lien, and under the authority of *Reynolds v. Price*, 88 S. C. 530, 71 S. E. 51, there is no escape from the conclusion that tender of the real amount due was not a discharge of the lien.

The majority of the court being of the opinion that the petitioners should have had judgment for \$37.51, therefore it is the judgment of this court that the judgment of the circuit court be reversed, and that the case be remanded to that court with instructions to enter judgment in favor of petitioners for said sum, and for the costs of the proceedings up to the date of the tender, and with leave to enforce payment thereof by sale of the property described in the petition, unless said sum and said costs, as taxed by the clerk, shall be paid into the hands of the clerk within 10 days after notice of the taxation of said costs by the clerk.

GARY, C. J., and HYDRICK, J. We concur in the judgment suggested by Mr. Justice WOODS, because we think all the exceptions should be overruled, except the fifth.

WATTS, J., disqualified.

FRASER, J. (dissenting). This is a proceeding to foreclose a mechanic's lien. It seems that the respondent, Senn, made a contract with one W. O. Stover to erect for him some houses at Mayo, in Spartanburg county. It is not denied that Stover had contracted with Senn to furnish all materials and to do the work for the stipulated price. Some of the materials are furnished by the appellants, Burnett & Johnston. The amount claimed by the appellants was \$598.15.

The record shows that the respondent admitted that he was responsible for \$37.51 of the amount claimed, and tendered it and the



costs up to the date of trial. The record is as follows: "Mr. Nash: We do not admit that they can take judgment like this, but we tender them now \$37.51 in payment of our obligation, and we also agree to pay the costs up to this date and tender it also, and here is the money."

It seems that Mr. Senn lived in Greenville county at the time of the contract and went to Mayo with Mr. Stover to locate the buildings. On the way they passed through Spartanburg and called at the lumber yard of Burnett & Johnston, when the larger part of the bill was purchased. Stover did not complete the work, and the amount of \$37.51 was ordered by Senn alone. As to the rest of the bill, Stover participated, at least in the purchase. At the time of the purchase of the first bill, Senn was present. The lumber was shipped to Stover at Mayo; the appellants stating that this was merely for convenience in order to hasten the delivery, as Senn would not be at Mayo to receive it. That the subsequent shipments, except those covered by \$37.51, were made in the same way. The evidence shows that the original entry was in the name of W. O. Stover, and afterwards the name of J. H. Senn was added. The only testimony to which the attention of this court is called by way of exception is that in relation to a statement over the phone.

1. The other exceptions are to the charge and to the decree. I think the first exception ought to be sustained. The case of *Gilliland v. Southern Railway*, 85 S. C. 26, 67 S. E. 20, 27 L. R. A. (N. S.) 1106, 137 Am. St. Rep. 861, does not authorize the admission of this evidence. Identification of a person by his voice may not be necessary, especially in the case of a railroad office, where the law provides "that any one occupying an office or room in any railway station and attending to and transacting therein in the business of any railroad \* \* \* shall be deemed the agent." But it is necessary to show that there was some one at the other end of the line. The testimony is, "Did he get somebody when he called for Burnett & Johnston? I guess he did, he was talking." The test suggested by respondent is fair here. He says, "Cut out the lines." It is done. A man goes to an office, opens the door, and makes a statement loud enough to be heard by a third person. No one could suppose that such statement could bind the owner of the office unless it were at least shown that there was some one there to hear the statement. It seems to me that this exception ought to be sustained.

I cannot agree with the majority of this court because, in my judgment, when a party loses his cause and there has been introduced against him evidence which is relevant, though inadmissible, he is entitled to a new trial. When this court passes on the effect of the testimony, it is really passing on the facts of the case and invading the

province of the jury. None but the jury can say what effect the incompetent testimony had or ought to have had.

2. The appellant consolidated the second, third, and fourth exceptions as follows: "Second, third, and fourth grounds: Alleged violation of section 26, art. 5, of the Constitution."

The objectionable language was: If Johnston & Burnett sold him (Stover) and looked to him for pay, and subsequently discovered that they could not get it out of Stover, and charged the account to Senn, then, under those circumstances, petitioners would not be entitled to recover anything against "Senn," and "if plaintiffs had actual knowledge of the fact that Stover was an independent contractor with Senn, and dealt with him with that knowledge or notice, why then they did so at their peril; under circumstances of that sort they would have to look to Stover for their debt," and "If Senn went to Johnston & Burnett and told them that Stover wanted certain material, and, 'if Stover don't pay it, I will,' then they looked directly to Stover, and indirectly to Senn, and that would not be sufficient to hold him responsible."

His honor did not intimate his opinion or state the facts. He merely said in short, "if the materials were sold to Senn, then Senn is responsible." If they were sold to Stover, then Senn was not liable, even though he undertook verbally to guarantee the payment. These exceptions are overruled.

3. Exception 5: "5. In decreeing that the petition be dismissed and the lien canceled, and that defendant recover his costs of plaintiffs; the errors being: (1) That it was an admitted fact in the case, and so stated by the court on the record, that plaintiffs were entitled to judgment in the cause for \$37.51, and his honor should in any event have decreed against defendant for that amount and the costs of the action; and (2) that the lien should not have been canceled so long as any amount was due and unpaid thereon."

The first specification cannot be sustained. The record quoted above shows that Mr. Nash, the attorney for the respondent, stated: "We do not admit that they can take judgment like this, but we tender them now \$37.51 in payment of our obligation, and we will also agree to pay the costs up to this date and tender it also, and here is your money." The appellant has overlooked this statement. It is in the case, and we are bound by it.

As to the second proposition: I would say this was a proceeding to enforce a lien. The record shows that the full amount (covered by exceptions) and costs were tendered in open court. That extinguished the lien, and it seemed to me ought to.

Again I cannot agree with the majority of the court. It seems to me that when the court finds that a debtor honestly tries to as-

certain the amount of his indebtedness, and the creditor refuses to tell him, and, as soon as he is informed (i. e., when suit is brought), the debtor tenders the amount of the debts with cost and repeats the tender in open court, the court ought not to allow a judgment against him if it has a discretion to refuse. It seems to me that to allow a judgment for money only under the circumstances so found is stretching discretion beyond its utmost tether.

My opinion is overruled by the opinion of the majority, and the judgment of this court is that the judgment appealed from is reversed and the cause remanded to the circuit court to allow the entry of judgment in accordance with the opinion of the majority of the court.

WATTS, J., disqualified.

(91 S. C. 129)

#### KERSHAW v. BURNS.

(Supreme Court of South Carolina. March 26, 1912.)

#### 1. APPEAL AND ERROR (§ 991\*)—QUESTIONS REVIEWABLE—ISSUE OF TITLE—"EASEMENT APPURTENANT."

An "easement appurtenant" being one which inheres in the land, and is necessary to the enjoyment thereof, and is in the nature of a covenant running with the land, attached to the land to which it is appurtenant, an issue as to the existence of such an easement involves title; and the facts are not reviewable on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3896-3899, 3912, 3913; Dec. Dig. § 991.\*]

For other definitions, see Words and Phrases, vol. 1, pp. 477-487; vol. 8, p. 7580.]

#### 2. EASEMENTS (§ 3\*)—"EASEMENT APPURTENANT"—EXISTENCE.

A right of way which has neither of its termini on the premises of the claimant, and is not essentially necessary to the enjoyment of such premises, is not appurtenant, but a mere right of way in gross.

[Ed. Note.—For other cases, see Easements, Cent. Dig. §§ 8-12; Dec. Dig. § 3.\*]

#### 3. EASEMENTS (§ 3\*)—EASEMENT APPURTENANT—EXISTENCE.

The nature of an easement of a way, whether in gross or appurtenant, is not determined solely by the language of the deed granting it, but is dependent on the facts of the particular case; and the court must define the two kinds of easement to permit the jury to determine from the facts the kind of easement created.

[Ed. Note.—For other cases, see Easements, Cent. Dig. §§ 8-12; Dec. Dig. § 3.\*]

#### 4. EASEMENTS (§ 61\*)—ACTIONS—COMPLAINT—SUFFICIENCY.

A complaint, in an action involving a right of easement over an alley, which alleges that plaintiff is seised of a lot and owns a right of way easement, appurtenant to the lot, in and over an alleyway, and that the way is necessary for the use and enjoyment of his property, sufficiently charges that the way is essentially necessary to the enjoyment of the land, and states a cause of action, as against

a demurrer, on the theory that the easement is not an easement appurtenant.

[Ed. Note.—For other cases, see Easements, Cent. Dig. §§ 102, 130-144, 148; Dec. Dig. § 61.\*]

#### 5. EASEMENTS (§ 3\*)—RIGHT OF WAY—DEEDS—EASEMENT APPURTENANT.

A provision in a deed of a lot that the use of described land is permitted to the grantee is appropriate to the creation of a right of way appurtenant; but it does not confer a right of way appurtenant, unless the evidence shows the existence of the essential elements of such an easement.

[Ed. Note.—For other cases, see Easements, Cent. Dig. §§ 8-12; Dec. Dig. § 3.\*]

Appeal from Common Pleas Circuit Court of Lee County; John S. Wilson, Judge.

"To be officially reported."

Action by Friday Kershaw against W. B. Burns. From a judgment for defendant, plaintiff appeals. Affirmed.

Lee & Molse, for appellant. Purdy & Bland, for respondent.

GARY, C. J. This action involves a right of easement over an alley.

The complaint alleges: That the plaintiff is seised in fee and possessed of all that lot of land in the city of Sumter bounded north by Hampton avenue, east by land of Mrs. Gregg, south by land of Mrs. C. C. Bultman, and west by the strip of land or alleyway hereinafter referred to. That the plaintiff owns a right of way easement, appurtenant to the lot described, in and over the said alleyway for ingress and egress from Hampton avenue to the lot above described; Hampton avenue being a public street. That the plaintiff owns a large building, situated on the lot hereinafter described, and conducts a restaurant and hotel in the building on said lot, and resides with his family in the building located thereon; and it is necessary for the use and enjoyment of his property that he have the continuous use of said alleyway for the ingress and egress thereto. The defendant denied the allegations of the complaint, and alleged title to himself. A temporary order of injunction was granted when the action was commenced. Under an order of reference, the master took the testimony, and reported it to the court. His honor, the circuit judge, heard the case, without a jury, and dismissed the complaint, whereupon the defendant appealed.

The exceptions, though numerous, may be classified under two heads: (1) Those assigning error on the part of his honor, the presiding judge, in his findings of fact; and (2) those assigning error in not ruling that the plaintiff had a right of way appurtenant over the alley.

[1] We will consider, first, whether the facts are reviewable by this court. The following statement appears in the record: "The plaintiff claimed an easement or right

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

of way over a strip of land 10 or 11 feet wide \* \* \* owned and occupied by the plaintiff, and the defendant denied that the plaintiff had any such right, and claimed that he had title to the same, free from any right on the part of the plaintiff, and this raised the issue for trial." The characteristics of an easement appurtenant are thus stated in 14 Cyc. 1140: "An easement appurtenant is one that inheres in the land, concerns the premises, and 'is necessary to the enjoyment thereof, and is in the nature of a covenant running with the land, attached to the land to which it is appurtenant, and passing by deeds of conveyance.'" To the same effect are the cases of *Stovall v. Granite Co.*, 116 Ga. 376, 42 S. E. 723, and *Whaley v. Stevens*, 21 S. C. 221. An issue of title was therefore involved, and the facts are not reviewable by this court. *Alston v. Limehouse*, 60 S. C. 559, 39 S. E. 188; *Johnson v. Jones*, 72 S. C. 270, 51 S. E. 805. These exceptions are therefore overruled.

[2] We proceed to consider whether there was error in not adjudging that the plaintiff had a right of way appurtenant. The distinction between rights of way in gross and appurtenant is thus pointed out, in the case of *Whaley v. Stevens*, 21 S. C. 221: "A right of way may be in gross, or it may be appendant or appurtenant to land, and the distinction between the two kinds of rights are very marked and important. In the former, it is a mere personal privilege, which dies with the person who may have acquired it; while in the latter it inheres in the land to which it is appurtenant, is essentially necessary to its enjoyment, and passes with it. An essential feature of a right of way appurtenant is that it must have one of its termini on the land to which it is claimed to be appurtenant." There was a second appeal in said case (27 S. C. 549, 4 S. E. 145), and the court, in construing the opinion in the former appeal, said: "The court said in the former appeal, through Mr. Justice McIver, delivering the opinion, 'that a way to be appurtenant, it must adhere in the land, and be *essentially necessary to its enjoyment*' (*Whaley v. Stevens*, 21 S. C. 223); and, further, that the complaint therein was defective as a complaint for a way appurtenant; that it did not allege that it was necessary for the enjoyment of the land known as Caneslatch." Mr. Washburne says: "Ways are said to be appendant or appurtenant when they are incident to an estate; one terminus being on the land of the party claiming. They must inhere in the land, concern the premises, and be *essentially necessary to their enjoyment*." Wash. Eas. c. 2, § 5, p. 217." The syllabus in the case of *Fisher v. Fair*, 34 S. C. 203, 13 S. E. 470, 14 L. R. A. 333, which states the principle correctly, is as follows: "A right of way which has neither of its termini on the premises of the grantee, and is not *essentially*

*necessary to the enjoyment of his premises*, is not appurtenant, but a mere right of way in gross, which is personal to the grantee, and cannot be by him transferred, *notwithstanding the grant is to him for value, and to his heirs and assigns forever*." (Italics ours.)

[3] It will thus be seen that the nature of the easement is not to be determined solely by the language of the deed granting it; but the question whether the right of way is in gross or appurtenant to the land is dependent upon the facts of the particular case. In other words, it is a mixed question of law and fact. It is the duty of the court to define these different kinds of easement; but it is the province of the jury to determine whether the facts constitute the one or the other, when they are in dispute. The principle is well settled that a right of way appurtenant cannot be granted, unless it is essentially necessary to the enjoyment of the land to which it appertains.

[4] The complaint herein was not subject to demurrer, as in the case of *Whaley v. Stevens*, 21 S. C. 221, for the reason that the plaintiff alleges, that "it is necessary for the use and enjoyment of his property; that he have the continuous use of said easement and right of way and the use of the alleyway for ingress and egress to said property."

[5] Let us now turn to the testimony. On the 29th of October 1890, E. W. Moise, conveyed to B. G. Pierson, by deed, the lot of land now owned by the plaintiff, in which appears this provision: "The use of the land, between Reid's land and the lot herein conveyed, being permitted to the grantee, B. G. Pierson." B. G. Pierson made a deed of conveyance of said lot to Susan Peters on the 6th of January, 1894, and the following appears as a part of the description of the land thereby conveyed: "The use of the land between John Reid's land and the lot herein conveyed, being permitted to the grantee B. G. Pierson." Susan Peters conveyed the land to Friday Kershaw, the plaintiff, on the 7th of November, 1908, and in her deed are these words, "also all my right, title and interest in and to the alley-way, above referred to. \* \* \*" On the 23d of February, 1898, E. W. Moise executed a deed of conveyance of the land to E. A. Solomons, trustee; also "the said lot including the alley-way in the rear of said premises, leading to Republican street." On the 24th of May, 1890, E. A. Solomons, trustee, conveyed the said lot to W. B. Burns, the defendant; also "the said lot including an alley-way in the rear of said premises, leading to Republican street."

His honor, the circuit judge, made the following findings of fact: "The question as to having a right of way by necessity was scarcely touched upon by the plaintiff, and was not insisted on; nor was any argument made on the question of having a right of way by prescription, although his counsel stated that no rights which the plaintiff con-

ceived himself to have were abandoned, but the main reliance was placed upon title by grant; and I have already construed the deeds as not giving any right by grant, and no right has been made out by this method. \* \* \* In order to claim a right of way by prescription, one terminus must be upon the land of the dominant estate, must adhere in it, and be essential to its enjoyment, and the use must be adverse and not permissive; and none of these requisites exist here, although, independent of this, the plaintiff has not shown any right to the use of the alleyway by prescription. \* \* \* From what I have said and held, it follows that the plaintiff has failed to make out any right, in any of the methods required by law, to the right of way or easement claimed by him; and I so find and adjudge."

As we have said, these findings relate to the question of title, and are not reviewable by this court.

It will be seen that his honor, the circuit judge, finds that "the question as to having a right of way by necessity was scarcely touched upon by the plaintiff, *and was not insisted on*, \* \* \* but the main reliance was placed upon title by grant." As we have already shown, a right of way appurtenant is not only dependent upon the words of the grant, but upon the further question whether there are facts sufficient to prove the essential elements of such an easement; one of which being that it is essentially necessary to the enjoyment of the land to which it appertains.

The appellant's attorneys seemed to have entertained the idea that, if the language of the grant was appropriate to the creation of a right of way appurtenant, he was entitled to have the easement so adjudged, without resorting to testimony, although the facts were in dispute. We are inclined to the opinion that the language of the grant was appropriate to the creation of a right of way appurtenant; but such language could not confer a right of way appurtenant, unless the evidence showed that all the essential elements of such an easement existed, which the circuit court held was not done in this case.

Judgment affirmed.

WOODS, J., concurs. HYDRICK, J., concurs in the result.

(31 S. C. 181)

LANGFORD et al. v. JENKINS et al.

(Supreme Court of South Carolina. March 30, 1912.)

APPEAL AND ERROR (§ 110\*)—ORDERS APPEALABLE—NEW TRIAL.

No appeal lies from an order granting a new trial, unless the Supreme Court can render a judgment absolute.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 740-748; Dec. Dig. § 110.\*]

Appeal from Common Pleas Circuit Court of Barnwell County; George E. Prince, Judge.

Partition by Mary Langford and others against Sallie Jenkins and others. From an order granting plaintiffs a motion for a new trial, defendants appeal. Affirmed.

Bates & Simms, for appellants. B. T. Rice, for respondents.

WOODS, J. In this action for partition the defendants denied that the plaintiffs had any interest in the land, and alleged title in themselves to the entire land. On the trial of the legal issue of title, the jury found a verdict for the defendants. Thereafter the plaintiffs made a motion for a new trial on the ground that the circuit judge had given the jury an erroneous instruction. The motion was granted, and the defendants appeal.

No appeal lies from an order granting a new trial, except where this court can render judgment absolute. *Lamplay v. Atlantic Coast Line Ry. Co.*, 77 S. C. 319, 57 S. E. 1104; *Barker v. Thomas*, 85 S. C. 82, 67 S. E. 1, and cases cited. The defendants, while admitting this rule, contend that on the evidence offered by the plaintiffs the court should have granted their motion for nonsuit, or their motion for the direction of a verdict, and that the Supreme Court, if it sustains this position, could grant a judgment absolute in favor of the defendants. Careful examination of the record does not lead to the clear conviction that there was no error committed on the trial against the plaintiffs, or that the entire competent testimony offered by the plaintiffs would not have raised an issue of fact to be passed on by the jury. In holding the order not appealable, we reserve opinion on all the legal questions in the case.

It is the judgment of this court that the judgment of the circuit court be affirmed.

GARY, C. J., and HYDRICK, J., concur.

(31 S. C. 183)

BOYLES et al. v. WAGNER et al. SAME v. SANDERS.

(Supreme Court of South Carolina. March 30, 1912.)

WILLS (§ 605\*)—CONSTRUCTION—ESTATE DE- VISED—"HEIRS."

Testator declared that his whole estate should be kept together until his youngest daughter should arrive at 21, should marry or die, and that when either of those events happened, the whole should be divided among testator's children living at the time, share and share alike, that the portions passing to sons or daughters should not be liable for their debts or contracts, or for any debts or contracts of any husband which either one of the daughters might thereafter marry, but should be for the sole separate use of them and the heirs of their bodies forever. *Held*, that the

word "heirs" was a word of limitation, so that the ancestors would take the whole estate.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1360-1365; Dec. Dig. § 605.\*]

For other definitions, see Words and Phrases, vol. 4, pp. 3241-3265; vol. 8, pp. 7677, 7678.]

Appeal from Common Pleas Circuit Court of Barnwell County; Geo. E. Prince, Judge. "To be officially reported."

Actions by J. F. Boyles and others against F. W. Wagner and others and against Mamie Sanders. From a judgment for defendants in each case, plaintiffs appeal. Affirmed.

B. T. Rice and R. C. Holman, for appellants. Bates & Simms and J. O. Patterson & Son, for respondents.

WOODS, J. The will of Henry Boyles, probated October 25, 1872, contained these provisions: "It is my will and desire that the whole of my estate, both real and personal, be kept together until my youngest daughter Florence Boyles shall arrive at the age of 21 years, marries or dies. When my said daughter Florence Boyles shall arrive at the age of 21 years, marries or dies, whichever shall first happen, then and in that case, it is my will and desire that the whole of my estate, both real and personal shall be divided equally among my children, who may be living at that time, share and share alike. It is my will and desire that the portions of my estate, both real and personal which either one of my sons or daughters shall receive, shall not be liable for the payment of any debts or contracts which any one of them may at any time contract, or for the payment of any debts contracts or engagements of any husband or husbands, which either one of my daughters may hereafter marry, but it is to be for the sole separate use, benefit and behoof of them and the heirs of their body forever, and I hereby appoint my friend John W. Freeman, trustee for my son Henry, and my said son Henry and the said John W. Freeman, trustee for the other children."

The sole question made by the appeal is, Did the children of Henry Boyles take a fee conditional and convey to their grantees a good title by their deeds of conveyance executed after the birth of issue? The estate taken under the will was a legal estate, since the trustees had no duties to perform, and the statute, therefore, executed the use. That the legal estate devised was a fee conditional has been decided many times. The devise falls within the precise words of the rule thus laid down in *Austin v. Payne*, 8 Rich. Eq. 10: "Where an estate of freehold is limited to a person, and the same instrument contains a limitation either mediate or immediate to his heirs, or the heirs of his body, the word 'heirs' is a word of limitation, i. e., the ancestor takes the whole estate comprised in this form. Thus, if the

limitation be to the heirs of his body, he takes a fee tail or a fee conditional." *Whitworth v. Stuckey*, 1 Rich. Eq. 404; *Bethea v. Bethea*, 48 S. C. 440, 26 S. E. 716.

It is the judgment of this court that the judgment of the circuit court be affirmed.

GARY, C. J., and HYDRICK, J., concur.

(91 S. C. 185)

### DUPUY v. WILLIAMS.

(Supreme Court of South Carolina. April 1, 1912.)

#### 1. EJECTMENT (§ 106\*)—TITLE AND RIGHT OF POSSESSION—EVIDENCE.

Evidence of the title and right of possession of plaintiff in an action to recover land held sufficient to go to the jury.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. §§ 307-310; Dec. Dig. § 106.\*]

#### 2. SPECIFIC PERFORMANCE (§ 123\*)—AUTHORITY OF AGENT—EVIDENCE.

Evidence of authority of plaintiff's agent to make, except subject to plaintiff's ratification, the contract of sale of land, which defendant seeks to have specifically enforced, held insufficient to go to the jury.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 397-399; Dec. Dig. § 123.\*]

Gary, C. J., dissenting in part.

Appeal from Common Pleas Circuit Court of Barnwell County.

"To be officially reported."

Action by C. E. R. Dupuy against H. A. Williams. Judgment for plaintiff. Defendant appeals. Affirmed.

The complaint, answer, and the exceptions, except the sixth, tenth, eleventh, and twelfth, which four exceptions appear in that order in the dissenting opinion are as follows:

#### "Complaint.

"The complaint of the above-named plaintiff respectfully shows to the court: (1) That the above-named plaintiff, C. E. R. Dupuy, is the owner in fee and entitled to possession of the following described tract of land, to wit: 'All that tract or parcel of land lying and being situate in the county of Barnwell, state of South Carolina, containing one hundred and seventy-eight (178) acres, more or less, bounded north by lands of S. L. Peacock, east by lands of F. J. Sanders, south and west by lands of T. H. Willingham.' (2) That the above-named defendant, Henry A. Williams, is in possession of the above-described tract of land, wrongfully withholding possession from the above-named plaintiff to plaintiff's damages \$500. Wherefore plaintiff demands judgment: (1) For possession of the above-described tract of land. (2) And for \$500 the plaintiff's damages by the defendant withholding possession of said lands from the plaintiff, and for such other and further relief as the plaintiff may be entitled to, and as to the court may seem just and proper."

**"Answer.**

"The defendant, answering the complaint of above-named plaintiff, respectfully shows: For a first defense (1) That the defendant denies each and every allegation in the said complaint contained. For a second defense (1) That the defendant purchased the property described in the complaint from one C. Dupuy, for the sum of \$300 under an agreement with Bates & Sims, his agents and attorneys, and paid the said amount to said agents, taking their receipt therefor. (2) That soon after the 21st day of November, 1904, the defendant entered into possession of the premises, by and with the written consent of the said Bates & Sims, agents and attorneys, as aforesaid, and immediately began to repair the buildings on said place, which were in a greatly dilapidated condition, and spent large sums of money for such repairs and otherwise improving the property, and has remained in continuous possession of said premises since that time and is now in such possession. (3) That several months after defendant had paid for the said premises, as aforesaid, and after he had taken possession of the property and made repairs on the buildings, cleared land, and made other improvements in his efforts to make the property desirable as a home for himself and to increase the value thereof, he was informed by Bates & Sims that the plaintiffs refused to execute and deliver to him titles to the property as contracted for by the defendant with the said agent and attorneys of the plaintiff, although the said contract and sale to this defendant had been expressly ratified and confirmed by the said plaintiff. Wherefore the defendant prays that the complaint be dismissed, and that the plaintiff be required to specifically perform his contract with this defendant, by executing and delivering to this defendant title to the property in dispute, and for costs."

**"Exceptions.**

"1. That it was error to refuse the motion for nonsuit when there was no testimony tending to show a grant to the plaintiff, or to any one with whom she connected herself, and no testimony tending to show such possession 20 years in her or in some one with whom she connected herself as would authorize the presumption of a grant, or she must show that she and the defendant claim from a common source of title and that she has the better title of the two, and there was no testimony to that effect.

"2. That it was error to hold that the mere presumption of possession arising from the holding of a paper title to plaintiff, or to some one with whom she connected herself, if such adverse holding as would ripen into title under the statute of limitation; whereas he should have held that the plain-

tiff or some one under whom she claims must have entered into possession of the premises under claim of title, and continued to occupy and possess the premises included in such instrument under such claim for 10 years.

"3. That it was error to hold that the sheriff's deed showed title in Ingram; whereas he should have held that the plaintiff must also show title in the judgment debtor, J. M. Harley.

"4. That the presiding judge erred in holding that the Harleys had title to the land in dispute in 1889, and from that date to date of master's deed to the plaintiffs in 1900, made the 10 years' possession; whereas, he should have held that there was no proof that the Harleys were in possession of the land at the time of the execution of the mortgage to Voorhees, or that the Harleys were in possession of the land from that time (1889) until the master's deed in 1900, and that no title by adverse possession could be acquired except by the actual entry into possession and the continued occupation and possession of the premises for a period of 10 years, and that title cannot be proven by proof of deed without proof of title in grantor, and should have granted the nonsuit.

"5. That the presiding judge erred in directing a verdict for the plaintiff, thereby holding that plaintiff had proven a good and legal title in herself to the land in dispute; whereas, the plaintiff had failed to show (1) either a grant from the state to herself for the land in question, or to some one with whom she connected herself or to show 20 years' possession in herself, or in some one with whom she connected herself, as would authorize the presumption of a grant; (2) or to show a common source; (3) or to show such an adverse possession in herself or some one from whom she can trace title, as would give her title under the statute of limitations."

"7. That it was error to hold that the alleged possession of the Harleys and of Ingram could be tacked to make up the period of 20 years' presumption of a grant from the state whereas the court should have held that the introduction of the alleged deeds of the sheriff to Ingram and Ingram to the Harleys and the Harleys' mortgage and the foreclosure thereof and the master's deed rebutted any presumption that either of these respective parties were holding under a grant from the state.

"8. That it was error to refuse the motion for nonsuit when there was not a scintilla of testimony that the land sued for was the same land that was conveyed by the sheriff to Ingram and Ingram to Harley, etc.

"9. That it was error to permit the plaintiff to introduce a part of a letter or other written document and not require the introduction of the whole into testimony."

G. M. Greene and James A. Willis, for appellant. J. O. Patterson & Son, for respondent.

WATTS, J. This is an action brought by the plaintiff to recover the tract of land described in the complaint and for damages. In order to understand fully the questions raised by the exceptions, it will be necessary to set forth in the report of the case the complaint, answer, and the exceptions.

At close of plaintiff's testimony, a motion was made for a nonsuit which was overruled, and, when all the testimony was in, his honor, Judge De Vore, directed a verdict in favor of the plaintiff for the land, but submitted to the jury the question of damages. Defendant appealed.

[1] The first, second, third, fourth, and eighth exceptions question the judge's refusal to grant a nonsuit. There was some testimony to go to the jury. The plaintiff offered in evidence a deed of A. H. Patterson, master, of date July 6, 1900, to plaintiff, and judgment rolls, mortgage, and deed connecting the property in dispute to June 20, 1868, when it was conveyed by deed of Woodward, sheriff, to J. J. Ingram, and by deed of Ingram, to S. F. Harley, March 25, 1874; mortgage of Harley to Voorhees September 3, 1889; judgment roll, Voorhees v. Harley; and sale under that by Patterson, master, to the plaintiff. Here we have the plaintiff with a paper title dated July 6, 1900, claiming the land, and records showing those under whom she claimed were asserting title under paper deeds as far back as June 20, 1868, and we think there was sufficient testimony as to the identity of the land and possession of those under whom she claimed and in herself to carry the case to the jury. It has been decided that the right of possession follows title, and when it was admitted that the plaintiff had title from Patterson, master, she was presumed to be in possession of the land described in the deed. These exceptions are overruled.

[2] The other exceptions question the court's ruling in directing a verdict for plaintiff as far as the land was concerned. It appears not only that the plaintiff established paper title in herself and those under whom she claimed for more than 20 years, but the answer of defendant admits title in plaintiff, for in his second defense he alleges that he purchased the property described in the complaint from one C. Dupuy for the sum of \$300 under the agreement with Bates & Sims, agents and attorneys, and the testimony in the case shows that the plaintiff C. E. R. Dupuy and C. Dupuy was the same person.

The evidence of Fred Cook, a witness whose testimony was taken *de bene esse*, under notice of plaintiff, but whose testimony was offered by defendant, establishes the fact that the plaintiff turned over the management of this land to the Corbin Bank-

ing Company for the purpose of selling, renting, and paying taxes, and that Bates & Sims for the Corbin Banking Company paid the taxes for Dupuy and collected the rent. He says Dupuy owned this land. This is evidence introduced by the defendant. Dupuy obtained title from Patterson, master, July 6, 1900. The proof shows that after that time it was rented for her; that taxes were paid for her. This shows that she exercised ownership over the property for more than 10 years before the commencement of this action. Mr. Justice McGowan in *Harrelson v. Sarvis*, 39 S. C. at page 18, 17 S. E. at page 369, says: "It is certainly true that in actions for the recovery of land the plaintiff must recover, if at all, upon the strength of his own title and not on the weakness of that of his adversary. But it is not necessary that under all the circumstances there should be an unbroken chain of paper title back to the grant. The statute of limitations has a double aspect. Besides affording a shield of defense, it may under certain circumstances give title capable of being asserted actively." As was said by Judge Earle in *Young v. Watson*, 1 McMul. 449, cited with approbation in the case of *Geiger v. Kaigler*, 15 S. C. at page 273: "A plaintiff can only make out a perfect title by producing a grant or by proving such a possession as will give title in himself or in some one from whom he derives title." The same view is taken in 13 Am. & Eng. Enc. L. page 643: "Where property, whether real or personal, is held adversely, the statute operates on the title, and when the bar is complete the title of the original owner is defeated and the adverse possessor has a complete title." So we think in this case that the plaintiff showed by proof such a possession in herself and others, from whom she derives title, as to make out a perfect title in herself. We also think that an adverse possession for 10 years entitled plaintiff to recover land of which she had such possession. *Duren v. Kee*, 50 S. C. 457, 27 S. E. 875; *Bushby v. Railroad*, 45 S. C. 315, 23 S. E. 50.

The evidence in this case shows that the plaintiff was not only herself in possession for more than 10 years, but that she and those under whom she claimed were in possession under claims of paper title for more than 20 years. The defendant absolutely failed to make out any defense as set up by him in his answer. There was nothing to go to the jury. The testimony of Mr. Bates only went to show that his firm had charge of the property, rented it, paid taxes, and remitted rent to Corbin Banking Company; that they attempted to sell the property; that the owner refused the offer. This is borne out by the correspondence in the case between Bates & Sims and Corbin Banking Company, and the testimony of Fred Cook, introduced on the part of defendant. Nowhere in the testimony do we find any com-

petent testimony establishing the agency of any one to sell the land of plaintiff without submitting an offer to her for her acceptance or refusal. On the contrary, we find an offer to buy and a refusal to accept the offer by plaintiff, and defendant went into possession of the property as a pretended purchaser having attempted to purchase from parties having no authority to sell but only authority to offer land for sale subject to ratification by owner, and the owner refused to accept the offer by defendant, and defendant was in possession of property wrongfully and without authority. We see no merit in the exceptions, and they are overruled.

Judgment affirmed.

HYDRICK, J., concurs in the result.

WOODS, J. (concurring in result). This case is presented in an unusual form. The action was to recover the possession of land. By his answer, the defendant admitted the plaintiff's legal title, but alleged that plaintiff had contracted with him to sell the land at the price of \$300, and that he had paid the purchase money and entered into possession. On these allegations the defendant asked for the equitable relief of specific performance. It is manifest in this state of the pleadings that no legal issue was involved, and that the case was one of equitable cognizance entirely. Yet the cause was tried before a jury as if nothing but a legal issue was involved. As no objection was made to this course, the appeal is considered as if the court had ordered the issue of fact to be submitted to the jury whether the plaintiff had authorized Messrs. Bates & Sims to make the contract which they undertook to make with the defendant for the sale of her land at the price of \$300.

On this issue I concur in the conclusion of Mr. Justice WATTS that there was no evidence from which such authority could be inferred, and that the circuit judge was right in directing a verdict in favor of the plaintiff. As evidence of such authority, the defendant relies on the testimony of Cook, the manager of the Corbin Banking Company, taken de bene esse and introduced by the defendant, and of Mr. Bates of the firm of Bates & Sims. It is true that Cook testified: "The tract of land referred to is the property of C. E. R. Dupuy, of Paris, France, who placed her properties for sale and rent in the hands of the Corbin Banking Company, through its president, Mr. Austin Corbin, with full authority to act for her." But it is also true that the testimony of Cook makes it perfectly clear that he understood that this authority to sell was subject to the approval of the owner, and that he so expressly informed Messrs. Bates & Sims, for in his testimony appears a letter from the Corbin Banking Company to Messrs. Bates & Sims, written October 11, 1904, more than a month before they undertook to contract to sell, and in answer to their letter advising a sale at

\$300, in which is found the following: "You give in your letter referred to a description of the land. In order that we may be prepared to make a deed in case of acceptance by the owner, would say that our title deeds show as follows. \* \* \*." That all parties understood that the agency was to sell subject to the approval of the owner is made still clearer by the following testimony of Mr. Bates, relied on by the defendant: "Q. Mr. Bates, you say that these receipts—Williams came and left the money with you? A. Williams came and offered \$300 for this tract of land and paid the money down in my hands, and I gave him a receipt dated in October, 1904. I sent that offer to the Corbin Banking Company and recommended that it be accepted, because it was the best offer we had ever had for this land, and afterwards, I don't know how long, we received a letter from the Corbin Banking Company stating that the offer had been accepted, and when we received that letter we gave Williams that certificate certifying that he had bought the land. He afterwards came for his title and we wrote to the Corbin Banking Company to know why the title had not been sent, and they replied that Mrs. Dupuy refused to sign the title. We had been notified that the offer had been accepted before that. When they refused to send the title, we offered to pay Williams his \$300 back and he refused it, and we have got that money now. The Corbin Banking Company would not take it, because they would not send us the title. We have been holding it subject to settlement in some way."

Giving the fullest credence to this evidence of Mr. Bates, what is its effect? It is nothing more than his statement that the Corbin Banking Company had said to him in writing that Mrs. Dupuy had authorized the sale of her property for \$300. This was clearly hearsay testimony, and not binding on the plaintiff. To bind her there should have been evidence from a witness testifying of his own knowledge that she had authorized the sale. So far from producing testimony from such a witness, the only witness examined who had direct communication with Mrs. Dupuy was Cook, the manager of the Corbin Banking Company, and his testimony was to the effect that she expressly refused to authorize the sale for \$300.

FRASER, J., concurs in the separate opinion of Mr. Justice WOODS.

GARY, C. J. (dissenting). I concur in so much of the opinion of Mr. Justice WATTS as overrules the exceptions assigning error on the part of his honor, the presiding judge, in refusing the motion for a nonsuit, not only for the reasons stated by him, but on the additional ground that it appears from the defendant's testimony that he holds under the plaintiff, and it was for the jury to determine who had the better title.



In determining whether there was error in refusing the motion for a nonsuit, this court will consider not only the plaintiff's but the defendant's testimony. *Hicks v. Railway*, 63 S. C. 559, 41 S. E. 735; *Scates v. Henderson*, 44 S. C. 554, 22 S. E. 724; *Fales v. Browning*, 68 S. C. 19, 46 S. E. 545; *Woodward v. Cave*, 79 S. C. 578, 61 S. E. 82.

But I dissent from his conclusion that the exceptions should be overruled, which raise the question whether there was error in directing the jury to render a verdict in favor of the plaintiff for possession of the land in dispute.

The following exceptions raise this question:

"That it was error to hold that there was no testimony tending to show the agency of the Corbin Banking Company for the plaintiff; whereas he should have held that the testimony of Fred Cook and G. H. Bates, showing the acts of the plaintiff and of the Corbin Banking Company and Bates & Sims for her were facts to go to the jury on the question of agency.

"That it was error to direct a verdict for the plaintiff upon the ground that there was no testimony going to prove the agency of the Corbin Banking Company for the plaintiff; whereas he should have held that the testimony of the witness Fred Cook to the effect that this property was put in the hands of the Corbin Banking Company by the plaintiff for sale and rent through its president, Mr. Austin Corbin, with full power to act for said plaintiff was some testimony to go to the jury on the question of agency.

"That it was error to direct a verdict for the plaintiff upon the ground that there was not a scintilla of testimony that the plaintiff had ever ratified the sale of the land; whereas he should have held that there was testimony to go to the jury to establish the agency of the Corbin Banking Company for the plaintiff, and the acts of Bates & Sims as agents for the plaintiff, through the Corbin Banking Company, were binding upon the plaintiff whether she ratified the sale or not, and was some testimony to go to the jury on the question of ratification of the sale.

"That his honor further erred in directing a verdict upon the ground that there was not a scintilla of testimony going to show the ratification of this contract by the plaintiff, when the witness George H. Bates testified that the Corbin Banking Company had written to Bates & Sims ratifying the contract, and they so informed the appellant, who upon the strength of this ratification entered into possession and spent considerable sums of money in improving said lands before he was notified that the plaintiff declined to execute and deliver to him a deed."

The defendant introduced in evidence the following receipt: "Barnwell, S. C. Oct. 4, 1904. Received of H. A. Williams three hun-

dred dollars, as purchase money for 175 acres of land, more or less, known as the S. F. Harley place in Bennett Springs township, now owned by C. Dupuy. This, however, is subject to approval of the owner of this land, and, if refused, the same is to be returned to the said H. A. Williams. Bates & Sims." Also the following certificate: "Barnwell, S. C. Nov. 21, 1904. This will certify to all whom it may concern that H. A. Williams has purchased the S. F. Harley place, containing 175 acres more or less, and is entitled to the possession of the same. Bates & Sims, attorneys."

The defendant testified that he entered into the possession of the land soon after the said certificate was delivered to him, that he has made valuable improvements thereon, and has remained in the continuous possession thereof.

His honor, the presiding judge, made the following ruling, "There is enough testimony here as to the agency of Bates & Sims, of the Corbin Banking Company, to go to the jury;" thus showing that there was testimony tending to prove that Messrs. Bates & Sims were duly authorized by the Corbin Banking Company to sell the land to the defendant. We do not therefore deem it necessary to consider the question of agency in this respect, but proceed to discuss the question whether there was any testimony tending to show that the Corbin Banking Company was empowered by the plaintiff to sell said land.

Mr. Fred Cook, a witness for the plaintiff, in his testimony taken *de bene esse*, thus testified: "Q. Are you connected with the Corbin Banking Company? If so, state in detail such connection. A. I came with the Corbin Banking Company in the year 1874, and have been connected with it ever since and as general manager for over 20 years past, and as such have had access to all their books and correspondence. Q. Please state as fully as possible what you know in regard to the lands described in the complaint. A. The tract of land referred to is the property of C. E. R. Dupuy of Paris, France, who placed her properties for sale and rent in the hands of the Corbin Banking Company, through its president, Mr. Austin Corbin, *with full authority to act for her.*" (Italics ours.)

Mr. George H. Bates, a witness for the defendant, testified as follows: "Q. Mr. Bates, you say that these receipts— Williams came and left the money with you? A. Williams came and offered \$300 for the tract of land, and paid the money down in my hands, and I gave him a receipt dated in October, 1904. I sent that offer to the Corbin Banking Company and recommended that it be accepted because it was the best offer we had ever had, and afterwards, I don't remember how long, we received a letter from the Corbin Banking Company stating that the offer had been accepted, and when we received that let-

ter we gave Williams that certificate certifying that he had bought the land. He afterwards came for his title, and we wrote to the Corbin Banking Company to know why the title had not been sent, and they replied that Mrs. Dupuy had refused to sign the title. We had been notified that the offer had been accepted before that. When they refused to send the title, we offered to pay Williams his \$300 back and he refused it, and we have got that money now. The Corbin Banking Company would not take it because they would not send us the title. We have been holding it subject to the settlement in some way."

It will thus be seen that the plaintiff placed the land for sale in the hands of the Corbin Banking Company, with full authority to effect the sale; that the Corbin Banking Company duly constituted and appointed Messrs. Bates & Sims their agents, and that the transaction with the defendant came within the scope of their agency; that when the receipt and certificate were given the defendant entered into possession of the land and made valuable improvements, and was notified that his offer had been accepted before the plaintiffs refused to make the title.

If there was such a contract between the plaintiff through her duly authorized agents and the defendant as the court, in the exercise of its equitable powers, would enforce, then a revocation by her of the authority conferred upon her agents could not convert the defendant who entered by permission of the plaintiff through her agents into a trespasser, even though the contract was not reduced to writing.

"According to the authorities, it seems that putting the purchaser into possession is to be considered as stronger evidence of part performance than mere payment of the purchase money, for the reason that such act would be a fraud upon the purchaser unless the agreement should be fully performed. 'Especially will it be held to do so when the party let into possession has expended money in building or repairs or other improvements, for under such circumstances, if the parol contract were to be deemed a nullity, he would be liable to be treated as a trespasser, and the expenditure would not only operate to his prejudice but be the direct result of a fraud practiced upon him.' 3 Story's Eq. 765." *Mims v. Chandler*, 21 S. C. 480. This language was quoted with approval in *Bell v. Lumber Co.*, 85 S. C. 182, 67 S. E. 151.

The present case is much stronger than the one just mentioned. Furthermore, when a principal enters into a contract with an agent whereby the agent undertakes to negotiate the sale of his lands, the authority thus conferred is either revocable or irrevocable, and, whether it is the one or the other, depends upon the terms of the particular con-

tract. *McCallum v. Grier*, 86 S. C. 162, 68 S. E. 466, 138 Am. St. Rep. 1037.

As the question whether the plaintiff had the right to revoke the authority conferred by her upon the Corbin Banking Company was necessarily involved in the ruling of the presiding judge, he was not in a position to decide whether the plaintiff had such power, as the contract was not before him for construction.

It seems to me that these authorities are conclusive of the question, and that the judgment of the circuit court should be reversed.

(91 S. C. 523)

#### MCCOWN v. MULDROW.†

(Supreme Court of South Carolina. March 30, 1912.)

#### 1. APPEAL AND ERROR (§ 1050\*)—HARMLESS ERROR—ADMISSION OF EVIDENCE.

Plaintiff cannot complain on appeal of the admission of evidence, where similar evidence was admitted without objection.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 1068, 1069, 4153-4157, 4166; Dec. Dig. § 1050.\*]

#### 2. APPEAL AND ERROR (§ 1050\*)—HARMLESS ERROR—ADMISSION OF EVIDENCE.

In an action for damages for personal injuries received in a collision with an automobile, the admission of evidence as to the speed of the automobile at the time of the accident by a witness who did not observe its speed at that time, but based his opinion upon the manner in which it started out some distance away, could not have been prejudicial to defendant.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 1068, 1069, 4153-4157, 4166; Dec. Dig. § 1050.\*]

#### 3. MUNICIPAL CORPORATIONS (§ 706\*)—INJURIES IN STREETS—ADMISSION OF EVIDENCE.

In an action for damages for negligently running over plaintiff with an automobile, evidence as to whether the city clerk and treasurer had received any report of defendant violating the speed ordinances on the day of the accident was irrelevant.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1518; Dec. Dig. § 706.\*]

#### 4. APPEAL AND ERROR (§ 1058\*)—HARMLESS ERROR—ADMISSION OF EVIDENCE.

There was no reversible error in excluding evidence where witness afterwards repeated his testimony in substantially the same language without further objection.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4195, 4200-4204, 4206; Dec. Dig. § 1058.\*]

#### 5. MUNICIPAL CORPORATIONS (§ 706\*)—INJURIES IN STREETS—ADMISSION OF EVIDENCE—RELEVANCY.

In an action for damages for running over plaintiff with defendant's automobile, a question to defendant whether he would have run at a high or dangerous rate of speed with young ladies in his automobile was irrelevant.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1518; Dec. Dig. § 706.\*]

#### 6. EVIDENCE (§ 548\*)—OPINION EVIDENCE—EXPERT TESTIMONY.

An expert witness may give his opinion when the facts upon which it is based are within his own knowledge, but, if they are in is-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

† Rehearing denied June 12, 1912.

sue, he may only state his opinion hypothetically.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2365; Dec. Dig. § 548.\*]

#### 7. EVIDENCE (§ 550\*)—EXPERT TESTIMONY—MODE OF INJURY.

If the manner in which an injury was inflicted, or its extent, is controverted, an expert witness cannot give his opinion that it was inflicted in a certain manner.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2366, 2367; Dec. Dig. § 550.\*]

#### 8. APPEAL AND ERROR (§ 970\*)—DISCRETION OF TRIAL COURT—EXPERT TESTIMONY.

The trial court's decision whether a question is one upon which expert testimony is proper and the witness has the necessary qualifications will not be disturbed on appeal, except for abuse of discretion.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3849-3851; Dec. Dig. § 970.\*]

#### 9. EVIDENCE (§ 470\*)—OPINION EVIDENCE.

Opinion evidence is not as a rule admissible when the facts can be reproduced before the jury so as to show the condition upon which the opinion is desired.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2220; Dec. Dig. § 470.\*]

#### 10. TRIAL (§ 162\*)—NONSUIT—TIME OF MOTION.

A motion for nonsuit may be made at any time during trial.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 370; Dec. Dig. § 162.\*]

#### 11. JUDGMENT (§ 570\*)—RES JUDICATA—NONSUIT.

An order granting a motion for nonsuit for want of evidence to sustain the allegation of the complaint will not bar a subsequent action.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1028-1034, 1036-1040, 1042-1045, 1165; Dec. Dig. § 570.\*]

#### 12. JUDGMENT (§ 570\*)—RES JUDICATA—DIRECTED VERDICT.

A judgment upon a directed verdict is res judicata as to all questions properly arising under the pleadings.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1028-1034, 1036-1040, 1042-1045, 1165; Dec. Dig. § 570.\*]

#### 13. TRIAL (§ 173\*)—DIRECTION OF VERDICT—TIME OF MOTION.

A motion for a directed verdict cannot be made until all the evidence on both sides is submitted.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 397; Dec. Dig. § 173.\*]

#### 14. TRIAL (§ 420\*)—DIRECTION OF VERDICT—WAIVER OF MOTION.

A motion by defendant for a directed verdict at the close of plaintiff's evidence was waived by introducing evidence to support the defense.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 983; Dec. Dig. § 420.\*]

#### 15. NEGLIGENCE (§ 136\*)—NONSUIT.

Where the complaint alleges damages from ordinary negligence, as well as willful misconduct, a nonsuit cannot be granted on the whole case, if there is any evidence tending to show negligence or willfulness.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 277-283; Dec. Dig. § 136.\*]

#### 16. NEGLIGENCE (§ 100\*)—ACTIONS—DEFENSES—WILLFUL NEGLIGENCE.

Contributory negligence is not a defense to an action for reckless or willful misconduct.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 85; Dec. Dig. § 100.\*]

#### 17. TRIAL (§ 194\*)—INSTRUCTIONS—CHARGES ON FACTS.

In an action for damages for personal injuries by being struck by an automobile when plaintiff stepped into the street a few feet north of the corner, defendant requested a charge that he was not bound to exercise the same care against collisions with pedestrians stepping from the sidewalk into the street as would be required at a legal crossing; that crossings were for the convenience and safety of pedestrians in crossing, and an automobile should be slowed at corners, and under such control as to be able to be immediately stopped, but that defendant could assume that no person would step from the sidewalk into the street, where there was no crossing, and where vehicles were constantly passing, without taking reasonable precautions against danger of injury from vehicles. *Held*, that the charge would have been properly refused as being on the facts.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 413, 439-441, 446-454, 456-466; Dec. Dig. § 194.\*]

#### 18. APPEAL AND ERROR (§ 1064\*)—HARMLESS ERROR—ABSTRACT INSTRUCTIONS.

In an action for personal injuries by being struck by an automobile as plaintiff stepped into the street, the court gave defendant's requested charge that one who steps into a street must remember that vehicles, etc., have a right of way, and give due attention thereto, but charged, in connection therewith, that a man must use his senses in any transaction, and in considering plaintiff's conduct the jury should ask whether a man of ordinary prudence under all the circumstances would have acted as plaintiff did, and that he would not be negligent if he so acted. *Held*, that the court's additional instruction, which was abstractly correct, could not be said to have prejudiced defendant.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4219, 4221-4224; Dec. Dig. § 1064.\*]

#### 19. APPEAL AND ERROR (§ 837\*)—REVIEW—EVIDENCE.

In determining whether the evidence sustains the verdict, the appellate court must consider the evidence as a whole.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3262-3272, 3274-3277, 3289; Dec. Dig. § 837.\*]

Appeal from Common Pleas Circuit Court of Florence County; Thos. S. Sease, Judge. "To be officially reported."

Action by James McCown against Charles W. Muldrow. From a judgment for plaintiff, defendant appeals. Affirmed.

The exceptions are as follows:

"(1) His honor erred in allowing the witness, James Baskins, to give his opinion, over the objection of the defendant, concerning the speed of defendant's car at the time of the accident; the error being (a) that defendant's car was not at the time of the accident under the immediate observation of witness; (b) that the facts within the knowledge of witness were not sufficient

to furnish an adequate basis for such opinion.

"(2) His honor erred in admitting over defendant's objection, and in refusing to strike out upon motion of defendant, the testimony of the witness, John Hollis, that he would judge from the way defendant started off that his automobile was running at a speed of not less than 18 or 20 miles an hour at the time of the accident; the error being (a) that witness did not observe the speed of the automobile at the time of the accident, and based his opinion wholly upon the manner in which it started off; (b) that witness did not have adequate facilities for observation as to the speed of the automobile at the time of the accident; (c) that witness should only have been allowed to testify as to facts within his observation, and should not have been allowed to state the conclusions or inferences which he drew from such facts.

"(3) His honor erred in refusing to grant the motion made by defendant upon cross-examination of the witness John Hollis to strike out the testimony given by witness as to speed at which defendant was running his automobile when the accident occurred; the error being (a) that witness, by his own admission, did not have sufficient knowledge of the speed of automobiles on which to base his opinion; (b) that his honor's ruling disregards the rule of law governing the admission of opinion evidence, which requires that witness should state facts upon which he bases his opinion, and must be shown to have had adequate facilities for observation.

"(4) His honor erred in refusing to allow the defendant to ask the witness W. H. Malloy (who was city clerk and treasurer), upon cross-examination, whether he had any report of defendant's having violated the city ordinances on the day of the accident; the error being (a) that the city ordinances were introduced in evidence for the purpose of showing that defendant was driving his automobile at an unlawful rate of speed at the time of the accident, and the fact that a charge of violation of the city ordinances in this respect had or had not been made against defendant on the day in question would be some evidence to show whether he was guilty of such violation; (b) the circumstances in this case were such as properly to lead to the inference that a charge of violating the city ordinances in respect to exceeding the speed limit would have been made against defendant, had such violation actually existed.

"(5) His honor erred in refusing to allow in evidence the following testimony of the witness, J. W. Ragsdale: 'In my opinion, based on the experience I have had as an automobile driver, and observing other cars driven, it was a physical impossibility for me or Mr. Beard or anybody else in my car to have had any accurate idea of the rate of speed that a car would make going in our

direction.' It is respectfully submitted that this testimony was competent and relevant and that his honor's ruling was in error, in that: (a) It was competent for witness to express his opinion as to the possibility for any one in his car to have had an accurate idea of the speed of the approaching car, said witness having previously stated the facts upon which said opinion was based. (b) Witness had qualified as an expert; and it was competent for him to give his opinion whether an occupant of his automobile could accurately judge the speed of an approaching car, as the facts, upon which such opinion was based, were within his personal knowledge. (c) Said testimony was relevant for the purpose of impeaching the testimony of the witness Joe Beard by showing that he did not have adequate facilities for observation of the speed of defendant's car at the time of the accident.

"(6) His honor erred in refusing to allow the defendant to answer the following question: 'Q. Would you or not have run at a high, reckless, or dangerous rate of speed with those young ladies on your car?' It is respectfully submitted that his honor's ruling was in error, in that: (a) Willfulness and wantonness of defendant is one of the material issues in this case; and it was competent for defendant to testify whether or not he consciously and intentionally ran his automobile at such reckless and dangerous rate of speed that accidents would be likely to result. (b) The operation of the automobile at a high, reckless, and dangerous rate of speed would endanger its occupants; and it was competent for defendant to state whether or not he would have acted with reckless disregard of their safety.

"(7) His honor erred in refusing to allow the witness Leslie McLaurin to answer the following question: 'Q. From your own knowledge of the conditions that existed there, what was the cause of that accident?' the error being: (a) That it was competent for witness to express his opinion, as he was present when the accident occurred, and the facts relating to the accident were under his immediate observation; (b) that witness had stated sufficient facts upon which to base his opinion as to the cause of the accident.

"(8) His honor erred in refusing to allow the witness Leslie McLaurin to answer the question asked him upon direct examination whether it would have been possible, with ordinary care on the part of an automobile driver going ten miles an hour, to have stopped his car or have avoided the accident at the time Mr. McCown stepped in front of defendant's car, the error being: (a) That it was competent for witness to give his opinion as an expert in answer to said question, as the facts, upon which the question was based, were within his personal knowledge; (b) that said question was relevant for the

purpose of showing whether or not defendant could have avoided the accident by the exercise of reasonable care and skill.

"(9) His honor, the presiding judge, erred in refusing to grant the motion made by defendant at the close of plaintiff's testimony, that a verdict should be directed in his favor, whereas it is respectfully submitted that his honor should have granted the said motion upon the grounds and for the reasons stated therein, to wit: 'That the testimony shows that the plaintiff, James McCown, according to his own testimony, stepped off the sidewalk and stepped immediately in front of a moving car without making any effort to ascertain if there were any vehicles or any animals of any kind approaching in his direction, and that, according to his own statement, he made no effort to ascertain that he was stepping into a place of danger, and that, if he had used ordinary care and looked, he would have seen the danger, and would not have stepped in front of the car, and that by his failure to use due care and caution he contributed to the accident by his own carelessness.

"(10) His honor erred in charging the first request submitted by the plaintiff, to wit: 'The violation of a city ordinance is negligence as a matter of law.' It is respectfully submitted that this instruction is in error, in that: (a) It disregards the rule of law that the violation of the ordinance must result in injuries to another, in order to constitute negligence as a matter of law on the part of the person guilty of such violation. (b) There must be a causal relation between the violation of the ordinance and the injury to render defendant liable, and such violation must be the proximate cause of the injury, and in this respect it must appear that compliance with the ordinance would have prevented injury. (c) This instruction was calculated to create the impression upon the jury that, if defendant violated a city ordinance, such violation would be conclusive of his negligence towards the plaintiff, whether or not the accident would have been avoided by compliance with the ordinance.

"(11) His honor erred in not charging the second request submitted by defendant without modification; the said request being as follows: 'The plaintiff seeks a recovery upon the grounds that his injuries were caused by the careless and reckless acts of defendant in operating and driving his automobile on a public thoroughfare. The defendant denies that his negligence caused the injuries complained of. I instruct you that, in order to make out his case, the plaintiff must prove by a preponderance of the evidence that the defendant was guilty of negligence in the manner charged in this complaint, and that his injuries were the direct and proximate result of such negligence on the part of defendant. The plaintiff must show that the defendant did not exercise such care and prudence in operating and driving his auto-

mobile as an ordinarily careful and skillful driver would use under similar circumstances. If, in your judgment, he has failed to prove this by a fair preponderance of the evidence, he cannot recover.' It is respectfully submitted that: (a) Said request is a correct statement of the law applicable in this case, and his honor erred in qualifying said request by saying, 'I charge you that, gentlemen, with this modification: If the conduct of the defendant was that of willfulness and wantonness, the plea of contributory negligence is no defense.' (b) No reference was made in this request to the defense of contributory negligence, and it was, therefore, improper and prejudicial to the defendant for his honor to declare that the plea of contributory negligence was no defense if the conduct of the defendant was that of willfulness and wantonness. (c) Said remarks were calculated to convey the impression that defendant was relying wholly upon the defense of contributory negligence. (d) The modification made by his honor was calculated to confuse the jury as to the principles of law embodied in this request, and to convey the impression that the defendant was guilty of willfulness and wantonness.

"(12) His honor erred in not charging the third request submitted by defendant without modification; the said request being as follows: 'The defendant, Chas. W. Muldrow, was not bound to exercise the same care and attention to guard against collision with pedestrians stepping from the sidewalk into the street as would be required at a regular crossing. Crossings are provided for the convenience and safety of pedestrians in crossing the street, and at corners and crossings an automobile should be slowed down and in such control as to be able to be immediately stopped if necessary, but defendant had the right to assume and to act upon the assumption that no person would step from the sidewalk into a public thoroughfare in a place where there was no crossing and where horses, vehicles, and automobiles were constantly passing, without first looking about and taking reasonable precautions to observe whether there was any danger of receiving injury from approaching vehicles, horses or automobiles. If, under these circumstances, the defendant exercised reasonable care in driving his automobile, he was not guilty of negligence.' It is respectfully submitted: (a) That the said request is a correct statement of the law applicable to this case, and that his honor erred in adding to this charge the modification: 'But I also charge you that in considering the conduct of the plaintiff as to whether he was observing due care and prudence is to ask yourself whether the man of ordinary care and prudence would have acted as the plaintiff did under all the circumstances surrounding him. If he acted as a man of ordinary prudence and care would have acted under all the circumstances, did what that kind of a man would have

done, then he is not guilty of contributory negligence.' (b) This request merely sets forth the duties and rights of the automobile driver, and instructs the jury concerning the amount of care and prudence which he should exercise, and his honor's modification of the request by stating the principles of law which should govern the conduct of plaintiff was therefore improper and calculated to confuse the jury as to the principles of law embodied in the request.' (c) The remarks of his honor were prejudicial to the defendant, as they were calculated to convey the impression to the jury that defendant was relying wholly upon the defense of contributory negligence. (d) Said remarks are a plain intimation of his honor's opinion that plaintiff was not guilty of contributory negligence.

"(13) His honor erred in not charging defendant's sixth request without qualification, the said request being as follows: 'You are instructed that a person who steps into a public street is bound to remember that horses, vehicles, and automobiles have also a right of way there, and he must give due attention thereto.' It is respectfully submitted that this request is a correct statement of law, and that his honor erred in charging in connection therewith as follows: 'I also charge you that a man must use his senses in any transaction, and in considering the conduct of the plaintiff in this transaction you ask yourselves the question whether a man of ordinary prudence and care under all the circumstances would have acted as the plaintiff acted. If he did, then he would not be guilty of contributory negligence'—the error being (a) a person stepping from the sidewalk into a public street is negligent, as a matter of law, if he does not give attention to the fact that there is danger of approaching horses, vehicles, and automobiles; (b) that plaintiff's own testimony shows that he did not act as a reasonable and prudent person would ordinarily have acted under those circumstances.

"(14) His honor erred in not charging the defendant's fifth, eighth, ninth, tenth, and eleventh requests, submitted by defendant without modification, and in charging that these requests leave out of the consideration of the case the question whether or not the defendant was willful or wanton in the acts and conduct complained of; it being respectfully submitted that there was no evidence of willfulness or wantonness on the part of defendant to be considered by the jury.

"(15) His honor erred in refusing to charge defendant's fourth request, to wit: 'The fact that one was driving an automobile at a rate of speed greater than that prescribed by statute or municipal ordinance is not conclusive of negligence on his part, but is evidence thereof to be considered by the jury; and the court instructs you that even if you should believe from the evidence that the

defendant was running his automobile at a speed in excess of the statutory limit of 15 miles per hour when the accident occurred that fact does not of itself show negligence on the part of the defendant. The question before you is solely this: Whether the accident could have been avoided by reasonable care and prudence on the part of the defendant. If it could not in any case have been avoided by the exercise of such reasonable care and prudence on the part of defendant, then it is immaterial to this case whether or not the defendant was running his car at a high rate of speed.'

"(16) His honor erred in refusing to grant the defendant's motion for a new trial, upon the first ground of said motion and for the reasons stated therein, to wit: 'Because the verdict was so clearly against the evidence as to indicate that the jury misapprehended the facts or the principles of law governing the case, or that they were influenced by passion, prejudice or other improper motive.'

"(17) His honor erred in refusing to grant defendant's motion for a new trial, upon the second ground of said motion and for the reasons stated therein, to wit: 'Because the evidence clearly shows that the accident could not have been avoided by the exercise of reasonable care and prudence on the part of the defendant, in that the uncontradicted testimony of several witnesses is to the effect that the plaintiff stepped from the sidewalk into the street when the automobile was less than 10 feet distant, and that it was then impossible for defendant to have stopped his automobile or to have guarded against collision with the plaintiff.'

"(18) His honor erred in refusing to grant the defendant's motion for a new trial, upon the third ground of said motion and for the reasons stated therein, to wit: 'Because there was no evidence of such wantonness, willfulness, or recklessness on the part of the defendant as would deprive him of the right to rely upon his defense of contributory negligence; and the overwhelming weight of the evidence shows that the plaintiff was guilty of contributory negligence in bringing about the accident, in that he stepped into a public thoroughfare without looking or listening or taking any other precaution to guard against the danger of approaching horses, vehicles, or automobiles.'

"(19) His honor erred in refusing to grant the defendant's motion for a new trial upon the fourth ground of said motion, and for the reasons stated therein, to wit: 'Because the plaintiff, by his own admission, did not exercise ordinary care and prudence in stepping from the sidewalk into the street; and his carelessness and negligence was a proximate cause of his injury.'

"(20) His honor erred in refusing to grant the defendant's motion for a new trial, upon the fifth ground of said motion and for the reasons stated therein, to wit: 'Because the evidence shows that the plaintiff was guilty

of such utter want of caution and prudence as amounted to recklessness and a complete disregard of the care which he owed to himself."

"(21) It is respectfully submitted that his honor committed abuse of discretion in refusing to grant the defendant's motion for a new trial, upon the sixth ground of said motion and for the reasons stated therein, to wit: 'Because the verdict for punitive damages is so excessive as to show on its face that the jury were influenced by passion, whim, or prejudice.'"

J. W. Ragsdale, for appellant. Walter H. Wells and Henry E. Davis, for respondent.

GARY, C. J. This is an action for damages, alleged to have been sustained by the plaintiff through the negligence and recklessness of the defendant.

The complaint alleges: That on the 13th day of February, 1910, the plaintiff after nightfall was proceeding from the American Hotel into Evans street, in the city of Florence, S. C., for the purpose of getting into an automobile that was in the act of stopping at a point opposite said hotel, a few feet distant from the north side of Evans street. That before plaintiff reached said automobile he was struck and run over by an automobile that was being driven by the defendant. That the plaintiff was injured through the recklessness and negligence of the defendant in operating said automobile on a public thoroughfare at a dangerous rate of speed, in failing to have any lights on said automobile, in failing to give any signal or other warning of the approach of said automobile, in attempting to drive the said automobile too near the sidewalk at a time when it was occupied by pedestrians, in attempting to drive said automobile between the one to which plaintiff was going and the sidewalk, when there was not sufficient space to allow its passage, in failing to keep a proper lookout, and in failing to observe the plaintiff in his position of danger so as to avoid striking him. The defendant denied the allegations of negligence and recklessness, and set up the defense of contributory negligence. At the close of the plaintiff's testimony the defendant made a motion for the direction of a verdict in his favor, which was refused, but neither a motion for a nonsuit nor for the direction of a verdict was made at the close of all the testimony. The jury rendered a verdict in favor of the plaintiff for \$1,000 actual damages and \$3,000 punitive damages. The defendant made a motion for a new trial, which was also refused, and he has appealed upon exceptions, which will be reported.

First exception:

[1] This exception cannot be sustained for the reason that similar testimony was introduced without objection. *Machine Co. v. Browning*, 72 S. C. 424, 52 S. E. 117; *Laugh-*

*lin v. Pub. Ser. Cor.*, 83 S. C. 62, 64 S. E. 1010.

Second exception:

[2] The objection to the testimony is thus stated in the record: "Objected to, and asked that it be stricken out, as the witness only testified, as to how fast it started off from Lake's corner." In addition to what was said, in disposing of the first exception, it is scarcely reasonable to suppose that testimony tending to show how fast the automobile started off from Lake's corner may have caused the jury to render a verdict in favor of the plaintiff.

Third exception:

This exception is disposed of by what has already been said.

Fourth exception:

[3] The testimony was irrelevant, and the refusal to allow its introduction was not prejudicial to the rights of the defendant.

Fifth exception:

[4] The following appears in the record: "Plaintiff objects to testimony of witness as it refers to the testimony of Mr. Beard. (Objection sustained. Exception noted.) The Witness (continuing): It was impossible in my opinion for anybody situated as I was, with my car going in that direction, to judge of the speed— (Objected to.) The Court: State the facts and tell whether you could tell. The Witness (continuing)." The witness then testified in substantially the same language as that to which the objection had been interposed without further objection.

Sixth exception:

[5] The testimony, as to what the witness would have done, was irrelevant, and the exception is overruled.

Seventh exception:

[6-8] The rule is thus stated in *Easler v. Railway*, 59 S. C. 311, 37 S. E. 938: "Without undertaking to review in detail the different cases in this state upon this subject (expert testimony), we will state the rules that have been followed: First. A witness is competent to give his opinion as an expert when the facts upon which it is based are within his own knowledge. Second. If the facts upon which his opinion is formed are in issue, his testimony is not admissible, except upon an hypothetical state of facts. Third. If the mode in which an injury was inflicted, or the extent thereof is itself one of the disputed facts in the case, the witness will not be allowed to testify that in his opinion the injury was inflicted in a certain manner or to a certain extent." The court uses the following language in the case of *Fitzgerald v. Langley Mfg. Co.*, 74 S. C. 332, 54 S. E. 373: "It is contended that the testimony was competent as the opinion of an expert. This court will not reverse the judgment of the circuit court for excluding expert testimony, unless it is convinced that the error, if any, was harmful. It is for the trial court to decide whether the question under inquiry

is one upon which expert opinion is proper, and whether the witness has the necessary qualifications. 2 Elliott, Ev. § 1086. The trial court's conclusion on these matters will not be disturbed except in a case of abuse of discretion, which we do not find in this case. 'Opinion evidence is based on necessity and is not admissible as a general rule when the facts can be reproduced before the jury, in such a way as to show the condition of things, upon which the opinion of the witness was based.' *Easler v. Railway Co.*, 59 S. C. 311, 815, 39 S. E. 938. It is a cardinal rule that the evidence must be of such a character as not to fall within the range of common experience and observation, and therefore not to be intelligible to jurors without the aid of opinion. 12 Ency. Law, 458, and cases cited."

**Eighth exception:**

What was said in considering the seventh exception disposes of this exception.

**Ninth exception:**

[10-14] The motion was for the direction of a verdict, and not for a nonsuit, between which motions there is a marked difference. A motion for a nonsuit may be made at any time during the trial of the case. "The usual time for such motions is when the plaintiff closes his evidence in chief, but it is not beyond the power of the judge charged with the control of the conduct of the cause to entertain such a motion, even at the close of the whole evidence for both sides, since there is no particular time in the trial of a case when a motion for nonsuit must be made." *Gandy v. Insurance Co.*, 52 S. C. 224, 29 S. E. 655; *McEwen v. Mazyck*, 3 Rich. 210. A motion for a nonsuit, on the ground that there is no testimony tending to sustain the material allegations of the complaint, does not involve the merits, and the granting of such motion would not support a plea of *res adjudicata*. In the case of *Whaley v. Stevens*, 24 S. C. 479, the court said: "The judgment in the former case was nothing more than a nonsuit for failure of evidence to establish one of the material allegations of the complaint; and it certainly cannot be pretended that such a judgment on such a ground would support a plea of *res adjudicata*." But a motion to direct a verdict involves the merits, and a judgment entered upon the verdict rendered by a jury is *res adjudicata* as to all questions properly arising under the pleadings. The fact that the verdict was rendered by the jury under the direction of the presiding judge does not impair the efficiency of the judgment entered thereon to support a plea of *res adjudicata*. A motion for the direction of a verdict cannot properly be made until all the testimony on both sides which is to be submitted to the jury has been introduced. The rule is thus stated in the case of *Cincinnati Traction Co. v. Durack*, 78 Ohio St. 243, 85 N. E. 38, 14 Ann.

Cas. 218: "Where, on the trial of a civil action, the defendant at the close of the plaintiff's evidence moves for a verdict thereon in his favor, and on excepting to the decision of the court overruling such motion introduces evidence to support his grounds of defense, and rests without renewing the motion at the close of all the evidence, the exception is deemed to be waived, and it is no longer a predicate for error in a reviewing court." (Syllabus.) The opinion is very able, and the notes are voluminous and exhaustive. The court in that case quotes with approval the following language from *Barabasz v. Kabat*, 91 Md. 53, 46 Atl. 337: "It would certainly produce a failure of justice, if a verdict of a jury, rendered upon the evidence of both parties, and upon instructions at the close of the case, to the granting or refusing of which there was no exception, should be set aside upon an alleged erroneous ruling upon the plaintiff's evidence only, and it would be trifling with the purpose for which courts are created to require the review of an error which, if declared, would not justify a reversal." The court also quotes with approval the following statement of the rule from the case of *Hopkins v. Clark*, 158 N. Y. 299, 53 N. E. 27: "It is the contention of the appellants that they are entitled to the benefit of the exception taken to the denial of the motion to dismiss at the close of plaintiff's case, as that was not strengthened, but was clearly weakened, by the defendant's evidence. In other words, this court is to be asked in all cases to examine the evidence of the defendant, no matter how lengthy it may be, to determine whether defendant shall have the benefit of an exception, concerning which all doubt would be removed by his renewing the motion to dismiss at the close of the whole evidence." It will thus be seen that the proposition which we have announced is sustained both by reason and authority.

[15] There is, however, another reason why this exception cannot be sustained. 'The complaint alleges two causes of action—one based on negligence and the other on recklessness. *Roberts v. Telegraph Co.*, 73 S. C. 520, 53 S. E. 985, 114 Am. St. Rep. 120. The defendant had the right to move for the direction of a verdict as to each cause of action. In such cases the rule is thus stated in *Machen v. Telegraph Co.*, 72 S. C. 256, 51 S. E. 697: "The cases are numerous to the point that where the complaint alleges damages as the result of negligence, and as the result of willful misconduct, a nonsuit cannot be granted as to the whole case, if there be any testimony tending to show damages as the result of either negligence or willfulness. In all the cases cited above the motion for nonsuit was directed to the whole case, and the point decided was that nonsuit was improper, if there be any evidence tending to support a verdict for dam-



ages, either for negligence or willful misconduct." This language was quoted with approval in *Carter v. Telegraph Co.*, 73 S. C. 430, 53 S. E. 539. There was testimony tending to show that the defendant was driving his automobile when the injury was sustained at a rate of speed greater than was allowed by the ordinance of the city; and this was evidence per se, and not merely prima facie, of negligence. In *Whaley v. Ostendorf*, 90 S. C. 281, 73 S. E. 186, the court says: "When evidence of negligence is only prima facie, it is subject to rebuttal, but, when there is negligence per se, it is conclusive of that question. The fact that there is negligence per se does not, however, tend to show that such negligence is actionable. The question whether negligence is actionable depends upon the further question whether such negligence was the direct and proximate cause of the injury."

[16] There is still another reason why this exception cannot be sustained. Contributory negligence on the part of the plaintiff cannot be introduced as a defense against a cause of action based upon the defendant's reckless misconduct. *La Fitte v. Railway*, 73 S. C. 467, 53 S. E. 755. If the request had been charged, the defendant would have received the benefit of the defense of contributory negligence against the cause of action for recklessness.

Tenth exception:

What has just been said disposes of this exception.

Eleventh exception:

The record shows that the request referred to in the exception was in fact charged, and that the modification that contributory negligence would not be a defense, if the defendant was guilty of recklessness, was the statement of an elementary principle of law, and therefore the exception has no foundation.

Twelfth exception:

[17] It would have been proper for his honor, the presiding judge, to refuse altogether to charge the request as it embodied a charge on the facts. *Weaver v. Railway*, 76 S. C. 49, 56 S. E. 657, 121 Am. St. Rep. 934. In that case the court, having under consideration somewhat similar requests, used this language: "The presiding judge could not have charged the said requests, without intimating to the jury, the inference to be drawn from the facts so carefully set out in detail. The instructions would have been in violation of article 5, § 26, of the Constitution, and were therefore properly refused."

Thirteenth exception:

[18] The presiding judge charged the request, but also charged other law applicable to the case; and it has not been made to appear that the additional charge of a correct principle at that particular time was prejudicial error.

Fourteenth exception:

The failure to charge the requests mentioned in this exception is assigned as error, on the ground that there was no testimony tending to show willfulness or wantonness on the part of the defendant. There was testimony tending to sustain the allegations of the complaint, and it was for the jury to determine whether there was wantonness.

Fifteenth exception:

What has already been said disposes of this exception.

Sixteenth exception:

It has not been made to appear to the court that there is anything in the record sustaining this assignment of error.

Seventeenth exception:

[19] The testimony must be considered in its entirety, and, when so considered, justifies the verdict.

Eighteenth, nineteenth, twentieth, and twenty-first exceptions:

What has already been said disposes of these exceptions.

Judgment affirmed.

WOODS and HYDRICK, JJ., concur.

(112 Va. 440)

WILLIAMSON v. TOWN OF GRAHAM.

(Supreme Court of Appeals of Virginia.  
March 22, 1912.)

1. MUNICIPAL CORPORATIONS (§ 907\*)—VALIDITY OF STATUTES—ELECTIONS TO DETERMINE BOND ISSUES.

Code 1904, § 1038e, which authorizes elections to determine whether bonds shall be issued and provides the steps to be taken therein, is valid and constitutional, as within the power of the Legislature to enact.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1895; Dec. Dig. § 907.\*]

2. MUNICIPAL CORPORATIONS (§ 918\*)—BONDS—SUBMISSION TO POPULAR VOTE—FORM OF SUBMISSION.

Code 1904, § 1038e, subsec. 6, provides that the town council or trustees shall, prior to an election to determine whether bonds shall be issued, have printed proper ballots, "upon which shall be stated the date of election and the amount of bond issue, and shall also have printed thereon, in separate lines, the words 'For bond issue' and the words 'Against bond issue.'" Held that, though money to be obtained from a bond issue was to be used for school, waterworks, sidewalks, and sewers, there is no requirement that such matters be segregated, so that voters may have an opportunity to vote on each expenditure, and ballots containing the entire amount of issue are proper.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1919-1923; Dec. Dig. § 918.\*]

3. MUNICIPAL CORPORATIONS (§ 918\*)—BONDS—SUBMISSION TO POPULAR VOTE—FORM OF SUBMISSION.

Under Code 1904, § 1038e, subsec. 6, which provides that, on a town election to determine whether bonds shall be issued for municipal purposes, the board of trustees or

town council "shall \* \* \* have printed" ballots upon which shall be stated the "amount of bond issue," the printing of the amount is mandatory, and its omission from the ballots invalidates an election.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1919-1923; Dec. Dig. § 918.\*]

Error to Circuit Court, Tazewell County.

Action by the Town of Graham against R. B. Williamson. From a judgment for plaintiff, defendant brings error. Reversed and rendered.

R. Kemp Morton, for plaintiff in error.  
Sexton & Roberts, for defendant in error.

**PER CURIAM.** The town of Graham, in Tazewell county, petitioned the circuit court, in accordance with the provisions of section 1038e of the Code of 1904, to order an election for the purpose of submitting to the registered voters of the town the question whether or not bonds should be issued to the amount of \$50,000, the proceeds to be expended for certain municipal purposes.

The election was held, and 88 votes were cast in favor of the issue of the bonds and 3 votes against such issue. Williamson, the plaintiff in error, became the purchaser of one of the bonds for \$500, but subsequently declined to accept and pay for it; and thereupon the town of Graham proceeded by notice against him to recover the amount of the bond, and upon the pleadings and proof judgment was entered for the plaintiff, and the defendant obtained a writ of error from this court.

[1] The plaintiff in error insists, in the first place, that the statute under which the election was held and the bonds issued is unconstitutional. In this we cannot concur, and without going into a discussion of the subject we shall content ourselves by saying that it was plainly within the power of the Legislature to enact section 1038e, and that it is a valid and constitutional law.

Other errors of a minor character are suggested in the brief of plaintiff in error, but only two of them are in our judgment of sufficient consequence to be mentioned in this opinion.

[2] It is insisted that as the money to be raised by the bond issue was to be expended, \$20,000 for the erection of a public school building, \$15,000 for the improvement of the waterworks, and \$15,000 for street sidewalks and sewers, that the ballots should have given the voters the opportunity to vote for or against the appropriation for each of these improvements, whereas the ballots as prepared required them to vote for or against the entire issue of \$50,000, and did not give them the right to segregate and cast their votes for or against the issue of bonds for a particular purpose, and that, while a voter might have desired to vote for bonds for a public school building, he might also have

opposed the issuing of bonds for other purposes.

The answer to this is that the statute makes no such requirement. Subsection 6 of section 1038e provides that "the town council, or board of trustees of said town, shall, prior to said date of election, have printed, at the expense of said town, proper ballots to be voted at said election, upon which shall be stated the date of election and the amount of bond issue, and shall also have printed thereon, in separate lines, the words 'For bond issue' and the words 'Against bond issue.'" It is plain that in this respect the ballot was in strict conformity with the law, and this assignment of error is overruled.

[3] The subsection referred to, however, does explicitly declare that the amount of the bond issue shall be stated upon the ballot, and this was not done. This provision of the statute is a most essential feature of the whole procedure, is mandatory, and its omission is, we think, fatal to the election.

For these reasons we are of opinion, without passing upon any question except those specifically mentioned, that the judgment of the circuit court should be reversed, and this court will proceed to render such judgment as the circuit court ought to have rendered.

Reversed.

(113 Va. 442)

**BENET et al. v. FORD et al.**

(Supreme Court of Appeals of Virginia.  
March 21, 1912.)

**1. JUDICIAL SALES (§ 8\*)—POWER OF COURT OF EQUITY.**

Where a court of equity orders a sale of property on the ground that a sale is absolutely necessary, and appoints commissioners to sell at auction or at a private sale, the commissioners may hold a private sale, where a public sale after due notice has failed to bring a purchaser at a satisfactory price, and where a delay will involve depreciation in the property, which yields no income comparable to the expenses of preserving it.

[Ed. Note.—For other cases, see *Judicial Sales*, Cent. Dig. § 32; Dec. Dig. § 8.\*]

**2. JUDICIAL SALES (§ 1\*) — DISCRETION OF COURT.**

A court of equity, ordering a sale of property under its control, must exercise a sound legal discretion, with a view to fairness and just regard to the rights of all persons interested.

[Ed. Note.—For other cases, see *Judicial Sales*, Cent. Dig. §§ 1-4; Dec. Dig. § 1.\*]

**3. JUDICIAL SALES (§ 31\*)—OBJECTIONS—BURDEN OF PROOF.**

A party, objecting to the confirmation of a sale by a court of equity, has the burden to show that he has been injured by the sale.

[Ed. Note.—For other cases, see *Judicial Sales*, Cent. Dig. §§ 59-67; Dec. Dig. § 31.\*]

**4. JUDICIAL SALES (§ 31\*)—OBJECTIONS—BURDEN OF PROOF.**

A court of equity ordered a sale of property, and appointed commissioners to sell at public auction or at private sale. The commissioners were unable to sell the property at a fair price at a public sale held under favor-

able conditions. Thereafter the commissioners negotiated for a private sale, and made a sale largely in excess of the highest bid at the auction. No evidence was offered as to how or from whom a better price could be obtained. Held to justify a confirmation of the sale.

[Ed. Note.—For other cases, see *Judicial Sales*, Cent. Dig. §§ 59-67; Dec. Dig. § 31.\*]

#### 5. JUDICIAL SALES (§ 31\*)—OBJECTIONS—BURDEN OF PROOF.

The highest bid made at an open judicial sale fairly conducted after full notice, in the face of such competition as can be attracted, is a fair criterion of the value of the property at that time, and subsequent opinions are entitled to but little weight in comparison.

[Ed. Note.—For other cases, see *Judicial Sales*, Cent. Dig. §§ 59-67; Dec. Dig. § 31.\*]

Appeal from Chancery Court of Richmond.

Proceedings for the judicial sale of the A. J. Ford trust estate, in the combined cases involving that estate. From a decree confirming a sale, Mary Lee Benet and another appeal. Affirmed.

R. E. Byrd, for appellants. David Meade White, McGuire, Riely & Bryan, and Robt. H. Talley, for appellees.

CARDWELL, J. The litigation out of which this appeal arises has been of long standing and conducted in four separate suits in equity, involving the rights and interests of various parties in what is spoken of in the record as the "A. J. Ford Trust Estate," including the "Ford's Hotel" property, situated at the southeast corner of Broad and Eleventh streets in the city of Richmond. Said suits involved also the rights of the various creditors of the respective parties interested in the trust estate.

These causes were, in the course of litigation, consolidated or heard together, and by various decrees entered therein the rights of all parties to the said suits and others concerned in the property involved were sufficiently and finally determined to warrant, and, indeed, to require, the court, in the exercise of its judicial discretion, to sell the trust property, in order that the proceeds of such sale or sales might be distributed among the parties entitled thereto. No question was ever raised, it would seem, that a sale of the trust estate was absolutely necessary, inasmuch as a partition thereof in kind among the parties entitled thereto was impracticable. We are concerned, however, on this appeal, with only that part of said trust estate spoken of as the "Ford's Hotel" property.

It appears that the burdens on this trust property, in the way of taxes, repairs, and other necessary expenses, were greater than the income from the property, and that creditors of the various parties interested were asserting their rights, and thus more seriously complicating the situation. In this situation the parties, whose rights in the estate were not denied or contested in any way, could neither enjoy the property nor receive

any benefit therefrom on account of its chaotic condition, due alone to a contest over the interest of B. W. Ford, which does not exceed, if it is so much as, one-fourth of the trust estate.

By reason of the condition of the trust property and the expenses thereof exceeding the income from it, which condition had continued for a long while, negotiations were begun and conducted between the parties holding different interests, which resulted in a decree entered by the trial court on the 26th day of April, 1910, completely settling the rights of all parties and fixing their respective interests in the trust estate. By said decree Robert H. Talley, R. E. Byrd, David M. White, Henry C. Riely, and Addison L. Holladay were appointed special commissioners to sell certain of the trust property, of which "Ford's Hotel" was a part. The decree gave authority to any three or more of the special commissioners to act, and authorized them to sell the property, either privately or at auction, but subject to confirmation by the court. Holladay refused to act, and the other four special commissioners, after duly qualifying as such by executing the bond required of them by the court, and after conference with four of the leading real estate agents in the city of Richmond, decided to offer the real estate in the city, mentioned in the decree, for sale at auction on the 18th day of May, 1910. On the day named "Ford's Hotel" was offered for sale at public auction; but, although the offering was under favorable conditions, the highest bid received for it was \$80,000, and thereupon the special commissioners, after they found that they could not obtain a higher bid, withdrew the property.

It further appears that from the 18th day of May, 1910, until the 24th day of May, 1911, the "Ford's Hotel" property was on the market for sale, but the special commissioners received no offer for it. In the meantime the buildings on said property, which had been used as a hotel, had gone so far from bad to worse in their condition that the building inspector of the city declined to permit them to be occupied, and, having been practically vacant for two years, the income therefrom was but a trifle as compared to the yearly taxes thereon and the costs of caring for and protecting the property. Moreover, owing to the condemnation of the buildings by the building inspector, all insurance on them had been canceled.

On the 16th day of January, 1911, an ordinance of the council of the city of Richmond, approved by its mayor, directed the city's attorney to acquire by gift, purchase, or condemnation the lot or block of land bounded by Broad street on the north, Capitol street on the south, Eleventh street on the west, and Twelfth street on the east, to be used by the city as a site for a courthouse

and for executive offices. The "Ford's Hotel" property was within the bounds named in said ordinance, and thereupon negotiations were begun between the city's attorney and the three acting special commissioners of the chancery court, which resulted in an agreement on the part of the special commissioners to make report to the court recommending a sale of the "Ford's Hotel" property to the city at the price of \$90,000 cash, that being the highest price that the city would agree to pay, and the commissioners were given to understand that if that offer was not accepted the property would be taken for the city's purposes by condemnation proceedings. Upon the coming in of a report by the three acting special commissioners to the court of the above-mentioned facts, it was made to appear that the offer to sell the hotel property to the city for the price of \$90,000 necessarily had to be kept open, as suggested in a communication from the city's attorney, for a period of at least 90 days to permit the necessary action to be taken by the finance committee and the council of the city upon said offer.

In accordance with said suggestion, the court, by its decree entered January 31, 1911, over the objection of Mary Lee Benet and Charles T. Herndon, two of the numerous parties interested, authorized its acting special commissioners to make an offer in writing to the attorney for the city of Richmond to sell said "Ford's Hotel" property to the city at the price of \$90,000, such offer "to remain open for a period of 90 days from the date of this decree, which offer, if accepted by said counsel of the city of Richmond, will be hereafter confirmed by a decree entered in these causes."

On the 22d day of April, 1911, the special commissioners filed a report stating that the city of Richmond had not accepted the offer made for the "Ford's Hotel" property at \$90,000, and asked an extension of the decree of January 31, 1911, for a period of 30 days, which request the court by its decree of April 24, 1911, granted.

Within the limits of this extension, the special commissioners reported to the court that the city of Richmond had, through its attorney, agreed to purchase the "Ford's Hotel" property at the price of \$90,000, whereupon the court, by its decree of May 24, 1911, after stating its reasons for so doing, proceeded to confirm the sale of this property to the city as follows: "Accordingly the court doth overrule the exceptions of Mary Lee Benet and Charles Thomson Herndon to the report of Special Commissioners Robert H. Talley, David Meade White, and Henry C. Riley, dated May 22, 1911, and doth adjudge, order, and decree that the above-mentioned offer of the city of Richmond for said Ford's Hotel property be and the same is hereby accepted, and that the sale of the said Ford's Hotel property to the city of Richmond, Va., at the price of ninety

thousand dollars (\$90,000.00), payable in cash, be and the same is hereby confirmed."

From said decree of May 24, 1911, Mary Lee Benet and Charles Thomson Herndon obtained this appeal, and the sole question presented is whether or not the court erred in confirming a sale of the "Ford's Hotel" property to the city of Richmond, under the circumstances and conditions surrounding the property at that time.

We have already stated in this opinion many of those circumstances and conditions, all of which and other cogent facts are set out in the court's decree of confirmation as not only justifying, but requiring, the entry of the decree, and which seem to us all-sufficient to show that the court's action was to the best interest of all parties concerned in its ruling.

[1, 2] We know of no valid reason why a court of equity, under like circumstances and conditions, should not negotiate through its duly appointed commissioners for a private sale of property, especially when a public sale had been attempted after due advertisement, and failed to bring a purchaser for the property at a satisfactory price, and when delay of a sale, as in this case, involved serious depreciation in the value of the property, already yielding no income comparable to the costs and expenses necessarily incurred in preserving and protecting it. The controlling purpose and prime object in all cases is to sell the property, so that it may realize the best price obtainable. *First Nat. Bank v. Trigg Co.*, 106 Va. 327, 56 S. E. 158, 7 L. R. A. (N. S.) 744; *Watkins v. Jones*, 107 Va. 8, 57 S. E. 608. The court should exercise a sound legal discretion, with a view to fairness, prudence, and just regard to the rights of all concerned; but, when the action of the court in confirming a sale of property under its control is complained of, the burden is upon the complaining party to show that he has been injured. If the grounds relied on for the setting aside of a judicial sale go to the very substance of the contract, such as fraud, accident, mistake, or misconduct on the part of the purchaser or other person connected with the sale, which has worked injustice to the party complaining, the rule governing in determining whether the sale should be set aside or not is very different from the rule controlling where the question is whether the price at which the property was sold is entirely inadequate. *Patterson v. Eakin*, 87 Va. 56, 12 S. E. 144; *Moore v. Triplett*, 96 Va. 603, 32 S. E. 50, 70 Am. St. Rep. 882.

[3] In this case appellants rely alone on their contention that the price obtained for the property is inadequate, but do not sustain the contention by any proof offered or to be found from the facts already appearing in the record; the only proof offered being the affidavits of three persons, who say that they are experienced in the real estate business, and who only express their opinion that

the "Ford's Hotel" property is worth more than the price at which the court ordered its sale. Furthermore, no evidence whatever is offered as to how or from whom a better price for the property could probably be obtained. The other proof in the case abundantly shows that \$90,000 was not only a fair price for the property, but all that could have been obtained for it. The property, as we have seen, had been offered for sale at public auction and under the most favorable conditions, but a bid of \$80,000 only could be obtained for it.

[4, 5] "The highest bid made at an open judicial sale, fairly conducted, after full notice, in the face of such competition as can be attracted, is a fair and just criterion of the value of the property at that time. After-stated opinions, affidavits of undervalue, and the like, are regarded with little favor, and are entitled to little weight in comparison with the fact established by the auction and its results." *Nitro-Phos. Syn. v. Johnson*, 100 Va. 774, 42 S. E. 995, citing *Todd v. Gallego Mills*, 84 Va. 586, 5 S. E. 676. See, also, *Hogg's Eq. Pro.* §§ 408, 683; *Hazlewood v. Forrer*, 94 Va. 703, 27 S. E. 507; *Bradford v. McConihay*, 15 W. Va. 732.

There are other facts appearing in the record of the combined causes in which the decree here complained of was entered, going to show that it was manifestly to the best interest of all parties concerned that the "Ford's Hotel" property be sold, as it was, to the city of Richmond, at the price obtained therefor (\$90,000); but we do not deem it necessary to review the facts further. The appellants doubtless hoped, and perhaps believed, that further efforts in that direction on the part of the court would result in obtaining a higher price for the hotel property; but they furnished the court with no data upon which it would have been warranted in refusing to confirm the sale of the property to the city of Richmond. Therefore it very plainly appears that they have not successfully borne the burden upon them of showing error in the decree of which they are here complaining.

The decree appealed from is without error, and therefore it is affirmed.

Affirmed.

(113 Va. 760)

#### COMMONWEALTH v. BASS.

(Supreme Court of Appeals of Virginia.  
March 21, 1912.)

#### 1. CRIMINAL LAW (§ 447\*)—JUSTICES OF THE PEACE—CONCLUSIVENESS OF RECORDS.

A justice court is not a court of record, so that the indorsement of the justice on a warrant, "Fine and costs paid," is not conclusive on an appeal therefrom, and that the justice received only a negotiable note as payment may be proved by his admissions on a trial de novo in the circuit court.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 1029-1031; Dec. Dig. § 447.\*]

#### 2. CRIMINAL LAW (§ 260\*)—JUSTICES OF THE PEACE—SATISFACTION OF FINE—PROMISSORY NOTE—PAYMENT—RIGHT TO APPEAL.

Under Code 1904, § 717, which provides that a justice may, in his discretion, in misdemeanor cases tried by him, take security for the payment of a fine and costs imposed, the taking of a negotiable note for a fine and costs upon a conviction for the violation of the revenue laws in a justice court was only security for payment, or, at most, a conditional satisfaction, and is not a payment which will preclude an appeal.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 567-609; Dec. Dig. § 260.\*]

#### 3. CRIMINAL LAW (§ 598\*)—CONTINUANCE—DISCRETION OF COURT.

Where, in a prosecution for a violation of the revenue laws, there had been a number of continuances, and no effort had been made by the commonwealth to secure the attendance of the prosecuting witness in a prosecution before the justice from whom the cause was appealed until a short time before the trial, the refusal of a continuance was not an abuse of discretion.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 1335-1341; Dec. Dig. § 598.\*]

Error to Circuit Court, Hanover County.

Charles Bass was charged with selling intoxicating liquors without a license. From a judgment of acquittal, the Commonwealth brings error. Affirmed.

The Attorney General, for the Commonwealth. Leith S. Bremner, for defendant in error.

CARDWELL, J. This writ of error was awarded to the commonwealth to a judgment of the circuit court of Hanover county acquitting the defendant in error, Charles Bass, of the charge of the violation of the revenue laws of the state by selling intoxicating liquors without a license so to do.

Upon a warrant issued, executed by the constable to whom it was addressed, and trial the same day by Thomas R. Puller, a justice of the peace for Hanover county, the defendant in error, Bass, was found guilty, on June 6, 1910, of the charge of violation of the revenue laws of the state, as above mentioned, fined \$50 and costs, and required to enter into a recognizance in the sum of \$100 for his good behavior for 12 months from said date. On the back of the warrant the justice, over his official signature, indorsed his judgment, stating the aggregate amount of the fine and costs imposed, viz., \$53.85, and added: "Fine and costs paid on June 6, 1910." Four days later, to wit, on June 10, 1910, Justice Puller indorsed on the warrant that, upon application made to him by counsel for Bass, an appeal was allowed Bass; "subject to the opinion of the circuit court as to his right to an appeal." "Prisoner released on \$200.00 bond for his appearance on the second day of the next term thereof, with H. L. Ligon as his surety."

Pursuant to his recognizance, Bass appeared before the circuit court at its July

term, 1910, and by consent of parties, by counsel, the case was continued to the following September term of the court. By like consent the case was continued at the September term, 1910, and at each term of the court until the March term, 1911, was reached. At the March term, 1911, to wit, on March 22d, the attorney for the commonwealth moved the court to dismiss the appeal as improvidently awarded, the fine and costs imposed by the justice upon the defendant, Bass, having been paid; but the court overruled the motion and required the case to be regularly tried upon the appeal, and to this ruling the commonwealth excepted, whereupon the commonwealth moved for a continuance of the case, which motion was also overruled, to which ruling exception was also taken. The case was then tried by a jury, and by their verdict the defendant was found not guilty. The motion of the attorney for the commonwealth to set aside the verdict of the jury, because contrary to the law and the evidence, having been by the court overruled, the commonwealth again duly excepted.

The principal point made and relied on by the commonwealth in its petition for this writ of error is the ruling and judgment of the trial court sustaining defendant's right of appeal to that court.

Section 4107 of the Code of 1904, under which the appeal to the circuit court was applied for and obtained by the defendant, was enacted pursuant to the eighth section of article 1 of our Constitution (Code 1904, p. ccix), relating to the trial of misdemeanors by justices, and has reference to section 4106 of the Code, and provides the means of securing in all cases referred to in section 4106 a trial by jury, if the defendant so desire, and complies with the terms of the statute. The provision of the statute for an appeal in misdemeanor cases tried by a justice is very broad, viz.: "Any person convicted by a justice under the preceding section [4106] shall have the right, at any time, within ten days from such conviction, to appeal to the circuit court of the county. \* \* \*" But there are certain reasonable requirements with which a person convicted before a justice must comply, in order to avail himself of his constitutional right of appeal. These requirements are that he must ask for an appeal within 10 days from his conviction, and he must enter into a recognizance in an amount fixed by the justice, and with surety satisfactory to the justice, or be committed to jail to await the next term of the court to which the appeal is taken. Whether or not a person who is given the right of appeal from a judgment of a justice to the circuit court of the county waives this right by paying the fine and costs imposed upon him by the justice is a question not necessary to be considered in this case, since it is made plainly to appear in the record that the fine and costs imposed upon the defendant were not paid before an

appeal was taken by him to the circuit court.

Section 717 of the Code confers upon a justice authority, in his discretion, in any misdemeanor cases tried by him, when a fine and costs are imposed upon the accused which are not paid in cash, to "take security for the payment of such fine and costs, \* \* \* such payment to be made within thirty days from the day of the trial."

[1] In this case the trial court certifies as a fact proven at the trial that notwithstanding the indorsement on the warrant that the fine and costs had been paid, the justice who tried the warrant and made said indorsement thereon admitted, when examined as a witness before the circuit court, that he had only taken from the defendant a negotiable note, with good security, for the fine and costs. The indorsement of the justice on the warrant, "Fine and costs paid," could not be considered as conclusive on that point, as a justice's court is not a court of record, and when cases are tried on appeal from such a court, the whole case and the proceedings therein are to be heard de novo.

[2] Evidence that the fine and costs had not been actually paid being plainly admissible in the trial upon the appeal in the circuit court, the acceptance by the justice of "a negotiable note with good security for the fine and costs," could not be considered a payment of the fine and costs, in the sense that it would preclude an appeal from the judgment of the justice, but could only be considered, as contemplated by the statute (section 717, *supra*) security for "such payment to be made within thirty days from the day of trial," or at most a conditional satisfaction of the judgment. *Morris v. Harveys*, 75 Va. 726.

In the petition of the commonwealth for this writ of error, the contention seems to be made that the fine and costs in question were actually paid, and the note and security, referred to by the learned judge of the circuit court in his opinion sustaining the right of appeal in the defendant from the judgment of the justice, had reference to some other case tried at the same term of court; but we are unable to find in the record any ground upon which this contention could be sustained.

[3] We are further of opinion that there is no merit in the contention of the commonwealth that the trial court erred in overruling its motion for a continuance at the March term, 1911. This motion was upon the ground of the absence of a witness, with whom the attorney for the commonwealth had never talked, but who, as the attorney had been informed by others, was a material witness.

It may be true, as contended, that the absent witness was the principal witness against the defendant at his trial before the justice; but it is equally true that soon after the trial the witness left the neighborhood,

and the deputy sheriff had been unable to serve upon him either of three subpoenas put into his hands for execution, although every effort had been made to find the witness, and that the location of the witness was not actually known, but was supposed to be in Philadelphia, Pa. There had been, as we have seen, a number of continuances of this case, and it further appears that no effort was made on behalf of the commonwealth to find the wanted witness until about two weeks before the trial of the case, for the reason that the commonwealth was relying upon the appeal being dismissed as improvidently awarded. In these circumstances it cannot be said that the trial court abused its discretion in refusing a continuance of the case.

The case was submitted to the jury upon its merits, and without instructions asked by either of the parties, and with respect to the assignment of error in the refusal of the court to set aside the verdict of the jury finding the defendant not guilty, we deem it only necessary to say that the evidence was plainly insufficient to have warranted the jury in any other finding.

It follows that the judgment of the circuit court has to be affirmed.

**Affirmed.**

(113 Va. 765)

# ARMSTEAD v. COMMONWEALTH.

(Supreme Court of Appeals of Virginia.  
March 28, 1912.)

## INTOXICATING LIQUORS (§ 138\*)—SHIPMENT— “LOCAL OPTION TERRITORY”—“NO-LICENSE TERRITORY.”

Under Acts 1910, c. 190, § 30, requiring shipments of ardent spirits into local option or no-license territory to be plainly marked, showing the kind and quantity of spirits and the consignee of the package, and section 19c, defining “local option territory” as territory which, by vote under the local option law, has declared against the issuance of licenses for the sale of ardent spirits, and “no-license territory” as territory in which, under the provisions of that or some other act, no license for the sale of such spirits can be granted, a conviction cannot be sustained for failure to mark as specified a shipment into a magisterial district, where licenses may be issued under certain conditions, and which voted against local option at the last local option election, although no licenses are actually in effect.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 148; Dec. Dig. § 138.\*]

Error to Circuit Court, Orange County.

Howard Armstead was convicted of crime, and he brings error. Reversed, and prosecution dismissed.

V. R. Shackelford, for plaintiff in error.  
The Attorney General, for the Commonwealth.

BUCHANAN, J. This is a prosecution by the commonwealth against Howard Armstead, the plaintiff in error, for shipping ar-

dent spirits into the town of Orange in violation of section 30 of an act of Assembly approved March 15, 1910 (Acts 1910, c. 190, pp. 289, 302).

That section is as follows: “In every shipment of ardent spirits into local option or no license territory the consignor shall mark plainly on the outside cover of every package containing ardent spirits, so that it may be easily seen and read, the kind and quantity of ardent spirits therein contained and the names of the bona fide consignee of said package.”

The facts of the case were agreed, and are as follows:

“That the town of Orange, in the county of Orange, state of Virginia, is a town of 500 inhabitants or more by the United States census of 1900 and of 1910; that by vote under the local option law, the magisterial district, in which said town is located, in the year 1907 declared in favor of the issuance of license of the sale of ardent spirits. Since then no election on said question has been petitioned or held in said district.

“On motion of C. D. Quisenberry on the 31st day of March, 1908, to revoke and set aside orders entered on the 23d day of March, 1908, granting licenses to George A. Gaines, Mason & Rhoades, C. W. Hickey, and Joel M. Cochran & Co., respectively, granting the said parties a license to sell intoxicating liquors and malt beverages in said town, the circuit court for the county of Orange, entered the following order in each case. \* \* \*

“On motion to revoke and set aside the order entered on the 23d day of March, 1908, granting to Geo. A. Gaines a license to sell intoxicating liquors and malt beverages in the town of Orange, Va., on the ground that the place of sale is not suitable, convenient, and appropriate, and that proper and satisfactory police protection is not afforded.

“On motion of C. D. Quisenberry, he is admitted a contestant and allowed to make his motion to revoke and set aside said order, and the court having fully heard the evidence and the argument of counsel is of the opinion that the place where it is proposed to sell the intoxicating liquors and malt beverages is not suitable, convenient, and appropriate, and that there is not proper and satisfactory police protection; therefore it is considered by the court that the order granting said license be, and the same is hereby, set aside and revoked, and the said C. D. Quisenberry recovers his costs in this behalf expended.’

“Since that time no further application has been made to the court for such license, and there has been no licensed sale of intoxicating liquor or malt beverages or ardent spirits in said town from the said 31st day of March, 1908. \* \* \*

“It is further agreed that Howard Armstead, who resides in the city of Washing-

ton, D. C., did on the 1st day of August, 1911, after having purchased his transportation from Washington, D. C., to Orange, Va., check in the customary manner via the C. & O. Ry., a certain trunk wherein was contained 3½ gallons whisky in ½-pint bottles, together with an old torn blanket; that after his arrival on said train, it being the same train on which his trunk arrived, the said trunk was delivered on presentation of said check to an agent acting for said Howard Armstead for the purpose of hauling the same from the railroad station at Orange, Va., and thereupon was seized by the officers. There is no evidence of any sale of the whisky by said Armstead, and this statement of facts is for the purpose of trying a certain warrant against the said Armstead under section 30 of chapter 189 of volume 3, Pollard Supplement, said act being known as the 'Byrd Law,' and for no other purpose. The trunk was not marked plainly on the outside cover, so that it could be easily seen and read, with the kind and quality of ardent spirits therein contained, nor was the name of the bona fide consignee of said trunk so marked, nor was it marked in any other manner."

There was a verdict and judgment in favor of the commonwealth, and to that judgment this writ of error was awarded.

There are four assignments of error; but in the view we take of the case it will be necessary to consider only the first, viz., that the town of Orange is neither "local option" nor "no-license" territory within the meaning of the statute under which the accused was prosecuted.

Subsection "c" of section 19 of the said act declares that, wherever used in the act, "the words 'local option territory' shall be held to mean the territory which, by vote under the local option law, has declared against the issuance of license for the sale of ardent spirits, and the words 'no-license territory' shall be held to mean the territory (in) which, under the prohibitions of this or any other act, no license can be granted for the sale of ardent spirits."

It is clear from the facts agreed in the case that the town of Orange is located in a magisterial district which voted against local option in the year 1907, which was the last local option election held in the district, and that the town was not, therefore, local option territory.

It is also clear that the town of Orange is not "no-license territory" within the meaning of the statute. "No-license territory" is such territory as under the prohibition of some act of the Legislature no license can be granted for the sale of ardent spirits in that territory. There is nothing in the act approved March 15, 1910, or in any other act of assembly which prohibits license from being granted for the sale of ardent spirits

in the town of Orange under the conditions and requirements of section 141 of the Tax Bill (2 Pollard's Code, pp. 2253, 2256). In fact, license to sell ardent spirits in the town had been granted and had been subsequently revoked by the court because, as stated in the orders of the court, the places of sale were not convenient and appropriate, and proper and satisfactory police protection was not afforded. Since the circuit court had the right, under certain conditions, to grant license to sell ardent spirits in the town, it was not "no-license territory" within the meaning of section 19 of the act approved March 15, 1910.

The judgment complained of must be reversed, the verdict set aside, and the prosecution dismissed.

Reversed.

(118 Va. 479)

# UNITED STATES LEATHER CO. v. SHOWALTER.

(Supreme Court of Appeals of Virginia.  
March 28, 1912.)

## 1. MASTER AND SERVANT (§ 276\*)—INJURIES—SUFFICIENCY OF EVIDENCE.

Evidence, in an employe's action for personal injuries while operating a wringing machine in a tannery, held to sustain a verdict for plaintiff.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 950-952, 954, 959, 970, 976; Dec. Dig. § 276.\*]

## 2. MASTER AND SERVANT (§ 153\*)—MASTER'S DUTY—WARNING USEFUL SERVANT.

An employer, who knew that it was dangerous to clean a wringer operated by an inexperienced employe, was bound to warn him employe of the danger, though the employe was between 17 and 18 years of age; the mere fact that an employe is more than 14 years of age not relieving the employer of the duty of warning him of known dangers in view of his inexperience.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 314-317; Dec. Dig. § 153.\*]

## 3. MASTER AND SERVANT (§ 296\*)—INSTRUCTIONS—CONTRIBUTORY NEGLIGENCE.

The court instructed, in an employe's personal injury action, that in determining the question of negligence the jury should consider the situation and conduct of both parties at the time of the injury, and if it was caused by defendant's negligence without any greater want of ordinary care by the plaintiff than was reasonably to be expected from one of his age, experience, and mental capacity, he could recover. Held, that the instruction was correct.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1180-1194; Dec. Dig. § 296.\*]

## 4. MASTER AND SERVANT (§ 218\*)—ASSUMED RISK.

An employe only assumes the risks ordinarily incident to the service, and those known to him or so obvious as to be readily observed by one of his age, experience, and mental capacity, in the exercise of ordinary care.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 574-600; Dec. Dig. § 218.\*]



**5. MASTER AND SERVANT (§ 222\*)—ASSUMED RISK—OBEYING MASTER'S ORDERS.**

An employé injured in executing an employer's order does not assume the risk of obeying it, unless the danger is so great that a reasonably prudent man would not have obeyed the order.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 648-651; Dec. Dig. § 222.\*]

**6. TRIAL (§ 260\*)—INSTRUCTIONS—REQUESTS—CHARGES ALREADY GIVEN.**

A requested charge submitting a question already instructed on was properly refused.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 651-659; Dec. Dig. § 260.\*]

**7. TRIAL (§ 260\*)—INSTRUCTION—REQUESTS—CHARGES ALREADY GIVEN.**

In an action for injuries to a servant while cleaning a machine while it was in motion, defendant requested a charge, which was refused, that if it was not necessary for plaintiff to clean the machinery while it was in motion, and he could have waited until it was stopped before cleaning it, he would be negligent in attempting to clean it while in motion, requiring a finding for defendant. The court instructed that if plaintiff was told by his foreman not to clean the machinery while in motion, but attempted to clean it while in action, in disobedience of such instruction, he would not be entitled to recover, and the jury must find for defendant. *Held*, that the requested charge was substantially covered by the one given so as to be properly refused.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 651-659; Dec. Dig. § 260.\*]

Error to Circuit Court, Alleghany County.

Action by D. Showalter against the United States Leather Company. Judgment for plaintiff, and defendant brings error. Affirmed.

P. H. C. Cabell, for plaintiff in error. John T. Delaney and Geo. A. Revercomb, for defendant in error.

**PER CURIAM.** The defendant in error, Showalter, a youth between 17 and 18 years of age, was employed by the plaintiff in error to operate a machine in their tannery, known as a "wringer." On the occasion of the accident, while Showalter was engaged in cleaning the machine with "waste," his left hand was drawn into the cogwheel, resulting in the loss of his index finger, two joints of his middle finger, and part of his thumb.

There was an award of \$2,000 for the injury suffered, and to the judgment of the circuit court sustaining the verdict of the jury this writ of error was awarded.

The material facts of the case, from the viewpoint of a demurrer to the evidence, are these: Showalter had been employed by the company on three different occasions, for 40 days in the fall of 1906, and for three weeks in the fall of 1907; but the work done by him during these periods did not involve the operation of machinery. The third period commenced May 22 and ended July 3, 1908. During this last service, except for the space of two weeks preceding the accident, he worked on a "bleacher," which service only

brought him in contact with machinery to the extent of stopping the machine by means of a lever. For the following two weeks he was assigned to help a young man named Gregory in operating a "wringer," a machine used to press water out of leather. On the rear of the "wringer," extending from one side to the other, are two iron rods, 2 inches in diameter, 8 feet long, and  $4\frac{1}{2}$  inches apart. At each end of these rods are two cogwheels, one 8 and the other 3 inches in diameter. These cogwheels are not inclosed. The "wringer" was located in the "scrub" room, where a number of other machines were operated, all by the same motor. These machines were equipped with appliances known as "loose pulleys," by means of which any one of them could be stopped without stopping the others.

After Showalter had been working on the "wringer" for about a week, the superintendent of the company had the loose pulley removed, and the "wringer" was thereafter operated without that appliance. The duty of Gregory and Showalter was to wring a certain amount of leather each day, and then to clean the machine. While the loose pulley was in use, they cleaned the "wringer" by throwing water on it while in motion, and then stopping the machine by means of the loose pulley and wiping it with waste. After the loose pulley was removed, they were not at once instructed how to clean the machine; but for two days cleaned it simply by throwing water on it while in motion, but did not undertake to wipe the machine with waste. On the next day the superintendent complained that the "wringer" was not being kept clean, and told the boys that if they could not keep it clean he would put others in their places who would do so. He then showed them how to clean the "wringer" while in motion by first throwing on water, and then wiping it off with waste. This the boys did in his presence, and repeated the process the next day. But on the day following, while Showalter was engaged in wiping off the "boxing" around one of the revolving shafts with waste, as he had been instructed to do by the superintendent, his hand, in some way unknown to him, was "jerked" into the cogwheel and injured.

[1] The refusal of the court to set aside the verdict as contrary to the law and the evidence is assigned as error; but, from the foregoing summary of the evidence, it is apparent that the assignment is without merit.

The remaining assignment involves the giving of instructions 1, 2, 3, and 4 for the defendant in error, and in refusing to give instructions 9 and 10, prayed by the plaintiff in error.

[2] Instruction 1 told the jury "that it was the duty of the defendant company to take notice of the apparent age of the young persons whom it employed in its service, and to

use reasonable or ordinary care to protect them from the risks which such young persons could not properly appreciate, and, to which they should not be exposed."

The contention of the plaintiff in error with respect to this instruction is that it "imposes upon the defendant a higher degree of duty than the law requires in the case of a bright and intelligent boy 17½ years old. It might be true of a boy under 14 years of age, but a different rule of law prevails when an employé is over 14 years of age."

The distinction contended for, except in degree, does not prevail in Virginia, and is not in accord with the weight of authority elsewhere.

1 Labatt on Master and Servant, § 249, says: "But the theory that at the age of 14 years, the stage reached in the development of the child's faculties is so definite that the burden of proving his nonappreciation of the risks of the service is shifted, is contradicted by the weight of authority, and does not seem to rest upon any adequate logical basis." 1 Shearman & Redfield on Negligence, §§ 219, 219a.

Showalter was inexperienced in operating machinery, and the danger of his employment had been greatly enhanced by the removal of the loose pulley. The superintendent knew that it was specially dangerous to clean the "wringer" while in motion, and, consequently, it was his plain duty to have warned Showalter (whose want of experience was known to him) of the danger. *Richmond Locomotive Works v. Ford*, 94 Va. 627, 645, 27 S. E. 509; *Jacoby Company v. Williams*, 110 Va. 55, 61, 65 S. E. 491.

[3] The second instruction is as follows: "The court instructs the jury that, in determining the question of negligence in this case, they should take into consideration the situation and conduct of both parties at the time of the alleged injury as disclosed by the evidence; and if they believe from the evidence that the injury complained of was caused by the negligence of the defendant, and without any greater want of ordinary care and caution on the part of the plaintiff than was reasonably to be expected from one of his age, experience, and mental capacity, under all the circumstances, then the plaintiff is entitled to recover."

This instruction is sustained by the case of *Richmond Traction Co. v. Hildebrand*, 99 Va. 48, 34 S. E. 888.

[4] The third instruction told the jury "that the only risks assumed by the plaintiff on his entering the service of the defendant, and while he continued in its service, were the ordinary risks of such service, and all risks from causes which were known to him, or which were so open and obvious as to be readily discernible by one of his age, experience, and mental capacity, in the exercise of ordinary care."

The principles enunciated in this instruc-

tion are in accordance with our decisions. See, also, Phillips on Instructions to Juries, pp. 318, 319.

The fourth instruction is as follows: "The court further instructs the jury that if they believe from the evidence that while the 'wringer' machine operated by the plaintiff was equipped with the loose pulley referred to in the evidence, the plaintiff cleaned said machine by causing it to come to a standstill by means of the loose pulley and then threw water on it and wiped it off with waste; and if they further believe from the evidence that for some time after the removal of the said loose pulley, he undertook to clean said machine only by throwing water on it while it was in motion; and if they further believe that some days after the loose pulley had been removed, Mr. Minnick, the company's superintendent, directed the plaintiff to clean said machine by throwing water on it and rubbing it with waste while it was in motion, and showed the plaintiff how to clean said machine while in motion—the plaintiff had the right to rely upon the directions given him by the said Minnick, unless the dangers of his undertaking to obey the directions of the said Minnick were so open and obvious as to be discernible by one of his age, experience and mental capacity. And if the jury believe from the evidence that the plaintiff, with ordinary care and caution to be reasonably expected from one of his age, experience, and mental capacity, was injured while cleaning said machine while it was in motion in the manner directed by said Minnick, they shall find a verdict for the plaintiff, unless the jury believe from the evidence that the plaintiff knew, or, taking into consideration his age, experience, and mental capacity, should have known, the danger of undertaking to clean said machine while in motion."

This instruction presents to the jury Showalter's theory of the case, there was evidence to sustain it, and it is free from objection on legal grounds. *Michael v. Roanoke Machine Works*, 90 Va. 492, 19 S. E. 261, 44 Am. St. Rep. 927.

[5] The settled rule in this state is that a servant, who is injured in executing a direct order of the master, will not be held to have assumed the risk incident to obeying such order, unless the danger is so great that a reasonably prudent man would not encounter it. *N. & W. Ry. Co. v. Ward*, 90 Va. 687, 19 S. E. 849, 24 L. R. A. 717, 44 Am. St. Rep. 945; *N. & W. Ry. Co. v. Ampey*, 93 Va. 108, 25 S. E. 226; *Va. P. C. Co. v. Luck*, 103 Va. 427, 49 S. E. 577; *Black v. Va. P. C. Co.*, 104 Va. 450, 51 S. E. 831; *Norton Coal Co. v. Murphy*, 108 Va. 528, 62 S. E. 268; *Clinchfield Coal Co. v. Wheeler*, 108 Va. 448, 62 S. E. 269.

[6] The court did not err in refusing to give plaintiff in error's instruction 9. The

instruction deals with the doctrine of assumed risk, and the jury had already been fully instructed on that subject.

[7] Instruction 10, which was also refused, is substantially covered by instruction 2, which was given.

Instruction 10 reads: "The court instructs the jury that if they believe from the evidence that it was not necessary for the plaintiff, Showalter, to clean the machinery while it was in motion, and that he could have waited until the machinery was stopped down before attempting to clean it, then he would be guilty of contributory negligence in attempting to clean the machinery in motion, and the jury must find for the defendant."

Instruction 2 reads: "The court instructs the jury that if they believe from the evidence that the plaintiff, Showalter, was told by Mr. Minnick not to clean the machinery while it was in motion, and that in disobedience of this instruction he attempted to clean the machinery while in action, then he would not be entitled to recover in this action, and the jury must find for the defendant."

The case was fairly submitted to the jury upon proper instructions, and the evidence was ample to sustain the verdict, and for these reasons the judgment must be affirmed.

**Affirmed.**

(113 Va. 452)

**CUTCHIN, Mayor, v. CITY OF ROANOKE.**  
(Supreme Court of Appeals of Virginia. March 28, 1912.)

**1. APPEAL AND ERROR (§ 1041\*)—HARMLESS ERROR—AMENDING PLEADINGS.**

An amendment of the rule against a mayor to show cause before a municipal court against his removal from office for misfeasance on grounds charged, which omitted a number of offenses originally charged in the rule, was not prejudicial to defendant, but rather favorable to him.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4106-4109; Dec. Dig. § 1041.\*]

**2. MUNICIPAL CORPORATIONS (§ 159\*)—REMOVAL OF OFFICERS—PROCEEDINGS—ADMISSION OF EVIDENCE.**

The mayor of a city was charged, in removal proceedings, with permitting houses of ill fame to illegally exist, and it appeared that at one time during his administration he turned over the regulation of such houses to the chief of police for about four months. The city offered in evidence a newspaper report of an address by the mayor to the effect that he had decided to assume the position occupied by him since he had been mayor, except the past four months, and that bad results had followed the attempt to break up houses of ill fame; that the police were unable to change the inclination of such people, and had simply scattered them about the city to the danger of respectable people. *Held*, that the address was admissible in evidence; objection being made only to its relevancy.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 350-356; Dec. Dig. § 159.\*]

**3. EVIDENCE (§ 271\*)—SELF-SERVING DECLARATIONS.**

In proceedings to remove a mayor from office for failure to enforce the law against houses of ill fame, a negress, who had conducted such a house, testified that the mayor, with whom she had had intimate relations, had permitted her to do so. It also appeared that at the time she testified she was under a penitentiary sentence for committing a felony, and that the mayor had refused to testify for her at her trial. To support her evidence as to permission given by the mayor, the prosecution proved by a number of police officers that prior to the negress' prosecution, in which the mayor had refused to testify for her, she had told them that the mayor had given her such permission to conduct houses of ill fame. *Held*, that evidence of the negress' statement out of court was admissible to support her evidence in court, in view of the evidence showing possible bias by her against the mayor.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1068-1079, 1081-1104; Dec. Dig. § 271.\*]

**4. EVIDENCE (§ 271\*)—SELF-SERVING DECLARATIONS.**

With certain exceptions, self-serving statements made out of court are not admissible in evidence to corroborate the testimony of a witness.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1068-1079, 1081-1104; Dec. Dig. § 271.\*]

**5. APPEAL AND ERROR (§ 237\*)—WAIVER OF ERROR—ADMISSION OF EVIDENCE.**

Where certain evidence was admitted in a proceeding to remove a mayor for misfeasance, upon the promise of the city to connect it with defendant, defendant should have moved to strike the evidence upon failure to connect it with him, and, not having done so, cannot complain on appeal of its submission to the jury.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1386-1388; Dec. Dig. § 237.\* Trial, Cent. Dig. §§ 228-252.]

**6. MUNICIPAL CORPORATIONS (§ 159\*)—OFFICERS—REMOVAL PROCEEDINGS—ADMISSION OF EVIDENCE.**

In proceedings to remove a mayor for failure to enforce the law against houses of ill fame, evidence was admitted that the keeper of such a house threatened to have two policemen removed from the beats, and that the mayor gave the chief of police orders to remove such officers because of the complaints from the woman, and that, in obedience to such orders, the chief ordered the police sergeant to have them removed, which was done. *Held*, that the evidence was admissible on the charge of malfeasance; the several events being connected.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 350-356; Dec. Dig. § 159.\*]

**7. WITNESSES (§ 340\*)—IMPEACHMENT—REPUTATION FOR CHASTITY.**

In proceedings to remove a mayor from office, a female employé of the mayor, who testified that he once locked his office door and put down the blinds and commenced to take liberties with witness, could not be impeached by evidence as to her reputation for chastity.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1116, 1117, 1119, 1121; Dec. Dig. § 340.\*]

**8. MUNICIPAL CORPORATIONS (§ 159\*)—OFFICERS—REMOVAL PROCEEDINGS—ADMISSION OF EVIDENCE.**

In a proceeding to remove a mayor from office for failure to enforce the law against

houses of ill fame, evidence by leading citizens that, during defendant's term of office, the number of such houses had largely decreased, notwithstanding a large increase in population, and that the moral condition had greatly improved within that time, was not admissible.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 350-356; Dec. Dig. § 159.\*]

**9. MUNICIPAL CORPORATIONS (§ 159\*)—OFFICERS—REMOVAL PROCEEDINGS—ADMISSION OF EVIDENCE.**

In proceedings to remove a mayor from office for failure to enforce the law against houses of ill fame, a letter from the mayor to the chief of police was admitted in evidence, which requested the chief to arrest any persons keeping a house of ill fame on E. avenue, west of the alley from S. avenue, leaving that portion of E. avenue east of the alley "undisturbed for the present, but have such regulation as you see proper." The mayor was asked what he meant by "have such regulation as you see proper," and answered that he meant for the chief to use his discretion in handling that matter. *Held*, that the question and answer were immaterial.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 350-356; Dec. Dig. § 159.\*]

**10. EVIDENCE (§ 450\*)—OFFICERS—REMOVAL PROCEEDINGS—ADMISSION OF EVIDENCE.**

In proceedings to remove a mayor for failure to enforce the law against houses of ill fame, a letter from the mayor to the chief of police was introduced, stating that it was not the mayor's intention to interfere with the houses of ill fame on H. street, or on the property of A., "but, of course, this does not mean to say that you are not to run every one out of the city, if you see proper." The mayor was asked what he meant by the statement that it was not his intention to interfere with H. street, or the house located on A.'s property. *Held*, that the evidence sought to be elicited was inadmissible; the letter not being ambiguous so as to require explanation.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2066-2082, 2084; Dec. Dig. § 450.\*]

**11. APPEAL AND ERROR (§ 205\*)—HARMLESS ERROR—BURDEN OF SHOWING PREJUDICE.**

An objection to the exclusion of a question will not be considered on appeal, where exceptor does not show the answer expected.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1281, 1282; Dec. Dig. § 205.\*]

**12. APPEAL AND ERROR (§ 1053\*)—HARMLESS ERROR—ADMISSION OF EVIDENCE.**

In a prosecution to remove a mayor from office for failure to enforce the law against houses of prostitution, evidence was admitted that the mistress of a house of ill fame, who testified in the present proceedings, was sued for a debt in 1903 before the mayor's present term of office, and that he was her counsel, and that the debt was paid by illicit intercourse between the woman and plaintiff's agent. The court instructed that, to remove the mayor from office, the jury must find that during his present term of office he unlawfully and willfully neglected to enforce the ordinances against houses of ill fame, or unlawfully permitted and connived thereat. *Held*, that the admission in evidence of the occurrences before the mayor's present term of office could not have misled the jury to his injury.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4178-4184; Dec. Dig. § 1053.\*]

**13. TRIAL (§ 28\*)—VIEW BY JURY—DISCRETION OF COURT.**

Whether the jury shall view the premises involved rests in the sound judicial discretion of the court, and is not a matter of absolute right.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 77-79; Dec. Dig. § 28.\*]

**14. TRIAL (§ 28\*)—VIEW BY JURY.**

The court should permit the jury to view the scene of an occurrence only when it is reasonably certain that it will give the jury substantial aid in reaching its decision.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 77-79; Dec. Dig. § 28.\*]

Error to Corporation Court of Roanoke.

Proceedings by the City of Roanoke against Joel H. Cutchin, Mayor, to remove defendant from office. Judgment of removal, and defendant brings error. *Affirmed*.

W. J. Henson and Marshall McCormick, for plaintiff in error. H. M. Smith and R. H. Willis, for defendant in error.

**PER CURIAM.** A special grand jury of the corporation court of the city of Roanoke made a report on the 29th of March, 1911, tending to show misfeasance, malfeasance, and gross neglect of official duty on the part of Joel H. Cutchin, as mayor of the city of Roanoke, and recommending to the court that such proceedings be had as are provided by law for his removal from said office; and thereupon the court summoned Joel H. Cutchin, mayor as aforesaid, to appear before the corporation court on Monday, the 24th day of April, 1911, to show cause why he should not be removed from the said office of mayor of the city of Roanoke.

This proceeding was had under section 1033 of the Code, which, so far as applicable to this case, is as follows: "The corporation court of a city may remove the mayor of said city from office for malfeasance, misfeasance, or gross neglect of official duty, and such removal shall be deemed a vacation of the office. All proceedings against a mayor for the purpose of removing him from office shall be by order of or motion before said court, upon reasonable notice to the party affected thereby, and with the right to said party of an appeal to the Supreme Court of Appeals."

The charges which the mayor was called upon to answer were numerous, embracing his conduct with reference to houses of ill fame, gambling houses, his refusal to investigate the conduct of police officers, and various specifications of those charges. The mayor appeared, and at the conclusion of the evidence in chief in support of the rule against him, the court (Judge J. M. Mullen, of Petersburg, presiding), being of opinion that the interests of justice would be subserved thereby, amended the rule and substituted in lieu thereof four charges, which are as follows:

"(1) That the said Joel H. Cutchin, mayor

of the city of Roanoke, aforesaid, did, at divers times during his present term of office unlawfully and willfully neglect and refuse to enforce the laws of the state of Virginia and the ordinances of the city of Roanoke against certain houses of ill fame within said city.

"(2) That the said Joel H. Cutchin, mayor of the city of Roanoke, did, at divers times during his present term of office, unlawfully and willfully permit, encourage, connive at, and advise the keeping of certain houses of ill fame in said city of Roanoke, and the maintenance of the same.

"(3) That the said Joel H. Cutchin, mayor of the city of Roanoke, aforesaid, did, at divers times during his present term of office, unlawfully, willfully, and corruptly neglect and refuse to enforce the laws of the state of Virginia and the ordinances of the city of Roanoke against certain houses of ill fame within said city.

"(4) That the said Joel H. Cutchin, mayor of the city of Roanoke, aforesaid, did, at divers times during his present term of office, unlawfully, willfully, and corruptly permit and encourage and connive at and advise the keeping of certain houses of ill fame in the city of Roanoke, and the maintenance of the same."

After all the evidence in support of and in answer to the rule had been introduced, and the jury had been fully instructed, a verdict was returned, finding the mayor guilty upon all four of the charges; and thereupon the court entered judgment vacating the office of mayor of the city of Roanoke. To this order a writ of error was awarded, which brings in review certain rulings of the court made during the trial, in the admission and rejection of evidence, in instructions given and refused, and on the motion to set aside the verdict as contrary to the law and the evidence.

[1] Plaintiff in error complains that the court directed an amendment of the rule after the testimony in support of the rule, as originally framed, had been introduced; but it is certain that this action of the court was not prejudicial to the plaintiff in error, but was to his benefit rather than otherwise, as it limited the range of inquiry and reduced the charges to the conduct of the mayor with reference to houses of ill fame, omitting all reference to other offenses originally alleged against him. It operated no surprise, diminished no means of defense, and abridged no right which he would otherwise have enjoyed.

The first assignment of error in the petition relates to the instructions given and refused by the court; but we deem it expedient to deal first with those with respect to the admission of testimony.

[2] Assignment of error No. 3 is founded upon bill of exceptions No. 4, taken during the progress of the trial because A. H. Griffin was permitted to read a newspaper

publication to the jury, purporting to be a speech made by the mayor some time in the year 1900, which was objected to because it was not sufficiently shown that the publication contained the exact language of the mayor, and because there was nothing in the speech that was relevant to any issue in the cause.

We think it was sufficiently identified by the evidence of Griffin and by the testimony of the mayor. In answer to a question from the court, counsel for the defense said: "We admit that the mayor made that address, and we admit that it was published in the newspapers the next morning; but we do not admit the relevancy of it." But this objection is, we think, without force. One of the necessary elements of the inquiry under consideration was to bring home knowledge of existing conditions to the mayor, and that address seems to bear forcibly upon that point. At one period during his administration the situation with respect to houses of ill fame seems to have been turned over by the mayor to the control of the chief of police. That control lasted for about four months, and in the address he uses the following language: "I have decided to assume the position occupied by me ever since I have been mayor except the past four months. \* \* \* Bad results have followed the attempt to break up houses of ill fame. The police have been unable to change the heart and inclination of such people, and have simply scattered them about the city, to the disgust, danger, and annoyance of respectable people." This assignment of error is overruled.

[3] Assignment of error No. 4 is based upon bills of exceptions 5, 10, 11, 12, and 13, all of which deal with the evidence of one Maggie Ferguson.

The record shows that Maggie Ferguson, a negress, had been conducting a house of ill fame in the city of Roanoke, that at the time she testified she had been convicted of a felony, and that the verdict of the jury fixed her punishment at eight years in the state penitentiary. She testified that the mayor had given her permission to conduct a house of ill fame in the city of Roanoke and to keep white girls as inmates. She also testified as to having had intimate personal relations with the mayor, and the prosecution sought to support her statements by proving that prior to the mayor's giving her this alleged permission she asked other officers for such permission and was referred to the mayor, and by proving by a number of police officers that prior to this prosecution she had told them that the mayor had given her such permission, thus attempting to support her statements made in court by proof of the fact that similar statements had been made by her out of court.

[4] The rule, without doubt, is that self-serving statements made out of court cannot be shown in order to corroborate the testi-

mony of a witness. But there are well-established exceptions.

It appears that counsel for the defense examined this witness as to why she had not been sentenced after conviction by the jury, and brought out the fact that she had been convicted at a prior term, but that sentence had not been pronounced upon her. It appears further that counsel for the defense brought out the fact that Mayor Cutchin was not put on the stand at the trial of this woman to prove that she had been given permission to commit the crime for which she had been sentenced to the penitentiary, and it was further shown that Mayor Cutchin had refused to come and testify for her at the time of her trial. The inference which was sought to be deduced from these facts was a bias or spite against the mayor by reason of his refusal to testify in her behalf. The witness was subjected to a severe cross-examination by counsel for the defense as to previous statements made by her, and we are of opinion that the ruling of the court comes within the exception to the rule.

In *Howard v. Commonwealth*, 81 Va. 490, an attempt was made to discredit a witness by showing malice growing out of an arrest for larceny, and the court said: "To repel the attack thus made, it was competent for the prosecution to prove that prior to his arrest the witness gave the same account of the matter that he gave on the trial." The opinion cites *Robb v. Hackley*, 23 Wend. (N. Y.) 50, where it is said: "If an attempt is made to discredit the witness on the ground that his testimony is given under the influence of some motive prompting him to make a false or colored statement, the party calling him has been allowed to show, in reply, that the witness made similar declarations at a time when the imputed motive did not exist."

In *Rice's Criminal Evidence*, § 241, the law is thus stated: "Where the witness is charged with giving his testimony under the influence of some motive prompting him to make a false or colored statement, it may be shown that he made similar declarations at a time when the imputed motive did not exist. So, in contradiction of evidence tending to show that the account of the transaction given by the witness is a fabrication of late date, it may be shown that the same account was given by him before its ultimate effect and operation, arising from a change of circumstances, could have been foreseen."

And in *Wigmore on Evidence*, § 1128, the law is very clearly and specifically stated as follows: "A consistent statement, at a time prior to the existence of a fact said to indicate bias, interest, or corruption, will effectively explain away the force of the impeaching evidence; because it is thus made

to appear that the statement in the form now uttered was independent of the discrediting influence."

In *Jessie v. Commonwealth*, 112 Va. —, 71 S. E. 612, this court held, after reviewing a number of authorities, that it was competent for the prosecution to meet an attempt to discredit the witness by showing that he himself had been charged with murder, by proving that before the assertion of that charge the witness had made the same declaration as to the guilty agent out of court that he afterwards testified to in court.

To the suggestion of counsel for the defense that the statement to the officers was fabricated for the purpose of throwing them off their guard and preventing arrest, the answer by counsel for the prosecution is ample that the witness could not have known but that the police officers would report her statement to the mayor for confirmation, in which most probable event she would have been caught in her own snare.

Assignment of error No. 5 rests upon bills of exceptions 6 and 7, and deals with the evidence of Rose Turner. This woman had kept a house of ill fame in Roanoke, which had been broken up by the authorities. She left the city for a time, and, wishing to return, opened negotiations with Mr. Penn to see if she could not be permitted to come back; and she came back and opened a house on High street. This evidence was objected to by counsel for the defendant on the ground that he was not shown to be in any way connected with Mr. Penn; "\* \* \* but the court, being assured by counsel for prosecution that they would connect it, permitted said questions to be asked and said answers to be given, but the same were not connected as the record will show, and the court's attention not being called to this failure, did not rule further on the motion to exclude, and said evidence went to the jury"—and to this action of the court the defendant excepted.

[5] What the court did was but the equivalent of saying to counsel: "I will not rule upon this question for the present; the commonwealth having undertaken to connect the mayor with this evidence. But if that is not done and this objection shall be renewed, the evidence will be excluded." And the sole question is: Upon whom lay the burden to make the subsequent objection to its introduction and to ask for its exclusion? To require the court to bear all these matters in mind during a protracted trial would be to impose upon it a burden not conducive to the proper administration of justice. It is the business of counsel to bring such matters to the attention of the court. Counsel may have waived the objection; they may have regarded it as immaterial. But, however that may be, it was the duty of counsel, and not that of the court, to renew the objection to the admission of testimony.

In *Lundvick v. National Union Fire Ins. Co.*, 128 Iowa, 347, 103 N. W. 970, it is said that "though, on the statement of counsel that he will 'connect this further on,' testimony incompetent, so far as the record discloses, is admitted over objection, and it is not made competent by further testimony, error is waived by failure to move to strike."

In *Brady v. Finn*, 162 Mass. 260, 38 N. E. 506, it is said: "An exception to the admission of evidence which it was within the discretion of the judge to admit when offered, although it might have been excluded until further testimony had been put in, cannot be sustained, if, no such testimony having been introduced, the excepting party, at the close of the evidence, did not request that the evidence objected to be stricken out, and that the jury be instructed to disregard."

In *Doon v. Felton*, 203 Mass. 267, 89 N. E. 539, it was held that "where evidence was admitted on statement of plaintiff's counsel that he would offer evidence to connect the subject of the evidence with the defendant, upon plaintiff's failure to offer that evidence, defendant should have moved to strike out the evidence, and, not having done so, he has no ground of exception."

To the same effect is *Ducharme v. Holyoke St. Ry. Co.*, 203 Mass. 384, 89 N. E. 561. See, also, *N. & W. R. Co. v. Anderson*, 90 Va. 1, 17 S. E. 757, 44 Am. St. Rep. 884; *Moore Lumber Corporation v. Walker*, 110 Va. 775, 67 S. E. 374, 19 Ann. Cas. 314.

[6] Assignment of error No. 6 rests upon bills of exceptions 8 and 9. J. L. Manning and J. T. Reynolds, police officers of the city of Roanoke, testified that one Vici Isom, a keeper of a house of ill fame, had caused them to be removed from their beats, because they interfered with her in her violation of the law. H. N. Dyer, chief of police, testified that the mayor gave him orders to remove these officers from this beat by reason of complaint from women up there, and that he gave the orders to the sergeant in charge (Sergeant Overstreet), and the officers testified that this sergeant changed their beats. We have, then, this sequence of events: Vici Isom threatened that she would have Manning and Reynolds removed from their beats; the chief of police testified that the mayor gave him orders to remove these officers by reason of complaints from the women up there, and that in obedience to the mayor's direction he gave orders to Sergeant Overstreet for their removal; and they were in point of fact removed. These events seem to be so reasonably connected and dependent the one upon the other in the chain of causation as to render them admissible in evidence upon the charge of malfeasance in office.

[7] Assignment of error No. 7 calls in question the rulings shown in bills of exception 14 and 15. They deal with the witness Bertie A. Martin, who testified that she was in

the defendant's office two years ago; that he locked the door, put the key in his pocket, pulled down the blinds, and commenced to take liberties with her; that she commenced to cry, and finally he let her go.

In order to impeach this testimony, witnesses were offered to prove her reputation for chastity; but the court declined to allow the defendant to introduce proof along that line.

In *Langhorne's Case*, 76 Va. 1012, it was held that it was not admissible to ask a witness if he had not been convicted of an offense which did not involve his character for truth on oath.

And in *Uhl's Case*, 47 Va. 706, it was held that the record of the conviction of a witness for petty larceny in another state is not admissible evidence to impeach the veracity of the witness. And it was further held that a party seeking to impeach a witness will not be allowed to ask what the general character of the witness is in relation to other matters, as well as to his veracity.

Any other rule would involve the court in an endless investigation of matters wholly collateral to the issue under trial.

[8] Assignment of error No. 8 presents this question: The defendant offered to prove by a number of witnesses, leading citizens of Roanoke, that during defendant's incumbency of the office of mayor, from 1902 down to the present time, notwithstanding the large increase in population, the number of houses of ill fame in the city of Roanoke had been largely decreased, and that the moral conditions of the city had been greatly improved, and that there was very much less disorder in any of said houses; but the court refused to allow the evidence to go to the jury.

The evidence offered was wholly irrelevant. It tended neither to prove nor to disprove the charges under consideration. Grant that the number of houses had diminished, that the moral conditions of the city had improved, and that there was less disorder in those houses than formerly, yet if the mayor had unlawfully, willfully, and corruptly neglected and refused to enforce the laws of the state of Virginia and the ordinances of the city of Roanoke against houses of ill fame, he would have been guilty as charged, although, during the course of his administration, all the things sought to be proved in his favor had been conclusively shown to the jury. It is our boast that ours is a government of law and not of men. No officer may substitute his discretion in the place of the law, which alone expresses the will and policy of the state.

[9] Assignment of error No. 9 rests upon bill of exceptions No. 17. The defendant, to maintain the issue on his part, introduced as a witness Joel H. Cutchin, in his own behalf, and the following extract from a letter from him to the chief of police was read:

"I also desire you to have before the court any persons keeping a house of ill fame on Earnest avenue west of the alley from Salem avenue to Earnest avenue alongside the office and wareroom of the Central Manufacturing Company, leaving that portion of Earnest avenue east of the said alley undisturbed for the present, but have such regulation as you see proper." And the witness was asked: "What did you mean by 'but have such regulation as you see proper'?" A. For him to use his discretion in handling that matter." Counsel for the prosecution objected to said question and the answer thereto, and the court sustained the objection, to which action of the court the defendant excepted.

With respect to this question and answer, it seems to us wholly immaterial. It throws no light upon the letter, but merely restates the phrase which he was asked to explain by the use of substantially identical terms.

[10] Counsel for the defendant then stated: "I observe this passage in this letter: 'It is not my intention to interfere with High street, or with those at present located on the property of R. H. Angell; but of course this does not mean to say that you are not to run every one out of the city if you think proper.' I want to know what you mean by saying, 'It is not my intention to interfere with High street or with those at present located on the property of R. H. Angell.' What did you mean by interference for the present with High street?" At this point counsel for the prosecution interposed an objection to the question and any answer that might be given thereto, and the objection was sustained. Counsel for the defendant thereupon asked: "Then you state in this letter, 'It is not my intention to interfere with High street.' Was it your intention to interfere everywhere else than High streets?" The prosecution again objected, and the court sustained the objection, to all of which rulings of the court the defendant excepted.

[11] With reference to the second and third questions propounded, it is sufficient to say that the exceptor does not vouch the answer which he expected to elicit. See *Stoneman v. Com.*, 66 Va. 887, the syllabus of which states: "An objection to a question asked and to the witness answering it is overruled, and an exception taken which does not state the answer. The appellate court cannot consider it." The same proposition has been frequently decided by this court, and is, indeed, so well established as not to require authority in support of it.

The evidence was in any event inadmissible. No mistake with respect to the letter was claimed, and no ambiguity in it appears, and there was therefore nothing to explain.

Assignment of error No. 10 is sufficiently disposed of by what has been said with reference to assignment of error No. 8.

[12] Assignment of error No. 11 calls in question the ruling of the court as set forth in bills of exceptions 19 and 20, which deal with an occurrence that took place in 1903, when a warrant was brought against Vici Isom to recover money which it was alleged she owed. Mayor Cutchin was her counsel, and under his direction she pleaded that the debt was paid, and upon further examination it appeared that payment was made by illicit intercourse between herself and the agent of the plaintiff.

The exceptions in each one of the bills relating to this matter are based, not upon the fact that the occurrences took place in 1903 before the beginning of the mayor's present term of office, but that the evidence was immaterial, irrelevant, impertinent, collateral, and too remote. The court was not called upon by bills of exceptions 19 and 20 to rule upon the admissibility of evidence relating to what occurred prior to the beginning of the present term of the mayor. We feel confident in stating that no objection upon that ground was taken to the admission of evidence during the entire trial—certainly it has been so asserted by counsel for the defendants in error, no instance of it has been pointed out to us by counsel for plaintiff in error, and our researches into this very voluminous record have not disclosed to us any such ruling upon the part of the court. When the court came to give instructions to the jury, it told them that "they must believe from the evidence that, during his present term of office, which the evidence shows began September 1, 1908, he unlawfully and willfully neglected or refused to enforce the ordinances of the city of Roanoke against houses of ill fame within said city; or they must believe that, during his present term of office, he unlawfully and willfully permitted, encouraged, connived at, or advised the keeping of such houses within said city." And the same proposition was presented in another instruction. So that the jury could not possibly have been misled into the belief that the mayor could be found guilty, except for some act of omission or commission during his present term of office.

We are of opinion that there was no error committed by the court in the admission or exclusion of testimony.

From bill of exceptions No. 21 it appears that the plaintiff in error moved the court to allow the jury to view the room which the mayor used as his office at the time of the alleged incident related by the witness Bertie Martin, who had testified that when she visited the mayor's office he had first locked the door and then taken liberties with her person; the object of the view being to show that the door could not be locked from the inside. The motion of the plaintiff in error, being objected to, was refused by the court.

[13, 14] It not infrequently happens that in cases of homicide, in actions for damages



for negligence, in suits to establish boundary lines, and in other instances, the jury are taken to the scene of the subject of investigation, in order that by a personal inspection of the locality they may be enabled intelligently to apply the evidence; but this is not one of the absolute rights of the litigant. It rests in the sound discretion of the court—a judicial discretion, it may be, which this court will under proper circumstances review. But there is nothing in the record in this case to show that such a view would have been helpful. The testimony of the witnesses was all-sufficient to explain the situation. The view of a jury, in any case, is of indeterminate probative value, and should be resorted to only where there is a reasonable certainty that it will give the jury substantial aid in reaching a right verdict.

The condition of the lock—whether it would lock upon one side or the other—offered no difficulty which the jury could not as readily solve by the testimony of others as by a personal inspection.

Counsel for plaintiff in error asked for 18 instructions, all of which the court refused, but in lieu thereof gave to the jury 12, as sufficiently presenting the law of the case. We have considered these instructions, and while we do not mean to say that none of those offered by the defendant correctly propounded the law, or that some of them might not have been given with propriety, we are of opinion that those which the court gave of its own motion correctly propounded the law, and were amply sufficient to guide the jury in their deliberations.

Viewed as upon a demurrer to the evidence, there can be no doubt that the evidence was sufficient to maintain the verdict. We are, indeed, of opinion that the verdict of the jury was in strict accordance with the preponderance of the evidence.

Counsel for plaintiff in error animadvert somewhat upon the conduct of the grand jury in this case, and seem to be of the opinion that, in making the report upon the conduct of the mayor, the grand jury had transcended its duty. In this view we cannot concur. "To examine into accusations against persons charged with crime, and if they see just cause to find bills of indictment against them, and to act in such public matters as may be brought before them, such as inquiries into misfeasance in office, prevalence of crime and public nuisances," are among the recognized duties of grand juries (Webster's Dictionary)—sometimes neglected, it is true, but which, when faithfully performed, deserve public commendation.

Upon the whole case, we are of opinion that there is no error disclosed by the record, and the judgment of the corporation court is affirmed.

Affirmed.

(70 W. Va. 472)

WILLIAMS et al. v. BROWN et al.  
(Supreme Court of Appeals of West Virginia.  
March 5, 1912.)

(Syllabus by the Court.)

1. PRINCIPAL AND SURETY (§ 115\*) — DISCHARGE OF SURETY—NEGLECT TO PROCEED AGAINST PRINCIPAL.

Release of property of a principal debtor, sufficient to pay the debt and held under levy by virtue of an execution, at the instance of the creditor, after service of the statutory notice from the sureties to make the debt out of the property of the principal, wholly discharges the sureties, even though the debt, as to the principal, has not been paid, nor the execution legally satisfied.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. §§ 244-268; Dec. Dig. § 115.\*]

2. QUIETING TITLE (§ 7\*) — REMEDIES OF SURETIES—RELEASE OF JUDGMENT LIEN.

Under such circumstances, the sureties may, in equity, compel execution of a release of the lien of the judgment as to their real estate as constituting a cloud on the title.

[Ed. Note.—For other cases, see Quieting Title, Cent. Dig. §§ 14-33; Dec. Dig. § 7.\*]

3. EQUITY (§ 149\*)—PLEADING—BILL—MULTIFARIOUSNESS.

A bill for such purpose by two sureties, owning separate tracts of land, on the titles to which such lien is a common cloud, is not multifarious.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 342, 368-370; Dec. Dig. § 149.\*]

4. ELECTION OF REMEDIES (§ 7\*) — SUIT IN EQUITY—RESORT TO REMEDY AT LAW.

Institution of a summary statutory proceeding for the release of such lien by one of such sureties does not preclude his joinder with a cosurety in a suit in equity to obtain the same relief.

[Ed. Note.—For other cases, see Election of Remedies, Cent. Dig. § 12; Dec. Dig. § 7.\*]

Appeal from Circuit Court, Harrison County.

Bill in equity by James E. Williams and another against Beeson H. Brown and others. From the decree, defendants Brown and another appeal. Affirmed.

W. Scott, for appellants. Charles G. Coffman, for appellees.

POFFENBARGER, J. The decree appealed from in this cause canceled, annulled, and declared void, as to the plaintiffs, a judgment of a justice of the peace, recorded in the clerk's office of the county court, so as to make it a lien upon their property, and required Beeson H. Brown, assignee of William O. Straley, the judgment creditor, to execute a release of said judgment in so far as it affects them. They were sureties for the debt for which the judgment was acquired and, after the recovery thereof, made a proper demand upon Straley, the creditor, under the statute (Code, c. 101), to proceed against the property of the principal debtors, J. H. Watson and Lucy Watson, and make his money out of the same. Thereupon an execution was levied upon sufficient

property to pay the debt, or the constable advertised such property upon which he had previously levied. Then Mabel Watson intervened by petition, claiming title to the property, and the finding upon the issue made upon her petition was against her. This litigation ended August 24, 1905, and, on the next day, Straley gave to the constable the following written directions as to the execution: "Return execution against J. H. Watson and Lucy Watson, F. C. Robinson, and James E. Williams in my favor satisfied, as J. H. Watson has settled same with no less costs which he will settle with you and oblige." This order or direction the constable obeyed. On the same day, Straley assigned the judgment to Beeson H. Brown. It had not in fact been paid. J. H. Watson and Lucy Watson and B. H. Brown, the assignee, had given to Straley their note for the amount of it and Watson had assigned to Straley the rents of certain real estate owned by him to be by Straley collected and applied on the note. The personal property so levied on and released was afterwards disposed of by the Watsons and the collection of rents of the real estate was cut off by a receivership.

[1] As the constable had in his hands property of the principal debtors out of which he could have made all of the debt, and released it at the instance of the creditor, notwithstanding the sureties had previously notified the latter to proceed and make his money out of that property, the discharge of the sureties from liability for the debt is a matter of simple justice and in accord with positive law. Code, c. 101, §§ 1 and 2. The judgment having thus become unenforceable against the sureties or their property, the recorded abstract thereof constituted a cloud on the titles to their real estate. *Ambler v. Leach*, 15 W. Va. 677, 697. Here the execution had been actually levied upon property amply sufficient to pay the whole debt, and the liability of the property to sale under the execution adjudicated. The release of this lien upon specific property discharged the sureties, whether the substitution of the note for the judgment was intended as payment or satisfaction of the judgment, as averred in the bill, or not. "It has long been the settled rule in equity that where there are principal debtor and surety, if the creditor, without the knowledge and consent of the surety, makes any contract with the principal, by which he ties up his hands from proceeding to recover his debt, or discharges any specific lien on the principal's property, out of which he might have made the debt, he releases the surety from his obligation." *Ward v. Vass*, 7 Leigh (Va.) 135, 138. Though there may not have been a legal satisfaction of the judgment as claimed by the bill, facts constituting a discharge of the sureties are clearly shown. Satisfaction of the judgment in the full sense of the term

was not necessary to such discharge. The judgment may remain valid and in force as against the principals, and the sureties be nevertheless discharged.

[2] The demurrer to the bill was properly overruled.

[3] *Moore v. McNutt*, 41 W. Va. 698, 24 S. E. 682, does not sustain the argument for multifariousness. In that case, the two titles asserted in the bill were wholly distinct and unconnected. Here the two plaintiffs are jointly interested in the same question, the vital matter in controversy. The case is therefore ruled by *Depue v. Miller*, 65 W. Va. 120, 64 S. E. 740, 23 L. R. A. (N. S.) 775.

[4] Robinson, one of these plaintiffs, instituted a summary proceeding for the release of the judgment lien under the provisions of chapter 76 of the Code, before this suit was instituted. This did not preclude him from uniting with Williams, his cosurety, in this suit, nor Williams from instituting it. Robinson had a right of election which was not destroyed by his mere institution of the statutory proceedings. He did not prosecute it to a finality. All the defendants could have required of him, as prosecutor of two proceedings, was an election as to which he would rely upon. The institution of one did not bar the other. *Gibbs v. Perkinson*, 4 Hen. & M. 415.

Finding no error in the decree, we affirm it.

BRANNON, P., absent.

(70 W. Va. 442)

WHELAN v. BALTIMORE & O. R. CO.  
(Supreme Court of Appeals of West Virginia.  
March 5, 1912.)

(Syllabus by the Court.)

1. JUSTICES OF THE PEACE (§ 166\*)—APPEAL—DISMISSAL.

Irregularities and mistakes in the proceedings of a justice of the peace, in an action wherein he had jurisdiction of the subject-matter and the parties, furnish no ground for dismissing an appeal, properly taken, to the circuit court.

[Ed. Note.—For other cases, see *Justices of the Peace*, Cent. Dig. §§ 638-646; Dec. Dig. § 166.\*]

2. JUSTICES OF THE PEACE (§ 166\*)—APPEAL—DISMISSAL.

A defendant who has appealed from the judgment of a justice, rendered against him in an action wherein the justice had jurisdiction of both the subject-matter and the parties, cannot dismiss his appeal over the objection of plaintiff.

[Ed. Note.—For other cases, see *Justices of the Peace*, Cent. Dig. §§ 638-646; Dec. Dig. § 166.\*]

3. RAILROADS (§ 446\*)—KILLING STOCK—QUESTION FOR JURY.

In an action against a railroad company for the negligent killing of a horse trespassing upon the company's right of way, negligence is generally a mixed question of law and fact for the jury; and, if circumstances are proven from which they may reasonably infer negligence, such, for instance, as that the horse could

have been seen, dangerously near the track, by the engineer in charge of the train for a distance of 300 yards, that the speed of the train increased, and no effort was made to stop it until after the engine struck the horse, that the train was a light one, making only a half a load for the engine, the case should go to the jury.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1627-1641; Dec. Dig. § 446.\*]

**4. NEW TRIAL (§ 71\*)—GROUNDS—INSUFFICIENCY OF EVIDENCE.**

The jury are the judges of the credibility of witnesses and the weight to be given to their testimony; and the court has no right to set aside their verdict founded upon conflicting testimony, provided there is sufficient evidence to support it, and it be not contrary to the overwhelming weight thereof.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 144, 145; Dec. Dig. § 71.\*]

**5. RAILROADS (§ 426\*)—KILLING STOCK—CONTRIBUTORY NEGLIGENCE.**

Plaintiff's negligence in permitting his horse to stray upon a railroad track does not relieve the railroad company's servants from the exercise of reasonable care to avoid injuring him.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1511; Dec. Dig. § 426.\*]

**6. RAILROADS (§ 415\*)—KILLING STOCK—DUTY OF ENGINEER.**

It is the duty of the engineer to keep a reasonable lookout for dumb animals trespassing on the tracks.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1476-1482; Dec. Dig. § 415.\*]

**7. RAILROADS (§ 446\*)—KILLING STOCK—NEGLECT.**

The failure to ring the bell or sound the whistle, to frighten animals off the track, is not per se negligence.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1627-1641; Dec. Dig. § 446.\*]

Error to Circuit Court, Lewis County.

Action by Thomas Whelan against the Baltimore & Ohio Railroad Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Brannon & Stathers, for plaintiff in error.  
J. M. Foster, for defendant in error.

**WILLIAMS, J.** This writ of error was granted, on defendant's petition, to a judgment of the circuit court of Lewis county for \$192, rendered against it in favor of plaintiff, in an action for the negligent killing of a horse. The action was originally brought in a justice's court, and, after judgment in favor of plaintiff, defendant appealed.

[1, 2] After taking the appeal, defendant moved to dismiss it, on the ground that the transcript from the justice's docket showed that, on June 23, 1908, that being the day on which the summons was returnable, neither party to the action appeared, and the justice, on his own motion, continued the cause until the 23d of July, at which time, defendant still failing to appear, the justice heard plaintiff's proof and rendered a judgment in his favor. The court overruled the motion, and defendant's counsel assign this action of the court as error. The nature of the

action and the amount in controversy show that the justice had jurisdiction of the cause. The constable's return on the summons shows it to have been served in sufficient time and in proper manner. This gave the justice jurisdiction over the person of defendant. His jurisdiction is therefore shown to have been complete. It is not necessary to decide, nor do we say, that the justice had a right to continue the case for 30 days, in the absence of both parties; nor do we decide what effect such continuance had upon the justice's judgment. Because, having jurisdiction of the parties and of the subject-matter, the mistake, if such it is, was a mistake in procedure only. Whether the justice erred, after having acquired complete jurisdiction, and whether the error, if any, rendered his judgment void, or only voidable, are questions not material to the proceedings in the circuit court on appeal, because the appeal had the effect to vacate the judgment of the justice, in any event. It was no longer of any force. *Elkins v. Michael*, 65 W. Va. 503, 64 S. E. 619; *De Armit v. Town of Whitmer*, 68 W. Va. 300, 60 S. E. 136; *Evans v. Taylor*, 28 W. Va. 188. The appeal having been properly taken, and the jurisdiction of the justice being clear, defendant could not dismiss its appeal, and thereby prevent a trial of the case. *Elkins v. Michael*, supra; *Watson v. Hurry*, 47 W. Va. 809, 35 S. E. 830. The appeal was for the purpose of another trial before the court, and not to review the proceedings of the justice. *Thorn v. Thorn*, 47 W. Va. 4, 34 S. E. 759. An appeal from a justice is, more accurately speaking, a removal of the cause, and not an appellate procedure. *Elkins v. Michael*, supra. The party against whom a judgment is rendered by a justice having jurisdiction, and who has appealed, cannot dismiss his appeal over the objection of the opposing party. *Watson v. Hurry*, supra.

The case of *Thomasson v. Simmons*, 57 W. Va. 576, 50 S. E. 740, is authority for the proposition that the continuance of the case by the justice for 30 days did not operate to oust him of jurisdiction or work a discontinuance, whatever may be the effect of such continuance upon his judgment. The court did not err in overruling defendant's motion to dismiss the appeal.

The refusal of the court to sustain defendant's motion to strike out plaintiff's evidence is assigned as error. But it waived this error, if error it was, by thereafter introducing its own evidence, and by submitting the case to the jury. *Trump v. Tidewater Coal & Coke Co.*, 46 W. Va. 238, 32 S. E. 1035; *Core v. Railroad Co.*, 38 W. Va. 456, 18 S. E. 596.

One of plaintiff's witnesses who saw the accident testified to the following facts, viz.: That the horse was run over and killed by

an engine and train of cars in charge of defendant's servants on the 12th day of December, 1907, about 4 o'clock in the afternoon; that the engineer, if he had been looking out along the track, could have seen the horse for a distance of 350 or 400 yards; that, after the point was reached from which the horse could have been seen by the engineer, no signal was sounded, and no effort made to stop the train until the instant the horse was struck by the engine, when the whistle gave a sharp blast; that for a distance of about 200 yards before the horse was struck the train was going downgrade, and the speed of the train increased above what it had been just before reaching this downgrade; that the train was making very little noise; that, after striking the horse, the train was stopped in about 75 yards; that the color of the horse was a light iron gray, and the ground back of him dark, thus making it easier to see him; that he was not immediately upon the track until the engine approached very near to him, but was standing in the ditch between the tracks and a high bank, and when the engine got near to him he made two or three jumps along the side of the tracks and then tried to cross the tracks, and was struck by the engine and killed.

[3, 4] The testimony of the engineer and of some of the other of defendant's witnesses conflicts with very much of the above-mentioned testimony. But the jury were the judges of the credibility of witnesses, as well as triers of all matters of fact, and, they having found a verdict for the plaintiff upon conflicting oral testimony, the court was justified in refusing to set it aside. Plaintiff's evidence proved a state of facts from which the jury could say that defendant's engineer was negligent in not sooner seeing the animal by the track, in a place of imminent danger, and in not having the speed of his train under better control when approaching him. The facts in the present case are very similar to those in *Johnson v. Railroad Co.*, 25 W. Va. 570, and *Heard v. Railroad Co.*, 26 W. Va. 455. We think those cases should control the decision of the present case, and we need only refer to them. True plaintiff's evidence does not prove how near the engine was to the horse when the engineer first saw him; but it does prove that, if he had been looking out for animals on the track, he could have seen him for a distance of 250 or 300 yards; that he had a light train, one which the engineer himself calls a half load for his engine; that, just before reaching the point from which he could have seen the horse, there was an upgrade, and, while the engine and some of the cars would be on the downgrade towards the horse, some of the hindmost cars would still be on the upgrade, thus making it easy to get control of the speed. The failure to ring the bell or blow the

whistle would not, of itself, prove negligence, as such means of warning are not intended for dumb animals; but there are other facts tending to prove negligence. Plaintiff's witnesses say that no effort was made to slacken the speed until after he had struck the horse. He admits that he saw him when he was within about 200 feet of him, and says that he at once put on the brakes, but that the rails were wet and caused the engine to slide on the track, and for that reason he could not check the speed. But on that point he is contradicted by plaintiff's witnesses.

[5] Defendant's instruction No. 8 was properly refused. It would have told the jury that plaintiff could not recover, if plaintiff's horse escaped from the stable, strayed on defendant's track, and was struck by defendant's engine, for the reason that the failure to ring the bell and sound the whistle is not negligence. This instruction ignored other evidence tending to prove defendant's negligence. The fact that plaintiff may have been negligent in permitting the horse to escape from his custody, and to get upon defendant's track, does not preclude recovery, because his negligence in that regard is not the proximate cause of the injury. This instruction does not correctly state the law of this case, and was properly refused. Moreover, it would have been in direct conflict with plaintiff's instruction No. 1, which the court gave. Plaintiff's No. 1 told the jury that, notwithstanding plaintiff's negligence in permitting his horse to stray upon the railroad track, his negligence did not excuse the killing of the horse, "if, by the use of ordinary care by the defendant or its agents, it might have prevented the injury." This is undoubtedly the law of the case.

[6] The court modified defendant's instruction No. 10 by striking out the words in italics, and gave it as thus modified, and defendant assigns that action of the court as error. The instruction, as first offered, reads as follows: "The court instructs the jury that, if they believe from the evidence that those in charge of the defendant's engine saw the animal as soon as they reasonably might have seen it, under the circumstances of the case, and that when they saw the animal they used ordinary care to stop the engine, in order to prevent striking said animal, and that the said animal had escaped from the plaintiff's stable, *and was out on the commons*, and strayed to the side of the track of the defendant, and was grazing, and that just before the train reached the place on the track near which the horse was grazing it jumped one or more times in the direction the train was running, and then suddenly jumped on the track in front of the engine, and was killed, then the jury should find that the accident was unavoidable, and was not the result of negligence, and the jury in such case should find for the defendant, the Bal-

timore & Ohio Railroad Company." The words stricken out were immaterial, and the court committed no error in making the modification. Regardless of how the horse came to be on defendant's tracks, it was under legal duty to use reasonable care to avoid injuring him.

[7] Defendant was not prejudiced by the refusal of the court to strike out plaintiff's evidence relating to the fact that the bell was not rung or the whistle blown. The jury were instructed that the omission to do those things did not prove negligence; that, if they believed the accident was inevitable and unavoidable, they must find for the defendant, notwithstanding the engineer may have used no precaution whatever, "such as blowing the whistle or doing anything else." The court also instructed the jury, at defendant's request, "that, if they believe from the preponderance of the evidence that no precaution could possibly, under the circumstances, have avoided the accident, the failure to use any precaution will not render the company liable."

Neither was it error to overrule defendant's motion to strike out plaintiff's evidence concerning what was done, in respect to other and different trains of defendant company, in relation to stopping and having to stop on the grade near plaintiff's residence. That evidence tended to show the condition of the track, as to grade, at that point, and it tends to prove that defendant's servants, on the occasion in question might easily have stopped the train, or checked its speed, at the point from which the dangerous position of the horse could have been seen, if the engineer had been on the lookout for trespassing animals.

Finding no error, we will affirm the judgment.

BRANNON, P., absent.

(70 W. Va. 452)

ONEAL et al. v. STIMSON et al.

(Supreme Court of Appeals of West Virginia.  
March 5, 1912.)

*(Syllabus by the Court.)*

1. PARTITION (§ 95\*) — DECREE — ALLOTMENT. In partition, if no injustice is done to other co-tenants, an allotment may be made so as to render effective a conveyance by a co-tenant purporting to be in severalty, though operating when made to convey only his undivided interest.

[Ed. Note.—For other cases, see Partition, Cent. Dig. §§ 300-316; Dec. Dig. § 95.\*]

2. PARTITION (§ 95\*) — FORMER ALLOTMENTS. When a partition long before made is set aside and a new partition is to be made on the same proportion of interests among the co-tenants, the court in decreeing the new partition may properly direct that the former allotments be followed or considered as far as fairness and justice to the co-tenants will permit, and there-

by protect those who have held, purchased or improved on the faith of the former partition.

[Ed. Note.—For other cases, see Partition, Cent. Dig. §§ 300-316; Dec. Dig. § 95.\*]

Appeal from Circuit Court, Wyoming County.

Bill by Joseph P. Oneal and others against L. T. Stimson and others. Decree for defendants, and plaintiffs appeal. Affirmed.

File & File, for appellants. M. F. Matheny, for appellees.

ROBINSON, J. This suit has for its object the vacating of a partition made in a former suit and the making of a new partition. The case has been here once before on appeal. 61 W. Va. 551, 56 S. E. 889. By the decision on that appeal, the partition was held to be void. The case was remanded and has been proceeded in to a decree directing a new partition of the land. From that decree we now have this appeal.

Thirteen years elapsed between the making of the first partition and the bringing of this suit to attack it. During all that time the partition originally made was looked upon as a valid one, and the land dealt with accordingly. True, it may be that adverse possession or ouster is not shown, but conditions arose by reason of a reliance on the original decree of partition which furnish grounds for equitable considerations in the case.

It will be recalled that, in the partition which has been declared void, 22 acres of the land were assigned in kind to D. J. T. Oneal, and the residue, 18 acres, was ordered to be sold. Stimson became the purchaser of the 18 acres at the court sale. On the faith of his purchase, he went into possession of that parcel. Before the validity of the partition and the sale to him was attacked, he had sold and conveyed many town lots out of the parcel to others. Oneal, some years before the bringing of this suit to set aside the partition, sold and conveyed the 22 acres to Matheny. That grantee took possession thereof and the same passed to others on the faith of the partition which turned out to be void.

When the partition and sale in partition were had in the old suit, the region in which the land is situated was in a sense a wilderness. At that time, the land was of little value. The thirteen years, however, brought great changes. A railroad had been constructed through the land. The town of Pierpoint had been laid out on it and there flourished. So it came about that the land which had been abandoned to those holding under the old partition for so long was again sought from them on behalf of those who formerly owned it. A loop-hole in title is readily discovered by speculators. Unfortunately, however, the discoverers too often arrange to take all the benefits from

those really entitled by reason of the defect.

[2] That the original proceedings in partition were void is foreclosed by the decision on the former appeal. But it seems conceded that the interest to be assigned on behalf of D. J. T. Oneal in the new partition is the same as that assigned him in the old, a 12/22 of the forty acres. And the interest of the other owners is 10/22 as considered in the former partition. Presumably, from all that appears in the proceedings, that former partition was a fair one as far as a division of the land into a parcel of 22 acres and one of 18 acres is concerned. It was void for want of parties to it, not for unfair division. A new partition is asked and must be made. But how shall it be made? Shall no notice be taken of the situation that has arisen by reason of the decrees that have been set aside? Appellants insist that none shall be taken. They say, that those who took under the void decrees did so with notice and are entitled to no consideration in the premises. They want a new partition of the land, as though no one had been led by the former decrees to invest money in it or to put improvements on it. They object to any equitable consideration in relation to those who have dealt with the property on the faith of the decrees set aside. Though Oneal sold a definite parcel of twenty-two acres to Matheny and received pay for it, those who have taken a subsequent conveyance from Oneal, for a trifling consideration, with knowledge of the whole situation and of all its equities, say that, since the partition has been declared void, the land should be so allotted in a new partition as to deprive Matheny of about one-half of what he purchased. In other words, they say that Oneal, being originally the owner of a 12/22 in the forty acres, and the land being in fact unpartitioned, could convey only that fractional interest in the 22 acres by the deed to Matheny. But in equity and good conscience we know that Oneal meant to convey all his interest in the land to Matheny, which at the time of the conveyance was supposed to be the identical 22 acres conveyed. And to Matheny and those holding under him equity and justice will preserve in a new partition as much of what Oneal intended to convey to him as may be done consistent with the rights of the co-tenants. The same principle of course applies to those whose situation on the 18 acres is affected by the new partition that must be made. Equity will let the owners again into their own as to this forty acres of land, as though no partition had been attempted, but will preserve the rights of those disturbed as far as may be consistent with the rights of the owners. Why are

those who bought into this suit since the declaration of the invalidity of the partition worthy of more consideration than those who acted on the faith of the old partition? The equities are indeed with the latter.

Now, the decree complained of, ordering a new partition, does no more than to apply the principles of equity which have been outlined above. It is carefully drawn and quite specific. We find no fault with it. The learned chancellor has recognized and applied simple justice in this case. He has violated no legal or equitable principle; nor has he inaugurated anything new. All that the suit seeks has been granted. He has decreed that a new partition shall be made to take the place of the invalid one. The 22 acres, as the 12/22 of Oneal, shall be laid off to the grantees of Matheny if that can be done consistent with a fair partition of the land between the owners. The interests of those holding under the original owners of the remaining 10/22 shall be laid off in the 18 acres which Stimson invalidly bought at court sale if that can be done in fair partition between the co-tenants. If the partition cannot be so made in fairness and justice to the co-tenants entitled, then it shall be made on that principle as fully as the respective rights of the co-tenants will permit.

[1] The decree is supported by the authorities. They are cited and reviewed by Judge Green in the well considered opinion in *Boggeas v. Meredith*, 16 W. Va. 1. It suffices to quote therefrom the following: "It is certainly law, that a conveyance by one co-tenant of a part of a tract specified by metes and bounds cannot give the grantee any greater right thereto than held by his grantor; and as he could not exclusively occupy the parcel of land he conveyed, so his grantee can have no such exclusive right; and as the grantor of such parcel could not demand that the whole or any part of such parcel should be set off to him, so his grantee could acquire no such right. Yet the better authorities hold, that he has rights, which will be considered by the court in making the partition of the whole tract, and which will be respected, so far, and so far only, as they can be without prejudice to the original co-tenant of the entire tract. In making such partition, if the parcel so sold and conveyed by one tenant in common can be assigned to the purchaser as a part or the whole of the share of his grantor without prejudice to the co-tenant of the grantor in the entire tract, the court will so assign it, thereby making the purchaser's title perfect." See, also, *Worthington v. Staunton*, 16 W. Va. 208, and 30 Cyc. 257.

An order affirming the decree will be entered.

BRANNON, P., absent.

(70 W. Va. 467)

**MALLONEE v. TAYLOR.**(Supreme Court of Appeals of West Virginia.  
March 5, 1912.)*(Syllabus by the Court.)***1. JUSTICES OF THE PEACE (§ 166\*)—APPEAL—TRIAL DE NOVO.**

After an appeal to the circuit court within ten days, or on petition for good cause shown, within ninety days from the date of the judgment of the justice, such judgment is thereby vacated, and the case is thereby removed into the circuit court for trial de novo, and no issue of fact tendered by answer to such petition or otherwise will warrant the circuit court in dismissing such appeal as improvidently awarded.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 638-646; Dec. Dig. § 166.\*]

**2. JUSTICES OF THE PEACE (§ 155\*)—APPEAL—DISMISSAL.**

If, however, the petitioner in his petition and accompanying proofs does not show fraud, accident, surprise, or some adventitious circumstance beyond his control, as an excuse for not having exercised his right of appeal within ten days, the appeal may on motion be properly dismissed, as improvidently awarded.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 524-533; Dec. Dig. § 155.\*]

**3. JUSTICES OF THE PEACE (§ 155\*)—APPEAL—DISMISSAL.**

It is not sufficient to show mistake in the legal consequences of the fact alleged, or mistake of law, though acting by advice of counsel.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 524-533; Dec. Dig. § 155.\*]

Error to Circuit Court, Taylor County.

Action by G. W. Mallonee against D. B. Taylor. Judgment for plaintiff, and defendant brings error. Affirmed.

A. W. Burdett, for plaintiff in error. Sidney H. Sommerville, for defendant in error.

MILLER, J. On petition presented to the judge of the circuit court within ninety days, purporting to show cause why he had not appealed within ten days from the date of the judgment, defendant was awarded an appeal from the judgment of the justice against him in favor of plaintiff.

The circuit court, on motion and answer of plaintiff controverting the facts alleged in defendant's petition, dismissed said appeal, as improvidently awarded. On writ of error to this court the only question of merit presented is the correctness or incorrectness of that judgment.

[1] On behalf of defendant, plaintiff in error, it is insisted that on award of the appeal, the judgment of the justice thereby became a nullity, and the case was removed to the circuit court for trial de novo, and that no issue on the facts tendered by the answer of plaintiff thereto and affidavit filed, could be thereafter tried in the circuit court.

[2] Assuming that defendant's petition,

duly verified, shows on its face good cause why he failed to exercise his absolute right of appeal within ten days, given by statute, the proposition contended for is fully supported by the decisions cited and relied on. Hubbard v. Yocum, 30 W. Va. 740, 753, 5 S. E. 867; Ruffner v. Love, 24 W. Va. 181; Home S. M. Co. v. Floding, 27 W. Va. 540, 544; McCormick v. Short, 49 W. Va. 1, 37 S. E. 769; Elkins v. Michael, 65 W. Va. 503, 64 S. E. 619, and cases cited. Plaintiff's counsel, however, contend that the petition does not in fact allege or show good cause, and that the judgment below dismissing the appeal as improvidently awarded is clearly right. Assuming the petition and affidavit to be so defective, the cases above cited, we think, fully support the plaintiff's counter proposition.

The question then is, Is the petition wanting in showing good cause? According to the decisions cited, to constitute good cause, it must allege facts showing fraud, accident, surprise, or some adventitious circumstance beyond the control of the petitioner, and such as would entitle him to a new trial, or a decree in equity enjoining the judgment. It is not enough to show mistake in the legal consequences of the facts alleged, or mistake of law, though acting by advice of counsel. Ruffner v. Love, supra; McClung v. Price, 61 W. Va. 84, 55 S. E. 996. The only reasons alleged by petitioner for not having appealed within ten days, are that he was *informed* and *believed* and so alleged that no writ was ever served upon him upon which the justice could render a *legal* judgment against him; that not having had *legal* notice thereof he did not make defense to the action; that on September 7, 1909, he was *again* served in Ohio county, with a summons in chancery suit brought in Taylor, and that upon investigation he found said suit was for the purpose of enforcing said judgment. He charges also that the judgment was obtained without *legal* process served upon him, and that, though he has a just defense, he had had no opportunity, by reason of not having received notice, to make defense to the action.

[3] It will be observed that the material facts are alleged on information and belief. Petitioner does not swear that no process was served upon him, but that no writ was served upon him upon which the justice could render "a legal judgment," that not having had "legal notice thereof" he did not make defense, etc. We think we must assume from that charge, that petitioner means not that he in fact had had no notice, but that he relies on his alleged information and belief, that he had not been served with *legal* notice as previously averred. We do not think these allegations amount to a showing of good cause. The facts alleged plainly imply some kind of notice or service of process on the petitioner. The return on the process sworn to by the plaintiff, to whom it is ad-

dressed, as special constable, to execute the same, shows that it was in fact served upon petitioner, June 7, 1909, at 1:35 a. m. He does not deny that he was so served. Whether process thus directed to and served by the plaintiff in the action is voidable we need not say for the purposes of this suit; it certainly is not absolutely void. 32 Cyc. 454. Our statute, sections 17 and 30, chapter 50, Code 1906, authorizes the justice, where there is necessity therefor, to direct his process to any constable "or to any person specially deputed by the justice, to serve or execute the same." The justice is the judge of the necessity, at least in the first instance. Whether his action is subject to review on appeal it is unnecessary for us to say; his act would certainly not be void, but voidable only. Nor would his judgment rendered on process so directed and served be void. Appearance on appeal cured defective process and service of process.

While our decisions say, as in *Elkins v. Michael*, supra, that where an appeal has been taken within ten days, or afterwards within ninety days for good cause shown the appeal can not be dismissed as improvidently awarded, other decisions hold with equal emphasis, that where an appeal has been awarded after ten days, and within ninety days, on a petition and proofs, not showing good cause, the appeal is properly dismissed as having been improvidently awarded. *Hubbard v. Yocum*, supra, 30 W. Va. 758, 5 S. E. 867; *McClung v. Price*, supra, citing *Powell v. Miller*, 41 W. Va. 371, 23 S. E. 557.

For these reasons we are of opinion to affirm the judgment.

BRANNON, P., absent.

(70 W. Va. 476)

#### SECURITY BANK NOTE CO. v. SHRADER.

(Supreme Court of Appeals of West Virginia.  
March 5, 1912.)

##### (Syllabus by the Court.)

#### 1. FRAUDS, STATUTE OF (§ 23\*) — ORIGINAL PROMISE—INTENT OF PARTIES.

In determining whether an oral promise is original or collateral, the intention of the parties at the time it was made must be regarded. In ascertaining such intention, the words of the promise, the situation of the parties, and all the circumstances attending the transaction should be taken into consideration. *Johnson v. Bank*, 60 W. Va. 320, 55 S. E. 394, 9 Ann. Cas. 893.

[Ed. Note.—For other cases, see *Frauds*, Statute of, Cent. Dig. §§ 18, 19; Dec. Dig. § 23.\*]

#### 2. APPEAL AND ERROR (§ 532\*) — JUDGMENT ON APPEAL.

The judgment of a circuit court in a case appealed from a justice's court will not be reversed for failure of the record to disclose the entry of a plea and joinder of issue thereon.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 2399-2401; Dec. Dig. § 532.\*]

Error to Circuit Court, Taylor County.

Action by the Security Bank Note Company against Samuel W. Shrader. Judgment for defendant, and plaintiff brings error. Reversed.

Harry Friedman, for plaintiff in error. A. W. Burdett, for defendant in error.

POFFENBARGER, J. Defense to this civil action, commenced in a justice's court and appealed to the circuit court, is made under the statute of frauds, and the principal question presented here is whether the evidence makes an issue proper for jury determination, the court having set aside a verdict for the plaintiff on the hypothesis of insufficiency of the evidence or a decided preponderance thereof against the verdict.

The action was brought to recover a balance of \$297 due on an account for engraved corporation bonds and certificates of stock and a corporation seal press, manufactured and delivered at the instance and request of the defendant. These supplies were obtained for the use of the West Virginia Consolidated Coal Company and the purchase price was \$897. The negotiations commenced by correspondence, February 17, 1906, and continued, in that form, until after March 8, 1906. Between that date and March 14, 1906, the defendant, after notice of his intention so to do, called personally at the plaintiff's factory in Philadelphia and completed the placing of the order. It does not appear that he gave any notice as to the capacity in which he was acting or said how, when, or by whom, the goods would be paid for. He was notified by a letter dated March 14th that the order had been entered. In acknowledging the receipt of this letter on the next day, he described it as one in reference to his order, saying "my order placed with you yesterday for 1,000 bonds for the West Virginia Consolidated Coal Company." On April 10th, he approved the proofs by telegram which he confirmed by a letter of the same date. On the next day, the plaintiff in a letter acknowledging the receipt of the telegram and letter, and, giving information as to the progress of the work, made this inquiry: "Kindly inform us, Mr. Shrader, how you want to settle for these, whether you want us to bill them directly to you, to the company on 30 days time, or to discount the bill at 2 per cent." Three days later, he replied as follows: "In reference to the settlement of your account for the bonds and certificates will say that you may make out your bill to me for the West Virginia Consolidated Coal Company at 30 days; on receipt of same I will place the matter before the first meeting of the company, and presume they will send you check within 10 days. However, I will attend to this matter and have it adjusted as quickly as possible." On July 13,



1906, he sent the plaintiff his check in part payment by letter, saying: "I inclose you herewith my personal check for \$600, to be credited on your account of your bill against the West Virginia Consolidated Coal Company. I do this pending settlement of the account in full, which will be forwarded to you in a few days. Kindly forward me proper bill crediting the \$600 that I have sent to you personally." Thomas A. Bradley, president of the plaintiff company, testified that it relied solely upon the defendant for payment and extended no credit to the coal company, it having been ascertained that he had a good commercial rating, and the coal company none at all. He further says the goods were charged, billed, and shipped to the defendant. As to whether they were actually charged to him on the books of the plaintiff, and, if so, on what date, he said he spoke from recollection and belief, and was rather contradictory in some of his statements.

[1] The vital and controlling inquiry upon this evidence was, to whom did the plaintiff extend credit, or upon whom did it rely, as the real debtor, for payment? That the supplies furnished were intended for use by the coal company is not conclusive upon this inquiry. All the facts and circumstances must be considered. The question is one of intent. The contract was not merely one of purchase of manufactured articles. It was really one for work, labor, and materials, and the work seems to have been substantially completed before any inquiry was made as to the source of payment or direction given as to how the charge should be made. The letter in which the inquiry was made bears date nearly a month after the order was entered, and says, "I see no reason why these bonds and certificates should not leave here on Friday next." A letter from the defendant indicates a postponement of the date until the Monday after that Friday. Whatever may have been the exact stage of the work, it is clear that much of it had been done. Moreover, there is no direct or positive evidence that the goods were charged to the coal company. Shrader's letter, saying "make out your bill to me for the West Virginia Consolidated Coal Company," is somewhat indefinite, but, if it could be construed as a plain direction to make the charge against the coal company, there is no proof that it was so made. On the contrary, we have the positive testimony of Bradley that it was made against the defendant on the books of the company and the goods billed and shipped in his name. If, however, a charge to the coal company upon the books of the plaintiff appeared, a great volume of authority says this would not be conclusive. Nor does it clearly appear that such a corporation as that described in the bonds and certificates had been actually organized or even chartered at the date of the

beginning of the work. It may have existed only in contemplation. All this, we think, made a case for the jury, and this view is well sustained by principles announced in *Johnson v. Bank*, 60 W. Va. 320, 55 S. E. 394, 9 Ann. Cas. 893, asserting and applying the following propositions: "In determining whether an oral promise is original or collateral, the intention of the parties at the time it was made must be regarded. In ascertaining such intention, the words of the promise, the situation of the parties, and all the circumstances attending the transaction should be taken into consideration." "In many cases in which goods have been sold or money has been advanced to one person on the oral promise of another to be answerable therefor, a decisive test as to the applicability of the statute of frauds to the promise is afforded by the determination of the question on whose credit the goods were sold or the money advanced. If it appears that the sale or loan was made in reliance solely on the credit of the promisor, and on his unconditional agreement to be answerable therefor, the statute does not apply; and the rule is the same in the case of an oral promise to pay for services rendered to a third person at the request of the promisor. But in all such cases it is requisite that credit should be given exclusively to the promisor; if any credit be given to him for whose benefit the promise is made, the promisor is not liable unless his promise is in writing, and this is so although the collateral undertaking may have been the principal inducement to the delivery of the goods or the performance of the services. In determining to whom credit was given, the jury are to take into consideration the extent of the undertaking, the expressions used, the situation of the parties, and all the circumstances of the case. \* \* \* In determining to whom, as between the promisor and the person for whose benefit the promise is made, the credit was actually given, an important consideration is the manner in which the creditor entered the transaction on his books. Evidence that the goods sold were charged to the person to whom they were delivered strongly tends to show that the vendor gave credit to him and relied upon him for payment, and therefore that the promise of another to be answerable for the debt was at most a collateral undertaking. However, this evidence is not conclusive, but is open to explanation, and the weight of it is for the jury." 20 Cyc. 180, 181, 182, 183.

The attack upon the secondary evidence of Bradley, relating to the state of the books, seems not to have been made in the court below. The record shows no objection to it in any form. If inadmissible, failure to object let it in for such weight as the jury saw fit to give it. *Armstrong v. Coal Co.*, 67 W. Va. 589, 614, 69 S. E. 195. Though the witness spoke only from recollection and made some mistakes as to dates, his was

the only testimony bearing upon the question, and his credibility and the weight of his evidence were clearly questions for the jury.

[2] As the record shows no entry of a plea by the defendant, the technical rule, requiring reversal for such defect in the record, applied in common-law actions, as will be seen by reference to *Good v. Chester*, 65 W. Va. 13, 63 S. E. 615, and *Stevens v. Friedman*, 53 W. Va. 79, 44 S. E. 163, and many other cases cited in the opinions of the two here mentioned, is invoked to sustain the action of the court in setting aside the verdict. This is not a common-law action. The procedure is statutory and liberal in all respects. There can be no judgment by default in a justice's court. The plaintiff is always required to prove his case. Though the statute contemplates, allows, and requires pleadings, nothing more is necessary than enough "to enable a person of common understanding to know what is intended." Clause 5, § 50, ch. 50, Code. Section 68 of the same chapter commands the justice to render judgment as the right shall appear. Here the parties proceeded as if a general denial of the plaintiff's demand had been entered, and the case was tried by a jury on its merits. Under such circumstances and in a case commenced in a justice's court, a judgment will not be reversed, merely because the record does not show the entry of a plea and issue joined thereon. *Simpkins v. White*, 43 W. Va. 125, 27 S. E. 361.

We think therefore the court erred in setting aside the verdict. Its order will be reversed and a judgment rendered here upon the verdict.

BRANNON, P., absent.

(70 W. Va. 456)

**BENNETT v. FEDERAL COAL & COKE CO.**  
(Supreme Court of Appeals of West Virginia.  
March 5, 1912.)

(Syllabus by the Court.)

1. INTEREST (§ 13\*)—WHEN ALLOWABLE.

As a general rule, where plaintiff's demand is liquidated, or if unliquidated, can be readily ascertained by computation, interest thereon should be allowed, if the demand be for work done or material furnished, from the date the labor is done or material furnished, or from the date when by the terms of the contract payment should have been made.

[Ed. Note.—For other cases, see Interest, Cent. Dig. § 25; Dec. Dig. § 13.\*]

2. INTEREST (§ 7\*)—IMPLIED CONTRACT.

When there is no express contract to pay interest, there is generally an implied contract to do so.

[Ed. Note.—For other cases, see Interest, Cent. Dig. §§ 17-19; Dec. Dig. § 7.\*]

3. INTEREST (§ 62\*)—PAYMENT OF PRINCIPAL—ACTION TO RECOVER.

Where the contract or obligation expressly stipulates for the payment of interest the in-

terest becomes an integral part of the debt, and payment and acceptance of the principal sum will not, as a general rule, defeat a subsequent action to recover the interest not paid, carried by the contract.

[Ed. Note.—For other cases, see Interest, Cent. Dig. §§ 140-144; Dec. Dig. § 62.\*]

4. INTEREST (§ 62\*)—RECOVERY—IMPLIED CONTRACT.

But where the contract does not so specifically provide for payment of interest, but the right thereto is by an implication, interest is considered as damages, and not as forming the basis of the action, and is recoverable only along with the principal sum and as an incident thereto, and if the principal sum be accepted in settlement the right to the damages is lost and no separate subsequent action can be maintained therefor.

[Ed. Note.—For other cases, see Interest, Cent. Dig. §§ 140-144; Dec. Dig. § 62.\*]

5. ACCORD AND SATISFACTION (§ 7\*)—BALANCE DUE FOR INTEREST.

The old common law rule applied in *Nixon v. Kiddy*, 66 W. Va. 355, 66 S. E. 500, that payment by a debtor and receipt by the creditor of a less sum than is due upon an undisputed liquidated demand is not satisfaction of the debt, although the creditor agrees to accept it as such, is inapplicable to a balance claimed for interest due by way of damages on an implied agreement to pay interest.

[Ed. Note.—For other cases, see Accord and Satisfaction, Cent. Dig. §§ 46-59, 66; Dec. Dig. § 7;\* Payment, Cent. Dig. §§ 133, 134.]

6. ACCORD AND SATISFACTION (§ 11\*)—ACTION TO RECOVER—PAYMENT OF PRINCIPAL.

The fact that receipt of payment without interest may have been done under protest of a creditor will not change the legal effect of his act on his right to maintain a subsequent separate suit to recover the interest.

[Ed. Note.—For other cases, see Accord and Satisfaction, Cent. Dig. §§ 75-83; Dec. Dig. § 11.\*]

Error to Circuit Court, Marion County.

Action by John R. Bennett against the Federal Coal & Coke Company. Judgment for defendant, and plaintiff brings error. Affirmed.

M. Powell, C. Powell, and Scott C. Lowe, for plaintiff in error. W. S. Meredith, for defendant in error.

MILLER, J. Plaintiff brings error to the judgment below, setting aside the verdict in his favor and awarding defendant a new trial.

The suit was in assumpsit, and except one item, "To one dump cart, \$50.00," the purpose of the suit is to recover interest on the principal sum, \$21,085.00, for building certain coke ovens, during the year 1905-06, audited and credited by defendant to plaintiff, some months prior to payment.

The correctness of the judgment below and the rulings of the court on the trial, and in the giving and refusing of instructions to the jury, for the most part, depend upon the effect of a settlement made, December 4, 1906, and the following receipt, then execut-

ed and delivered by plaintiff to defendant as follows:

"Pittsburg, Pa., Dec. 4th, 1906.

"Received of Federal Coal & Coke Co., twenty-one thousand six hundred ninety-five dollars in form of 2-6 mo. notes for \$10,000, each, and check for \$1695.00 in settlement of account. \$21,695.00.

"John R. Bennett."

It is conceded that the notes and the check receipted for cover the exact amount of the principal, and \$610.00, included in the check for interest on the notes from their date to date of maturity, and that nothing was included, or intended to be included for interest prior to the date of the receipt and settlement. The interest which the plaintiff sues for in this action is the interest which he claims accrued to him on the principal sum, from April 1, 1906, when he alleges the principal sum should have been paid, and the date of his receipt and settlement, claiming to have accepted the notes and check under protest, and with the understanding on his part that the prior interest was to be adjusted between him and the president of the defendant company, when he should recover from his then illness, and be able to attend to business. The president died a few days afterwards, and the interest was never adjusted, wherefore this suit.

Refusing plaintiff's two instructions embodying the contrary proposition, the court below on the trial, at the instance of defendant and over the objection of plaintiff, instructed the jury in substance, that if they believed from the evidence that plaintiff and defendant made a settlement on December 4th, 1906, and that the plaintiff accepted from the defendant the two notes for ten thousand dollars each, and the check or voucher for \$1695.00, and thereupon signed and delivered to the defendant the receipt above mentioned, plaintiff was not entitled in this action to recover any interest theretofore accrued on the items, and amount therein settled, and that he was estopped from recovering any such interest in the absence of an express contract on the part of the defendant to pay the same, made before or at the time of said settlement.

It is not pretended or proven that there was any such express contract. Plaintiff relies solely on an implied promise to pay interest from April 1st, 1906, the latest date when by the terms of his contract, as he claims it, estimates were to have been furnished him, and the estimates, or principal sums paid.

[1, 2] The general rule of law in this, as in other jurisdictions, undoubtedly is, that where the demand of the plaintiff is liquidated, or if unliquidated, can be readily ascertained by computation, as in this case, interest thereon will be allowed, if the demand is for work done or material furnished, from the time the material is furnished, or work completed, or from the time when by the terms of the contract payment should have

been made. 22 Cyc. 1513, 1514, 1540, 1543; *Becker v. New York*, 77 App. Div. 635, 78 N. Y. Supp. 1064. It is equally well settled, as shown by the authorities cited, that when there is no express contract to pay interest, there is an implied contract to do so. *Chapman v. Shepherd*, 24 Grat. 377; *Roberts v. Cocke*, 28 Grat. 207; *Cecil v. Deyerle*, Id. 775; *McVeigh v. Howard*, 87 Va. 603, 13 S. E. 31; *Kent v. Kent*, 28 Grat. 840; *Cecil v. Hicks*, 29 Grat. 1, 26 Am. Rep. 391.

But what is the relationship of the interest to the principal? Is the interest a part of the debt, or only an incident to it, recoverable along with the debt, or by way of damages for the wrongful detention thereof? On the proper answer to these questions depends the answer to the question above propounded, what is the legal effect of the receipt given in December, 1906?

[3] The authorities we believe to be uniform in holding, that where the contract or obligation to pay money bears interest on its face, by express stipulation, the interest becomes an integral part of the debt, as much so as the principal itself. 16 Am. & Eng. Ency. Law, 1032; 22 Cyc. 1570, and authorities cited in note 78, and the Virginia authorities above cited. At least payment of the principal sum will not defeat a subsequent action to recover the balance for interest carried by the contract. 22 Cyc. 570, 571, and notes; 16 Am. & Eng. Ency. Law, 1033.

[4] But the contract we have here is one which does not bear interest on its face; there is only an implied contract to pay interest. What is the relationship of interest to principal in such cases? Is it a mere incident to the demand, and recoverable only in an action on the demand itself, and by way of damages for the wrongful detention of the money, as counsel for defendant contend; or is it as in the case of an express contract, an integral part of the debt, recoverable by separate action after payment of the principal, as is argued by counsel for plaintiff? This is the pivotal question.

For the proposition that interest on an implied contract is a mere incident to the debt, and that after payment of the principal interest cannot be recovered by separate action, defendant's counsel rely upon the following authorities: *Brewster v. Wakefield*, 1 Minn. 352 (Gil. 260), 69 Am. Dec. 343; *Graves v. County*, 104 Fed. 61, 43 C. C. A. 414; *Southern Ry. Co. v. Dunlop Mills*, 76 Fed. 505, 22 C. C. A. 302; *Smith v. Buffalo* (Sup.) 39 N. Y. Supp. 881; *Fake v. Eddy*, 15 Wend. (N. Y.) 76; *Stewart v. Barnes*, 153 U. S. 456, 14 Sup. Ct. 849, 38 L. Ed. 781; and the leading case of *Moore v. Fuller*, 47 N. C. 205, a North Carolina case, and 22 Cyc. 1572, 1573.

These authorities fully support the proposition contended for. In *Stewart v. Barnes*, supra, Judge Shiras says: "Interest in such cases is considered as damages, and does not

form the basis of the action, but is an incident to the recovery of the principal debt. The right of action is the right to compel the payment of the money which is being retained. When he who has this right commences an action for its enforcement, he at the same time acquires a subordinate right, incident to the relief which he may obtain, to demand and receive interest. If, however, the principal sum has been paid, so that, as to it, an action brought cannot be maintained, the opportunity to acquire a right to damages is lost."

Plaintiff's counsel reply that in the application of the rules of law concerning interest to this case, interest should not be classified, as defendant's counsel does, as (1) interest in the nature of damages, (2) interest due by express contract; that a proper classification would be, (a) interest in the nature of damages for the detention of money, (b) contractual interest, subdivided into, (1) interest due by express contract, (2) interest due by implied agreement, based on the presumed intention of the parties. They say the authorities are divided as to whether interest by way of damages may be recovered after acceptance by the creditor of the principal sum due. They admit, however, that the weight of authority is against its collection. They might have gone farther, we think, and admitted, that there is no authority to the contrary.

Their principal proposition, and the one on which they rely, is, that in Virginia and in this State at least, and according to the decisions they rely upon, interest due by implied contract has the same relation to the principal debt, as interest due by express contract; that interest due by implied contract is as much an integral part of the debt, and as recoverable by separate action, as if borne on the face of the contract, and by express provision thereof, and recoverable by separate action.

Can this position be supported by authority? It is conceded that no Virginia or West Virginia decision can be found exactly in point, and none are cited, nor have we found any decision from any state supporting counsel to the extent claimed. Nor are any authorities cited by counsel illustrating the application of the law to their classification of interest. If their classification be the correct one, in what kind of cases would interest be allowed by way of damages for the detention of money? They would say, perhaps, in actions for torts. But without statute interest is not usually recoverable in such actions. 16 Am. & Eng. Ency. Law, 1031. What the books generally mean when they refer to interest recoverable by way of damages, is interest recoverable, not by express contract, but by implied contract and as damages for the unlawful detention of the money. The Supreme Court of the United States, in *Stewart v. Barnes*, supra, affirms this proposition in language already quoted: "Interest

in such cases is considered as damages, and does not form the basis of the action, but is an incident to the recovery of the principal debt." So in *Graves v. Saline County*, supra, it is held, that where interest is not stipulated for in the contract, and is recoverable merely as damages, or as an incident to the debt, it may not be recovered after acceptance by the creditor of full payment of the principal of the obligation. Citing numerous cases supporting the proposition, some of which have already been cited. To the same effect is 22 Cyc. 1572. In *Davis v. Harrington*, 160 Mass. 278, 35 N. E. 771, Justice Knowlton says: "But interest which is allowed by way of damages and for the neglect to pay promptly is a mere incident of the debt, which falls when the debt itself is extinguished. It is well settled that in such a case, if the debt is paid, there can be no recovery afterward for the interest which might have been collected." Citing numerous cases. In *Railroad Co. v. Moravia*, 61 Barb. (N. Y.) 180, it is distinctly held, that where there "is no agreement to pay interest, interest, when allowable, is allowed not as a part of the contract, but as an incident, and by way of damages for the default, to make the creditor good for the loss he has sustained by reason of the breach or default." This case also holds, that after the principal of the debt has been paid and receipted for in full, no action can be maintained to recover interest, for the reason, that the interest being a mere incident to the debt cannot exist without it, and the debt being extinguished the interest must necessarily be extinguished also. This case also makes a clear distinction between those cases where interest is made payable by the terms of the contract, and the case we have here, and holds in the former case that the interest is as much a part of the contract as the principal, and not a mere incident to it. In support of these principles see also, *Fake v. Eddy*, supra, and *Milliken v. Southgate*, 26 Me. 424. Interest, therefore, according to these decisions and many others, which may properly be said to be due by contract, and recoverable by separate and independent action, even after payment of principal, and as an integral part of the debt, is interest due by the specific terms of the contract. In that class of cases, as is said in 16 Am. & Eng. Ency. Law, 1033, "There would be no more reason for holding that the payment of the original principal extinguished the claim for interest than that a part payment of such principal destroyed the right to the remainder."

But can the position of plaintiff's counsel be supported by the principles enunciated, or the reasonings applied in the Virginia and West Virginia cases relied upon? The cases referred to are those already cited, of *McVeigh v. Howard*, *Roberts v. Cocke*, *Kent v. Kent*, supra, and *Shipman v. Bailey*, 20 W. Va. 140. It is argued that these cases regard interest, where the promise to pay interest is

either express or implied, not in the nature of damages, but as an integral part of the debt. The proposition so far as it is applicable to express promises is correct, but we do not regard the language of the decisions, by implication or otherwise, as supporting the proposition respecting interest recoverable on an implied promise. *McVeigh v. Howard* was an action on the following contract: "\$10,000. Richmond, Va. Jan'y 9th, 1878. In consideration of professional services rendered to me by John Howard, Esq., I owe, and hereby promise to pay to him, ten thousand dollars. Witness my hand and seal this day, and year above written. W. N. McVeigh. [Seal.]" The only point for decision in that case was, from what time interest on the bond sued on should be allowed? It was held, that the court below properly instructed the jury that interest should go from its date, predicated its judgment on the decisions of *Chapman v. Shepherd*, *Roberts v. Cocke*, *Cecil v. Hicks*, *Cecil v. Deyerle*, and *Kent v. Kent*, supra. The language of Judge Burks, in *Roberts v. Cocke*, and of Moncure, President, in *Kent v. Kent*, quoted in that case, is especially relied on here. Judge Burks said: "It has always been lawful in Virginia for parties to contract for the payment of interest for the use or forbearance of money within the limits prescribed by statute; and in the absence of any express agreement for the payment of interest, in obligations for the payment of a certain sum of money on demand or on a given day, interest on the principal sum from the time it becomes payable is 'a legal incident of the debt,' and the right to it is founded on the presumed intention of the parties." Judge Moncure said: "A bond payable on demand, or on a certain day, bears interest from the time it is payable, according to the well-settled law of this State, unless there be some contract, express or implied, between the parties, or some extraordinary or peculiar circumstances showing that such interest was not to be paid; and the burden of proving such contract or circumstances devolves on the party who seeks to avoid such payment. In the absence of such proof, the obligation for the payment of interest is as much a matter of contract in the case as the obligation for the payment of the principal." We see little in the language of either of these judges to support the contentions of counsel. Of course interest is a legal incident of the debt; the text books and decisions from other states, cited, so treat it. And it is true also, as said by Judge Moncure, absolutely, that when the contract is express as it was in the case he then had under consideration, and in a certain sense when the contract to pay interest is implied, that "the obligation for the payment of interest is as much a matter of contract in the case as the obligation for the payment of the principal." But to say that the interest is a legal incident of the debt in either case, or is a matter of con-

tract, is not equivalent to saying, that the interest where the contract is implied is an integral part of the debt, recoverable by separate action after payment of principal. None of the Virginia decisions justify this conclusion. Quite the contrary we think.

We have only found one line of decisions noting any exceptions to the general rule. One instance is where interest is given by statute for delay in paying money for land taken by condemnation, as in *Devlin v. Mayor*, 131 N. Y. 123, 30 N. E. 45. Another instance is where a charter law of a city provided that warrants issued for repairing sewers should bear interest, supplemented by a resolution of council, as in *Smith v. Buffalo*, supra, where it was held, that the interest became thereby engrafted in the debt itself. Another instance is where pursuant to an act of the legislature a railroad company by resolution, ordered that subscribers to stock be allowed interest on installments as paid, to be payable in stock, the interest to be carried to the credit of the stockholder annually, as in *City of Ohio v. Cleveland & Toledo Ry. Co.*, 6 Ohio St. 489. A pertinent point of the syllabus in that case is: "Interest follows the principal as an incident to it, so long as it remains an incident; but where it is separated and set apart from the principal by actual payment, or by being carried, when due, to the credit of the owner of the principal, in his account with the debtor, and this in pursuance of a provision in the contract creating and defining the principal debt, it is so separated and disjoined from the principal, as to cease to be an incident to, and does not follow it." The case here cannot be brought within the principles of either of these exceptional cases.

[5] Lastly as to the effect of the receipt. On the theory that the interest sought to be recovered here, supposed to be due by the implied agreement to pay interest, is an integral part of the principal debt, and recoverable by separate action, plaintiff's counsel have argued that the receipt for the principal, without interest under protest, does not estop the plaintiff from recovery of the interest sued for in this action. They rely especially upon our recent case of *Nixon v. Kiddy*, 66 W. Va. 355, 66 S. E. 500, and cases there cited. This case holds that "payment by a debtor and receipt by the creditor of a less sum than is due upon an undisputed liquidated demand is not satisfaction of the debt, although the creditor agrees to accept it as such, if there be no release under seal or no new consideration given as to the part left unpaid." Of course if counsel's premises were well founded, their conclusion would follow and this decision would apply. But if, as we hold, interest on an implied promise to pay is only an incident to the debt, following it, as was said in *Hatcher v. Lewis*, 4 Rand. 152, as the shadow the substance, and not an integral part of the debt, the argument wholly fails. The old common law rule

followed in *Nixon v. Kiddy*, long since abolished in Virginia (V. C. 1887, c. 134, § 2858 [Code 1904, p. 1499]), has always been regarded a harsh one, and one that ought not be extended by judicial interpretation beyond its present limits. Quoting from *Brooks v. White*, 2 Metc. (Mass.) 283, 37 Am. Dec. 95, and other cases, Peck, C. J., in *Wescott v. Waller*, 47 Ala. 492, says: "This rule, which obviously may be urged in violation of good faith, is not to be extended beyond its precise import; and whenever the technical reason for its application does not exist, the rule itself is not to be applied. And in the case of *Johnson v. Brannon*, 5 I. R., the court speaks of it as 'that rigid and rather unreasonable rule of the old law.' Being a rigid rule, and the reasons for it not altogether satisfactory, it might be expected that cases would arise that would constrain the courts, to prevent injustice and a violation of good faith, to treat as exceptions to it. This we find to be the case."

For these reasons we are not disposed to apply the rule to interest due by implied agreement, and where it is not carried in the contract as an integral part of the debt.

[6] Does the fact that plaintiff may have received and receipted for the principal, under protest, change the effect of his action? The authorities say, no. 22 Cyc. 1573, and cases cited in note 90.

We see no merit in the point that the item "To one dump cart, \$50.00," sued for, left a part of the principal of the debt unpaid, entitling plaintiff to sue for it, and for interest on the whole debt. At the time of the settlement defendant owed plaintiff nothing for the cart. He had not sold it to defendant; defendant had not bought it from him. The item was then no part of any debt defendant then owed plaintiff. Plaintiff had left the cart on defendant's premises; the latter was at most a mere bailee. No demand was ever made for the cart; if plaintiff had wanted it he could have gone and gotten it no doubt, as he had gotten other carts left by him on the premises. It is plainly evident that the purpose of adding the item to the account sued for was to avoid the effect of the settlement and receipt of December 4, 1906. This is no such case as was presented in *Walker v. Railway Co.*, 67 W. Va. 273, 67 S. E. 722.

Our conclusion is to affirm the judgment.

BRANNON, P., absent.

POFFENBARGER, J. (concurring). Yielding to the weight of authority, I concur in this decision; but, to my mind, it involves a contradiction. An implied contract to pay money as interest or upon any other valid consideration is just as binding as an express contract. There is or is not an implied contract to pay interest for the use of money retained after it has become due and pay-

able. Our decisions say there is, and money due is not satisfied by anything short of payment or a release in some form. The receipt is not conclusive and the parol evidence shows the amount received was not accepted as payment in full. If the interest was due by contract, it could not be satisfied or its existence negatived by mere conduct, affording ground for a contrary inference.

The rule here adopted will often work injustice as it has done here. A debtor may refuse payment and threaten defenses as a means of forcing a creditor, who is not in a situation to suffer delay without great hardship, to accept the principal sum without the interest and thus escape payment of a part of what he justly owes. Legal rules should make provision against such results

WILLIAMS, J., unites in this criticism.

(137 Ga. 833)

BROADHURST et al. v. HILL et al.  
(Supreme Court of Georgia. March 23, 1912.)

(Syllabus by the Court.)

1. APPEAL AND ERROR (§ 973\*)—REFUSAL TO DIRECT VERDICT.

Under former rulings of this court, the judgment of the trial court will not be reversed for refusing to direct a verdict on motion of one of the parties.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3846; Dec. Dig. § 973.\*]

2. TRIAL (§ 139\*)—EXECUTORS AND ADMINISTRATORS (§ 397\*)—DIRECTION OF VERDICT—SUFFICIENCY OF EVIDENCE.

The judge of the superior court should not direct a verdict, except where there is no conflict in the evidence, and where that introduced, with all reasonable deductions or inferences therefrom, demands a particular verdict.

(a) In the case at bar, although there was positive evidence that one who appeared as a purchaser in an administratrix's deed, together with two others, was not in fact such, but merely loaned money to the others for the purpose of paying a part of the purchase price, and that his name was inserted in the deed as a mode of securing him for the loan, and that the deed did not express the legal intention of the parties, yet the entire evidence in the record was not such that it, with all reasonable deductions or inferences therefrom, demanded a verdict in favor of the plaintiffs, or authorized the presiding judge to direct a verdict in their favor.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 332, 333, 338-341, 365; Dec. Dig. § 139.\*; Executors and Administrators, Cent. Dig. §§ 1598-1604; Dec. Dig. § 397.\*]

3. EXECUTORS AND ADMINISTRATORS (§ 380\*)—ADMINISTRATION OF ESTATE—SALE OF LAND—WHO MAY PURCHASE.

If a husband purchases land at a sale made by his wife as administratrix, such purchase is voidable at the election of heirs of the intestate, who move within a reasonable time after the sale to set it aside.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 1545-1564, 1567, 1568; Dec. Dig. § 380.\*]

4. EXECUTORS AND ADMINISTRATORS (§ 388\*)—ADMINISTRATION OF ESTATE—SALE OF LAND—REMEDIES OF PURCHASERS.

The doctrine that, although a sale may be voidable as against an original purchaser, bona

side purchasers from him for value and without notice may acquire a title which cannot be successfully attacked or set aside, is not so applicable to the present case as to demand a verdict in favor of the plaintiffs. This case did not originate in a proceeding instituted by heirs against subsequent purchasers from those who bought at the administratrix's sale, to recover from them or cancel their title. As to the plaintiffs, it is an equitable proceeding instituted by persons who claim to be the original purchasers at the administratrix's sale, for the purpose of correcting an alleged mistake in a deed made by the administratrix. The verdict directed was in favor of the plaintiffs on their proceeding, and also against the cross-petition.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 1573-1582; Dec. Dig. § 388.\*]

#### 5. ESTOPPEL (§ 92\*)—SALE OF LAND—REFORMATION OF DEED.

Under the evidence in the record, a direction of a verdict in favor of persons claiming to be purchasers at the administratrix's sale, and seeking to have the deed made to them and another so reformed as to eliminate such other person as a purchaser, cannot be sustained by this court, on the ground that, as matter of law, the defendant, who contested the case as guardian for the minor heirs, and such heirs, were estopped from asserting the invalidity of the sale by reason of the receipt of a part of the purchase money by the guardian.

[Ed. Note.—For other cases, see *Estoppel*, Cent. Dig. §§ 260-263; Dec. Dig. § 92.\*]

#### 6. NEWLY DISCOVERED EVIDENCE NOT CONSIDERED.

On another trial the newly discovered evidence can be offered, and it is unnecessary to deal with its weight or force at this time.

#### 7. TRIAL (§ 176\*)—DIRECTION OF VERDICT—EFFECT OF MOTION BY BOTH PARTIES.

The fact that a defendant may make a motion that a verdict be directed in his favor, which is overruled, does not, without more, waive the submission of the case to the jury, or authorize the presiding judge, on motion, to direct a verdict for the plaintiff, where the evidence, with all reasonable deductions and inferences therefrom, does not demand such a verdict.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. § 399; Dec. Dig. § 176.\*]

#### 8. TAXATION OF COSTS—QUESTION NOT REVIEWED.

As a reversal is granted, it is unnecessary to deal with the question of taxing costs by the presiding judge.

Error from Superior Court, Sumter County; Z. A. Littlejohn, Judge.

Action by E. B. Hill and another against R. S. Broadhurst, guardian, and others. Judgment for plaintiffs, and defendants bring error. Reversed.

Mrs. Bela Hill Moreland, as administratrix of the estate of Mrs. Pauline A. Hill, deceased, obtained an order for the sale of real estate of the intestate, advertised it, and exposed it for sale on the first Tuesday in January, 1910. She made an administratrix's deed to E. B. Hill, W. D. Moreland, and D. B. Hill. It recited: "E. B. Hill having paid one-half of the purchase price, his interest would be that of an undivided one-half interest in the property hereinafter described; and W. D. Moreland having paid

one-fourth of the purchase price, his interest will be a one-fourth undivided interest in the property hereinafter described; and D. B. Hill having paid one-fourth of the purchase price, he will be one-fourth interested therein. The said E. B. Hill, W. D. Moreland, and D. B. Hill are designated as parties of the second part, owning respective interests in said property as set out above, and will be understood throughout the entire deed." After reciting the order of sale and the advertisement, the deed further stated that the administratrix "did expose to sale, within the legal hours of sale, on the first Tuesday in January, 1910, the real estate hereinafter described, when the parties of the second part became the purchasers thereof, being the highest and best bidders at said sale." This deed was duly recorded on January 12th. E. B. Hill and D. B. Hill were the brothers of the administratrix, and W. D. Moreland was her husband.

On October 26th thereafter E. B. Hill and D. B. Hill filed their equitable petition against Mrs. Moreland, individually and as administratrix, W. D. Moreland, and the other heirs of the intestate, two of them being her children, and four her minor grandchildren, and against the guardian of the latter. They alleged, in substance, as follows: There are no creditors of the estate, and no unpaid debts. At the sale by the administratrix, plaintiffs were the highest bidders, and the property was knocked off to them at the aggregate price of \$29,905. The sale was public, open, and fair, and the property brought its full value at that time. It brought more than the plaintiffs anticipated that it would, and they were without means to pay the full cash purchase price. They made arrangements with, and secured from, W. D. Moreland, as a loan, one-fourth of the amount of the purchase price, to enable them to pay for the property. In order to secure him for the advance, they requested the administratrix, instead of making the deed to them cover the entire interest in the property, to convey to Moreland an undivided one-fourth interest, which was done, and the deed made as above stated. The conveyance to Moreland of the undivided one-fourth interest was not intended to convey to him the absolute title thereto, but was only to secure him the advance made by him to them, to enable them to pay the purchase price. Moreland was to have no interest in the land or title thereto, except as security for the money loaned to them, and he does not claim and never has claimed any title to the land except as security. "Petitioners show that said deed conveying to said Moreland the undivided one-fourth interest in said property was a mistake of said administratrix, of your petitioners, and of said Moreland, and was contrary to the intention of said parties, was an unintentional error, arising from ignorance on the part of the par-

ties, with no intention to convey to said Moreland an absolute fee-simple title to said undivided one-fourth interest." The plaintiffs prayed that the mistake in conveying to Moreland the undivided one-fourth interest in the property be corrected and the deed reformed, and that the title to said property be decreed to be absolute and in fee simple in them, "to each an undivided one-half interest therein," and that they have general relief.

Moreland answered the equitable petition, admitting the allegations thereof, and alleging that he had been repaid the loan of \$7,476.25, and in pursuance of the agreement had conveyed the one-fourth interest in the land to the plaintiffs. A copy of the deed was attached to the answer, which showed that it contained recitals in accordance with such answer, and that it was made on October 31st, five days after the commencement of the suit. The answer of Mrs. Moreland individually and as administratrix was in accord with the allegations of the plaintiffs. She alleged that she was informed that the plaintiffs had made arrangements with Moreland for the loan of some money with which to pay a part of the purchase price; that as administratrix she made the deed as it appears, at the request of the plaintiffs; that she never understood that he had purchased any interest in the property, but always understood that it was purchased by the plaintiffs; that the funds arising from the sale had been distributed among the heirs, and \$4,829.98 had been paid to Broadhurst as guardian for the minor grandchildren, and a receipt taken therefor; that all the other funds in the hands of the administratrix had been distributed among the heirs, leaving only certain real estate in Houston county to be administered; and that a second receipt had been taken from Broadhurst as guardian for the amount so paid.

Broadhurst, as guardian for the minor grandchildren of the intestate, filed an answer in substance as follows: He denied that Moreland was not a bidder at the sale. He alleged that he understood at the time of the sale that Moreland announced, when the property was knocked off by the crier, that E. B. Hill was the purchaser. This defendant was not apprised of the fact that Moreland, the husband of the administratrix, was named as one of the purchasers until recently. The property was sold as a whole, and not in undivided interests. The division between the plaintiffs and Moreland was agreed upon and determined either before or after the sale, and the deed was made in pursuance of this understanding and agreement between the parties. On account of the fact that Moreland was the husband of the administratrix, he could not become a purchaser of the land at the sale by her, and on this account the sale was void as against the interests of his minor wards. So far as appeared at the time of

the sale, the property brought its full value; but he is advised and believes that, owing to the inopportune time for the sale of the property, as shown by subsequent events, it did not bring its real and true value, and that in a very short time after the sale the land was sold by the purchasers to Andrews and Logan for \$32,000, and was subsequently sold by them for \$40,000. He has tendered to the administratrix the full amount received by him from the sale as guardian for the minor children. By way of cross-petition, he prayed that, instead of the deed being reformed as desired by the plaintiffs, it should be declared to be null and void, and that the administratrix should be required to resell the land. A guardian ad litem, who had been appointed for the minors, adopted this answer as his own.

On the trial, after the close of the evidence, the presiding judge refused to direct a verdict in favor of the guardian and guardian ad litem, and directed a verdict in favor of the plaintiffs. The guardian and guardian ad litem moved for a new trial, which was refused, and they excepted.

R. L. Maynard, for plaintiffs in error.  
E. A. Hawkins, Ellis, Webb & Ellis, and  
W. P. Wallis, for defendants in error.

LUMPKIN, J. (after stating the facts as above). [1] 1. It has been held that this court will not reverse a refusal by a trial judge to direct a verdict in favor of one of the parties to a litigation. *Green v. Scurry*, 134 Ga. 482 (2), 68 S. E. 77. Hence the ground of the motion for a new trial, which complained of the refusal to direct a verdict for the defendants, was without merit.

[2] 2. The presiding judge directed a verdict in favor of the plaintiffs. Civ. Code 1910, § 5928, declares: "Where there is no conflict in the evidence, and that introduced with all reasonable deductions or inferences therefrom demands a particular verdict, the court may direct the jury to find for the party entitled thereto." It is only in the case thus declared that a judge may properly direct a verdict. We do not deem it desirable to enter into a full discussion of the evidence, or to intimate how the jury should have found, if the case had been submitted to them. We will only discuss it far enough to show that the presiding judge erred in directing the verdict, and that there was sufficient evidence to carry the case to the jury, under proper instructions.

The deed made by the administratrix, which shows on its face that it was carefully prepared, so as to recite a compliance with the requirements of the law in regard to the sale, and the interest which each of the grantees therein should take, declared that the two Hills and Moreland were the parties of the second part; that at the sale "the parties of the second part became the purchasers thereof, being the highest and



best bidders at said sale"; that E. B. Hill having paid one-half of the purchase price, his interest will be an undivided one-half interest in the property; that, Moreland "having paid one-fourth of the purchase price, his interest will be a one-fourth undivided interest in the property hereinafter described"; and that D. B. Hill, having paid one-fourth of the purchase price, will be interested to the extent of one-fourth. The deed, containing these explicit recitals, was delivered and recorded. There was evidence that the two Hills did not give to Moreland any note or evidence of indebtedness, or make any written contract with him as to it. There was no evidence of even a parol agreement as to when the money was to be returned, or when the debt would become due, or whether it bore interest. Thus the usual indicia of an indebtedness for so large a sum of money seem to have been entirely wanting. And this is true, although Moreland testified that he borrowed part of the money which he let the Hills have.

Some time after the making of the deed by the administratrix, the plantation included in the deed was sold to J. R. Logan and Reese M. Andrews. A bond for title was made to them, and notes given by them. The bond was signed by E. B. Hill, D. B. Hill, and W. D. Moreland, apparently as tenants in common, and the notes were made to them. Andrews testified that at the time of the making of the notes and the bond for title (in May, 1910) nothing was said as to the interest of Moreland being simply as security for a loan, and that he first learned of the claim that such was the fact about the 1st of the following November. Logan testified that he bought the land with the understanding that Moreland had an interest in it; that the bond for title and notes were drawn to that effect; that nothing was said about Moreland's interest being a security for debt; and that he first learned of the claim that such was the fact after they failed to make a title, about the 1st of November. There was evidence tending to show that the two Hills borrowed money from a bank to pay Moreland the amount which they claimed to be due him, and that they paid him, and took from him a deed dated after the present petition had been filed.

Without pursuing the evidence further, there cannot be a doubt, from what is stated above and the reasonable deductions which might have been drawn therefrom, that the jury might have believed that Moreland and the two Hills were purchasers at the sale by the administratrix. It is true that much evidence was introduced tending to establish the contentions of the plaintiffs, and that the witnesses swore positively to the fact that Moreland was not a purchaser, but merely loaned money to the Hills, and the deed from the administratrix included his name as a

means of securing him for the loan, instead of having a deed made to the Hills and then from the Hills to him. But juries are authorized to pass upon questions of fact. And it cannot be successfully contended that the evidence in this case, and the reasonable deductions therefrom, so plainly demanded a verdict for the plaintiffs that the presiding judge was authorized to direct a verdict in their favor.

[3] 3. An administratrix cannot sell property of the estate to her husband. The relationship of husband and wife is too intimate, and she is too much interested in his welfare and in the success of his undertakings, to permit her to sell to him property of an estate which is in her hands to be administered for the best interest of the beneficiaries. An administrator cannot be allowed to sell the property of the estate to himself, nor an administratrix to herself. A trustee cannot be allowed to be on both sides of a sale. At common law there was a merger of the wife's legal existence into that of the husband, and the two became one. Relatively to her separate property, this is not so under our statutes. But the law still recognizes a unity of interest, and still indulges in the presumption that the husband has influence over the wife. Under our Code, she is not permitted to sell her own property to him without an order of court. Nor should she be allowed to sell to him the property of others intrusted to her management as administratrix. If a husband purchases property at a sale made by his wife as administratrix, the sale to him is voidable at the election of heirs of the intestate, who move within a reasonable time to have it set aside. *Lowery v. Idleson*, 117 Ga. 778, 45 S. E. 51. If this was in fact a sale by the wife as administratrix to the husband as the purchaser, the rule stated would apply, unless there was laches, or some other sufficient reason, which would authorize a denial of the setting aside of the sale. What were the real facts we have already declared was a question for the jury.

[4] 4. It was argued that the sale to Logan and Andrews terminated the right to set aside the administratrix's sale, if such a right ever existed; and in support of this position authorities were cited in which an attempt was made by heirs to set aside a sale and recover property from innocent purchasers who had bought without notice of any defect in the title. But in the present case the proceeding was not instituted by the heirs against Logan and Andrews; nor are the latter here asserting that the title in them is good as it stands. Indeed, they are not parties to the litigation at all. On the contrary, there is some intimation that they are not satisfied to take the title as it now exists, and the present equitable proceeding was brought by the Hills against Moreland, the administratrix, and the heirs

of the decedent, to correct an alleged mistake in the title. The verdict directed granted their prayer, as well as refused that of the cross-petition. The difference between the cases cited and the present one is obvious.

[5] 5. It was contended that the heirs of an estate cannot have both the proceeds of the sale and the land itself, and that, by receiving the part of the proceeds of the sale applicable to the distributive share of the minors, the guardian estopped himself and them from seeking to set aside the sale. The general principle that one cannot have the proceeds of a sale and at the same time seek to set it aside and recover the property is sound. *Battle v. Wright*, 116 Ga. 218, 42 S. E. 347. But there was some evidence tending to show a retender to the administratrix of the amount received by the guardian (no point appears to have been made that it was by check), and it was refused, and the minor grandchildren were represented both by him and a guardian ad litem. On the record before us, we cannot declare, as matter of law, that the minor grandchildren and their guardian are estopped.

[8] 6. By amendment a ground was added to the motion for a new trial, based on newly discovered evidence. After consideration, we think it best not to discuss the weight or force of such evidence, or the question of diligence in its discovery, as it may be offered upon another trial.

[7] 7. It was argued that, because the plaintiffs in error moved the court to direct a verdict in their favor, and the defendants in error also moved for the direction of a verdict in their favor, this waived the question of whether the case should be submitted to the jury, and that, upon overruling the motion of the plaintiffs in error, the court could grant that of the defendant in error. The motion for a new trial distinctly makes the point that, under the evidence, the motion for the defendants in error should not have been granted, but the case should have been submitted to a jury. The mere fact that a party to a litigation contends that the evidence demands a finding in his favor does not amount to a concession that, if this position is not correct, a verdict may be directed in favor of the other party. On the contrary, a contention that the evidence demands a verdict for one party *prima facie* includes the contention that it does not demand a verdict in favor of the other. Of course, parties may agree that the case is controlled by a question of law, and the judge shall direct a verdict one way or the other, and thus waive the right to have a jury pass upon the facts. In *Lydia Pinkham Co. v. Gibbs*, 108 Ga. 138, 33 S. E. 945, something of this kind occurred; and, moreover, the Supreme Court held that there was no conflicting evidence on the issue involved. In the present case there was no such waiver of a jury trial on the facts.

[9] 8. One ground of the motion for a new trial was that the court erred in taxing any part of the costs against the moving defendants, because they were not responsible for, and did not participate in, the making of the mistake from which the plaintiffs sought relief. If the question of taxing cost is a proper ground of a motion for a new trial, this ground becomes immaterial, since, the judgment being reversed, the costs will be retaxed upon another trial. The case being equitable in its nature, the presiding judge has some discretion in the matter.

Judgment reversed. All the Justices concur.

(137 Ga. 668)

### GRAHAM v. GRAHAM.

(Supreme Court of Georgia. Feb. 27, 1912.)

(Syllabus by the Court.)

1. LOST INSTRUMENTS (§ 10\*)—JUDGMENT (§§ 429, 747\*)—EQUITABLE RELIEF—CONCLUSIVENESS—EVIDENCE.

If a party is sued at law, and has a legal defense, he must avail himself of it at law pending the suit, and cannot afterwards ask for relief, unless he was prevented from so pleading his defense by fraud, accident, or the act of the adverse party, unmixed with negligence on his part. *Thomason v. Fannin*, 54 Ga. 361 (2). See, also, *Civil Code* 1910, § 4585; *Pollock v. Gilbert*, 16 Ga. 398, 60 Am. Dec. 732; *Moore v. Gill*, 43 Ga. 388; *Brown v. Boynton*, 69 Ga. 754; *McCall v. Fry*, 120 Ga. 661, 48 S. E. 200.

(a) Accordingly, in an action of complaint for land by one claiming title under a deed, a copy of which had been established in a proceeding under *Civil Code* 1910, §§ 4191, 5314, et seq., against one who had been a defendant in such proceeding, and who claimed from the same grantor by virtue of a deed executed subsequently to the date of the alleged lost original, a duly certified transcript of the record of the superior court, including the pleadings and judgment establishing a copy of the deed in lieu of the alleged lost original, was admissible in evidence over the objection that the grantor was not a party to the action, and was not served, and that the defendant in the action of complaint for land was an improper party in the statutory proceeding to establish a copy of the lost deed; it appearing that the grantor had died, that there was no administration upon the estate, and that all the heirs at law of the grantor, including the defendant in the action for land, were made parties and duly served.

(b) Nor was it error to exclude evidence offered by the defendant, which purported to go behind the judgment establishing a copy of the lost deed, and tended to show that the grantor signed, but did not deliver, the alleged lost deed, and that a warranty deed was executed by the same grantor, conveying the same property to the defendant, subsequently to the signing of the alleged lost deed; it further appearing from such testimony that the defendant had full notice of the fact that the grantor had signed the alleged lost deed before the execution of the deed under which the defendant claimed.

[Ed. Note.—For other cases, see *Lost Instruments*, Cent. Dig. §§ 18, 19; Dec. Dig. § 10;\* *Judgment*, Cent. Dig. §§ 808, 810-815, 1284-1296; Dec. Dig. §§ 429, 747.\*]

## 2. EVIDENCE (§ 568\*)—OPINION EVIDENCE—EFFECT.

Jurors are not absolutely bound by the opinions of the witnesses as to the rental value of land for the recovery of which an action is brought. *McCarthy v. Lazarus*, 78 S. E. 493. The trial judge, therefore, erred in directing a verdict for mesne profits in accordance with the opinion of witnesses as to the rental value of the premises.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 2392-2394; Dec. Dig. § 568.\*]

Error from Superior Court, Madison County; D. W. Meadow, Judge.

Action by Alexander Graham against Mary A. Graham. Judgment for plaintiff, and defendant brings error. Reversed.

Alexander Graham instituted complaint for land against Mary A. Graham. The defendant admitted possession, but denied the plaintiff's title. By amendment to her plea the defendant set up that she and the plaintiff were brother and sister, and that the plaintiff claimed title under a pretended deed, which was signed by Mary E. Graham, their mother; that the consideration of the deed was a promise of the plaintiff to live with and support his mother for the rest of her life, and bury her when dead; that after the deed was signed it was never delivered, and the plaintiff refused to live with and support his mother, and, in the presence of defendant, told her he would not support her or have anything to do with the property, and moved away, whereupon the mother destroyed the deed; that afterwards a similar proposition was made by the mother to the defendant, which being accepted, a warranty deed was executed and delivered to her, conveying the property, and she fully performed the contract, and by virtue of the deed became the owner of the land.

On the trial the plaintiff offered in evidence the record of a proceeding in the superior court, to establish a lost deed, wherein the same Alexander Graham was plaintiff, and Mary A. Graham and other named persons were defendants, instituted after the death of Mary E. Graham. The petition therein alleged that the defendants "and petitioner are the only heirs at law of said Mary E. Graham, deceased, being the children of said Mary E. Graham, deceased, all of whom are more than 21 years of age, and being all that are in any wise interested in any property or estate that the said Mary E. Graham may have died seised and possessed of, there being no representative of said deceased; and, all the heirs being more than 21 years of age, this suit is brought against them." A rule nisi was issued by the clerk, calling on the defendants to show cause, at

the next ensuing term, why the copy of the alleged lost deed (which purported to be a warranty deed) should not be established as prayed. The return of the sheriff showed that each of the defendants was served personally. At the term to which the rule was returnable, the judge passed an order reciting: "A rule nisi having been duly served, and no good and sufficient cause shown why a rule absolute should not be granted, it is ordered that the copy deed attached to said petition be and the same is hereby established in lieu of the lost or destroyed original. Let the clerk of this court furnish the established copy to petitioner, with a certified indorsement thereon of the term when this rule absolute was granted," etc.

The defendant objected to the admission of this record, upon the grounds: (a) That the legal representative of Mary E. Graham, the grantor, was not made a party nor served; and (b) that Mary A. Graham was not a proper party to such proceeding. The objection was overruled and the record of the proceedings admitted in evidence. The plaintiff introduced also evidence to the effect that the land described in the copy deed so established was the land in controversy, and that it was reasonably worth for rent \$75 a year for the three years next succeeding the execution of the defendant's deed. The defendant introduced her deed in evidence, and testified in substance as alleged in her plea; but all of her testimony was ruled out on motion of the plaintiff, whose objections were: (a) That the deed from Mary E. Graham to the plaintiff passed the title to the land, and if he failed to maintain and support her during her life, and to bury her after her death, such failure did not affect his title; (b) that, if the defendant carried out her contract with Mary E. Graham, it would not affect the plaintiff's title; (c) that the defendant by her testimony sought to attack a regularly established copy of a deed executed by Mary E. Graham to the plaintiff, when the defendant was a party to the proceeding to establish the copy, and was bound by the judgment therein, and she was therefore estopped. The court directed a verdict in favor of the plaintiff "for the premises in dispute, and \$75 per year for three years, as mesne profits, with costs of suit." The defendant excepted to each of the rulings before stated.

J. F. L. Bond and Worley & Nail, for plaintiff in error. Berry T. Moseley and Jno. J. Strickland, for defendant in error.

ATKINSON, J. Judgment reversed. All the Justices concur, except HILL, J., not presiding.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

(10 Ga. App. 802)

**NORMAN v. STATE.** (No. 3,959.)

(Court of Appeals of Georgia. March 19, 1912.)

*(Syllabus by the Court.)***CRIMINAL LAW (§§ 789, 1173\*)—INSTRUCTIONS**  
—“REASONABLE HYPOTHESIS”—“REASON-  
ABLE CERTAINTY”—“REASONABLE DOUBT”  
—“MORAL CERTAINTY.”

“There are no words plainer than ‘reasonable doubt,’ and none so exact to the idea meant.” “Reasonable hypothesis,” or “reasonable or moral certainty,” may be logically the equivalent of “reasonable doubt”; but these expressions are not so easily understood by the ordinary lay mind. In every criminal case the presiding judge should charge the jury that, to authorize conviction, guilt must be proved “beyond a reasonable doubt,” and, unless the evidence demands the verdict rendered, his failure to do so will be reversible error.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1846-1849, 1904-1922, 1960, 1967, 3164-3168; Dec. Dig. §§ 789, 1173.\*

For other definitions, see Words and Phrases, vol. 5, pp. 4577, 4578; vol. 8, p. 7724; vol. 7, pp. 5957-5972; vol. 8, p. 7779.]

Error from Superior Court, Colquitt County; W. E. Thomas, Judge.

Albert Norman was convicted of larceny, and brings error. Reversed.

James Humphreys and W. A. Covington, for plaintiff in error. J. A. Wilkes, Sol. Gen., J. T. Hill, and J. W. Dennard, for the State.

**HILL, C. J.** Albert Norman was convicted of simple larceny, and his motion for a new trial was overruled. The evidence, though not conclusive, was sufficient to support the verdict. Only one assignment of error contains merit. The trial judge failed to instruct the jury on the doctrine of “reasonable doubt.” This doctrine is so thoroughly imbedded in the jurisprudence of our country, and in a close case is so valuable to the accused, that the omission to give it in charge must be deemed hurtful.

It is claimed by the state that the judge did substantially charge the rule. He charged as follows: “The defendant is presumed by law to be innocent, and that presumption remains with him until his guilt is established by testimony, to the exclusion of any other reasonable hypothesis.” It is insisted that the language “reasonable hypothesis” is not the equivalent of “reasonable doubt”; that the expression “reasonable hypothesis” was not given in connection with the law as to reasonable doubt, was not explained to the jury, and its meaning was not easily apparent or comprehensible to the lay mind; in other words, that the ordinary juror would understand what was meant by the words “beyond a reasonable doubt,” and might not understand what was meant by the words “to the exclusion of any other reasonable hypothesis.” On this subject the court charged further: “Moral and reasonable certainty is all that can be

attained in legal investigation. In civil cases a preponderance of the testimony is sufficient to produce mental conviction. In criminal cases a greater strength of mental conviction is necessary to justify a verdict of guilty. The true question in criminal cases is, not whether the conclusion at which the testimony points may be false, but whether there is sufficient testimony to satisfy the mind and conscience of the jury of the guilt of the defendant, and, in cases of circumstantial evidence, to the exclusion of every other reasonable hypothesis save the guilt of the defendant.”

Are these excerpts, on the subject of the degree of mental conviction necessary to warrant a verdict of guilty, equivalent to the law which declares that, “whether the defendant relies upon positive or circumstantial evidence, the true question in criminal cases is, not whether it be possible that the conclusion at which the testimony points may be false, but whether there is sufficient testimony to satisfy the mind and conscience beyond a reasonable doubt?” Penal Code 1910, § 1013. It has been said that the term “moral certainty” is equivalent to the words “beyond a reasonable doubt.” *Bone v. State*, 102 Ga. 391, 30 S. E. 847, and citations. In the *Bone* Case the learned Justice, in the opinion, says: “It is difficult to conceive how the mind of a juror may reach a conclusion as to a fact to the point of moral certainty, and yet be rendered uncertain by the existence of a doubt of that fact which is reasonable.” In that case the complaint was, not as to the failure to charge the law of reasonable doubt, but as to the judge’s addition, to a correct instruction on that subject, of the words, “The jury must be satisfied of guilt to a moral and reasonable certainty;” it being insisted that these last words qualified or modified somewhat the strength of mental conviction required by the words “beyond a reasonable doubt.” The court held that the use of both expressions in the same connection was “intended to convey to the jury the idea that the reasonable and moral certainty of guilt to which [the judge] referred was mental conviction excluding any reasonable doubt of guilt,” and, so considered, the charge was not erroneous. It is fair to infer from this decision that if the court had not used the words “beyond a reasonable doubt,” but only the words “to a moral and reasonable certainty,” the charge would have been held erroneous. See *Davis v. State*, 114 Ga. 104, 39 S. E. 906; *Robinson v. State*, 128 Ga. 253, 57 S. E. 315.

In the case sub judice the presiding did not use the words “beyond a reasonable doubt.” He used the expressions “to the exclusion of any other reasonable hypothesis save the guilt of the defendant,” and “establish guilt to a moral and reasonable cer-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep’r Indexes

tainty." It may be conceded that these expressions are logically and legally the equivalents of "beyond a reasonable doubt," and, if the jury was composed of erudite men, familiar with legal or logical terminology, either might be used to express the degree of mental conviction necessary to convict of crime. But we venture to say that the expression "reasonable hypothesis" would convey no very definite idea to the mind of those ordinarily selected as jurors, and the words "moral and reasonable certainty" would be little more illuminating. The words "beyond a reasonable doubt" are easily understood by every man. They require no definition. Indeed, attempts to define them are generally neither helpful nor accurate. As justly said by Bishop: "There are no words plainer than 'reasonable doubt,' and none so exact to the idea meant." 1 Bishop's New Criminal Proc. § 1094.

Learned counsel for the plaintiff in error insist that no conviction in Georgia has been allowed to stand when the expression "reasonable doubt" does not occur in simple terms in the charge of the court. So far as our research goes, we have not found a criminal case where the jury was not instructed that they must be convinced of guilt beyond a reasonable doubt before they could convict; and possibly the doctrine is so elementary and well known that the jury would be guided by it even without instructions. But so valuable to human liberty is the rule of "reasonable doubt" that this court is unwilling to accept for it any equivalent.

Judgment reversed.

(10 Ga. App. 623)

REGISTER et al. v. STATE. (No. 3,505.)

(Court of Appeals of Georgia. Nov. 20, 1911.)

Dissenting Opinion, March 27, 1912.)

(Syllabus by the Court.)

1. CRIMINAL LAW (§ 1064\*)—WRIT OF ERROR  
—PRESENTING QUESTION IN LOWER COURT  
—ADMISSION OF EVIDENCE.

No question for determination by this court is presented by a ground, in a motion for a new trial, alleging error in admitting certain testimony over the objection of the defendant, where it affirmatively appears from the ground that no reason was presented to the court in support of the objection, and that the court did not rule on the objection, and no ruling was invoked by the defendant thereon. Soell v. State, 4 Ga. App. 337, 61 S. E. 514; Phillips v. State, 102 Ga. 594, 27 S. E. 699.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 4219, 4221-4224; Dec. Dig. § 1064.\*]

2. CRIMINAL LAW (§ 351\*)—EVIDENCE—SELF-SERVING ACTS.

The fact that a person accused of crime voluntarily surrendered to the sheriff and made no attempt to escape cannot be proved by him in his own behalf. Lingerfelt v. State, 125

Ga. 4 (2), 53 S. E. 803, 5 Ann. Cas. 310, and authorities there cited.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 776, 778-785; Dec. Dig. § 351.\*]

3. CRIMINAL LAW (§§ 404, 444\*)—EVIDENCE  
—DEMONSTRATIVE EVIDENCE—DOCUMENTARY EVIDENCE.

Articles of wearing apparel, claimed by the accused to have been worn by him at the time of the difficulty, and evidencing by their physical condition that an assault had been made upon the accused by the deceased, are not admissible in evidence in behalf of the accused, when their identification rests solely upon his statement to the jury. Proof of genuineness and identification of documents must be made by relevant testimony, as a condition precedent to their introduction in evidence. Nero v. State, 126 Ga. 554, 55 S. E. 404.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 873, 891-893, 1457, 1028; Dec. Dig. §§ 404, 444.\*]

4. HOMICIDE (§ 315\*)—CRIMINAL LAW  
(§ 872\*)—TRIAL—VERDICT.

On the trial of an indictment for murder, the judge gave the jury instructions relating to the law of murder, voluntary manslaughter, and justifiable homicide in self-defense. He did not instruct them on the law of involuntary manslaughter. The jury, after deliberation, returned a verdict finding the accused guilty of "involuntary manslaughter," and this verdict was read and published in open court as their verdict. There was no intimation by any member of the jury that the instructions of the judge on the law of the case had been misunderstood, no further instructions were asked, no member of the jury dissented from the verdict, and nothing occurred tending in any manner to show that the entire jury did not deliberately intend the verdict published in court as their unanimous finding. The judge refused to receive the verdict of involuntary manslaughter, telling the jury that the court could not receive the verdict which they had attempted to return, that the court had not charged them upon the law of involuntary manslaughter, and to return to their room for further deliberation. Held: (1) The verdict for involuntary manslaughter was in legal effect a verdict finding the accused guilty of the highest grade of involuntary manslaughter, and operated as an acquittal of the higher grades of homicide; that is, murder and voluntary manslaughter, as charged in the indictment. (2) The verdict of involuntary manslaughter was a finality, unless objected to in some form by the accused, and the judge could not legally refuse to receive the verdict, or to restrict in any manner the exclusive right of the jury to find and return the verdict, and the action of the judge in refusing to receive the verdict and in requiring the jury to return to their room for further deliberation was unauthorized by law.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 679-682; Dec. Dig. § 315.\* Criminal Law, Cent. Dig. §§ 2082, 2083; Dec. Dig. § 872.\*]

Powell, J., dissenting in part.

Error from Superior Court, Colquitt County; W. E. Thomas, Judge.

B. L. Register and another were convicted of voluntary manslaughter, and bring error. Reversed.

W. A. Covington, James Humphreys, Edwin L. Bryan, and Claude Payton, for plaintiffs in error. J. A. Wilkes, Sol. Gen., and Shipp & Kline, for the State.

HILL, C. J. [1-3] The rulings stated in the first three headnotes do not require further elaboration.

[4] The question of law dealt with in the last headnote, being novel, important, and interesting, justifies, if it does not demand, elaboration. The accused were on trial for the crime of murder. The jury, after having been out for some time considering the verdict, came into court and announced that they had agreed upon a verdict. This verdict was read by the solicitor general, and was as follows: "We, the jury, find the defendants, B. L. Register and C. C. Register, guilty of involuntary manslaughter. E. L. Bacon, Foreman. This April 13, 1911." The presiding judge refused to receive this verdict, or allow it to be filed, and directed the jury to return to their room for further deliberation, stating to them that the court could not receive the verdict which they had attempted to return, and that the court had not charged them upon the law of involuntary manslaughter. Counsel for the defendants, immediately after the jury had returned to their room, asked that the judge charge the jury as to the grades of involuntary manslaughter, and reduced the request to writing; and the court refused to give the instructions requested, or to charge the jury upon the law of involuntary manslaughter. The judge had the jury brought back into the courtroom, and the following colloquy took place between the court and one of the jurors: The Court: "I just called you out, gentlemen, to see what the trouble was, if any—if there was any way in which the court could help you as a matter of law. Of course, the facts—the court could not intimate any opinion as to these." Juror: "We want to know as to the degrees in this manslaughter." The Court: "I don't quite understand the inquiry, gentlemen." Juror: "We want to know whether or not there was more than one kind." The Court: "I gave in charge instructions as to voluntary manslaughter. What is your inquiry now, Mr. Foreman?" Juror: "We wanted to know if there was more than one kind; that is, involuntary manslaughter." The Court: "The court gave you instructions with reference to voluntary manslaughter. The court did not give you any instructions with reference to involuntary manslaughter." Juror: "That is all." After this the jury retired and brought in a verdict of guilty of voluntary manslaughter.

The motion for a new trial alleges that this was error: (1) Because the accused had the right to have the first verdict filed, it being the verdict of the jury in the case, and it being the intention of the jury to give the defendants the benefit of the lower grade of punishment provided for the crime of involuntary manslaughter, and that the legal effect of such verdict was that the defendants stood guilty of the involuntary killing of a person while engaged in the commission of

an unlawful act, the heaviest punishment for which is three years in the penitentiary; and (2) because the defendants were entitled to have the jury charged as to the two grades of involuntary manslaughter, the jury having stated that the intendment of their verdict was to reduce the grade of punishment, and, by refusing either to allow the verdict or to charge the jury upon the law of involuntary manslaughter, the presiding judge deprived the jury of their rights as jurors, and forced them to return the verdict of voluntary manslaughter, which was thus not a free expression of the sworn opinion of the jury, and, therefore, not a legal verdict. The form in which this question is raised is probably not technically correct. It should have been made by direct exception at the time of the action of the court in refusing to receive the verdict for involuntary manslaughter and directing the jury to return to their room for further consideration, or by an exception contained in the final bill of exceptions. But, regardless of the manner in which the question is raised, this court thinks that the question of law which is presented in the ground of the motion for a new trial is of such character as to demand a decision, as, in our opinion, the question lies at the very foundation of the right of jury trial. It is interesting to note that the question here made has never before, except on one recent occasion, occurred in the history of criminal trials in this state; the previous occasion referred to being that of the case of *Darsey v. State*, 136 Ga. 501, 71 S. E. 661, in which case the judgment of the trial court was affirmed by operation of law, the Justices of the Supreme Court having been evenly divided in opinion.

In the *Darsey Case* the question, although identical as to principle, was presented somewhat differently to the Supreme Court from the manner in which the question is presented in the present case to this court. The *Darsey case* was an indictment for murder. The trial judge instructed the jury on the law of murder, the law of voluntary manslaughter, and the law of justifiable homicide, and as to the form of their verdict in each event. The court did not instruct the jury as to the law of involuntary manslaughter. The jury nevertheless returned a verdict into open court, which was received by the clerk and published, finding the defendant guilty of the offense of involuntary manslaughter. The judge thereupon refused to receive this verdict, and instructed the jury that he had not charged them on the law of involuntary manslaughter, and to retire and find a verdict, and further instructed the jury to strike from the indictment the verdict of involuntary manslaughter, stating that it was not proper and in legal form. The jury returned to their room, and, falling thereafter to agree upon a verdict, the court, over the objection of coun-

sel for the accused, declared a mistrial. Counsel for the accused insisted that the jury had already found the defendant guilty of involuntary manslaughter, that the verdict had been published, that it was a legal verdict finding the defendant guilty of the highest grade of involuntary manslaughter, and that the court had no power in such case to declare a mistrial. It may be also stated that counsel for the accused, when the court refused to receive the verdict for involuntary manslaughter and to have it filed, and directed the jury to return to their room, objected to this action of the court, and insisted on a reception of the verdict. When the case was again called for trial, the accused filed a plea of former conviction and former jeopardy, and, on an agreed statement of facts, this issue was presented to the presiding judge, who decided the issue in favor of the state, and the defendant excepted. On the question as thus presented, the Supreme Court, as before stated, divided equally, Justices Lumpkin, Beck, and Atkinson being of the opinion that the decision of the trial judge was error, and that the plea should have been sustained, and Chief Justice Fish, Presiding Justice Evans, and Justice Holden being of the opinion that the court did not commit an error in overruling the plea of former jeopardy, as the allegations therein were insufficient as a bar to further prosecution of the case.

It was insisted, in the argument of learned counsel for the defendant in error, and also in the brief filed in this court, that, the judgment in the Darsey Case is binding on this court on the question now raised. We do not concur in this view. By the constitutional amendment creating this court, "the decisions of the Supreme Court shall bind the Court of Appeals as precedents." But in the Darsey Case the court did not make any decision. The Justices of the court divided evenly as to what decision should be made, and by operation of law the judgment of the lower court was affirmed. This by no means constitutes any decision of the Supreme Court. It is simply an affirmation of the judgment below as to that particular case, and does not amount to a decision of the Supreme Court; and the opinion of one half of the Justices of the Supreme Court is entitled under the law to no more weight with this court than the opinion of the other half, and the fact that the judgment of the trial court strikes the balance in favor of the affirmative has no legal effect whatever as precedent or authority. Of course, it is desirable that there should be no conflict, real or apparent, in the decisions of this court and those of the Supreme Court, and the decision by this court on this question will present no conflict; but the question is before this court, and the plaintiff in error is entitled to a decision of the question, and this decision this court, in the discharge of its duty under the law, is obliged

to render. A majority of this court is clearly of the opinion that the ruling of the trial court on this point was erroneous, and that the motion for a new trial should have been granted, because of this error.

The fundamental law of this state declares that "the jury in all criminal cases shall be the judges of the law and the facts" (Constitution, art. 1, § 2, par. 1 [Civil Code 1910, § 6382]); and this has always been the law in this state. In the earlier decisions the Supreme Court held that this provision of law meant that the jury were such judges, even to the extent that they could determine the law to be different from that given in the judge's charge. In the case of *Ricks v. State*, 16 Ga. 600, it is held: "'On every trial of a crime or offense contained in this Code, or for any crime or offense, the jury shall be judges of the law and the facts, and shall in every case give a verdict of 'guilty' or 'not guilty'; and on the acquittal of any defendant or prisoner no new trial shall, on any account, be granted by the court.' The meaning of this plainly is that it is the jury, and not the court, whose right and whose duty it shall be to be the judges of both what the law is and what the fact is; that is to say, whose right and whose duty it shall be to judge—to decide both what the law is and what the fact is, and that after having judged, decided, what the law is and the fact is, they shall give their judgment, their decision, in the form of a general verdict of 'guilty,' or 'not guilty.'" In these earlier decisions it is held that, if the jury cannot conscientiously adopt the law as it is given in the charge of the court, it is not only their *right*, but their *duty*, to render a verdict according to the opinion which they entertain of the law. This was the uniform ruling of the Supreme Court prior to the late Civil War. The decisions are collated in 4 *Michie, Encyclopædic Digest of Georgia Reports*, p. 37. The interpretation now made by the Supreme Court of this provision of the law is that, while jurors are judges of the law as well as the facts in criminal cases, they must accept the law as laid down and expounded to them by the presiding judge. Beginning with the ruling in the case of *Brown v. State*, 40 Ga. 689, to the present day, this has been the uniform interpretation of this law by the Supreme Court, and we may consider the law as now settled that in the trial of criminal cases it is the duty of the jury to *take the law from the court*, as it is their duty to take the evidence from the witnesses.

But suppose the jury disregards its duty in a criminal case, and returns a verdict outside of the law as expounded by the judge, and without any evidence to support it as given by the witnesses, what would be the effect of such a verdict? The accused has a statutory remedy. He can file a motion for a new trial, and have the verdict set aside because contrary to law, or without

any evidence to support it. But what can the state do? It certainly cannot have such verdict set aside on any motion for a new trial, for in no case can the state file such motion, and no new trial shall on any account be granted by the court at the instance of the state. What the state cannot do directly, the trial judge cannot do for the state indirectly. If a verdict of acquittal is a complete bar to any further prosecution, the court has no authority to continue any further prosecution of the case after the verdict of acquittal by the jury. It is wholly immaterial whether the verdict is supported by the evidence or by the law. If a verdict found by the jury is included within the crime as charged by the indictment, and is in form correct and explicit, the court is powerless to change it. It is powerless to direct the jury to change it after it has been published. It stands forever as a protection to the accused, and as a complete bar to any further prosecution for the same transaction. In the case of *Kitchens v. State*, 41 Ga. 217, Mr. Justice McCay uses the following language: "If the jury fails to heed the charge of the judge, and finds the prisoner guilty, the court is authorized to grant a new trial. If the jury fail in favor of the prisoner, and find him not guilty, although there is no remedy for the error, it is none the less a wrong." The learned judge holds that this would be a wrong in the jury, because it would be their duty to receive the law from the judge; but if their failure to do so operates in favor of the prisoner, the conclusion is, notwithstanding the wrong, that there is no remedy for its correction. It cannot be doubted that an acquittal of the accused would operate as a complete bar to any further prosecution, however much such acquittal might be against the evidence and the law. Where the trial is for murder, and the verdict is for an inferior grade of homicide, this is in legal effect an acquittal of all the higher grades of the crime. *Jordan v. State*, 22 Ga. 559.

In this case the verdict of involuntary manslaughter, which was found by the jury in the first instance, was an acquittal of the defendants of all the higher grades of the homicide, and must be treated as equivalent to a finding that the defendants were guilty of involuntary manslaughter in the commission of an unlawful act. *Thomas v. State*, 121 Ga. 331, 49 S. E. 273. "When only a minor offense is found, the finding, unless set aside at the prisoner's instance, is a full and complete acquittal of the major offense charged." *Miller v. State*, 58 Ga. 203. Of course, where a verdict is not in proper form, or where it is uncertain what the jury intended to find by their verdict, or where that verdict is for an offense not covered by the indictment, the judge may send the jury back for further consideration of the case. *Cook v. State*, 26 Ga. 593; *Mangham v. State*, 87 Ga. 552, 13 S. E. 558. But if the

verdict is explicit, and is included in the charge set out in the indictment, and if it appears to be the deliberate and intentional finding of the jury, though it may be in the very teeth of the charge and wholly without any evidence to support it, the court is obliged to receive it, and to refuse to do so is, in the opinion of a majority of the court, under the law of this state, an unwarranted invasion by the judge of the exclusive province of the jury. Mr. Bishop, in his work on Criminal Procedure (2 New Criminal Procedure, § 642), uses the following language: "A verdict, contrary to instructions, for a less degree of the offense than the evidence proves, must be received and carried out. Certainly there is no higher duty on the jury to observe the instructions of the court than there is upon the jury to find a verdict according to the truth in the evidence." Proffatt, in his work on Jury Trials (section 467), in discussing the conclusiveness of a verdict, lays down this principle as without any exception: "In one instance a verdict is final; that is, in case of a verdict of acquittal. Whatever errors may have been made by the jury in the application of the law, or however perversely they may have acted, and in defiance of the plain and positive instructions of the court, their verdict of acquittal in a criminal case is final. The court cannot set it aside for any error of law or any disregard of the evidence. While in case of a conviction the prisoner has a right to have the action of the jury reviewed, in case of acquittal no such right is given to the people. It is for this reason, no doubt, that the doctrine has been maintained that in criminal cases the jury are the judges of the law and fact." And Mr. Bishop, further discussing the principle, uses the following language: "If, obeying their own conscience, and disobeying the judge, they [the jury] return a verdict of acquittal, he can neither punish them, nor set the verdict aside, though he can set aside a conviction. This power of granting a new trial, therefore, furnishes no reason or test of the rights of juries. They cannot convict a defendant contrary to the direction of the court; but they may acquit him in like disobedience, whenever their own judgments demand. The judge may in his charge convey to them his ideas of their duties; but the law restricts him from interposing with his power." The great Mansfield declared: "It is the duty of the judge, in all cases upon general issues, to tell the jury how to do right, though they have it in their power to do wrong, which is a matter between God and their own consciences." 3 T. R. 428, note 9.

In criminal case, therefore, we conclude that while it is the duty of the jury to take the law as given them in charge from the court and the evidence as presented to them by the witnesses, yet if they take the law and the evidence into their own hands, and



find a verdict explicit as to form and intention and included within the crime charged in the indictment, the finding is within their power as it is written in the law, and the verdict is an absolute protection from any subsequent prosecution for the same transaction, whether that verdict is received formally and filed by the court, and the court has no power to nullify or set aside the verdict of the jury by refusing to receive it and have it filed in such case. In other words, after a verdict of the character above described in a criminal case has been found by the jury and published in court as their verdict, the judge has no right, under the statute of this state, to take issue with the jury as to the legality of that verdict, or to get up any controversy with the jury as to whether the verdict is contrary to law, or without any evidence to support it, or to coerce them to any further consideration of their verdict. Now, in this case, the indictment being for murder, and the jury having found a verdict for involuntary manslaughter, which is embraced in the charge of murder, and that verdict having been returned into court and published by the jury as their verdict, and there being no objection by any member of the jury that the verdict was not the verdict of the twelve jurors, the court had no right to send the jury back for any further deliberation. It is wholly immaterial whether this verdict was in obedience to the instructions of the court, or was in accordance with the evidence in the case. It was the finding of the exclusive arbiters on the question of the defendants' guilt or innocence, and the reception of this verdict and its filing of record was a mere matter of formal procedure, and did not in any manner affect the substantial rights of the accused as fixed by the verdict, and the most substantial right was that they were acquitted by this verdict of all the superior or higher grades of the crime charged against them; and it seems to the majority of this court that it would be to overthrow the very foundation of the right of trial by jury, and to place the entire matter into the hands of the trial judge, both under the law and the evidence, to permit the judge in such case to send the jury back for further consideration of their verdict.

In *Fagg v. State*, 50 Ark. 506, 8 S. W. 829, the accused was tried on an indictment for murder, and the jury found the following verdict: "We, the jury, find the defendant guilty of manslaughter, but cannot agree upon the punishment." In Arkansas the statute, as in this state, makes two degrees of manslaughter, voluntary manslaughter and involuntary manslaughter. The judge, in sentencing the defendant, treated this verdict as one for voluntary manslaughter. The appellant contended that the killing was either murder in the first degree or justifiable homicide, and therefore that the jury could not legally return a verdict for manslaughter.

In the course of the opinion the Chief Justice says: "Where the evidence and the instructions of the court demand a verdict of murder, but the jury finds manslaughter, there is no alternative but to sentence the prisoner accordingly. The court cannot withhold from the jury the power to return a verdict according to their will for any grade of the offense charged against the defendant. The court can only instruct juries as to their duty, giving them in charge the law applicable to the facts and no other. If there is no evidence whatever tending to establish a lower grade of homicide than murder in one instance, or voluntary manslaughter in another, the court should decline to give to the jury directions as to any lower grade of homicide, and it is the jury's duty to take the court's exposition of the law as that applicable to the case. But the court cannot direct a verdict for the higher offense, nor restrain the jury from returning it for the lower grade." One of the headnotes applicable to this point is as follows: "On the trial of an indictment for murder, although both the instructions of the court and the evidence call for a conviction of the highest grade of the offense charged, there is no power to restrain the jury from returning a verdict of manslaughter; and in such case the accused must be sentenced according to the finding of the jury."

To refuse to receive the verdict in a criminal case, on the ground that the verdict is for a grade of the offense charged in the indictment, but not covered by the instructions of the court, and without evidence to support it, is to restrict the exclusive right of the jury in their finding of a verdict to that view of the law and the evidence entertained by the trial judge, and in its last analysis is destructive of the right of jury trial. And certainly, in a state where the statute deprives the judge of the right to intimate any opinion on the facts, and makes such intimation of opinion a mandatory ground for a new trial, the refusal of the trial judge to receive a verdict is, although indirect, a very strong method of informing the jury that the trial judge entertains a different opinion on the evidence as applicable to the law than that entertained by the jury. In the case of *Grant v. State*, 33 Fla. 291, 14 South. 757, 23 L. R. A. 723, the indictment was for murder, and the jury brought in a verdict for manslaughter in the first degree. The judge refused to receive this verdict, and directed the jury in effect that it was defective, as there were no degrees in manslaughter, and that they must retire and present a verdict in proper form. In discussing the right of the judge in this case to give such direction, the court, in the course of the opinion, says that the direction was to retire and present a verdict in a proper form. There is nothing here to indicate the character of the verdict to be returned, except that one for manslaughter in the first

degree was not in proper form. If there was any error on the part of the judge, it was in refusing to receive the first verdict as presented, and in not proceeding to affirm it in the proper way. It is, of course, true that, when a verdict complete in form is returned by the jury, the court has no discretion in the matter, but must proceed to affirm it. In the case now under consideration no objection was made as to the form of the verdict; but the objection in effect was that the verdict was unauthorized by the evidence and the law applicable thereto, as covered by the instructions of the court, and the jury was directed not to change the form of the verdict, but to retire and consider the question of evidence, according to the instructions of the court. In other words, the court, in effect, told the jury in the present case that their verdict for involuntary manslaughter was without any evidence to support it, and was contrary to his instructions as to the law applicable to the issues made by the evidence.

In the case of *Spence v. State*, 7 Ga. App. 825, 68 S. E. 443, this court held that on the trial of an indictment for murder the jury may convict of any lesser grade of homicide, and a verdict of voluntary manslaughter in accordance with the evidence would be a legal verdict, although the court did not instruct the jury on the law of voluntary manslaughter. A majority of the court in the case sub judice go even further than the decision announced in the *Spence Case*, and entertain the view that a verdict for a lower grade of homicide on the trial of an indictment for murder is binding both upon the trial judge and the state, and cannot be set aside or avoided, except at the instance of the accused. As before stated, a verdict of guilt of a lesser grade of homicide than that charged in the indictment is an acquittal of the higher grade. To allow the judge to refuse to receive it is to allow him to refuse to permit the jury to acquit of the higher grade of homicide because the verdict is not sustained by the evidence as the judge views it. The fact that the state cannot except to a wrong verdict and the defendant can do so is immaterial, and furnishes no answer to the argument. This is true of every error, either of law or fact, in criminal cases; for no error against the state can be corrected, while any error against the accused can be corrected. This arises from the general rule that no one can be twice put in jeopardy under the Constitution of this state, unless the verdict is set aside on his own motion, or by the direction of a mistrial in a proper case. Civil Code 1910, § 6364. What is here held is we think, not in conflict with the well-settled rule that the trial judge is not required to charge any part of the law which is not in his opinion applicable to the evidence, and the refusal of the court in this case to charge the law of involuntary manslaughter was not erroneous

under the evidence; but its refusal to receive a verdict, which was clear and explicit in its terms, of a lower grade of homicide embraced in the charge made by the indictment, and in sending the jury back with instructions to resume their consideration of the case, was, in the opinion of a majority of this court, error, and in its last analysis would tend to destroy the right of trial by jury, and to place in the hands of the trial judge the exclusive determination of the ultimate guilt or innocence of the accused.

We have not referred to the colloquy between the judge and the jury subsequently to the return of the verdict for involuntary manslaughter, and the absolute refusal of the judge to receive the verdict, and his direction to the jury to retire and resume their deliberations. If we are right in the view presented that the verdict for involuntary manslaughter was, under the circumstances stated, a final verdict, and it was the duty of the court to receive it, the subsequent action of the court was wholly immaterial. We think, however, that a fair deduction from the language used by the jury in reply to the judge's inquiry was the expression of a desire to adhere to the verdict for involuntary manslaughter, if there was such a grade of homicide, and they were prevented from doing so because the judge declined to answer their inquiry, except by telling them that the court had "given instructions only as to voluntary manslaughter." This was equivalent to telling the jury that, so far as the evidence in this case disclosed, there was no such offense as involuntary manslaughter. It will be noted that the judge did not refuse to receive the verdict of involuntary manslaughter on the ground that the verdict was imperfect or incomplete, in that it did not clearly express the intention of the jury on the grades of involuntary manslaughter, whether the jury intended to find the accused guilty of involuntary manslaughter in the commission of an unlawful act, or involuntary manslaughter in the commission of a lawful act without due caution and circumspection; but the judge placed his refusal squarely on the ground that the jury had found a verdict contrary to his instructions. We think the judge was authorized to assist the jury in making the verdict explicit as to the degree of involuntary manslaughter; but he could not intimate what sort of verdict the jury should find. *Turbaville v. State*, 58 Ga. 546 (3). His refusal to explain the grades of involuntary manslaughter after the jury had found a verdict for this offense, and when they requested him to do so, and he insisted in effect that they could only consider the offense of voluntary manslaughter, approached near, if it did not actually reach, an intimation of opinion on the subject. The jury ought to have followed the instructions of the judge as to the law. It was wrong for them to disregard these instructions, just as it would be wrong to find a verdict not

supported by the evidence; but if the wrong is perpetrated by the jury against the law, or against the weight of the facts, in the language of Judge McCay, "the wrong is without remedy," except at the instance of the accused, and in the words of Mansfield, "it is a matter between God and their consciences."

Suppose the jury in this case, after the refusal of the judge to receive their verdict, had persisted, and again returned the same verdict; could the judge have legally declared a mistrial? Would not the accused have been protected from any subsequent trial by the plea of *autrefois convict*, if the judge had declared a mistrial? Suppose the judge had said to the jury, when they brought in their verdict for involuntary manslaughter: "Gentlemen of the jury, you have found a wrong verdict, one wholly without evidence to support it and in the teeth of my instructions on the law, and I therefore set it aside, and direct that you retire to your room and resume your deliberations." Would this not have been a clear invasion of the exclusive province of the jury? Is there any substantial supposed action of the judge, and what was done in this case?

Judgment reversed.

POWELL, J. (dissenting from the ruling in the fourth paragraph of the syllabus and the corresponding matter in the opinion). There may have been a day when the proposition laid down in the majority opinion would not only have been sound from a logical standpoint, but would have been consistent with the general scheme of jurisprudence then in force. In my opinion that day is past, and, if not wholly past, is passing; and I would do nothing to protract its stay. A court is defined as "a place where justice is judicially administered." The chief task of all our ingenuity is and should be to make our courts efficient to this end of administering justice. Harmony is a *sine qua non* of efficiency. Courts give better justice now, and administer it more judicially, than they did in earlier times, because more certain and harmonious methods of trial then were then known have been devised. In no phase of the general question has more improvement in this respect been obtained than has come about through the progress which has been made in defining the respective functions of judge and jury as they are called upon to co-operate in the trial of a case.

Irrespective of all older views and judicial announcements on the subject, the modern view and the present rule are conceded to be that the judge is charged with the function of deciding all questions of law in the case and the jury with the function of deciding all questions of fact; and beyond this, wherever a general verdict is required, as it is in a criminal case, the jury is charged with the further duty of applying the law

as decided by the court to the facts as found by the jury. Further progress has been made in this state by the working out of the proposition that the determination of what issues are involved in a case is a question of law, for the court to decide. For instance, though the question as to whether the defendant is guilty of manslaughter may be a possible issue under an indictment for murder, it is error for the court to submit that issue to the jury, where there is no evidence of that character of homicide which constitutes manslaughter; and it is proper in such a case for the court to tell the jury that they should not consider that subject. This proposition has been established by repeated decisions, the majority opinion concedes it, and I need not elaborate it.

Not only is it the duty of the judge to decide the law, but it is his duty to tell the jury how he has decided it, and it is his duty to see that his decision is obeyed and respected, so far as may be in his power. For instance, suppose a writing were offered in evidence, and the court rejected it, and later, after submission of the case to the jury, they should file in and say to the court: "We are judges of the facts. We demand to see that writing, which we deem is relevant to the facts as we see them." Would it be any infringement upon the sacred prerogative of the jury for the judge to tell them, in language howsoever emphatic, that they could not see the paper, and should not consider it in making their verdict? On the contrary, it would be his duty to do so.

There are a number of decisions of our Supreme Court (and they are referred to with approval in the majority opinion, though as to them my colleagues find a distinction which my mind does not make) to the effect that, if the jury offers a verdict for some offense not included in the indictment, the court should decline to receive it. By what right does the court decline to receive such a verdict? It is for no other reason than that such a verdict is not responsive to any issue in the case; and it is the right and duty of the court to see that the verdict is responsive to the issue, or to one of the issues submitted. If the jury (though in a certain sense judges of the law and of the facts) differ with the judge, and believe that they have the right to return a verdict for some misdemeanor, say assault and battery, upon an indictment charging a felony, say arson, it is the jury, and not the judge, that must yield. If the judge should receive such a verdict, it would operate to acquit the defendant of the arson, and it would in all respects be equivalent to a verdict of not guilty of that offense; and yet, because the jury thus offer to express themselves in a formulated finding, as if it were a true verdict, should the court receive it? No. And this is an answer in which both reason and precedent heartily concur. And

from the correctness of this answer my colleagues offer no dissent.

Now, take a step further, keeping in mind, as we go, that the determination of what the issues in a case are depends upon a consideration of both the pleadings and the evidence. An indictment charges murder. There is evidence of a homicide, but nothing whatever to show (what it is necessary to show, in order to convict of involuntary manslaughter) that the killing was negligent, but unintentional; indeed, the defendant concedes an intent to kill, but pleads justification. The judge, charged with the duty of framing the issues on which the jury must pass, decides, and correctly decides, that there is no issue as to involuntary manslaughter in the case, and, as is his duty and privilege, he so informs the jury. Nevertheless the jury, disagreeing with him (as they did in the supposed case of arson discussed just above), offer to return a verdict for involuntary manslaughter. Shall the judge receive it, or shall he direct the jury to return to their room and bring a verdict responsive to the issues submitted to them? It is true that the verdict of involuntary manslaughter, if received, would operate to acquit the accused of the murder and of the voluntary manslaughter, if any, and, indeed, of all other offenses, if any, so far as the transaction charged in the indictment is concerned, just as a verdict of assault and battery, if received, on an indictment charging arson, would acquit the accused of that offense; but the question is not as to what would be the effect of the verdict if the court should receive it, but as to whether the court should receive it, notwithstanding its lack of responsiveness to any issue in the case, accordingly as those issues have been determined by the judge in pursuance of his unchallenged prerogative of framing the issues.

My Associates draw a distinction between the two cases, and say that, though the judge should not receive the unresponsive verdict in the arson case, he cannot legally refuse to receive the unresponsive verdict in the murder case; while to my mind there is no rational distinction to be made. And it seems to me not only logical, but eminently proper, and consistent with all the better notions as to how justice should be judicially administered, efficiently administered, that in such a case the judge should stand his ground and compel the jury to tender a verdict responsive to the issue as he in the due exercise of his prerogative has framed it, or else make a mistrial.

I fully agree to the proposition that the judge must not transgress upon the prerogative of the jury. I, with equal alacrity, agree that trial by jury is a well-established right, high and valuable in its nature. But my point is that trial by judge (meaning thereby that the judge shall perform those functions in the trial of the case which are his to perform, according to the recognized

division of duties) is to my mind a right no less firmly established, a right no less important in its nature, than trial by jury. Trial by court—that is, by both judge and jury, with each legitimately performing only the particular function given by law—is the kind of a trial that most commends itself to right thinking and to the highest sense of justice, and that best accords with the spirit of our law and with the principles of modern jurisprudence.

It is no less a wrong for the jury to invade the province of the judge than it is for the judge to invade the province of the jury. If a judge, forgetting his duty, should undertake to invade the province of the jury, and to express his opinion on the facts, the jury should disregard it, and should refuse to follow his opinion, unless it accorded with their own. On the other hand, if the jury undertakes to invade the province of the judge, and to inject into a case an issue which the judge has decided is not in it, the judge should likewise repel the invasion of his province, and, in the discharge of his function as the head of the court, directing the progress of the trial, should compel the jury to keep its place, and either to render a verdict on some issue submitted or else make a mistrial.

It is said that, if this proposition were recognized to its logical end, a judge might direct a verdict in a criminal case, where the facts were undisputed. Perhaps this may be a logical extension of the doctrine (though I do not concede that it is); but, even if it were, still it is to be remembered that we carry few, if any, of our legal doctrines to their full logical end in actual practice. This is true with courts, just as it is with men in other activities. From the standpoint of strict logic, we might say that no sensible man would ever eat food that he knows is likely to disagree with him; and yet, in actual practice, sensible men do that very thing every day. But, be that as it may, every criminal case contains the issue of guilty or not guilty of the offense charged, and the jury must first believe the evidence, howsoever strong and uncontradicted, before they are compelled to render a verdict of guilty. The jury may reject evidence, but they cannot supply it where it does not exist. And it must be kept in mind that the verdict which the judge refused to receive in the present case is one which could not be rendered upon a rejection of testimony, but only upon the jury's supplying certain facts of which there was no evidence.

Let us elaborate this last proposition slightly. The indictment charged murder—a homicide committed by shooting with a pistol. No matter how conclusive of that offense the testimony as delivered might have been, the jury might have disbelieved it, and could have rendered a verdict of not guilty, without going beyond their legitimate function, and without transgressing upon the

function of the judge. But the verdict offered was for involuntary manslaughter. Now, this is an offense which cannot exist in the absence of a certain affirmative characterizing element, namely, an intention to do some unlawful act other than to kill; and, as was pointed out in *Maughon's Case*, 7 Ga. App. 660, 665, 67 S. E. 842, this unlawful act cannot be shooting at another, for though a person shoot at another not intending to kill, still if death ensues, it is nevertheless murder under the express provision of section 67 of the Penal Code of 1910. So the jury in this case could not, by rejecting the testimony, or by rejecting a part of it and giving weight to the rest of it, find anything to supply this affirmative element essential to the existence of involuntary manslaughter. The jury had no power to go outside of the evidence to find this affirmative element; hence by no possibility was it included within the range of any issue before them for decision.

In this connection it is well enough to draw attention to a difference between the modern and the earlier functions of juries. The day was when the jury had the right to act on the private knowledge of its members. From our studies in the history of the English law we learn that in the earliest times juries acted solely on what they knew of the case or of the parties; later they might hear witnesses, but could still legally use their personal knowledge; but now our Civil Code of 1910 (section 5932) provides: "A juror should not act on his private knowledge respecting the facts." In the days when jurors could legally act on their private knowledge of the facts, it would have been improper for a judge to refuse to receive from the jury a verdict of any offense which by legal possibility could be included within the charge stated in the indictment. When that was the rule, every grade and degree of murder and manslaughter, as well as a number of minor offenses, was necessarily in issue when the accused pleaded not guilty to an indictment charging murder; for, even though no issue of fact should arise under the testimony as to some of these offenses, the court could not say that such an issue had not arisen by reason of some matter resting within the private knowledge of the jurors.

This is no doubt the rationale underlying many of the old precedents wherein the right of a judge to refuse a verdict not responsive to the issues made by the evidence is denied. Certainly this is the avowed reason for the abrogation of the ancient practice under which judges punished jurors who brought in a verdict which, according to the testimony as submitted, was necessarily false. So long as jurors might act upon private knowledge, the judge could not frame the issues, except in so far as they were dependent upon the scope of the pleading. Now that the right of jurors to act upon private knowledge has been taken away, there is no

longer any legal difficulty in the way of the judge's framing the issues in accordance with both the pleading and the evidence. It has become, not only his right, but his duty, to do so. And in my judgment he no more infringes upon the prerogative of the jury when he refuses to receive a verdict entirely beyond the fullest possible range of the evidence than when he refuses to receive a verdict beyond the fullest possible scope of the pleading.

If the jurors, acting within their appropriate sphere, find an untrue verdict upon some issue submitted to them, that is a matter which the judge cannot avoid, so far as the trial itself is concerned. (It is to be seen that I am now drawing the distinction between the powers of the judge at the trial, and the powers of the judge on motion for a new trial; for the two functions are different, and need not be exercised by the same person.) Whether a verdict is true or not is an issue of fact which the judge (on the trial) has no power to decide. He therefore cannot refuse to receive a verdict because it is not true. Whether a verdict is responsive to the issue submitted to the jury is a question of law; and hence, to that extent, the judge may control the verdict as to this, just as he may control it as to matters of form, as to the method in which it shall be received (that is to say, whether in open court or at recess), and as to how it shall be published (that is to say, whether by the oral announcement of the foreman, or in writing signed by the foreman, or on a poll of the entire jury).

After a verdict has been received, the power and the function of the judge are very different, both as to extent and as to limitations, from what they were on the trial. (I mention this because in the majority opinion reference has been had to the decisions which declare that the court cannot set aside a verdict in a criminal case except on motion of the accused.) If, after the trial, the court is called upon to deal with or set aside a verdict, the judge alone constitutes the court. He considers, and within certain limitations passes, on questions both of law and of fact. But before this jurisdiction can be exercised, it must be invoked in the way prescribed by law. In that way, only the accused can invoke it; the state cannot move. This proposition is in no wise involved in the question as to what are the respective provinces of the judge and of the jury on the trial of the case. It is not out of deference to the jury, or to any right of trial by jury, that the state is denied the right to move to set the verdict aside. The state is just as remediless to except if the accused is discharged by some act of the judge. How far a judge may take steps, pass orders, and give directions, in order to bring the case to a legitimate end so far as the trial is concerned, is a very different proposition from the proposition as to when

and how he must act in order to review and correct an erroneous finding, verdict, or judgment which has already been rendered. The two things stand on so different a basis that it makes only for confusion of thought to attempt to argue from the one instance to the other.

Certainly, if the judge had received the verdict of involuntary manslaughter in the present case, the state could not have moved to set it aside; and if the accused had filed no motion, this erroneous result would have become the final end of the case. The point I make is that the court did not err in guiding the jury while the trial was still in progress, so that they brought their part of the trial to a legal conclusion. In what he did and in what he told them he was merely guiding them as a judge should guide them. He told them the truth—not truth of facts (which would have been an invasion of their province), but truth of law. He told them that the verdict they offered was not a legal verdict; and this was true as a matter of law, and not merely as a matter of fact. He told them that they should retire and attempt to make a lawful verdict. It seems to me that to make a lawful verdict is the very object of having a jury—the only legitimate object. I shall never hold that a judge errs because he tells the jury that it is their duty to make a lawful verdict, or that it is their duty not to make one that is not lawful.

More could be said, but enough has probably been said to effect the sole purpose I have in mind, and that is to protest against our looking to the past, instead of to the present and to the future, in determining what is lawful and right on this proposition which divides us. I realize that my colleagues have taken the side of this question which many judges, perhaps most judges, to-day would take. I realize that their line of reasoning is consonant with the general consensus of the opinions of intelligent men in the past as to the general propositions involved. But this is a question as to which much progress in thought has been made in the past, and is still being made. Of course, I do not refer to the particular proposition involved in the present case, but to the broader general proposition as to how the functions of judge and jury can best be coordinated in the trial of a case. The trend of progressive thought is toward condemnation of the general verdict, and toward the substitution of special findings of fact by the jury. Some time soon, perhaps in less than a quarter of a century, I expect to see, if I am living, even criminal cases tried according to this plan, which is surest in its results, freest from chances of error, and, if error is committed, affords the greatest opportunity for easy and certain review and correction. I have merely tried to show that right of trial by jury is not impaired by

confining the jury, in their deliberations and finding, to specific issues, but that this great and valuable right is increased in efficiency, as an instrumentality of declaring truth and administering justice, by imposing these limitations. And this is what courts are for—to declare truth and to administer justice.

(10 Ga. App. 843)

NANCE v. PATTERSON et al. (No. 3,864.)  
(Court of Appeals of Georgia. April 2, 1912.)

(Syllabus by the Court.)

PLEADING (§ 243\*)—AMENDMENT—PETITION—SUBJECT-MATTER.

Where a petition in due form was filed in a court having jurisdiction of the parties and of the subject-matter, but by clerical omission the petition was not addressed to any court, and the clerk of the court in which the petition was filed attached process thereto, and the same was duly served on the named defendant, and he appeared and made a motion to dismiss the petition, because not addressed to the court in which it was filed, and because the clerk was not authorized to attach the process, the petition was amendable by inserting therein the court in which it was filed, and to which it was intended to be addressed.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 643-651, 820-822; Dec. Dig. § 243.\*]

Error from City Court of Blakely.

Action by S. T. Nance against Donalson Patterson and others. Judgment for defendants, and plaintiff brings error. Reversed.

Hawes, Pottle & Wright, for plaintiff in error. H. M. Calhoun, for defendants in error.

HILL, C. J. The plaintiff sued upon an open account, and prayed process requiring the defendants to appear at the next term of the court, to answer the complaint. The petition was in due form, and was headed, "Georgia, Early County," but was not directed to any court. The clerk of the city court of Blakely attached to the petition a process directed to the defendants, which was personally served on each of them, requiring them to be and appear at the city court of Blakely on the third Monday in October (the return day of the city court for the suit), to answer the plaintiff's demand. The defendants filed a motion to dismiss the suit: (1) Because the petition was not directed to any court; and (2) because the clerk of the city court of Blakely was without any authority of law to attach to the petition the process requiring the defendants to be and appear at the city court of Blakely on the third Monday in October, and the city court of Blakely was therefore without jurisdiction to try the case. Subject to the motion to dismiss, the defendants appeared and filed an answer at the appearance term. The plaintiff moved to amend the petition by alleging as follows: "Plaintiff brought said petition to the city court of Blakely, and handed the

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

same to the clerk of the court for filing therein. Said petition was filed in said court, and process issued directing the defendants to answer said petition to the city court of Blakely, and an answer was accordingly filed by defendant in said court. Plaintiff, by leave of the court, amends his petition by addressing the same as follows: "To the City Court of Blakely." The presiding judge refused to allow the amendment, and the plaintiff excepts.

We hold that the court erred in refusing to allow the amendment. The omission to address the petition to the court in which it was filed was manifestly a clerical error. The clerk was authorized to attach a process to the petition, addressed to the named defendants therein.

Judgment reversed.

POTTLE, J., disqualified.

(10 Ga. App. 834)

PONDER v. STATE. (No. 3,670.)

(Court of Appeals of Georgia. April 2, 1912.)

(Syllabus by the Court.)

HOMICIDE (§ 300\*)—INSTRUCTIONS—VOLUNTARY MANSLAUGHTER.

The evidence in behalf of the state demanded a verdict finding the defendant guilty of murder, and under the defendant's statement he was fully justified in the homicide. There is no view of the evidence which authorized the submission of the issue of the defendant's guilt of voluntary manslaughter to the jury, and the court erred in instructing the jury upon the subject of voluntary manslaughter.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 649-656; Dec. Dig. § 300.\*]

Error from Superior Court, Screven County; B. T. Rawlings, Judge.

Oliver Ponder was convicted of voluntary manslaughter, and brings error. Reversed.

J. W. Overstreet, for plaintiff in error. Alfred Herrington, Sol. Gen., and Hines & Jordan, for the State.

RUSSELL, J. Judgment reversed.

POTTLE, J., not presiding.

(10 Ga. App. 835)

HARRIS v. STATE. (No. 3,720.)

(Court of Appeals of Georgia. April 2, 1912.)

(Syllabus by the Court.)

SUFFICIENCY OF EVIDENCE—FRAUD.

The evidence on the point of fraudulent intent is not sufficient to authorize conviction. The case is controlled by the decision of this court in *Mulkey v. State*, 1 Ga. App. 521, 57 S. E. 1022.

Error from City Court of Madison; K. S. Anderson, Judge.

Gus Harris was convicted of crime, and brings error. Reversed.

Percy Middlebrooks, for plaintiff in error. A. G. Foster, Sol., for the State.

RUSSELL, J. Judgment reversed

POTTLE, J., not presiding.

(10 Ga. App. 839)

FLANDERS v. SAILORS. (No. 3,803.)

(Court of Appeals of Georgia. April 2, 1912.)

(Syllabus by the Court.)

APPEAL AND ERROR (§ 1006\*)—REVIEW—SUFFICIENCY OF EVIDENCE.

There being evidence of some facts and circumstances sufficient to authorize a finding that the plaintiff was not a bona fide purchaser for value before maturity of the acceptance sued on, and it appearing that the defendant had paid all that the property for which the acceptance was given was worth, the plea of failure of consideration was not without evidence to support it, and the refusal of the judge of the superior court to set aside on certiorari the fourth consecutive verdict in favor of the defendant will not be disturbed, although there were minor errors committed during the trial in the magistrate's court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3951-3954; Dec. Dig. § 1006.\*]

Error from Superior Court, Jackson County; C. H. Brand, Judge.

Action by L. E. Flanders against W. L. Sailors. Judgment for defendant, and plaintiff brings error. Affirmed.

A. C. Brown, for plaintiff in error. P. Cooley, for defendant in error.

POTTLE, J. Judgment affirmed.

(11 Ga. App. 9)

CHURCH v. CITY OF ATLANTA.

(No. 3,933.)

(Court of Appeals of Georgia. April 2, 1912.)

(Syllabus by the Court.)

POSTPONEMENT OF TRIAL—ERROR.

Under the facts appearing in the record, it was error to refuse to postpone the trial in the recorder's court for one day to enable counsel for the defendant to prepare his defense.

Error from Superior Court, Fulton County; J. T. Pendleton, Judge.

Charles A. Church was convicted of violating an ordinance of the City of Atlanta, and brings error. Reversed.

Frank L. Haralson, for plaintiff in error. Jas. L. Mayson and W. D. Ellis, Jr., for defendant in error.

RUSSELL, J. Judgment reversed.

(11 Ga. App. 10)

**POWELL v. STATE.** (No. 3,996.)  
(Court of Appeals of Georgia. April 2, 1912.)

(Syllabus by the Court.)

**SWINDLING—EVIDENCE.**

This case is controlled by the decision of this court in *Adams v. State* (No. 3,954) 74 S. E. 95, decided March 17, 1912.

Error from City Court of Dublin; Jas. B. Hicks, Judge.

Hilliard Powell was convicted of crime, and brings error. Reversed.

Burch & Burch, for plaintiff in error. Geo. B. Davis, Sol., for the State.

**HILL, C. J.** Judgment reversed.

(10 Ga. App. 880)

**BRACEWELL et al. v. STATE.** (No. 3,574.)  
(Court of Appeals of Georgia. April 2, 1912.)

(Syllabus by the Court.)

**1. AFFRAY (§ 2\*)—DEFENSES—SELF-DEFENSE.**

When two or more persons are on trial for an affray (which occurred at a place where a congregation of people were assembled for Sunday school purposes), and one of the defenses relied upon was that the defendants were repelling an unlawful assault and battery made upon them, it was erroneous for the judge to restrict the defendants, in the exercise of their right of self-defense, to the right only of defending against a felonious assault. Regardless of the character of the place, the defendants would have the right to protect themselves against an assault, or assault and battery, or even to resent the use of opprobrious words and abusive language, provided in so doing they did not exceed the proper measure of resistance.

[Ed. Note.—For other cases, see *Affray*, Cent. Dig. § 5; Dec. Dig. § 2.\*]

**2. REVIEW.**

The other assignments of error in regard to the charge of the court involve questions which are not likely to recur on a second trial. In so far as the instructions of the judge relative to the form of the jury's verdict are concerned, the exceptions are without merit.

Error from City Court of Dublin; K. J. Hawkins, Judge.

R. S. Bracewell and others were convicted of affray, and bring error. Reversed.

John R. Cooper, for plaintiffs in error. Geo. B. Davis, Sol., for the State.

**RUSSELL, J.** Judgment reversed.

**POTTLE, J.,** not presiding.

(10 Ga. App. 851)

**CARTER et al. v. STATE.** (No. 4,001.)  
(Court of Appeals of Georgia. April 2, 1912.)

(Syllabus by the Court.)

**1. CRIMINAL LAW (§ 854\*)—TRIAL—SEPARATION OF JURY.**

To ask the counsel engaged in the trial of a criminal case, in the hearing of the jury, if they will consent to a separation of the jury

pending the trial, is bad practice; its tendency being to deprive one or the other of the parties of the free exercise of his will or judgment on the subject. If, however, both the solicitor general and the counsel for the accused consent to the separation, the latter will not be heard to move for a mistrial on the following morning, when the jury reassembles, on the ground that the request made by the judge before the jury was an improper coercion of his will, and deprived him of the free exercise of his judgment, and prevented the accused from having a fair and impartial trial. *Sullivan v. Padrosa*, 122 Ga. 339, 50 S. E. 142; *O'Dell v. State*, 120 Ga. 152, 47 S. E. 577.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 2039-2047; Dec. Dig. § 854.\*]

**2. REVIEW ON APPEAL.**

No material error of law appears in the conduct of the trial, though some of the excerpts from the charge of the court, to which exception is taken, are not entirely satisfactory. The case on the facts is very weak, but there is some slight evidence to sustain the verdict, and this court cannot interfere.

Error from City Court of Blackshear; Walter A. Milton, Judge.

Lawton Carter and others were convicted of crime, and bring error. Affirmed.

Jas. R. Thomas, for plaintiffs in error. S. F. Memory, Sol., for the State.

**HILL, C. J.** Judgment affirmed.

(11 Ga. App. 81)

**WINNOMS v. STATE.** (No. 4,019.)  
(Court of Appeals of Georgia. April 2, 1912.)

(Syllabus by the Court.)

**LARCENY (§ 55\*)—HOG STEALING—EVIDENCE.**

There was no evidence that the offense of hog stealing had been committed by any one in the present case; nor was there any evidence connecting the accused with the offense of hog stealing.

[Ed. Note.—For other cases, see *Larceny*, Cent. Dig. §§ 152, 164, 165, 167-169; Dec. Dig. § 55.\*]

Error from Superior Court, Wilkinson County; Jas. B. Park, Judge.

George Winnoms was convicted of hog stealing, and brings error. Reversed.

Livingston Kenan, for plaintiff in error. Jos. E. Pottle, Sol. Gen., for the State.

**HILL, C. J.** Judgment reversed.

(11 Ga. App. 29)

**BARROW v. STATE.** (No. 4,030.)  
(Court of Appeals of Georgia. April 2, 1912.)

(Syllabus by the Court.)

**CRIMINAL LAW (§ 1159\*)—APPEAL—SUFFICIENCY OF EVIDENCE.**

The evidence authorized the conviction of the plaintiff in error, and there was no error in overruling his petition for certiorari. The fact that the jury believed the single witness for the state, despite the testimony of a number of witnesses whose evidence as to her general bad reputation was used for the purpose



of impeachment, affords no ground for setting aside the finding. The plaintiff in error cannot complain that some of his codefendants were unjustly convicted, when his own conviction is authorized by the evidence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3074-3083; Dec. Dig. § 1159.\*]

Error from Superior Court, Greene County; Jas. B. Park, Judge.

Mose Barrow was convicted of crime, and brings error. Affirmed.

Hamilton McWhorter and J. G. Faust, for plaintiff in error. Jos. M. Pottle, Sol. Gen., and Jas. Davison, for the State.

RUSSELL, J. Judgment affirmed.

(10 Ga. App. 841)

GURLEY v. STATE. (No. 3,855.)

(Court of Appeals of Georgia. April 2, 1912.)

(Syllabus by the Court.)

**1. LARCENY (§ 55\*)—CRIMINAL PROSECUTIONS—SUFFICIENCY OF EVIDENCE.**

The evidence, though circumstantial, authorized the conviction of the defendant, and the assignments of error as to the admission of testimony and as to the argument of counsel for the state are immaterial.

[Ed. Note.—For other cases, see Larceny, Cent. Dig. §§ 152, 164-169; Dec. Dig. § 55.\*]

(Additional Syllabus by Editorial Staff.)

**2. CRIMINAL LAW (§ 1064½\*)—WRIT OF ERROR—RECORDS—QUESTIONS PRESENTED FOR REVIEW.**

In a prosecution for larceny, a ground of motion for a new trial, which is not fully approved by the court, cannot be considered by the Court of Appeals.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2876, 2887, 2948; Dec. Dig. § 1064½.\*]

**3. CRIMINAL LAW (§ 782\*)—TRIAL—INSTRUCTIONS—CONFLICTING TESTIMONY.**

In a criminal case, a charge that if the jury find any conflict, and cannot reconcile it, so as to give effect to all the testimony, they may take the entire testimony, run over it, glean from it the truth, and wherever they find the truth to be, between the charges in the indictment and the plea of not guilty, let it control the verdict, is proper.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1847, 1849, 1851, 1852, 1877, 1878, 1880-1882, 1906, 1907, 1909-1911, 1960, 1966, 1967; Dec. Dig. § 782.\*]

Error from Superior Court, Wilkes County; B. F. Walker, Judge.

Charlie D. Gurley was convicted of larceny from the house, and brings error. Affirmed.

P. L. Smith and I. T. Irvin, Jr., for plaintiff in error. Thos. J. Brown, Sol. Gen., and R. C. Norman, for the State.

RUSSELL, J. [1] The plaintiff in error, Charlie D. Gurley, was indicted jointly with Pat Gurley for the offense of larceny from the house. The theft of \$200 in money, and of an ancient German coin said to be worth

\$400, was charged in the accusation. Charlie Gurley defended by proof of an alibi. The theft was alleged to have been committed on the night of May 12th, and testimony was adduced to the effect that he was at a boarding house in Elberton that night for supper and after supper, and was in his room at the boarding house early the next morning. The distance from Elberton to the scene of the larceny was between 40 and 45 miles. The strongest incriminatory circumstance against the accused was his statement, a short time before the larceny, that he knew where there was \$1,000 in a trunk, and no one living in the house except a man and a woman. The evidence showed the prosecutor and his sister lived alone in the house in which this larceny was committed, and that they kept their money in a trunk. It was also shown that the defendant Pat Gurley, who was a brother of the defendant Charlie Gurley, boarded with the prosecutor and was thoroughly familiar with the premises. It was further shown that Charlie Gurley made a contradictory statement as to his presence in Wilkes county about the time of the larceny, having denied that he was in Wilkes county about that time. The state produced evidence to the effect that, while the prosecutor and his sister were at supper, some one entered the room where the trunk containing the prosecutor's title deeds and other valuable papers, as well as his money, were kept, and carried out the trunk containing them. It was too dark that night to find the trunk, but on the next morning tracks were discovered which were similar to those made by the shoes of the accused, and, some distance down the road, the trunk, which had been broken open, was found. There was blood on the trunk, and it was shown that Charlie Gurley, about the same time had a fresh wound upon his hand, which had bled. The evidence of the defendant's guilt was not conclusive; but we think, from the fact that the house was entered by one thoroughly familiar with the surroundings, the fact that the two brothers were together at different places about the time of the larceny, and that Pat Gurley fled and has not been arrested, taken in connection with the blood upon the trunk and the wound upon the hand of Charlie Gurley, are sufficient to authorize the inference of Charlie Gurley's guilt.

[2] Exception is taken to the admission of testimony from the sheriff of Hart county to the effect that he has been unable to locate or arrest the defendant Pat Gurley; the ground of objection being that this evidence was irrelevant and prejudicial, because Charlie Gurley alone was on trial. This ground of the motion is not fully approved by the court, and for that reason cannot be considered.

In the motion for a new trial, complaint is made that the judge permitted the coun-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

sel for the state to comment on some poetry written in the back of the guest register of the boarding house. We fail to see the relevancy of this poetry in the back of the register, and think that counsel could properly have been required to discontinue the comments on it; but there is nothing in the assignment of error which enables us to judge of the nature of the comments, or to decide that they were injurious to the plaintiff in error. The comments may have been a mere matter of pleasantry, and consequently of no pith or moment in affecting the consideration of the jury.

[3] There was no error in the charge of the court upon the subject of the conflict in testimony. The court's statement, "If you find any conflict, and you cannot reconcile it, so as to give effect to all the testimony presented, then you take the entire testimony, run over it, and glean from it the truth, and wherever you find the truth of the transaction to be, between the charges in the indictment and the defendant's plea of not guilty, let it control, shape, and mold your verdict," is in accord with the true rule as to the jury's doubt where there is conflict in the testimony.

Judgment affirmed.

POTTLE, J., not presiding.

(11 Ga. App. 10)

DAVIS v. STATE. (No. 3,995.)

(Court of Appeals of Georgia. April 2, 1912.)

(Syllabus by the Court.)

1. DISTRICT AND PROSECUTING ATTORNEYS (§ 3\*)—SUBSTITUTES.

An attorney, appointed by the judge of the superior court of the Eastern judicial circuit to act as solicitor general pro tempore during the absence of the regular incumbent of that office, has full power and authority to perform all the duties devolving upon the solicitor general, including those imposed upon him as ex officio solicitor of the city court of Savannah, when the judge of the latter court fails to exercise the power, conferred upon him by the law creating the court, to designate an attorney to act during the absence of the solicitor general.

[Ed. Note.—For other cases, see District and Prosecuting Attorneys, Cent. Dig. §§ 10-17; Dec. Dig. § 3.\*]

2. CRIMINAL LAW (§ 1030\*)—TRIAL—COUNSEL FOR PROSECUTION—TIME FOR OBJECTION.

The right of an attorney to act as solicitor in the city court of Savannah, where he appears as such by permission of the court and without objection from one against whom a criminal accusation has been filed, cannot be brought in question for the first time after conviction.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2619-2621, 2632, 2653; Dec. Dig. § 1030.\*]

3. CRIMINAL LAW (§ 211\*)—ACCUSSION IN CITY COURT—REQUISITES.

A criminal accusation in the city court of Savannah must be drawn up by the prosecuting officer, but need not be supported by

a precedent affidavit. McDonnell's Code of Savannah, p. 426; Wright v. Davis, 120 Ga. 670 (4), 48 S. E. 170.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 420-430, 431; Dec. Dig. § 211.\*]

4. SUFFICIENCY OF EVIDENCE—NO ERROR.

The evidence fully authorizes the verdict, and no error of law appears.

Error from City Court of Savannah; Davis Freeman, Judge.

Clara Davis, alias King, was convicted of crime, and brings error. Affirmed.

Robt. L. Colding, for plaintiff in error. Walter C. Hartridge, Sol. Gen., and Morris H. Bernstein, for the State.

POTTLE, J. Judgment affirmed.

(11 Ga. App. 14)

LEWIS v. STATE. (No. 4,003.)

(Court of Appeals of Georgia. April 2, 1912.)

(Syllabus by the Court.)

1. CRIMINAL LAW (§ 254\*)—TRIAL—ARGUMENT OF COUNSEL.

Where a criminal case is submitted to the presiding judge by consent, without the intervention of a jury, it is discretionary with the judge whether or not he will hear argument from counsel; and where the case is submitted by consent without argument, it is not error, after the court has intimated the probability of an adverse decision, to refuse to permit counsel for the accused to withdraw his consent and make an argument in the case.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 537, 538, 543; Dec. Dig. § 254.\*]

2. CRIMINAL LAW (§ 254\*)—TRIAL—DECISION BY JUDGE.

The fact that the presiding judge, to whose decision the issues of fact were submitted, in rendering his decision remarked that the accused had not proved his innocence, is not cause for setting aside the judgment of conviction.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 537, 538, 543; Dec. Dig. § 254.\*]

3. SUFFICIENCY OF EVIDENCE.

The evidence authorized the judgment of conviction.

Error from Superior Court, Quitman County; W. C. Worrill, Judge.

William Lewis was convicted of crime, and brings error. Affirmed.

John B. Guerrey, for plaintiff in error. J. A. Laing, Sol. Gen., and R. R. Arnold, for the State.

POTTLE, J. Judgment affirmed.

(10 Ga. App. 840)

WILLIAMS v. ALLISON. (No. 3,804.)

(Court of Appeals of Georgia. April 2, 1912.)

(Syllabus by the Court.)

1. EVIDENCE (§ 17\*)—JUDICIAL NOTICE—COMPUTATION OF TIME.

The courts will take judicial cognizance of the computation of time, and of what days

of the month are Sundays. *Dorough v. Equitable Mortgage Co.*, 118 Ga. 178, 45 S. E. 22.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 21; Dec. Dig. § 17.\*]

## 2. SUNDAY (§ 13\*)—CONTRACTS—VALIDITY.

A contract executed on Sunday, and which is connected with or relates to the business or work of the ordinary calling of one of the parties to the contract, and does not relate to work of necessity or charity, is invalid, and cannot be enforced. Penal Code 1910, § 416; *Thompson v. Wilkinson*, 9 Ga. App. 367, 71 S. E. 678; *McAuliffe v. Vaughan*, 135 Ga. 852, 70 S. E. 322, 33 L. R. A. (N. S.) 255.

[Ed. Note.—For other cases, see Sunday, Cent. Dig. §§ 86-44; Dec. Dig. § 13.\*]

## 3. SUNDAY (§ 13\*)—CONTRACTS—VALIDITY.

A contract made by the owner of real estate and personal property with a real estate agent, placing the property in the hands of the agent to be sold, and fixing the commission to be paid to him, and the terms of the sale, is a contract in connection with the ordinary calling or business of the real estate agent, and, if executed on the Sabbath day, cannot be enforced by the agent, although the contract may not have been made in the prosecution of the ordinary business or calling of the owner of the property. If the contract is executed in the prosecution of the ordinary business of either party thereto, and is executed on Sunday, it is invalid.

[Ed. Note.—For other cases, see Sunday, Cent. Dig. §§ 36-44; Dec. Dig. § 13.\*]

Error from City Court of Americus; J. A. Hixon, Judge.

Action by F. L. Allison against Mrs. J. H. Williams. Judgment for plaintiff, and defendant brings error. Reversed.

W. P. Wallis and H. M. Oxford, for plaintiff in error. Ellis, Webb & Ellis, for defendant in error.

HILL, C. J. Judgment reversed.

(10 Ga. App. 834)

## DOWDELL v. STATE. (No. 3,713.)

(Court of Appeals of Georgia. April 2, 1912.)

(Syllabus by the Court.)

### 1. SUFFICIENCY OF EVIDENCE.

The case is a close one upon the evidence, but the testimony in behalf of the state authorized the conviction of the accused.

### 2. BIAS OR PREJUDICE OF JUDGE.

There is nothing in the record that indicates that the judge was prejudiced or biased against the defendant, so as to diminish in the slightest degree his right to a fair trial, or that he did not have a fair trial.

### 3. CRIMINAL LAW (§ 1186½\*)—COMPETENCY OF JURORS—RELATIONSHIP TO PARTIES.

It not being manifest that W. H. Feagin was the prosecutor in the case, and the evidence not being sufficient to show that he was in fact the prosecutor, it does not appear that the relationship of one of the jurors to Feagin was prejudicial to the accused.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3114-3123; Dec. Dig. § 1186½.\*]

### 4. CHARGE OF COURT—ALIBI.

The court's instructions to the jury upon the subject of alibi were free from error.

### 5. CHARGE OF COURT—CONSTRUCTION AS A WHOLE.

The excerpts from the charge of the court, when considered in connection with the charge as a whole, were correct, and fully presented every material issue involved in the trial.

Error from City Court of Americus; J. A. Hixon, Judge.

Goodwin Dowdell was convicted of crime, and brings error. Affirmed.

J. B. Hudson and L. J. Blalock, for plaintiff in error. J. R. Williams, Sol. Gen., for the State.

RUSSELL, J. Judgment affirmed.

POTTLE, J., not presiding.

(11 Ga. App. 8)

## SOUTHERN RY. CO. v. LANG. (No. 3,905.)

(Court of Appeals of Georgia. April 2, 1912.)

(Syllabus by the Court.)

### 1. SUFFICIENCY OF PETITION—DEMURRER.

The petition as amended was not subject to the demurrer.

### 2. CERTIORARI (§ 68\*)—REVIEW—QUESTIONS OF FACT.

There was some evidence from which the jury could find that the servants of the defendant in charge of its engine could have seen the plaintiff's cow in time to have stopped the train before striking the animal, and there was no abuse of discretion in overruling the certiorari.

[Ed. Note.—For other cases, see Certiorari, Cent. Dig. §§ 180-182; Dec. Dig. § 68.\*]

Error from Superior Court, Wayne County; C. B. Conyers, Judge.

Action by N. H. Lang against the Southern Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Bennet, Twitty & Reese and Littlefield & Poppell, for plaintiff in error. Jas. R. Thomas, for defendant in error.

POTTLE, J. Judgment affirmed.

(10 Ga. App. 839)

## CAMPBELL v. ALKAHEST LYCEUM SYSTEM. (No. 3,740.)

(Court of Appeals of Georgia. April 2, 1912.)

(Syllabus by the Court.)

### 1. PLEADING (§ 354\*)—PAROL EVIDENCE—WRITTEN CONTRACT.

The written contract was unambiguous and explicit as to terms and complete. The presiding judge did not err in striking that portion of the answer which attempted to ingraft upon the express terms of the written contract by parol inconsistent terms and conditions. Civil Code 1910, § 5788; *Fleming v. Satterfield*, 4 Ga. App. 351, 61 S. E. 518.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1092-1095; Dec. Dig. § 354.\*]

### 2. EVIDENCE (§ 358\*)—ACTION ON CONTRACT—EVIDENCE.

The contract was signed in the name of the corporation, with the letters "L. S." af-

fixed, intended as the seal of the corporation. The evidence showed that it was executed for the corporation by its president, who was authorized to make the contract for the corporation. Besides, the corporation was endeavoring to enforce it. There was no error in admitting the contract in evidence.

[Ed. Note.—For other cases, see Evidence, Dec. Dig. § 353.\*]

### 3. REVIEW ON APPEAL.

The evidence demanded the verdict as directed, and the writ of error is so clearly without merit that the judgment is affirmed and the motion for 10 per cent. damages allowed.

Error from City Court of Monroe; A. C. Stone, Judge.

Action by the Alkahest Lyceum System against J. R. Campbell. Judgment for plaintiff, and defendant brings error. Affirmed.

Walker & Roberts, for plaintiff in error. Napier & Cox, for defendant in error.

HILL, C. J. Judgment affirmed, with damages.

(11 Ga. App. 9)

### BELL & HARRELL v. KWILECKI. (No. 3,915.)

(Court of Appeals of Georgia. April 2, 1912.)

#### (Syllabus by the Court.)

### 1. ATTORNEY AND CLIENT (§ 101\*)—AUTHORITY OF ATTORNEY—RECEIVING PAYMENTS.

"Without special authority, attorneys cannot receive anything in discharge of a client's claim, but the full amount in cash." Civil Code 1910, § 4956; Patterson v. Childs, 9 Ga. App. 646, 72 S. E. 45.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 209-216; Dec. Dig. § 101.\*]

### 2. NO ERROR—CERTIORARI SUSTAINED.

The court did not err in sustaining the certiorari and entering final judgment in the plaintiff's favor.

Error from Superior Court, Decatur County; Frank Park, Judge.

Action by I. Kwilecki against Bell & Harrell. Judgment for plaintiff, and defendant brings error. Affirmed.

A. E. Thornton, for plaintiff in error. Will H. Krause, for defendant in error.

POTTLE, J. Judgment affirmed.

(11 Ga. App. 15)

### BANISTER v. STATE. (No. 4,012.)

(Court of Appeals of Georgia. April 2, 1912.)

#### (Syllabus by the Court.)

### 1. CRIMINAL LAW (§ 1064\*)—APPEAL—ADMISSION OF EVIDENCE.

A ground of a motion for a new trial, complaining of the admission of testimony, which fails to set out, either literally or in substance, the testimony objected to, presents no question for decision by the reviewing court.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2676, 2887, 2948; Dec. Dig. § 1064.\*]

### 2. CRIMINAL LAW (§§ 1036, 1129\*)—APPEAL—ASSIGNMENTS OF ERROR.

The fact that evidence may have been obtained by an invasion of the constitutional rights of the accused cannot be taken advantage of by a general assignment of error that the verdict is contrary to the evidence. If such evidence be admitted without objection, and be otherwise sufficient to convict, the verdict will not be set aside on account of the manner in which the evidence was obtained.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1631-1690, 2639-2641, 2954-2964; Dec. Dig. §§ 1036, 1129.\*]

Error from Superior Court, Bryan County; W. W. Sheppard, Judge.

Fortune Banister was convicted of crime, and brings error. Affirmed.

W. W. Gordon, Jr., and W. F. Slater, for plaintiff in error. N. J. Norman, Sol. Gen., for the State.

POTTLE, J. Judgment affirmed.

(10 Ga. App. 835)

### MACK v. STATE. (No. 3,717.)

(Court of Appeals of Georgia. April 2, 1912.)

#### (Syllabus by the Court.)

### 1. CRIMINAL LAW (§ 914\*)—NEW TRIAL—GROUNDS—RULINGS ON INDICTMENT.

A judgment overruling a demurrer to an accusation should be excepted to directly by exceptions pendente lite properly preserved in the record, or by exceptions in the final bill of exceptions timely filed. It does not constitute a proper ground in a motion for a new trial.—Williams v. State, 4 Ga. App. 853, 62 S. E. 525.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2146-2151; Dec. Dig. § 914.\*]

### 2. CRIMINAL LAW (§ 1064½\*)—WRIT OF ERROR—PRESENTING QUESTIONS IN TRIAL COURT—MOTION FOR NEW TRIAL.

Grounds contained in an amended motion, not verified or approved by the trial judge, cannot be considered by this court. Soell v. State, 4 Ga. App. 337, 61 S. E. 514; Wilson v. Cobb, 4 Ga. App. 272, 61 S. E. 133.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2676, 2887, 2948; Dec. Dig. § 1064½.\*]

### 3. SUFFICIENCY OF EVIDENCE.

The evidence in support of the verdict is very weak and unsatisfactory, but this court cannot say that the verdict is wholly unauthorized.

Error from City Court of Madison; K. S. Anderson, Judge.

Herod Mack was convicted of crime, and brings error. Affirmed.

Williford & Lambert, for plaintiff in error. A. G. Foster, Sol., for the State.

RUSSELL, J. Judgment affirmed.

POTTLE, J., not presiding.

(10 Ga. App. 836)

PARRISH v. STATE. (No. 3,733.)  
(Court of Appeals of Georgia. April 2, 1912.)

(Syllabus by the Court.)

1. CRIMINAL LAW (§ 955\*)—NEW TRIAL—  
GROUNDS.

The motion for a new trial in this case having been heard and determined prior to the passage of the act regulating practice in courts of review, approved August 21, 1911 (Acts 1911, p. 149), and the brief of evidence failing to disclose in what county the alleged offense was committed, and failing thus to show that the trial court had jurisdiction of the case, a new trial should have been granted. *Mill v. State*, 1 Ga. App. 134, 57 S. E. 969; *Gosha v. State*, 56 Ga. 36.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2368-2372; Dec. Dig. § 955.\*]

2. PARENT AND CHILD (§ 17\*)—SUPPORT OF  
CHILD—CRIMINAL RESPONSIBILITY OF PAR-  
ENT.

There is no merit in the complaint as to the exclusion of the testimony in relation to the conduct of the wife, or to her ill treatment of her husband. The conduct of the child's mother, or her refusal to live with its father as her husband, is no defense to a prosecution for abandonment of the child. *Moore v. State*, 1 Ga. App. 502, 57 S. E. 1018. The father must support his child, whether it lives with him or with the mother; and if he desires the custody of the child he must pursue his remedy to obtain its custody.

[Ed. Note.—For other cases, see Parent and Child, Cent. Dig. §§ 176-181; Dec. Dig. § 17.\*]

Error from City Court of Reidsville; E. C. Collins, Judge.

Jeff Parrish was convicted of refusal to support his child, and brings error. Reversed.

Way & Burkhalter, for plaintiff in error.  
Robt. E. De Loach, Sol., for the State.

RUSSELL, J. [1] In so far as all of the special exceptions are concerned, the trial seems to have been free from error. But prior to the passage of the act regulating practice in courts of review, approved August 21, 1911 (Acts 1911, p. 149), the venue being a jurisdictional fact, and required to be proved by the state as a part of the general case, it was uniformly held that failure to prove venue could be reached by a general assignment that the verdict was contrary to law and evidence, or contrary to evidence, and in the present record there is no proof to show in what county the alleged offense was committed. There is evidence that at one time the mother and father of the child lived at Collins, and that at another period they lived about a mile from Collins, and at another time about a mile and a half from Collins; but there is no evidence that the home of either was in Tattnall county, and there is therefore, no evidence that the wife, either at the time the husband abandoned her before the child was born or (what is more material) at the time that the child was born, after the hus-

band had abandoned her, resided in Tattnall county. In *Smith v. State*, 2 Ga. App. 414, 58 S. E. 549, the writer referred to the rulings in the cases of *Moye v. State*, 65 Ga. 754, and *Cooper v. State*, 106 Ga. 120, 32 S. E. 23, and adverted to some other rulings of the Supreme Court upon the subject of venue, and suggested legislation which would correct such an anomaly as the court's knowing that the town of Collins is in Tattnall county, and yet not being permitted, in a criminal case, to use its knowledge in the absence of proof.

In the present case, however, even if the court were permitted to take judicial cognizance of the fact that Collins is in Tattnall county, it cannot be assumed that the residence of the defendant's mother-in-law, which is some distance from Collins, is still in Tattnall county. In this respect the record bears remarkable similarity to that in the *Gosha Case*, supra. At the last session of the General Assembly the suggestion of this court was adopted, and it is provided, by the second section of the act to regulate procedure and practice in courts of review (Acts 1911, p. 150), that "no judgment of a trial court in a criminal case shall be reversed by either the Supreme Court or the Court of Appeals for lack of proof of venue, or of the time of the commission of the offense, save where the particular point has been specifically raised by a ground of the original or amended motion for a new trial." In other words, the point cannot be raised in a court of review, unless it is insisted on in the trial court. However, the judgment overruling the motion for new trial in the present case was rendered on August 2, 1911, and for that reason our decision must be controlled by previous rulings of this court and of the Supreme Court, holding that, where the brief of the evidence contains no proof of the venue, a judgment refusing a new trial is erroneous, for the reason that, the venue being a jurisdictional fact, required to be proved as a part of the general case, failure to prove venue could be reached by a general assignment that the verdict was contrary to law and evidence.

[2] 2. A new trial is granted in this case solely upon this ground; for it is not disputed that the defendant is the father of the child, nor is it denied that he has not contributed anything towards its support. It does not matter whether the defendant was driven from home by his father-in-law or not, or whether his wife threatened to poison him, or attempted to shoot him. Even if it is necessary for the defendant to leave his wife as a matter of self-preservation, this will not relieve him from the duty of providing for the support of the child. And this means the care of the child in the custody of its mother, wherever she may be, and even while living apart from her husband, so long as she has the custody of the

child. If the father cannot properly provide for his child at the place where its mother keeps it, or if she should keep it at some other place, or if he desires the personal care of the child, he may himself obtain the custody of the child (if he be a more suitable person to be intrusted with its custody than its mother); but the child must be supported by its father, whether its mother has its custody or not. It is true that the abandonment which is penalized by law is voluntary abandonment, and it must appear that the father willingly withholds support from the child; but support and custody are not necessary concomitants. The father must support the child, whether it lives with him or not. He is not relieved from that duty, even though he justly fears so greatly for his life that he dare not live with the child's mother. As we held in *Moore v. State*, 1 Ga. App. 502, 57 S. E. 1018: "The conduct of the mother, or her refusal to live with the father, is no defense to a prosecution for abandonment of the child. The child is not responsible for such misconduct, nor is it to be abandoned by the father for that reason. While the father could, if he wished, live separately from his wife, or quit her altogether, for certain reasons, that has nothing whatever to do with the child, and in no way excuses him from his legal liability to care for his offspring. On the contrary, it is no defense, to a prosecution for abandonment of the child, that the mother has deserted the father, or even if she be guilty of the grossest immorality or unwifely conduct." Under this ruling it was not error to exclude the testimony of the defendant's mother to the effect that the defendant's wife drew a gun upon him and threatened to shoot him, and would have done so but for the fact that the witness took the gun away from her; and, for the same reason, the testimony which was admitted to evidence threats, on the part of the wife and mother, to poison her husband, as well as the testimony that the defendant's father-in-law drove him from his home with a shotgun, was irrelevant and immaterial.

Judgment reversed.

POTTLE, J., not presiding.

(11 Ga. App. 41)

**HAMILTON v. STATE.** (No. 4,055.)  
(Court of Appeals of Georgia. April 2, 1912.)

(Syllabus by the Court.)

**1. INDICTMENT AND INFORMATION (§ 3\*)—NECESSITY FOR INDICTMENT—MISDEMEANOR.**

The act of 1910 (Acts 1910, p. 60) makes the offense of larceny after trust, as defined by section 194 of the Penal Code of 1895 (Penal Code of 1910, § 192), a misdemeanor, where the money or other property intrusted and fraudulently converted does not exceed \$50 in value. Therefore, an indictment is not required for this offense, where the money or property intrusted

and fraudulently converted does not exceed \$50 in value, but the offender may be prosecuted by an accusation filed in the city court.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 9-23; Dec. Dig. § 3.\*]

**2. EMBEZZLEMENT (§§ 32, 33\*)—ACCUSATION—SUFFICIENCY.**

Under the allegations of the accusation, the bailment, the purpose of the bailment, and the fraudulent conversion were properly laid; and there was no error in overruling the motion in arrest of judgment.

[Ed. Note.—For other cases, see Embezzlement, Cent. Dig. §§ 47-50, 51, 52; Dec. Dig. §§ 32, 33.\*]

Error from City Court of Tifton; R. Eve, Judge.

C. L. Hamilton was convicted of larceny after trust, and brings error. Affirmed.

Fulwood & Skeen, for plaintiff in error.  
Jas. H. Price, Sol., for the State.

HILL, C. J. The plaintiff in error was convicted on an accusation in the city court of Tifton charging him with the offense of larceny after trust. He filed a demurrer to the accusation, on the ground that he could not lawfully be prosecuted for the offense of larceny after trust on an accusation, and that for that offense an indictment by a grand jury was necessary. The court overruled the demurrer, and the accused excepted. A motion in arrest of judgment was made on the ground that the accusation was fatally defective, in that "it fails to allege that the money or property to be applied to the use and benefit of John W. Poole was the money or property of the said John W. Poole, or that the said John W. Poole was the owner thereof." The motion was overruled, and to this ruling the accused excepted.

[1] 1. The accusation was based upon section 194 of the Penal Code of 1895, as amended by the act of August 12, 1910 (Acts 1910, p. 60), which makes the offense of larceny after trust as provided for in this section a misdemeanor, where the money or other property intrusted to the accused and fraudulently converted does not exceed \$50 in value. This amendment seems to have been omitted from the Penal Code of 1910. See Penal Code 1910, § 192. The accusation charges that the property intrusted to the accused for the purpose stated therein, and which was fraudulently converted by him, was 75 cents in money. The offense, therefore, was clearly a misdemeanor, under the amendment above referred to, and no indictment was necessary.

[2] 2. The indictment charges (omitting formal parts) that, "after having been intrusted by T. D. Smith with a certain sum of money, to wit, seventy-five cents in money, of the value of seventy-five cents, for the purpose of paying a certain board bill to John W. Poole, due by him, the said T. D. Smith, to

the said Poole, and for the purpose of applying the said sum of money as aforesaid in that way, for the use and benefit of him, the said T. D. Smith, the owner of said money as aforesaid, he, the said C. L. Hamilton, did wrongfully and fraudulently convert said sum of money as aforesaid to his own use." It will be seen, from these allegations, that the property was intrusted to the accused, not by Poole, but by T. D. Smith; that Smith, and not Poole, was the owner of the property; and that it was to be applied to the use and benefit of Smith. The violation of the trust was the failure of the accused to apply the property to the use and benefit of Smith, the owner, and not the failure to apply it to the use and benefit of Poole. Under these allegations, not only was the ownership of the property in Smith, but the relationship of trust was created by the bailment between Smith and the accused, and not between Poole and the accused. The allegations of the accusation are in strict conformity with the ruling of this court in *Norfleet v. State*, 9 Ga. App. 853, 72 S. E. 447, and the motion in arrest of judgment was entirely without merit. See, also, *Birt v. State*, 1 Ga. App. 150, 57 S. E. 965, and *Keys v. State*, 112 Ga. 392, 37 S. E. 762, 81 Am. St. Rep. 63.

Judgment affirmed.

(10 Ga. App. 840)

**SMITH v. STATE.** (No. 3,844.)

(Court of Appeals of Georgia. April 2, 1912.)

*(Syllabus by the Court.)*

**1. CRIMINAL LAW (§ 1124\*)—WRIT OF ERROR—RECORD—EVIDENCE.**

The statement which was excluded might have been admissible as part of the *res gestae* of the transaction, if it had appeared that it was made at a time so nearly coincident with the shooting as to be free from the suspicion of device or afterthought; but the judge certifies that it did not definitely appear when the remark was made, and thus the ground of the motion for new trial complaining of the exclusion of the testimony (not being approved by the trial judge upon the material point at issue) cannot be considered.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 2946-2948; Dec. Dig. § 1124.\*]

**2. HOMICIDE (§ 309\*)—INSTRUCTIONS—APPLICABILITY TO EVIDENCE.**

There was evidence which authorized the jury to infer that there was an intent to fight on the part of the accused, as well as on the part of the deceased; and it was therefore not error for the court to instruct the jury upon the subject of voluntary manslaughter.

[Ed. Note.—For other cases, see *Homicide*, Cent. Dig. §§ 649, 650, 652-655; Dec. Dig. § 309.\*]

**3. CRIMINAL LAW (§ 789\*)—INSTRUCTIONS—RULES OF EVIDENCE.**

Inasmuch as the court charged the jury fully and fairly to the effect that they could not convict the defendant unless they were satisfied of his guilt beyond a reasonable doubt, that portion of the charge wherein the judge instructed them that "the state, however, is not

required to demonstrate with mathematical accuracy and precision the guilt of the accused; the state is only bound to show his guilt to a reasonable and a moral certainty, and if the state has done that in this case, then it is your duty to convict the defendant," was not error. The instructions of the judge upon the subject of reasonable doubt, in this case, afford the defendant no ground for complaint. See *Norman v. State*, decided March 19, 1911, 74 S. E. 428.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 1846-1849, 1851, 1880, 1904-1922, 1960, 1967; Dec. Dig. § 789.\*]

Error from Superior Court, Laurens County; J. H. Martin, Judge.

Less Smith was convicted of homicide, and brings error. Affirmed.

S. W. Sturgis, for plaintiff in error. E. D. Graham, Sol. Gen., for the State.

RUSSELL, J. Judgment affirmed.

POTTLE, J., not presiding.

(10 Ga. App. 844)

**HUTSON v. SUTTON.** (No. 3,891.)

(Court of Appeals of Georgia. April 2, 1912.)

*(Syllabus by the Court.)*

**1. APPEAL AND ERROR (§ 889\*)—REVIEW—PLEADINGS.**

This being an exception to a judgment refusing to sanction a petition for certiorari complaining of a verdict in a justice's court adverse to the plaintiff in a lien foreclosure proceeding, and the case being argued in this court by both sides upon the theory that one of the contested issues was whether or not demand for payment was made before the institution of the proceeding, the case will be dealt with as though a counteraffidavit was duly filed denying that such demand was made.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3621, 3622; Dec. Dig. § 889.\*]

**2. LIENS (§ 18\*)—ENFORCEMENT—DEMAND—NECESSITY.**

There being some evidence that demand for payment was not made on the defendant before the foreclosure proceeding was instituted, and the case not being one where failure to make demand is excused, the judgment refusing to sanction the petition for certiorari will not be reversed, irrespective of other questions made in the record. Testimony by the defendant during the trial that, if demand had been made, payment would have been refused, will not dispense with proof of demand. *Civil Code* 1910, § 8366; *Shealey v. Livingston*, 8 Ga. App. 642 (3), 70 S. E. 100.

[Ed. Note.—For other cases, see *Liens*, Cent. Dig. § 80; Dec. Dig. § 18.\*]

Error from Superior Court, Berrien County; W. E. Thomas, Judge.

Action by O. L. Hutson against Joseph Sutton. Judgment for defendant before a justice. From an order refusing a writ of certiorari, plaintiff brings error. Affirmed.

J. B. Murrow and J. J. Murray, for plaintiff in error. Hendricks & Christian, for defendant in error.

POTTLE, J. Judgment affirmed.

(11 Ga. App. 9)

**BRUNSWIG v. EAST POINT MILLING CO.**  
(No. 3,908.)

(Court of Appeals of Georgia. April 2, 1912.)

*(Syllabus by the Court.)***1. SALES (§ 164\*)—PERFORMANCE OF CONTRACT—QUANTITY OF GOODS.**

A contract for the sale of "one car # 2 white corn, 1,000 bu. bulk, price 91½ cts. per bushel f.o.b. East Point, Ga.," is not complied with by the tender at the point of delivery of a car containing 1,071 bushels of corn of the quality contracted for.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 386-390; Dec. Dig. § 164.\*]

**2. CUSTOMS AND USAGES (§ 17\*)—EVIDENCE—ADMISSIBILITY.**

The contract being unambiguous, evidence of a custom of the trade that in sales of the character involved there might be a variance, in the quantity contracted for, of from 50 to 100 bushels, was not admissible.

[Ed. Note.—For other cases, see Customs and Usages, Cent. Dig. § 34; Dec. Dig. § 17; \* Evidence, Cent. Dig. §§ 1945-1952.]

**3. SALES (§ 176\*)—PERFORMANCE OF CONTRACT—WAIVER OF BREACH.**

Failure by the purchaser to assign the variation in quantity as a reason for his refusal to accept is not a waiver of his right, when sued for the purchase price, to plead the failure of the seller to comply with the contract with respect to the quantity tendered.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 436-444; Dec. Dig. § 176.\*]

Error from City Court of Atlanta; H. M. Reid, Judge.

Action by A. J. Brunswig against the East Point Milling Company. Judgment for defendant, and plaintiff brings error. Affirmed.

Payne, Little & Jones, for plaintiff in error. T. O. Hathcock, for defendant in error.

POTTLE, J. Judgment affirmed.

(11 Ga. App. 21)

**WILLIAMS et al. v. STATE.** (No. 4,028.)

(Court of Appeals of Georgia. April 2, 1912.)

*(Syllabus by the Court.)***CRIMINAL LAW (§ 945\*) — NEW TRIAL — GROUNDS—NEWLY DISCOVERED EVIDENCE.**

Under the facts of the present case, the showing as to newly discovered evidence required a new trial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2324-2327, 2336; Dec. Dig. § 945.\*]

Error from City Court of Reidsville; E. C. Collins, Judge.

Bob Williams and others were convicted of crime, and bring error. Reversed.

H. H. Elders, for plaintiffs in error. Robt. E. De Loach, Sol., for the State.

POTTLE, J. There was but one witness for the state. His testimony was that he

saw all of the plaintiffs in error playing cards for money on the last Sunday in April at a certain sawmill, and that two other men accompanied him to the mill and saw the game in progress. Three men of apparently good standing in the community testified positively that the character of the state's witness was bad, and that they would not believe him on oath. A single witness, offered for the purpose of restoring the character of the state's witness, testified that, while he would believe the impeached witness, yet that "it is true that his character is partly good and partly bad; some say it is good, and some say it is bad." The newly discovered evidence consisted of an affidavit from the two persons who the state's witness testified accompanied him to the mill and saw the game, to the effect that they did not go to the sawmill with the witness on the Sunday in question, and did not see any of the defendants engaged in a game of cards. The newly discovered witnesses were properly vouched for, and due showing as to diligence was made by the accused and their counsel.

The accused were probably convicted as much upon the well-known predilection of members of their race for a game of "skin" on a Sunday afternoon as upon the testimony of the state's witness, who had been so thoroughly discredited. The newly discovered evidence would have done much to overcome the presumption of guilt which juries generally apply in this class of cases. If it can be shown that this witness, in addition to being generally unworthy of credit, told a deliberate falsehood in reference to the particular transaction under investigation, no jury could afford to rest a verdict of conviction upon his unsupported testimony. The evidence related to a "new and material fact" (Penal Code 1910, § 1088), and on a second trial would probably produce a different result. Justice demands a new trial. Judgment reversed.

(11 Ga. App. 33)

**CARSON v. STATE.** (No. 4,044.)

(Court of Appeals of Georgia. April 2, 1912.)

*(Syllabus by the Court.)***REVIEW ON APPEAL.**

There are no special assignments of error, and the evidence fully supports the conviction.

Error from Superior Court, Cobb County.

J. J. Carson was convicted of crime, and brings error. Affirmed.

Clay & Morris and Mozley & Moss, for plaintiff in error. J. B. Brooke, Sol. Gen., for the State.

POTTLE, J. Judgment affirmed.



(158 N. C. 473)

**ALEXANDER v. WESTERN UNION TELEGRAPH CO.**

(Supreme Court of North Carolina. April 3, 1912.)

**1. TELEGRAPHS AND TELEPHONES (§ 66\*)—MESSAGES—FAILURE TO DELIVER—RECEIPT FOR TRANSMISSION — MENTAL ANGUISH — EVIDENCE.**

In an action for a telegraph company's failure to deliver a message sent by a surgeon for plaintiff's benefit, agreeing to perform an operation on plaintiff that was then supposed to be immediately necessary to save her life, evidence held to justify a finding that the message was received by defendant for transmission, and that plaintiff suffered sufficient mental anguish by its nontransmission and delivery to justify a recovery of substantial damages.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. §§ 61-63; Dec. Dig. § 66.\*]

**2. TELEGRAPHS AND TELEPHONES (§ 56\*)—MESSAGES—FAILURE TO TRANSMIT AND DELIVER—BENEFICIARIES—RIGHT TO SUE.**

A surgeon, having been applied to by wire to perform an operation on plaintiff, delivered to the telegraph company's messenger boy an answer, to be transmitted to plaintiff's local physician, informing him that the sender would perform the operation requested on credit. This message was never transmitted or delivered, and in consequence thereof plaintiff suffered mental anguish. Held, that plaintiff, being the beneficiary of the surgeon's message and her interest having been made known to the telegraph company, was entitled to recover substantial damages for the latter's negligent failure to deliver the message.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. § 37; Dec. Dig. § 56.\*]

**3. TELEGRAPHS AND TELEPHONES (§ 48\*)—MESSAGE BLANKS—STIPULATIONS—MESSENGER BOY—AGENT OF SENDER.**

When, in response to a specific request, a telegraph company sends a messenger for the express purpose of taking a message for transmission, a stipulation on the back of the message that, if a message is sent to the telegraph office by one of the company's messengers he acts for that purpose as the agent of the sender, does not apply; the messenger under such circumstances being the agent of the telegraph company.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. § 30; Dec. Dig. § 48.\*]

Brown, J., dissenting.

Appeal from Superior Court, Beaufort County; Cline, Judge.

Action by Annie E. Alexander to recover damages against the Western Union Telegraph Company for negligent failure to deliver a telegram. From a judgment allowing a recovery of substantial damages for mental anguish, defendant appeals. Affirmed.

Geo. H. Fearons, Small, MacLean & McMullan, and A. S. Bernard, for appellant. Ward & Grimes, for appellee.

HOKE, J. [1] It was chiefly urged against the validity of this recovery: (1) That there was no evidence that the message had ever been received for transmission by defendant company. (2) That there was not suffi-

cient evidence of mental anguish to justify an award of substantial damages on that account, but we are of opinion that neither position can be sustained.

There was testimony on part of plaintiff tending to show: That she resided with her mother about 300 or 400 yards from Swain, a local railroad station in a remote country district, and on July 19, 1909, she became imminently ill with an attack of appendicitis. That her attending physician was of opinion that an operation was immediately necessary. That he was unwilling and unable to undertake it there with the facilities afforded, and that she should go to a hospital for that purpose. That the plaintiff and her people were unable to pay ready money for such operation, and the doctor, who lived in 150 yards of the telegraph office, undertook to communicate by telegram with Dr. Leigh at Norfolk, and ascertain if the patient could be received in the hospital there and given the necessary treatment. This was 2 p. m. Monday afternoon. That at 4 p. m. Dr. Speight sent Dr. Leigh at Norfolk a message of inquiry as follows: "Roper, N. C. July 19, 1909. Dr. Southgate Leigh, Norfolk, Va.—Young lady appendicitis; Can't pay anything till Fall. Will you operate? Answer. J. H. Speight." This message was shortly received at Norfolk and within 30 minutes after receipt of same Dr. Leigh placed with a messenger boy sent from defendant company office for the purpose of taking the same, a return message, as follows: "May 19, 1909. Dr. J. W. Speight. Yes, send patient at once. What train? Southgate Leigh." That this message was never received, and the doctor, not having heard, did not go to see the patient the following morning by 8:30, as he would have done, nor until 2 or 3 p. m., and then told the parties that no message had been received. That it was then arranged that the patient should go to Dr. Tayloe at Washington, N. C., and she did go there on Wednesday, and was there treated successfully. That Dr. Tayloe was a skillful surgeon, and the patient's case was properly treated at Washington. As tending to show a degree of mental suffering amounting to mental anguish, the plaintiff, testifying in her own behalf, among other things was allowed to say: "He said I had to go to the hospital right away. He could not operate on me. He said that he would wire Dr. Leigh that afternoon and let us know the next morning, and, when my mother asked him why he did not come, he said it was because he had not heard from Dr. Leigh. Tell us whether you were alarmed or not about your condition, and to what extent as best you can? (Objection by defendant, overruled, and defendant excepts.) I was alarmed. I was scared. I had never thought of going to the hospital before. My

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes 74 S.E.—29

mother was crying and my sister, too, and, of course, they came in the room crying, and that scared me. (Defendant objects to this form of answer, and moves that the same be stricken out. Objection overruled, and defendant excepts. Here the court charged the jury that they should not consider the crying of the mother nor anything except the plaintiff's mental and physical condition directly due to her failure to hear from Dr. Speight as to whether he would operate.) I did not know of anywhere I could get relief except from Dr. Leigh during that whole day until Dr. Speight came late in the evening, and said he had not heard from Dr. Leigh, and fixed for me to go to the Washington Hospital. Q. What impression was made on your mind by Dr. Speight that you would die if you did not get operated on? A. He said that an operation had to be performed, and so I thought it was an operation or death. Q. Why was it that you had to look to Dr. Leigh? \* \* \* A. Because that was all Dr. Speight had told me. Q. Did you have any money to pay cash for your operation? A. I did not. \* \* \* And again: "Q. From the time Dr. Speight said he could not hear from Dr. Leigh on through the balance of the afternoon and night and next morning until you heard from Dr. Speight that Dr. Tayloe would operate on you, what was your mental condition with reference to the question as to whether you could get anybody to operate on you at all? A. I thought the reason that Dr. Leigh had not answered the telegram was that I did not have the money to pay him with, and I did not know whether I could get anybody else to operate on me or not. I did not know whether Dr. Tayloe would operate on me without the money or not, and my mind was all torn up because I did not know whether I could get anybody to operate on me or not. If I had heard from Dr. Leigh, I would have known whether he would operate on me or not, and would have not been uneasy. \* \* \* And further: "I was conscious of everything that was happening. I was studying whether I could be operated on or not. I did not want to be operated on, but, after Dr. Speight said I had to be operated on, I thought I would have to be operated on right away or die one. My mother and sister were crying because they were afraid of the operation and death, too, I suppose. What was troubling me was that Dr. Speight said I had to be operated on, and we didn't hear from Dr. Leigh, and I didn't know of anywhere else I could get operated on. \* \* \* I did not know why he did not hear from Dr. Speight. I did not know whether he thought I would die before I could get to the hospital or not. I was lying there thinking that he thought I was too low to go to the hospital, and that I would die before I could get there. I thought he

was waiting to let me die before he let us know what was the matter. That annoyed my mind. Q. To what extent? A. I was in agony. I did not know what to do or what to think. I just thought that he was waiting for me to die." On the same subject Walker Alexander, a brother of plaintiff, testified as to his sister's suffering as follows: "She would ask me when I would go to the room, 'Bud have you heard from the doctor yet?' and I said, 'No.' She said, 'Do you think I am going to die?' and I said, 'No; I hope not.' All she talked about was believing she was going to die."

[2] The right of an addressee or a beneficiary whose interest has been made known to the company to recover for a negligent failure to deliver a message of this character is fully established with us and a perusal of the testimony will clearly bring plaintiff's cause within the principle of our decisions, where substantial damages by reason of mental anguish have been allowed. *Christman v. Telegraph Co.*, 74 S. E. 325, present term; *Kivett v. Telegraph Co.*, 156 N. C. 296, 72 S. E. 388; *Suttle v. Telegraph Co.*, 148 N. C. 480, 62 S. E. 593, 128 Am. St. Rep. 631; *Dayvis v. Telegraph Co.*, 139 N. C. 80, 51 S. E. 898; *Green v. Telegraph Co.*, 136 N. C. 489, 49 S. E. 165, 67 L. R. A. 985, 103 Am. St. Rep. 955, 1 Ann. Cas. 349; *Bright v. Telegraph Co.*, 132 N. C. 317, 43 S. E. 841; *Kennon v. Telegraph Co.*, 126 N. C. 232, 35 S. E. 468; *Young v. Telegraph Co.*, 107 N. C. 370, 11 S. E. 1044, 9 L. R. A. 669, 22 Am. St. Rep. 883. As to the receipt of the message by the company, the relevant facts appearing in the record as we understand them are that the original message was received by Dr. Leigh in due course, at his office in Norfolk on the afternoon of July 19th, and the doctor then dictated a return message, which was written by his secretary on a company blank kept regularly in his office for the purpose. The secretary then called over the telephone for 165, the telegraph company's number, and asked them to send a boy for the telegram. The witness stating that "165 was the defendant company's phone number," as she had called it several hundred times before; that in 15 or 20 minutes, not over a half hour, a boy came for the return message and it was delivered to him in the office of Dr. Leigh. There was evidence for defendant from the different employes of the office that no such message was received in the office of the company, and the office record, the call sheet on which all entries of the kind were made, was referred to by the witnesses, who stated that it showed no call for a messenger on that date for any purpose, and, on consideration of the testimony and the authorities applicable, we are of opinion, and so hold, that there was a receipt of the return message for transmission on the part of the company, or, rather,

testimony from which such receipt could be properly inferred, and this notwithstanding a stipulation appearing on the blank that no responsibility regarding messages should attach to the company, unless accepted at one of its transmission offices, and, if a message is sent to office by one of the company's messengers, he acts for the purpose as "agent of the sender." It is well understood here and in other jurisdictions that a telegraph company may make reasonable stipulations restrictive of their liability and to the extent that they are not relieved thereby from the obligations of diligence superimposed by law in the performance of their duties (*Sherill v. Telegraph Co.*, 109 N. C. 527, 14 S. E. 94; *Thompson v. Telegraph Co.*, 107 N. C. 449, 12 S. E. 427), and there is authority to the effect that the stipulations in question here appearing on a blank on which the sender writes the message shall bind the sender as a part of the contract (*Stamey v. Western Union*, 92 Ga. 613, 18 S. E. 1008, 44 Am. St. Rep. 95).

[3] If this, however, may be allowed to prevail under ordinary conditions, it is qualified, as a general proposition, by decisions which hold that, if a messenger is instructed by the company to procure an answer for this last purpose, the messenger will be considered the company's agent, and the stipulation referred to is not controlling. And this limitation should apply, we think, when in response to a specific request the company sends a messenger for the express purpose of taking a message. *Will et al. v. Telegraph Co.*, 8 App. Div. 22, 37 N. Y. Supp. 933; *Ayers v. Telegraph Co.*, 65 App. Div. 149, 72 N. Y. Supp. 634; *Jones on Tel. & Tel. Cos.* § 408; 37 Cyc. p. 1692, note 63. The case of *Ayers v. Telegraph Co.*, 65 App. Div., 72 N. Y. Supp., cited by defendant, recognizes the limitations on the general principle established in the former case. *Will v. Telegraph Co.*, supra.

In this connection it was further insisted for defendant that there was no evidence that the messenger boy was sent by the company for the purpose of receiving the message, and that the message given over the telephone wire to the telephone number of defendant company was not sufficient as testimony, in the absence of evidence ultra that this message was received by an agent of defendant company authorized for that purpose, citing *Planters' Oil Co. v. Telegraph Co.*, 126 Ga. 621, 55 S. E. 495, 6 L. R. A. (N. S.) 1180. While there is some difference in the facts of that case, we do not think it can be upheld as authority on the facts presented here, where the number is called, known to be that of the telegraph company, "tried as such several hundred times," as stated by the witness and responded to by a company messenger. In such case on the better reason and by the weight of authority, we are of opinion that a messenger sent in response to such a

request should be considered prima facie an agent of the company, and certainly under such circumstance there is evidence from which authority of the company could be inferred. *Reed v. Railroad*, 72 Iowa, 166, 33 N. W. 451, 2 Am. St. Rep. 243; *Rock Island R. v. Potter*, 36 Ill. App. 590; *Gore v. Telegraph Co.* (Tex. Civ. App.) 124 S. W. 977; *Jones on Evidence* (2d Ed.) p. 262.

There were also several objections to the admission of evidence chiefly as to the physical and nervous condition of the plaintiff at the time in question, but none of the exceptions can be sustained or held for reversible error. Most of the testimony was directly relevant as tending to show mental suffering that would naturally arise under the conditions indicated, and, where it was otherwise, the trial court in its clear and comprehensive charge was so careful to restrict the recovery and the effect of the evidence to the suffering directly attributable to the failure to deliver the message and to that alone that the jury could not have been misled. There is no error, and the judgment below must be affirmed.

No error.

BROWN, J. (dissenting). The facts upon which this action is based are as follows: Plaintiff, who resided with her mother at Roper, N. C., was stricken with appendicitis. Her physician, Dr. Speight, advised an operation, and on Monday, July 19th, at 4 p. m., in plaintiff's behalf, wired Dr. Leigh at Norfolk, Va., in regard to performing it. Dr. Speight told his patient that he would see her next morning, and let her know what Dr. Leigh said. Dr. Speight did not visit his patient next morning, as promised, but called to see her at 2 p. m. that day, Tuesday, and informed her that he had not heard from Dr. Leigh, and that he had arranged for her to go to the Washington, N. C., Hospital to be treated by Dr. David Tayloe, an acknowledged expert in his profession. Dr. Speight says that plaintiff could not have left her home and arrived at Norfolk until 4 p. m. Wednesday, the 21st, and that she arrived at Washington Hospital in safety at 11 a. m. that day, five hours earlier than she could have reached Norfolk. She would have been compelled to travel 84 miles to Norfolk, and only traveled 40 to Washington. Plaintiff admits "that she came to as good hospital as she would have gone to if she had gone to Dr. Leigh's and got as good surgical attention." Dr. Tayloe kept the plaintiff until July 28th on account of slow development of the disease before operating. The operation was successful, and plaintiff returned home completely recovered.

1. The defendant excepted because the court permitted testimony that the plaintiff traveled from Roper to Washington on a "mixed" freight and passenger train, and the record shows that this evidence was re-

peated to the jury in several different forms over the objection of the defendant. It is true that his honor, at the time when the objection was first made, stated to the jury that they were not to consider the riding on a freight train as a measure or cause of damage, and, if the evidence had been terminated then and there under such instruction, it might be regarded as a harmless error. But the record shows that this testimony was repeated by several witnesses after that admonition to the jury over the subsequent objection of the defendant, and strongly impressed upon them, and undoubtedly they had a right to suppose that such testimony as was allowed by the court, after the admonition given, was intended to be considered. Such evidence was utterly erroneous and very harmful. The record shows that the plaintiff was brought in the baggage car on a cot. According to the testimony of Dr. Tayloe himself, she need not have come on the "mixed" train, but could have taken the regular passenger train, and arrived at Washington at 4 p. m., the same hour at which she would have arrived at Norfolk. Notwithstanding those facts proven by the plaintiff's own witnesses, and after the admonition of the judge, the plaintiff was permitted to testify that this "mixed" train, which she voluntarily took, without any necessity, was jarring in its motion, had to go in on side tracks and get freight cars, log cars, and switch cars in and out. No one can read the evidence in this case without being impressed with the undeniable fact that this evidence must have had great effect upon the jury in estimating the damages. That such evidence is incompetent, harmful to the defendant, and could not possibly have been in the contemplation of the parties, is shown by overwhelming authority. *Hancock v. Telegraph Co.*, 142 N. C. 163, 55 S. E. 82; *McCoy v. Railroad*, 142 N. C. 383, 55 S. E. 270. I am of opinion that a new trial should be granted for this flagrant and material error. Other incompetent evidence was received by the court over the objection of the defendant on which it is not necessary now to comment.

2. I am of opinion that there is no evidence in this record upon which a legitimate claim for damages for mental anguish suffered by the plaintiff because she did not hear from Dr. Leigh can be founded. It is admitted by the counsel for the plaintiff that the only period of time when the plaintiff could have suffered any mental anguish on such account covered only a very short time. She was told by Dr. Speight that he could not hear from Dr. Leigh until some time Monday morning, when he would come over and inform her of the result. He did not come until 2 p. m. on Tuesday, at which time he informed her that he had not heard from Dr. Leigh, and had made arrangements to take her to Washington. She left for Wash-

ington the next morning, and arrived there at 11 a. m., and could not be operated upon until the 28th on account of the condition of her appendix. I fail to find in the testimony of the plaintiff herself anything whatever which tends to prove that from the time that she expected to hear from Dr. Leigh Tuesday morning until 2 p. m., when Dr. Speight came, that she could reasonably have suffered any mental anguish because she had not heard from Dr. Leigh. During that time, according to her own testimony, she had grown very weak from the acute and sudden attack of her disease. She was greatly under the influence of drugs given to deaden this pain, which according to all the evidence was of such acute character as to render the plaintiff practically oblivious to her surroundings, and to the fact that she had not heard from the telegram sent to Norfolk.

Again, his honor permitted over the objection of the defendant, not only the plaintiff herself, but her physicians, to describe to the jury her physical condition, her acute and agonizing suffering, for none of which could this defendant be held responsible, and all of which was well calculated to appeal to the sympathies of the jury, and greatly and grossly aggravated the damages assessed. Upon the facts as set out in this record, I am bound to conclude with all deference to my Brethren who differ with me that the plaintiff should be permitted to recover \$1,000 for alleged mental anguish in not hearing from Dr. Leigh when her body and mind were tortured by agonizing disease, which undoubtedly excluded every other thought, is a great miscarriage of justice which should not be permitted to take place in the courts of this state.

The majority of courts in this country, as well as Great Britain, repudiate this doctrine of "mental anguish" because of the inequalities it produces and the impossibilities of establishing any uniform rule of damage, as well as on account of the frivolous character of many cases where the doctrine is applied.

I am of opinion that the facts of this case disclose no reasonable or just foundation upon which to base a recovery and that it should be dismissed by the court.

(158 N. C. 451)

WHITFIELD et al. v. BOYD et al.

(Supreme Court of North Carolina. March 27, 1912.)

1. EJECTMENT (§ 132\*)—RENTS AND BETTERMENTS.

Under Revisal 1905, § 652, providing for allowance to an unsuccessful defendant in ejectment for the value of improvements made by him in good faith under color of title, section 654 providing that defendant shall not be liable for rents for more than three years before suit, unless when he claims for improvements aforesaid, and section 656 providing

that, if the assessment for improvements exceeds the value of the rents for such three years, the rents for any time before such three years shall be estimated as for as necessary to balance the claim for betterments, but defendant shall not be liable for the excess thereof beyond the value of the improvements, plaintiff can in no case recover the rents for more than three years, and none where the betterments exceed the rents for such period.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. §§ 444, 447, 449-452; Dec. Dig. § 132.\*]

## 2. EJECTMENT (§ 127\*)—RENTS AND BETTERMENTS—MARRIED WOMEN.

Where one has brought ejectment, there is no exception in her favor, because of her being a married woman, in the matter of adjustment of betterments and rents.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. §§ 438-443; Dec. Dig. § 127.\*]

## 3. HOMESTEAD (§ 94\*)—BETTERMENTS—HOMESTEAD.

Plaintiff in ejectment cannot claim a homestead in priority to defendant's lien for betterments.

[Ed. Note.—For other cases, see Homestead, Cent. Dig. §§ 136-140; Dec. Dig. § 94.\*]

Appeal from Superior Court, Surry County; E. B. Jones, Judge.

Action by Bolling Whitfield and others against McD. Boyd and others. Judgment for plaintiffs was affirmed on equal division of the court. Defendant Boyd petitions for rehearing. Petition allowed.

Manly, Hendren & Womble, for petitioner. Watson, Buxton & Watson, opposed.

CLARK, C. J. This is a petition to rehear this case, which was decided at spring term, 1911. The only point sought to be presented is the ruling of the referee which was approved by the judge below that the petitioner, McD. Boyd, was liable for rents for more than three years next preceding the commencement of the action.

[1] In the original action, the plaintiffs sought, among other things, to recover of McD. Boyd a tract of land known as the "Homestead," alleging want of title in him. The referee found that McD. Boyd had title to all the interests in said land, except that Marietta C. Sheek was entitled to recover one-fifth interest in said land with one-fifth of the rents after the death of Elizabeth C. Sheek in 1879, down to the hearing in 1906 at the rate of \$80 per year, making a total of \$2,080 besides interest on each installment as it yearly fell due. The defendant Boyd excepted, but the referee was affirmed by the superior court, and, on appeal here, the judgment was affirmed by a per curiam order; the court being evenly divided. Boyd duly entered of record notice of his claim to have the value of his betterments assessed in this action. We are of opinion that this action, so far as recovery of this tract of land is concerned, was, in effect, a proceeding in ejectment. Rev. 654 provides that

in such cases "the defendant shall not be liable for such annual value for any longer time than three years before the suit, or for damages for any such waste or other injury done before said three years, unless when he claims for improvements as aforesaid."

The statute applicable is:

(1) Rev. 652 provides that when the court is satisfied of the probable truth of an allegation that the defendant while holding the premises under a color of title believed by him to be good, made permanent improvements thereon, he shall be allowed for the same over and above the value and occupation of the land. The court shall suspend judgment and impanel the jury to assess the damages of the plaintiff, and the allowance to the defendant for such improvements.

(2) Rev. 653: The jury in such case shall assess against the defendant the clear annual value of the premises exclusive of the use of the improvements by him; i. e., the rents should be assessed upon the basis of the property without such betterments.

(3) Rev. 654: The defendant shall not be liable for such annual value or for waste and damage for a longer time than three years before suit, with the exception of the provision in the next two sections.

(4) Rev. 655: The jury shall estimate in favor of the defendant the value of the improvements, made by him before notice in writing of the title under which the plaintiff claims, not exceeding the amount actually expended in making them, and not exceeding the amount to which the value of the premises is actually increased thereby at the time of the assessment.

(5) Rev. 656: If the assessment for improvements exceed the damages assessed by the jury against the defendant for said three years, the jury shall then estimate against him the rents and profits and damages for waste and injury so far as may be necessary to balance his claim for improvements. But the defendant shall not be liable for the excess of such rents and profits and damages if any beyond the value of improvements.

Barker v. Owen, 93 N. C. 202, citing Merritt v. Scott, 81 N. C. 385, and Wharton v. Moore, 84 N. C. 479, 37 Am. Rep. 627, are exactly in point. Reed v. Exum, 84 N. C. 430, is not in point because there the deed was set aside because procured by duress, and the defendant, not being a bona fide holder, was not entitled to the equity of reimbursement out of the rents not barred by the statute of limitations before applying to payment for betterments the rents that are thus barred, as is provided for by Rev. 656.

Sections 657 and 658 provide that the judgment shall be for the difference, if any, found in accordance with the above rules, and that any balance due the defendant

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

shall be a lien upon the land recovered by the plaintiff.

Applying the above rules, the plaintiff was entitled to recover in no event to exceed the \$80 per year for three years preceding action begun with interest on each installment. The defendant was entitled to have the betterments placed by him upon the land in good faith and without notice assessed, not to exceed the amount actually expended by him, with interest thereof, and not to exceed the increased value of the premises at the time of the assessment which has been caused thereby. If said betterments exceed in value the three years rental, and damages for waste, the rents and profits accruing prior to the three years may be assessed so far as is necessary to balance the improvements, but no further. The defendant McD. Boyd is not liable for rents and profits and damages prior to said three years should they exceed the value of the improvements, but, if the value added to the land by him exceeds the rents and profits and damages, he is entitled to recover the pro rata part, one-fifth thereof, due by the plaintiff, Marietta C. Sheek. Rev. 652.

[2] The statute of betterments is a statutory expression of the equitable principle that, when one under color of title believed by him to be good makes permanent improvements upon land, he shall be entitled to make use of the value thus added to the land by him, not to exceed the amount actually expended by him, after deducting for rents and profits and damages for injury to such premises for not exceeding three years prior to the action. There is no exception in the statute in favor of married women, and there should have been none. The exception of married women from the statute of limitations was repealed in 1899 (chapter 78), and, indeed, had no logical place in our laws after the enactment in 1868 that she could bring suit in her own name without joining her husband (Rev. 408). That exception was to protect a married woman from being barred when she delayed to bring action, but it had no application to a cause like the present, where she has brought her action, and there is to be an equitable adjustment of benefits accruing to her on account of betterments placed on the property by the defendant and the rents and damages incurred by him.

[3] Indeed, the plaintiff could not claim a homestead in priority to the defendant's lien for betterments. *Barker v. Owen*, 93 N. C. 199. The judgment heretofore entered is modified accordingly. The other defendants did not file a petition to rehear, and, though one of them has filed a brief, it cannot be considered.

Petition allowed.

BROWN, J., did not sit.

(159 N. C. 1.)

**COTTEN v. MOSELEY et al.**

(Supreme Court of North Carolina. April 3, 1912.)

**1. DEEDS (§ 128\*)—RULE IN SHELLEY'S CASE.**

Under the rule in Shelley's Case that, where an estate is limited to an ancestor for life and afterwards to his heirs, the ancestor takes the whole estate in fee instead of merely for life, a deed to husband and wife during their natural lives, and afterwards to the wife's heirs forever, conveyed the fee to the wife subject to the husband's life estate, and it was immaterial that the second limitation was not to the heirs of both husband and wife.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 413-415, 419-421, 427; Dec. Dig. § 128.\*]

**2. DEEDS (§ 133\*)—CONTINGENT REMAINDER.**

Where the limitation of a conveyance is to one for life, remainder to the heirs of her and her husband, the limitation over is a contingent remainder, and their heirs take as purchasers, because the heirs of the husband will not necessarily be the heirs of the wife.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 368-371; Dec. Dig. § 133.\*]

**3. DEEDS (§ 8\*)—ESTATE OF GRANTOR.**

One who has a freehold which by the terms of the limitation of the conveyance to him is to go to his heirs may alienate the estate subject only to such intervening limitations as may have been created between his freehold and the inheritance limited to his heirs.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 13-18, 408-412; Dec. Dig. § 8.\*]

**4. DEEDS (§ 128\*)—RULE IN SHELLEY'S CASE.**

It is the form of the limitation of a conveyance to one and his heirs, and not the quantity of the estate of the first taker, which determines whether the fee is taken by the ancestor under the rule in Shelley's Case.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 413-415, 419-421, 427; Dec. Dig. § 128.\*]

**5. REMAINDERS (§ 14\*)—CONVEYANCE—ESTATE CONVEYED.**

Where one having title to property in fee simple subject to a life estate in her husband conveyed the property to a third person by a deed in which her husband joined, the entire estate in fee passed to such party.

[Ed. Note.—For other cases, see Remainders, Cent. Dig. § 10; Dec. Dig. § 14.\*]

Appeal from Superior Court; Pitt County; Whedbee, Judge.

Action by R. R. Cotten against J. M. Moseley and others. From a judgment for defendants, plaintiff appeals. Reversed.

This case was heard below upon the following admitted facts: On September 13, 1871, William Gardner, being then the owner in fee of the tract of land in controversy, containing 140 acres, conveyed the same by deed "to Henry C. Gardner and his wife, Martha Jane Gardner, during their natural lives, afterwards to Martha Jane's heirs forever." The said grantees entered into possession of the land on that day, and continued in the possession until January 2, 1886, when they conveyed the land in fee by their deed duly executed to the plaintiff, R. R. Cotten, and he contracted to sell and convey the same in fee by deed, good and sufficient for the purpose,

to the defendants J. M. Moseley and W. B. Wooten. Plaintiff tendered a deed to them for the premises, and they declined to accept it and pay the purchase money, because the title is defective, as by the terms of the deed of William Gardner to Henry C. and his wife, Martha Jane, they acquired only a life estate, with remainder to the heirs of Martha Jane, who, it is alleged, take by purchase, and not by descent, and that the said heirs now claim the land accordingly, subject to the life estate of Henry C. Gardner, who is now living, his wife, the said Martha Jane, being dead. The heirs of Martha Jane Gardner are defendants in the case. The court held, and so adjudged, that the deed of William Gardner to Martha Jane Gardner did not convey the fee, but only a life estate, and therefore the plaintiff's deed will not convey a fee-simple estate to Moseley and Wooten. Plaintiff appealed.

F. G. James & Son and Aycock & Winston, for appellant. W. A. Finch and C. C. Pierce, for appellees.

WALKER, J. (after stating the facts as above). The question in the case is whether the limitation of the estate to husband and wife for their natural lives, afterwards to the heirs of the wife forever, is sufficient to pass the fee under the rule in *Shelley's Case*. The principle embodied in this rule, which, perhaps, was first formally and authoritatively announced by all the judges during the reign of Elizabeth, in the case from which it takes its name (1 Coke, 219), was of far more remote origin, and for many years had been called "an ancient dogma of the common law." The principal and most forceful reasons advanced for adopting the rule were to prevent the abeyance or suspension of the inheritance, and to facilitate the alienation of land, throwing it into the track of commerce one generation sooner, by vesting the inheritance in the ancestor, than if he continued tenant for life and the heir was declared a purchaser. "Therefore," said Justice Blackstone, "where an estate was limited to the ancestor for life, and afterwards (mediately or immediately) to his heirs, who are uncertain till the time of his death, the law considered the ancestor as the first principal of the donor's bounty; and therefore permitted him (who, as it is said, Co. Litt. 22, beareth in his body all his heirs, and who had the only visible and notorious freehold in the land) to sell it, devise it, where the custom would permit, or charge it with his debts and incumbrances. And however narrow and illiberal the original establishment of this rule, or the adhering to it in later times, may have been represented in argument, I own myself of opinion that those constructions of law which tend to facilitate the sale and circulation of property in a free and commercial country, and make it more liable to the debts of the visible owner, who derives a

greater credit from that ownership, such constructions, I say, are founded upon principles of public policy altogether as open and as enlarged as those which favor the accumulation of estates in private families by fettering inheritances till the full age of posterity now unborn, and which may not be born for half a century." The rule has also been fiercely assailed by some and mildly criticised by others, as being at war with our free institutions and policy, and as founded upon subtle and artificial reasons and extremely technical considerations. Whether it is an arbitrary rule which is calculated to defeat rather than to execute the intention of the grantor we are not at liberty to inquire, as it has been firmly established in our jurisprudence as a rule of law, which we must enforce whenever applicable.

[1] The question before us is as to the legal effect of the deed of William Gardner to Henry C. and his wife, Martha Jane Gardner. Did it convey the fee to Martha, under the rule in *Shelley's Case*? We are of the opinion that it did. The defendants contend that the subsequent limitation must be to the heirs of the person who takes the particular estate—that is, in this case, the second limitation should have been to the heirs of both husband and wife, as they were seised of the entirety and did not take by moieties—but such is not the true operation of the rule.

[2] If the limitation had been to the wife for life, remainder to the heirs of the husband and wife, the freehold being in the wife alone, the limitation over would be a contingent remainder, and their heirs would take as purchasers, because the heirs of the husband would not necessarily be the heirs of the wife. 2 Washburn on Real Property (5th Ed.) p. 649; *Robinson v. Wharey*, 3 Wilton, 125. As Fearn (page 38) says: "Every person may so far be supposed to carry his own heirs in himself during his life, as that a limitation to them where he takes a preceding freehold may vest in himself; yet no person can be supposed to include in himself the heirs of himself and of somebody else." Coke (section 26) refers to this passage from Littleton; "It tenements be given to a man and to his wife, and to the heirs of the bodie of the man, in this case the husband hath an estate in general taile, and the wife but an estate for terme of life. If lands be given to the husband and wife, and to the heires of the husband which he shall beget on the body of his wife, in this case the husband hath an estate in special taile, and the wife but an estate for life. If the gift be made to the husband and to his wife, and to the heires of the body of the wife by the husband begotten, there the wife hath an estate in special taile, and the husband but for terme of life. But if lands be given to the husband and the wife, and to the heires which the husband shall beget on the body of the wife, in this case both of them have an estate taile, be-

cause this word (heirs) is not limited to the one more than to the other." Commenting upon this passage, Coke says: "This word [heirs] is nomen operativum. To which of the donees it is limited, it createth the estate tail; but if it incline no more to the one than to the other, then both doe take, as here Littleton putteth the case." In pleading seisin of such an estate (when the inheritance inclines to the wife), "it shall be alleged that they were seised together and to the heirs of the body of the wife in her right; and not that they were seised of the freehold or fee tail." Coke, § 28, and note 1. And Fearn (page 39) tells us that "the same distinction was relied on" in *Repps v. Bonham*, *Yelverton*, 131, "where, upon a feoffment to the use of R. and his wife for their lives, remainder to the use of the first, second and third son of the body of the wife, and afterwards to the heirs of the body of the wife by R. begotten, it was held that the inheritance was only in the wife, because the word 'heirs,' which made the inheritance, was annexed only to the body of the wife; but that, if it had been to the heirs which the husband should beget on the body of the wife, it would have been an estate tail in them both." In the official report of this case it is stated to have been held that R. had an estate for life and his wife an estate tail, and "this was adjudged by all of the court, without any scruple." In a note to that case it is said that, to whichever body the word "heirs" inclines by the limitation, it creates a descendible estate in such person; but, if it be not more particularly limited to the body of one than the other, but inclines to each alike, then it creates a descendible estate in each of them. 3 *Bac. Abr.* (Bouvier's Ed.) p. 439. It is not necessary that the limitation to the heirs should be enjoyed immediately upon the death of the first taker. Nor will it have any effect to exclude the rule that the remainder cannot by possibility vest as a remainder in the lifetime of the ancestor, as where the limitation was to A. and B. and the heirs of him who should die first. So, if the remainder be limited on a contingency which does not happen in the ancestor's lifetime, nevertheless the heirs will take by descent. The mere circumstance that the remainder was contingent does not prevent the operation of the rule the moment the remainder vests. Thus an estate limited to A. for life, and, if A. survives B., then to his heirs, would be a contingent remainder in A., depending upon his surviving B. If he does, his estate becomes at once vested, and his term for life merges in the inheritance. *Starnes v. Hill*, 112 N. C. 1, 16 S. E. 1011, 22 L. R. A. 598.

[3] As a consequence from the foregoing principles, whoever has a freehold, which, by the terms of the limitation, is to go to his heirs, may alien the estate, subject only to such limitations as may have been created between his freehold and the inheritance limit-

ed to his heirs. Thus, where the limitation is to A. for life, and after his death to B. for life, and after his decease to the heirs of A., A. practically has two estates—one in possession, the other in remainder; the first for life, the other in fee, divided by the estate to B. And, if B. were to die in the life of A., the latter's estate would merge, and he would at once become the unlimited tenant in fee of the estate. 2 *Washburn*, R. P. (5th Ed.) p. 650. There are many cases in the books where it has been held that if an estate is limited to several persons for or during their lives, with remainder to the heirs of one of them, that one will take a fee, subject, of course, to the life estates of the others. See exhaustive note on the rule in *Shelley's Case* to *Price v. Griffin*, 150 N. C. 523, 64 S. E. 372, and other cases, in 29 L. R. A. (N. S.) 935; *Balls v. Davis*, 241 Ill. 536, 89 N. E. 706, 29 L. R. A. (N. S.) 937. The rule is said to "act upon the words of inheritance, and does not affect the rules for determining the quantity of estate conveyed, or the number and connection of the owners of the land." The very question presented in this case has been decided in other jurisdictions. In *Hess v. Lakin*, 7 Ohio S. & C. P. Dec. 800, where the grant was to a man and a woman during their natural lives, then to the woman's heirs at law, it was held that the woman took a fee in the whole tract of land, expectant as to one moiety, or subject to that life estate; and the court said: "It must be conceded the rule applies only when the subsequent limitation is to the heirs of him to whom the preceding estate was given, but nowhere has it been affirmed in express terms, by either a court or a text-writer, that the ancestor must take the whole of the preceding estate, or, if there is more than one preceding estate, he must have all of them. There is just as much reason for requiring him to have all of them when several antecede the remainder as there is for requiring him to have the entire preceding estate when only one precedes the remainder." The rule is learnedly discussed in that case, and was held to apply to a limitation similar to the one in the *William Gardner* deed. The two cases are strikingly alike in their facts, for in *Hess v. Lakin* it was decided that the wife acquired a fee simple, subject to her husband's life estate, and, having purchased that estate, she held the entire fee, which was, therefore, conveyed by her subsequent deed. The following authorities are cited in support of the decision: 1 *Preston on Estates*, 337-340; *Fearn on Remainders*, 36; *Fuller v. Chamler*, L. R. 2 Eq. 682; *Bullard v. Goffe*, 20 Pick. (Mass.) 252. The court gives the following extract from *Wooddeson*: "If the particular estate be to A. and B., jointly for their lives, remainder to the heirs of the body of B., this will be an estate-tail in B., executed in B., so as to make the inheritance not grantable distinct from the



particular estate of freehold by way of remainder, but, on the other hand, not to sever the jointure, or entitle the wife of B. to dower." Preston on Estates, 338. This corresponds with what is said in *Fearne on Remainders* at page 36. The same was decided in *Kepler v. Reeves*, 7 Ohio Dec. 34, in which there was a grant to husband and wife for their lives, remainder to the heirs of the wife. Judge Avery, delivering the opinion of the court, said: "Where either husband or wife singly has an estate for life, and the subsequent limitation is to the heirs of the two, it is widely different from where the life estate is in the two, with a limitation singly to the heirs of one. No person can be supposed to include in himself the heirs of himself and some other person, and yet may so far be supposed to carry his own heirs in himself during life that a limitation to them, where he takes a preceding freehold, will vest in him. That the preceding freehold may be taken jointly by himself with others seems, according to the authorities, not to make a difference. It is laid down that the subsequent limitation to the heirs must be confined to those of the ancestor who takes a particular estate, but at the same time that, if the heirs be confined to those of the persons taking a particular estate, it matters not whether the estates of the ancestors be several (so they all take) or joint, nor whether the remainder over be to the heirs of all, or only of some of such ancestors. *Watkins on Descents*, p. 162; *Fearne*, 86; 1 *Prest. Est.* 315-320; 2 *Prest. Est.* 442; 9 *Mod.* 292; 2 *Rep.* 61. In *Fuller v. Chamier*, L. R. 2 Eq. 682, it was held that an estate to A., B., and C. in equal shares during life, and after their decease unto the next lawful heir of A. forever, was a limitation within the rule of *Shelley's Case*, and that A. took an estate in fee simple. In *Bullard v. Goffe*, 20 Pick. (Mass.) 252, upon a conveyance to the use of husband and wife for their lives, and the life of the survivor, and after their decease to the use of H. for life, and after the decease of H. to the use of the heirs of the wife forever, it was held that a fee simple in the land vested in the wife, in the case of her surviving her husband and H. This last case furnishes a precedent precisely in point, and will be followed." So in *Patterson v. Patterson*, Dayt. 28 (cited in *Laning, Ohio Cyc. Dig.* 5865), it was held that: "Where title to lands is derived by deed limiting it to a person and her husband during their lives, and to the heirs of her body forever, the grantees in the deed take an estate for their lives under the rule, and the children take by descent, and not by purchase, and the husband is entitled to the estate by curtesy, and there can be no partition." In *Griffiths v. Evan*, 5 Beav. 241, a devise of a freehold estate to testator's daughter for life and the life of her husband, and after their deaths to the use of the law-

ful issue of the body of the wife forever, the testator empowering and authorizing the daughter, for want of such issue, to settle and dispose of the estate as she should think fit by will, was held to create an estate tail in the daughter, with a power of appointment. Under a deed by which lands were conveyed to a man and his wife during the term of their natural lives, and to the heirs of the wife and her assigns forever, to have and to hold unto the said husband and wife during the term of their natural lives, and to the heirs of the wife and their assigns forever, it was held that the wife took a fee simple. *Badgley v. Hanford*, 12 N. J. Law J. 75. The court said (by Van Syckle, J.) that where the particular estate is granted to two, with a limitation to the heirs or heirs of the body of one of them, the inheritance is executed in the person to whose heirs it is limited. And it was further said: "This case, I think, is not excluded from the rule in *Shelley's Case* by the fact that the husband was entitled to the use of the property during the joint lives of himself and wife. *Washburn v. Burns*, 34 N. J. Law, 18; *Bolles v. Trust Company*, 27 N. J. Law, 308. That is an incident of the marriage relation necessarily flowing from the unity of husband and wife. Each was in law, however, seised of the entirety, and all the conditions were fulfilled which are necessary to bring it within the rule in *Shelley's Case*. The particular estate and the remainder in her were created by the conveyance from *Simpson*."

[4] It is the form of the second limitation which determines the application of the rule, and it is so held in *Crockett v. Robinson*, 46 N. H. 461. Under the rule in *Shelley's Case*, the court said: "It is not material to inquire what the intention of the testator was as to the quantity of estate that should vest in the first taker. If the limitation were to A. for life, remainder to his heirs in fee simple, without other qualifying words, the actual intention would undoubtedly be that A. should take an estate for life only and have no power to dispose of the remainder in fee, and negative words saying that A. should take for life only would add nothing to the clearness of the first words. The material inquiry is, What is taken under the second devise? If those who take under the second devise, take the same estate that they would take as his heirs or as heirs of his body, the rule applies. However clear the intention may be to create an estate in A. for life, remainder to his heirs, so that the estate shall go to those persons who are the heirs of A., and descend to his heritable blood in line of descent, the policy of the law, which established the rule in *Shelley's Case*, did not allow such a limitation. By that rule no person was permitted to raise in another an estate of inheritance, and at the same time make the heirs of that person purchasers. 6 *Cruise*, 325, 326, 328; *Fearne on Con. Rem.*

196; Hargrave's Tracts, 551; 4 Kent, 208, 214; Denn v. Puckey, 5 T. R. 299, 303; Richardson v. Wheatland, 7 Metc. (Mass.) 172." This passage was cited with approval in Nichols v. Gladden, 117 N. C. at page 502, 23 S. E. 459, in which the court said that "the material inquiry is, what is taken under the second devise?"

[5] As H. C. Gardner survived his wife, the limitation is the same, in legal effect, as if it had been to his wife for life, then to him for life, and ultimately to the heirs of his wife. She acquired a fee simple, subject to his life estate, and, as he joined with her in the deed to R. R. Cotten, the entire estate in fee passed to the latter. Wooddeson, 205. The judgment of the court was therefore erroneous.

Reversed.

(158 N. C. 630)

#### STATE v. GARNER.

(Supreme Court of North Carolina. April 3, 1912.)

#### 1. ANIMALS (§ 34\*) — RUNNING AT LARGE—CRIMINAL PROSECUTION.

Where an owner of a cow was prosecuted for willfully violating the regulations of the board of agriculture in permitting a cow to move from a quarantined area into one free from quarantine, that there was no stock law fence between the two areas would not relieve him from liability under the indictment.

[Ed. Note.—For other cases, see Animals, Cent. Dig. § 93; Dec. Dig. § 34.\*]

#### 2. ANIMALS (§ 34\*) — RUNNING AT LARGE—CRIMINAL PROSECUTION.

The fact that cattle were allowed to run at large in a county quarantined by the board of agriculture would not excuse from criminal liability a person who permitted a cow to move from such county to one free from quarantine.

[Ed. Note.—For other cases, see Animals, Cent. Dig. § 93; Dec. Dig. § 34.\*]

#### 3. ANIMALS (§ 34\*) — RUNNING AT LARGE—CRIMINAL PROSECUTION — "WILLFULLY ALLOWED."

Under Revisal 1905, § 3294, making it a misdemeanor to willfully violate any regulation of the board of agriculture for the quarantine of animals, etc., in a prosecution for "allowing" a cow to run at large, by reason of which she strayed from quarantined territory into territory free from infection, the mere fact that the defendant allowed the cow to run at large and that she crossed the line was sufficient to establish that he "willfully" allowed her to move across the line.

[Ed. Note.—For other cases, see Animals, Cent. Dig. § 93; Dec. Dig. § 34.\*]

For other definitions, see Words and Phrases, vol. 8, pp. 7468-7481, 7835-7836.]

#### 4. ANIMALS (§ 34\*) — RUNNING AT LARGE—CRIMINAL LIABILITY.

In a prosecution for allowing a cow to move from infected territory into territory free from quarantine, it is not necessary to show that she was infected where the regulation of the board of agriculture on which the prosecution was based provided that "no cattle" shall be moved or "allowed to move" from infected territory across the line.

[Ed. Note.—For other cases, see Animals, Cent. Dig. § 93; Dec. Dig. § 34.\*]

Walker and Allen, JJ., dissenting.

Appeal from Superior Court, Moore County; Cooke, Judge.

Prosecution of Jim Garner for allowing cattle to move out of a quarantined area. From a judgment of acquittal on a special verdict, the State appeals. Reversed.

The Attorney General, for the State. R. L. Burns, for appellee.

OLARK, C. J. Indictment under Rev. 1905, § 3294, for "allowing" cattle to move from a quarantined area in North Carolina into that portion of the state lying north and west of the quarantine line established by the board of agriculture, i. e., from Hoke county into Moore. The special verdict finds that defendant owned a cow which was infected with the cattle fever tick, and permitted her to run at large in Hoke county from his home, one-fourth of a mile from the county line, and she strayed into Moore county. It further appears that Hoke county is nonstock law territory, and there was no fence between Hoke and Moore counties.

[1, 2] It is immaterial that there was no stock law fence between Hoke and Moore counties, and that cattle are allowed to run at large in Hoke county. The defendant is not indicted for violation of any stock law in permitting his cow to run at large. Indeed, his counsel in this court rested his defense purely upon the ground that it was not shown that the defendant "willfully" violated the regulation of the board of agriculture, which provides: "No cattle shall be moved or allowed to move from any quarantined area of this or any other state, as defined by the regulations of the United States Department of Agriculture and amendments thereto governing cattle transportation, into that portion of North Carolina lying north and west of the line described in section 2 of these regulations, nor into the counties of Halifax, Edgecombe, Wilson, Nash, Lee, Moore, Richmond, and Scotland, after February, 1911." The authority of the board of agriculture to make and enforce such regulation is fully discussed and determined in State v. Railroad, 141 N. C. 846, 54 S. E. 294; Kimmish v. Ball, 129 U. S. 217, 9 Sup. Ct. 277, 32 L. Ed. 695.

[3] When the defendant turned his cow out, and permitted her to run at large, and as a result she strayed across the line into the forbidden territory, he willfully "allowed" her to move across that line. It is not necessary to show that he drove her across the line, but merely that he permitted her such liberty that thereby she was "allowed" by him to move across the line. The act of turning her out, whereby she was permitted to stray, was done purposely, and therefore willfully. The enforcement of these quarantine regulations is a matter of great importance. Both the federal and state governments are at great expense to

have all cattle inspected and the ticks removed, so that from time to time new territory is announced to be free from inspection and a new quarantine line is established and proclaimed. All this effort would be in vain, and the great expense incurred would be useless, unless the regulation against cattle being moved or allowed to move from the infected territory into the territory that has been freed from infection is strictly enforced.

[4] In this case it is found as a fact that the cow was "infected," but the defendant's guilt does not depend on that. The regulation provides "no cattle" shall be moved or "allowed to move" from infected territory across the line.

Upon the facts found in the special verdict, it should be entered that the defendant is guilty.

Reversed.

WALKER and ALLEN, JJ., dissenting.

(158 N. C. 502)

# VANCE v. BRYANT et al.

(Supreme Court of North Carolina. April 8, 1912.)

## BILLS AND NOTES (§ 383\*)—PAYMENT.

Payments on notes, made to the payee of notes after they have been indorsed for value, and before maturity, will not defeat the claim of the bona fide indorsee, where not entered on the notes.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 956; Dec. Dig. § 383.\*]

Appeal from Superior Court, Cumberland County; Whedbee, Judge.

Action by J. A. Vance, trading as J. A. Vance & Co., against G. F. Bryant and others and R. K. Baugham, trading as the Carolina Machinery Company. From a judgment for plaintiff, defendants appeal. Affirmed.

On the trial it was made to appear that plaintiff, holding two notes by indorsement, for value, and before maturity, each for sum of \$251.34, given for a sawmill, engine, boiler, etc., and a registered lien, in the form of conditional sale, instituted the present action to recover on the notes and enforce the lien, etc. The property, having been seized by ancillary process of claim and delivery, was replevied by G. F. Bryant and others, the purchasers, and defendants, G. F. Bryant et al., admitting the purchase of the property and execution of the notes, alleged payment of the notes to their codefendant, R. K. Baugham, their immediate vendor. The jury rendered the following verdict:

"(1) Is the plaintiff the owner and entitled to the possession of the property seized by the sheriff in this action?" Answer: "Yes."

"(2) Does the defendant wrongfully withhold possession of same from plaintiff?" Answer: "Yes."

"(3) If so, what damage has plaintiff sus-

tained thereby?" Answer: "Six per cent. interest on amount due on notes from date of seizure by the sheriff."

"(4) What was the value of the property seized by the sheriff in this action on the day of the seizure?" Answer: "\$ 600 (six hundred dollars)."

"(5) Was the plaintiff a purchaser of the two notes sued on before maturity and for value?" Answer: "Yes."

"(6) Have said notes, or any part thereof, been paid by the defendants to the plaintiff?" Answer: "Yes, \$100, on the 26th day of November, 1898, to Mr. Alexander, attorney for the plaintiff."

There was judgment on the verdict for the plaintiff, and defendants excepted and appealed.

V. C. Bullard and Sinclair & Dye, for appellants. H. L. Cook and J. M. Alexander, for appellee.

HOKE, J. We have carefully examined the case, and find no reversible error to plaintiff's prejudice. On the trial it was made to appear that on March 1, 1904, defendant R. K. Baugham, trading as the Carolina Machinery Company, sold to his codefendants G. F. Bryant et al. the engine, boiler, and sawmill, and took from the purchasers two notes therefor in the sum of \$251.34 each, one payable July 1, 1904, and the second November 1, 1894, and also a lien on the property to secure the same in the form of a conditional sale, which was duly registered; that at the time the said notes were executed, or within a few days thereafter, they were indorsed for full value by the payee to plaintiff, and that no payment had been made thereon to plaintiff, except the \$100 as established by the verdict. It was chiefly contended by the purchasers that except the \$100 referred to they had paid for the sawmill, etc., to the Carolina Machinery Company, their immediate vendor, and that on the testimony the question should have been submitted to the jury whether the machinery company at the time the payments were claimed to have been made was not the agent of plaintiff for the purpose and duly authorized to receive the same, but we concur with his honor below in the opinion that there was no evidence tending to support the position and no facts appearing from which the same could be reasonably inferred. The plaintiff being holder of the notes in due course by indorsement for value and before maturity, etc., his demand is not affected by payments made to the payee, which were not entered on the notes and of which the holder had no notice. Bank v. Michal, 96 N. C. 53, 1 S. E. 855; Blackmer v. Phillips, 67 N. C. 340.

There is no error, and the judgment in plaintiff's favor will be affirmed.

No error.

(153 N. C. 465)

**WISSLER et al. v. YADKIN RIVER POWER CO.**

(Supreme Court of North Carolina. April 3, 1912.)

**1. EMINENT DOMAIN (§ 35\*)—CONDEMNATION PROCEEDINGS—"PUBLIC USE."**

Revisal 1905, §§ 1571-1577, confer on electric light companies the power to condemn property for the erection of poles and other appropriate purposes on making just compensation therefor. Defendant was incorporated to distribute electricity for the operation of street railways, and to supply electricity for any purpose whatever. *Held*, that condemnation by defendant of a right of way across plaintiffs' land for the erection of its electric light poles, etc., was for a public use, and therefore authorized.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. § 80; Dec. Dig. § 35.\*

For other definitions, see *Words and Phrases*, vol. 6, pp. 5825-5837; vol. 8, p. 7774.]

**2. EMINENT DOMAIN (§ 1\*)—DEFINITION.**

The phrase "eminent domain" means the right of the state or of a person acting for the state to use, alienate, or destroy property of a citizen for the ends of public utility.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. §§ 1, 2; Dec. Dig. § 1.\*

For other definitions, see *Words and Phrases*, vol. 3, pp. 2362-2366; vol. 8, p. 7649.]

Appeal from Superior Court, Lee County; Ferguson, Judge.

Suit by J. H. Wissler and others against the Yadkin River Power Company. On motion for an injunction to enjoin defendant from entering on plaintiffs' lands after defendant had condemned a right of way for power plant over the same. The writ was denied, and plaintiffs appeal. Affirmed.

A. C. Davis, Aycock & Winston, and A. A. F. Seawell, for appellants. McIver & Williams, for appellee.

**BROWN, J.** [1] The defendant by proper proceedings has condemned the right of way across the plaintiffs' land for the erection of its electric light poles and other appropriate purposes, and has paid into court damages assessed, and is now in the enjoyment of the easement.

The ground upon which the application for the injunction order is based is that the use to which the property condemned is to be put is private use, and not a public one. It is not denied that, under the general law of the state under which the defendant has been incorporated, it has been invested with the power of eminent domain, but it is contended by the plaintiff that, inasmuch as the use is a private one, no such power can be lawfully conferred. It is admitted that under the provisions of Revisal 1905, c. 32, §§ 1571-1577, electric companies, such as telegraph, telephone, electric power, or lighting companies, are invested with the power to condemn property for the erection of poles, the establishment of offices, and other appropriate purposes upon making a just compen-

sation therefor. We find upon examination of the defendant's charter that it undertakes to manufacture, produce, sell, furnish, and distribute electricity for the operation of street railways, of all kinds and descriptions, and to sell electricity to the public, and to supply electricity in any form, and for any purpose whatever.

[2] The phrase "eminent domain" has been so frequently defined that it needs no further definition at our hands. It originated in the writings of an eminent publicist, Grotius, in 1625, who says: "The property of subjects is under the eminent domain of the state, so that the state, or he who acts for it, may use and even alienate and destroy such property, not only in case of extreme necessity, in which even private persons have a right over the property of others, but for ends of public utility, to which ends those who founded civil society must be supposed to have intended that private ends should give way." Grotius, *De Jure Belli et Pacis*, Lib. 3, c. 20. This power of eminent domain is conferred upon corporations affected with public use, not so much for the benefit of the corporations themselves, but for the use and benefit of the people at large. What are public utilities has been pretty well settled by the courts, but with the advance of science and the arts the scope of such utilities must necessarily be constantly increased. That the power of condemnation could be lawfully conferred upon railroad companies, telephone and telegraph companies, has long since been settled by repeated decisions, as the owner or manager of such industries becomes voluntarily the agent or servant of the public. The vast growth in the knowledge acquired concerning the uses of electricity has made it possible to extend that subtle but powerful agent to many forms of industry, and to divide its efficacy into many desired portions, and to freely transmit it to almost any point for use. To make this agency useful to man requires capital for its extension, as well as the power to extend its operations even against the will of an individual. In commenting upon the wonderful growth of operations conducted by electrical power, Mr. Lewis says: "All of these considerations tend to show that the use of land for collecting, storing, and distributing electricity, for the purpose of supplying power and heat to all who may desire it, is a public use, similar in character to the use of land for collecting, storing, and distributing water for public needs—a use that is so manifestly public that it is seldom questioned, and never denied." 1 Lewis on *Eminent Domain*, § 268; L. & P. Co. v. Hobbs, 72 N. H. 531, 58 Atl. 46, 66 L. R. A. 581; Jones v. Electric Co., 125 Ga. 618, 54 S. E. 85, 6 L. R. A. (N. S.) 122, 5 Ann. Cas. 526; Goddard v. Railway Co., 104 Ill. App. 533; Palmer v.

Electric Co., 158 N. Y. 231, 52 N. E. 1092, 43 L. R. A. 672.

In a recent case in New York it has been held that the furnishing of electricity for the use of the inhabitants, or for illuminating purposes, and for the use of surface railroads, constitutes public use within the definition of that term as used with reference to the right of eminent domain. In re Niagara L. & O. Power Co., 111 App. Div. 686, 97 N. Y. Supp. 853; Prince v. Crocker, 166 Mass. 347, 44 N. E. 446, 32 L. R. A. 610. Joyce on Electric Law declares that the supplying of electricity to the citizens of a town or to the public generally is a public use, citing many cases which upon examination sustain the text. 1 Joyce, § 276. In 15 Cyc. p. 600, it is said: "The exercise of the right of eminent domain for the purpose of erecting and maintaining electric light plants for public and private lighting is not for a private use." And this court, as late as 154 N. C. 131, 69 S. E. 767, 62 L. R. A. (N. S.) 848, in Turner v. Power Company, expressly holds that "corporations engaged in furnishing electric power and lights to its patrons in the exercise of chartered rights and privileges conferred by the lawmaking power, in part for the public benefit, are quasi public corporations." Nichols on Eminent Domain, § 277, says, in substance, that the furnishing of any kind of artificial light, as well as power, by gas, or electricity, for the use of the public, is public purpose, in aid of which the power of eminent domain may be lawfully invoked. The authorities all seem to be uniform on this subject, and to multiply them is easy, but useless.

The judgment of the superior court is affirmed.

(158 N. C. 498)

VIRGINIA & C. S. R. CO. v. McLEAN et ux.  
(Supreme Court of North Carolina. April 3, 1912.)

EMINENT DOMAIN (§ 131\*)—CONDEMNATION PROCEEDINGS—DAMAGES.

Parties whose land had been condemned for a railroad right of way were entitled to recover, as an element of their damages, the market value of the land taken.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 353; Dec. Dig. § 131.\*]

Appeal from Superior Court, Cumberland County; Whedbee, Judge.

Action by the Virginia & Carolina Southern Railroad Company against Marshall McLean and wife. From judgment for defendants, plaintiff appeals. Affirmed.

The following issue was submitted and answered by the jury: "What damages are defendants entitled to recover of plaintiff on account of the condemnation and appropriation of the 3.12 acres of land described in the petition filed in this cause?" Answer: "\$462.50." Judgment on the verdict for the

amount and condemning the land in question "as a perpetual right of way for plaintiff company, to be used for railroad purposes and for such other purposes as may be permitted by statute," etc. Plaintiff, having duly excepted, appealed, and assigns and urges here for error the following direction with others given by the court as a rule for estimating the damages: "That in assessing the damages which the defendants may be entitled to you will allow the defendants the actual market value of the 3.10 acres covered by the right of way that the plaintiff seeks to condemn, as described in the petition."

McLean, Varser & McLean and H. L. Cook, for appellant. Shaw & McLean and Sinclair & Dye, for appellees.

HOKE, J. Under the general law (Rev. § 2575 et seq.) and ordinarily under special statutes applicable, only an easement passes to the railroad under condemnation proceedings, and that and the effect of it is the interest usually involved in such an inquiry. In section 2587, the one which more especially refers to the judgment in these cases and the vesting of the title, the determinative language is: "And on the payment by said company of the sum adjudged, together with the costs and counsel fees allowed by the court in the office of the clerk, then and in that event all persons, who had been made parties to the proceedings, shall be divested and barred of all right, estate, and interest in such easement in such real estate during the corporate existence of the company aforesaid," and this view has very generally prevailed with us. Parks v. Railroad, 143 N. C. 289, 55 S. E. 701, 12 L. R. A. (N. S.) 680; Railroad v. Sturgeon, 120 N. C. 225, 26 S. E. 779. In practical application of this principle the court has held that to the extent that the right of way is not presently required for the purposes of the road it may be occupied and used by the original owner in any manner not inconsistent with the easement acquired (Lumber Co. v. Hines Bros., 126 N. C. 254, 35 S. E. 458), a position that finds support in a line of cases which hold that for any additional burden put upon the right of way not properly embraced in the general purposes for which condemnation was had the compensation shall accrue to the owner and not to the company (Brown v. Power Co., 140 N. C. 333, 52 S. E. 954, 3 L. R. A. [N. S.] 912; Hodges v. Telegraph Co., 133 N. C. 225, 45 S. E. 572); and it has been further decided that this right of way, when once acquired, may be occupied and used by the company to its full extent, whenever the proper management and business necessities of the road may require and the company is made the judge of such necessity (Railroad v. Olive, 142 N. C. 257-275, 55 S. E. 263). The easement then and its

effect on the property being the question involved, the law aims at making the owner a "just compensation" for the injuries likely to arise from the imposition of such a burden upon the land. The statute so requires, and, stated in a general way, the rule is to "award the owner the difference in the market value of the whole lot or tract before the taking and the market value of what remains to him after such taking, uninfluenced by any general rise in values of property due to the improvement." Elliott on R. R. (2d Ed.) § 985. In determining this difference, and owing to the fact that the easement is perpetual in its nature, and in all probability likely to become permanent, and to the position just referred to that the entire right of way may be at any time appropriated and used for railroad purposes whenever in the judgment of the company such use is required, it is held by the weight of authority that the damages allowed the owner as a general rule shall include the market value of the land actually covered by the right of way, subject to the modification that, under special circumstances, showing for instance the existence of mineral or other deposits of value below the surface to the extent that they could be made available to the owner without interference with the easement, such conditions should be considered by the jury in estimating the damage to be allowed on this account. *Brown v. Power Co.*, 140 N. C. 333, 52 S. E. 954, 3 L. R. A. (N. S.) 912; *Railroad v. Land Co.*, 137 N. C. 330, 335, 49 S. E. 350, 68 L. R. A. 333; *Hollinsworth v. Railroad*, 63 Iowa, 443, 19 N. W. 325; *Weyer v. Railroad*, 68 Wis. 180, 31 N. W. 710; *So. Pa. R. R. v. San Francisco Sav. Union*, 146 Cal. 290, 79 Pac. 961, 70 L. R. A. 221, 106 Am. St. Rep. 36, 2 Ann. Cas. 962; *Lewis on Eminent Domain* (3d Ed.) § 694.

In *Railroad v. Land Co.*, *supra*, speaking to the question of allowing the market value of the land actually covered by the right of way, Associate Justice Douglas, delivering the opinion, said: "It is well settled that the defendant is entitled to recover, not only the value of the land taken, but also the damage caused to the remainder of the land. Even if the plaintiff should not use the entire right of way the rule would be the same, as it is not what the plaintiff (R. R.) actually does, but what it acquires the right to do, that determines the quantum of damages." In addition to market value of the land actually taken, the compensation to be allowed the owner shall include the damage done to the remainder of the tract or portions of land used by the owner as one tract, and in ascertaining this amount the rule generally obtaining in this state requires that there shall be deducted from the estimate the pecuniary value of any benefits or advantages which are special and peculiar to the tract in question but not for the benefits or

advantages shared in common with other lands of like kind in the same vicinity. *Railroad v. Platt Land*, 133 N. C. 266, 45 S. E. 589; *Railroad v. Wicker*, 74 N. C. 220; *Freedle v. Railroad*, 49 N. C. 89; *Bost v. Cabarrus*, 152 N. C. 535, 67 S. E. 1066. There are some helpful suggestions in these authorities on the question of general and special benefits, but, there being no exception to the charge of the court in this respect, the matter is not further pursued, and, on consideration of the principles stated, we are of opinion that there was no reversible error in allowing recovery for the market value of the land covered by the right of way as an element of damages.

The judgment is therefore affirmed.

No error.

(158 N. C. 632)

### STATE v. BURNO.

(Supreme Court of North Carolina. April 3, 1912.)

#### 1. WITNESSES (§ 406\*)—IMPEACHMENT—CRIMINAL CAUSE.

Where, in a prosecution for unlawfully selling cocaine, a person to whom the sale was alleged to have been made was a witness for defendant, evidence of an officer that he saw the defendant give the witness a package, for which she paid him and received change, and that as soon as she came out of the house he arrested her, and found on her person the package, which contained cocaine and the change, tied up with it in a handkerchief, and that she admitted purchasing it from the defendant, was admissible to contradict.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. §§ 1276-1279; Dec. Dig. § 406.\*]

#### 2. CRIMINAL LAW (§ 486\*)—EVIDENCE—OPINION.

An opinion of a doctor, who was also a pharmacist, that a powder in a package which he tasted was cocaine was properly admitted, in a prosecution for unlawfully selling it, though he testified that he could not tell the difference between cocaine and Epsom salts, except by an actual test, where he had previously described fully the effect of cocaine and the effect of the powder which he tasted, and did not say that his opinion was unsatisfactory.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 1076; Dec. Dig. § 486.\*]

#### 3. CRIMINAL LAW (§ 404\*)—EVIDENCE.

Admitting a package alleged to contain cocaine, in a prosecution for unlawfully selling cocaine, was proper, though the package was taken from the woman to whom it was alleged to have been sold in the absence of defendant, where the officer who took it from her testified that he saw the sale made, and was satisfied that the package found on the woman on her arrest immediately thereafter was the same which he saw the defendant give her.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 873, 891-893, 1457; Dec. Dig. § 404.\*]

Appeal from Superior Court, Richmond County; Whedbee, Judge.

Sam Burno was convicted of unlawfully selling cocaine, and appeals. No error.

John P. Cameron and Lorenzo Medlin, for appellant. Attorney General Bickett and T. H. Calvert, for the State.

ALLEN, J. No objection is taken to the bill of indictment, and there is no contention that the evidence was not sufficient to justify the verdict.

[1] All of the evidence introduced at the trial is not sent up as a part of the case on appeal; but it appears that C. B. Wright was the principal witness for the state, and he testified, among other things, as follows: "I saw Burno give the McKeithan woman a package, and saw her give him some money, and he gave her back change. I was looking through the window. That after the woman had come from out of the house I arrested her, and found on her person a package of cocaine—the same kind of package I saw Burno deliver to her. I saw him put in small papers, preparing it on a table. She had in the package when arrested—the same kind of package which I now hold in my hand—and I took off the table the cloth [exhibiting same], and it has on it the same kind of material which is in these packages. The woman put the change and little papers containing what she got from Burno in a handkerchief, and as soon as she came out I took from her the handkerchief, and it contained the money and little paper packages." This witness was then asked, "Where did she [Cora McKeithan] say she got the package?" and he answered, "She said that she got it upstairs, and then said afterwards she got it from Burno," and the defendant excepted. This evidence was offered after Cora McKeithan had testified; and, while it does not clearly appear from the record, the only reasonable inference is that she was a witness in behalf of the defendant, and the evidence was admitted for the purpose of contradiction, for which it was competent. *State v. Williams*, 91 N. C. 599; *State v. Exum*, 138 N. C. 600, 50 S. E. 283.

[2, 3] The state introduced Dr. N. C. Hunter, who was admitted to be an expert, and the solicitor exhibited to the witness the package which the witness Wright said that he got from the person of Cora McKeithan, and asked the witness what the package contained, and he answered: "I have no way of making chemical test as to what the package contains, and can only give an opinion, and my opinion is that it is cocaine, after tasting it." He described the effects of cocaine, and pronounced it cocaine, and said, "In my opinion, it is cocaine." The defendant excepted. On cross-examination by defendant, he said, without objection: "I cannot tell the difference between cocaine and Epsom salts, except by making actual test; but, in my opinion, it is cocaine." He had previously described fully the effects of cocaine and the effect of what he tasted out of one of the little paper packages. He also

stated that he was a pharmacist as well as a doctor. The defendant excepted to this evidence on two grounds: (1) That the court erred in allowing the witness to testify as to an opinion, when his opinion was not fully satisfactory to his mind. (2) That the court erred in allowing the solicitor for the state to exhibit to and in the presence of the jury the package taken off the McKeithan woman by the witness C. B. Wright, and said to contain cocaine; the package having been taken from the woman in the absence of the defendant, and not having been identified as the package received by the McKeithan woman from the defendant. We have no means of ascertaining whether the opinion of the doctor was satisfactory to him or not. We only know that he expressed his opinion under oath, and did not say it was unsatisfactory; and, in answer to the second objection, it is sufficient to say that it was not necessary for the defendant to be present when the package was seized to make it competent evidence, and the witness Wright said, in answer to a question by the defendant, that he was satisfied that the package he found on Cora McKeithan was the same package he saw the defendant give her. These are all the exceptions appearing in the record, and upon an examination of them we find no error.

No error.

(158 N. C. 484)

CHARLES S. RILEY & CO. et al. v. CARTER & PRATT et al.

(Supreme Court of North Carolina. April 3, 1912.)

WILLS (§ 245\*)—FOREIGN WILLS—PROBATE—CERTIFIED COPY.

Revisal 1905, § 8133, provides that, whenever any will of a citizen of another state is duly allowed in such state, a copy thereof duly certified by the clerk of the court in which the will has been allowed, and produced before the clerk of the superior court of any county wherein any property of testator may be, shall be recorded in the same manner as if the original had been proved and allowed by him. *Held* that a copy of a foreign will was improperly admitted to probate in the state where there was nothing to show that the person who authenticated the copy was the clerk of the court in which the will was originally probated; the provision requiring attestation of the clerk of the court whose record is offered being mandatory.

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. §§ 577-581; Dec. Dig. § 245.\*]

Appeal from Superior Court, Pender County; Cooke, Judge.

Action by Charles S. Riley & Co. and others against Carter & Pratt and others. From a judgment for plaintiffs, defendants appeal. Reversed, and new trial granted.

E. K. Bryan and R. G. Grady, for appellants. John D. Bellamy, Bland & Bland, and Herbert McClammy, for appellees.

BROWN, J. [1] The question involved in this controversy is the legal title to the timber on a certain tract of land in Pender county, known as the "Raynor land," conveyed by S. W. Raynor et al. to the Perego-Jenkins Company. The plaintiffs de-rain their title through a number of mesne conveyances, which it is unnecessary to set out; among others, the will of O. Morton Stewart, dated November, 1899, admitted to probate in the city of Baltimore, Md., and registered in the registry of wills for Baltimore county on the 21st of August, 1900. This writing testamentary appears to be an essential link in the plaintiffs' chain of title. When the same was offered in evidence, the defendant objected, and it was admitted by the court, and this forms the second assignment of error. The ground of objection is that the record of the said will is not properly proven, or exemplified, as required by law. The paper writing appears to have been offered for probate in the orphans' court of Baltimore county, and the court adjudged that the same be admitted to probate as the true and genuine will of O. Morton Stewart. This decree is signed by the three judges of the said court. A copy of the will was offered for probate in the superior court of Pender county before the clerk thereof upon the following certificate only, to wit: "In testimony that the foregoing is a true copy taken from 'Wills Liber,' H. R. No. 12, folio 32, one of the books in the office of Register of Wills for Baltimore County, I hereunto subscribe my name and affix the seal of my office, this 29th day of July, A. D., 1905. Test: Harrison Rider, Register of Wills for Baltimore County. [Seal.]"

We are of opinion that the certificate upon which the will was admitted to probate in this state was insufficient, and that his honor should have excluded it as muniment of title. It is admitted that the record of the will has not been certified in accordance with the act of Congress (U. S. Rev. St. § 905 [U. S. Comp. St. 1901, p. 677]), because there is no "certificate of the judge, chief justice, nor presiding magistrate, that the said attestation is in due form." 1 Pell's Revisal, § 129.

Nevertheless it is claimed that the will is properly authenticated under the statutes of North Carolina, which authorize its admission to probate without the certificate of the judge, chief justice, or presiding magistrate of the court in which the will was probated in Maryland, and in support of this we are cited to sections 1618 and 1619, Rev. 1905. It will be observed that those sections simply authorize the introduction of copies of letters testamentary, or of administration for certain purposes, but only upon "being properly certified" either according to the act of Congress, or by the proper officer

of the state or territory from whence they come. Section 3133 is the statute which we think is applicable to this case. That section reads as follows: "Whenever any will, made by a citizen or subject of any other state or country, is duly proved and allowed in such state or country according to the laws thereof, a copy or exemplification of such will duly certified and authenticated by the clerk of the court in which such will has been proved and allowed, if within the United States, etc., when produced, or exhibited before the clerk of the superior court of any country, wherein any property of the testator may be, shall be allowed filed and recorded in the same manner as if the original, and not the copy had been produced, proved, and allowed before such clerk." The act of Congress requires that these records shall be proved by the attestation of the clerk of the court, and the seal of the court annexed, with the additional certificate of the judge, chief justice, or presiding magistrate of the court. The only change that our statute makes is to no longer require the certificate of the judge of the court, but it requires specifically that the record of the will shall be certified and authenticated by the clerk of the court in which such will shall originally have been proved and allowed. This court has held in several cases that "records of other states to be used in evidence in this state must have the attestation of the clerk of the court whose record is offered, and the seal of the court, if it have one. If there be no seal, this must appear in the certificate of the clerk, and the judge, chief justice, or presiding magistrate of such court must certify that the record is properly attested. *Kinsley v. Rumbough*, 96 N. C. 193, 2 S. E. 174; *Hunter v. Kelly*, 92 N. C. 285. Under section 3133 of the Revisal the certificate of the presiding judge so far as the record of wills goes seems to be no longer necessary, but the statute is peremptory in requiring that the copy or exemplification of such will be duly certified and authenticated by the clerk of the court in which such will has been proved, and allowed, if within the United States.

There is nothing in this record tending to prove that Harrison Rider, the register of wills for Baltimore county, was the official clerk of the orphans' court in which the said will was offered for probate. It is true that he appears to have an official seal, but so has our register of deeds, and it is well known that he has no authority to take the probate of a deed, and has no connection with the superior court. It may be that on another trial a proper exemplification of this will may be procured and probated, or that Harrison Rider, the register of wills, may be shown to be the official clerk of the orphans' court of Baltimore county.

New trial.



(158 N. C. 455)

VIRGINIA-CAROLINA CHEMICAL CO. v.  
FLOYD et al.(Supreme Court of North Carolina. April 3,  
1912.)

## 1. PLEADING (§ 214\*)—ADMISSION BY DEMURRER.

A demurrer to a complaint admits the truth of the allegations thereof.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 525-534; Dec. Dig. § 214.\*]

## 2. CORPORATIONS (§ 360\*)—CONVERSION BY CORPORATE AGENTS—COMPLAINT—SUFFICIENCY.

A complaint, stating that defendants, while in control of a corporation, received money and notes belonging to plaintiff under a contract with the corporation, and knowingly misapplied and misappropriated the money and notes, states a cause of action.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1503-1505; Dec. Dig. § 360.\*]

## 3. CORPORATIONS (§ 357\*)—ACTION AGAINST OFFICERS—JOINDER—JOINT WRONG.

Defendants were properly joined in an action for their joint wrong as officers of a corporation in misappropriating plaintiff's money and notes.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1500, 1501; Dec. Dig. § 357.\*]

## 4. BANKRUPTCY (§ 299\*)—CORPORATIONS (§ 357\*)—ACTION AGAINST OFFICERS—UNNECESSARY PARTIES.

Neither a corporation nor its trustee in bankruptcy was a necessary party defendant to a suit for defendants' wrong as officers of the corporation in misappropriating plaintiff's money and notes.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 448; Dec. Dig. § 299.\* Corporations, Cent. Dig. §§ 1500, 1501; Dec. Dig. § 357.\*]

## 5. ACTION (§ 50\*)—JOINDER OF CAUSES.

A complaint for misappropriation by defendants, as officers of a corporation, of moneys and notes belonging to plaintiff, was not bad for misjoinder of causes, because it sought recovery of the value of the property misappropriated, and also vacation of deeds claimed to have been fraudulently executed by one of the defendants and his wife, a codefendant.

[Ed. Note.—For other cases, see Action, Cent. Dig. §§ 511-547; Dec. Dig. § 50.\*]

## 6. CORPORATIONS (§ 357\*)—JOINDER.

Nor was there a misjoinder of parties.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1500, 1501; Dec. Dig. § 357.\*]

Appeal from Superior Court, Robeson County; Caster, Judge.

Action by the Virginia-Carolina Chemical Company against O. I. Floyd and others. Judgment for defendants, and plaintiff appeals. Reversed.

The plaintiff is the Virginia-Carolina Chemical Company, and the defendants are O. I. Floyd, A. N. Mitchell, and wife, Elizabeth A. Mitchell.

The complaint filed by the plaintiff is as follows:

First. That it is a corporation duly organized and existing under and by virtue of the laws of the state of New Jersey, and

having offices in the city of Richmond, in the state of Virginia, and the city of Durham, state of North Carolina.

Second. That Floyd Bros. & Mitchell, Inc., was at the time hereafter referred to, and is now, a corporation existing under and by virtue of the laws of the state of North Carolina, and having its principal place of business in the town of Fairmont, in the county of Robeson, and state aforesaid. That the defendant O. I. Floyd was the secretary and treasurer of said corporation, and the defendant A. N. Mitchell was the president of said corporation, and these two defendants were largely in control of the business of Floyd Bros. & Mitchell, Inc.

Third. That on the 15th day of January, 1908, the said Floyd Bros. & Mitchell, Inc., entered into a contract with the plaintiff company, wherein and whereby it undertook to act as selling agent for commercial fertilizers of the plaintiff company under and by virtue of contract, a copy of which is hereto attached; and in pursuance of and according to the terms of said contract, the plaintiff shipped to the said Floyd Bros. & Mitchell, Inc., during the year 1908, commercial fertilizers under said contract of the value of \$7,252.56, the purchase price, and the said Floyd Bros. & Mitchell, Inc., sold on behalf of the plaintiff, for cash and on credit, a large portion of the said fertilizers, and paid over to the plaintiff on such account the sum of \$3,850.80. The sixth paragraph of said contract is as follows: "(6) That until sold or settled for by the customer, the fertilizer contracted for under this agreement shall remain the property of the company, and when sold, all the proceeds of the sale of such fertilizer, including cash, notes, liens, bills of sale, open accounts and collections therefrom, whenever in possession, shall be kept separate and be held by the customer for the use and benefit of the company and subject to its order, and the same, together with any unsold fertilizer taken under this agreement, shall be the property of the company until the entire indebtedness of the customer arising under this agreement has been paid."

Fourth. That on the ——— day of March, 1909, upon petition of certain creditors, said Floyd Bros. & Mitchell, Inc., was adjudicated an involuntary bankrupt, and plaintiff is informed, believes, and alleges that the assets upon distribution will not be sufficient to pay more than a small per cent. of claims proven against the said bankrupt company.

Fifth. That plaintiff is informed, believes, and alleges that a certain amount of money, for which the bankrupt sold the goods to the plaintiff, was collected by it, amounting to the sum of \$872.61, and that the defendants O. I. Floyd and A. N. Mitchell knew that the said sum of money was the prop-

erty of this plaintiff, and that it was the duty of Floyd Bros. & Mitchell, Inc., its officers, agents, and employees, to pay over to said plaintiff said sum, and that in violation of said duty O. I. Floyd and A. N. Mitchell misappropriated and misapplied said sum of money to other purposes, in violation of the trust imposed upon each of them by said contract, and thereby perpetrated a fraud on this plaintiff, wherein they became personally responsible to the plaintiff for said breach of trust, as plaintiff is informed, believes, and alleges.

Sixth. That on the — day of January, 1909, the defendants O. I. Floyd and A. N. Mitchell, in breach of the trust imposed by the said contract between Floyd Bros. & Mitchell, Inc., and this plaintiff, misapplied and misappropriated certain notes which had been taken by their company for goods of the plaintiff sold by them as agent under said contract, as they and each of them well knew, to the amount of \$760.70, and thereby committed a breach of trust and fraud upon this plaintiff, for which they and each of them are personally responsible, as plaintiff is advised.

Seventh. That the defendant Elizabeth A. Mitchell is the wife of the defendant A. N. Mitchell, and that on the — day of —, 1908, the defendant A. N. Mitchell was the owner of certain real estate in the county of Robeson, state aforesaid, described in the 11 certain deeds hereto attached, and made a part of this complaint.

Eighth. Plaintiff is informed, believes, and alleges that the defendant A. N. Mitchell transferred to his wife, the defendant Elizabeth A. Mitchell, all of the property set out in the deeds hereinbefore referred to, and that at the time of said conveyance the defendant A. N. Mitchell was deeply indebted to various sundry parties, and that said deeds were made voluntary, and without reserving property sufficient to pay all of his debts, and that said deeds were made for the purpose of hindering, delaying, and defrauding his creditors, including this plaintiff, as plaintiff is informed, believes, and alleges, and are null and void.

The defendants demurred to the complaint: (1) For that the superior court had no jurisdiction, on account of the pendency of the proceeding in bankruptcy against the corporation. (2) For that the corporation is not a party. (3) For that the trustee in bankruptcy is not a party. (4) For that there is a misjoinder of parties and causes of action. (5) For that the complaint does not state a cause of action. The demurrer was sustained, and the plaintiff excepted and appealed.

Rountree & Carr and R. G. Grady, for appellant. McIntyre, Lawrence & Proctor and McLean, Varser & McLean, for appellees.

ALLEN, J. [1,2] The demurrer admits the allegations of the complaint, and it is

well to see, in the first instance, if a cause of action is stated by the plaintiff. If not, the action must be dismissed, and it will not be necessary to consider the other grounds of demurrer, and, on the other hand, if the complaint states a cause of action, an examination and analysis of it will aid in passing on the effect of the proceeding in bankruptcy and the necessity for the presence of the corporation or the trustee in bankruptcy, as a party. Contracts almost identical with the one alleged to have been entered into between the corporation, Floyd Bros. & Mitchell, and the plaintiff, have been considered in several decisions of our court, and it has been held in each that the proceeds of sales of fertilizers made thereunder, whether in money or notes, are the property of the person originally furnishing the fertilizer for sale. *Chemical Co. v. Johnson*, 98 N. C. 123, 3 S. E. 723; *Hoffman v. Kramer*, 123 N. C. 566, 31 S. E. 828; *Lance v. Butler*, 135 N. C. 422, 47 S. E. 488. And it is also held that such a contract makes the person, with whom it is made, a trustee of the notes taken from the purchasers of fertilizer, and of the money derived from sales, or collected on notes, for the benefit of the original owner of the fertilizers. *Guano Co. v. Bryan*, 118 N. C. 579, 24 S. E. 364; *Chemical Co. v. McNair*, 139 N. C. 335, 51 S. E. 949.

[3] The complaint alleges that the defendant O. I. Floyd was the secretary and treasurer of the corporation which made the contract with the plaintiff, and that the defendant A. N. Mitchell was its president, and that these two were largely in control of its business; that money was collected and notes taken under said contract, which are the property of the plaintiff, and that said defendants, knowing these facts, misapplied and misappropriated said money and notes. The demurrer admits these allegations, and it cannot be questioned, assuming them to be true, that the defendants are liable to the plaintiff, if, as officers of the corporation, they, with knowledge, received property belonging to the plaintiff, and which they held in trust for it, and misappropriated it, and as the complaint alleges a joint wrong, it is not a misjoinder to sue both defendants in the same action. *Howell v. Fuller*, 151 N. C. 317, 66 S. E. 131. Note that the cause of action is for misappropriation of property belonging to the plaintiff, and not of property of the corporation, Floyd Bros. & Mitchell, and in this is the distinction between the cases relied on by the defendants and this.

In *Coble v. Beall*, 130 N. C. 533, 41 S. E. 793, a stockholder sued the directors of a bank for fraudulent and wrongful mismanagement of the property of the bank, and in *Latta v. Electric Co.*, 146 N. C. 309, 59 S. E. 1028, the action was for the fraudulent disposition of property of the corporation by its officers, and it was held in each that the

action should have been brought by a receiver, if one had been appointed, and, if not, by the corporation, and the citations from Loveland on Bankruptcy, §§ 23, 158, are to the same effect. Thompson on Cor. vol. 3, § 4132, marks the line between the two classes of cases: "The grounds on which the directors of corporations may make themselves liable to *strangers* have been already indicated. They stand toward the outside and in the same relation in which any other agents stand toward the general public. For a breach of duty to their principal, redress can only be had by that principal, the corporation, or by the shareholders, if the corporation refuses to sue, as elsewhere pointed out. But for any breach of duty toward a stranger to the company, such stranger may have redress against them, either at law or in equity, according to the nature of the injury; and it will be no defense that their principal is also liable."

[4] It appears, therefore, that the cause of action is against Floyd and Mitchell for misappropriating property which they knew belonged to the plaintiff. The complaint does not allege that the defendants converted the property to their own use, and the only other reasonable inference is that they used it for the benefit of their corporation. If so, neither the corporation nor the receiver could sue them, as the corporation had received and used the property, and if they converted the property to their own use, their liability to the plaintiff would be primary, and payment by them would exonerate the corporation. We are therefore of opinion that neither the corporation nor the trustee is a necessary party, and that the pendency of the proceeding in bankruptcy does not prevent the prosecution of this action, as in that proceeding the assets of the insolvent corporation are to be administered, and not the property of the plaintiff.

[5, 6] The question remaining to be considered is that of misjoinder of parties and causes of action, which is not free from difficulty; but we think the authorities authorize the prosecution of the action as now constituted. The cause of action is the recovery of the value of the property misappropriated, and one of the remedies sought to be enforced is the setting aside of certain deeds, alleged to have been executed fraudulently by one of the defendants. It has been held proper to join a cause of action on a note, a cause of action to set aside a deed made by a bank, and one against the stockholders to hold them personally liable (Glenn v. Bank, 72 N. C. 626); to join a cause of action against a sheriff, Wyatt, to compel the execution of a deed, with one against Edwards, who was in possession, to recover the land (McMillan v. Edwards, 75 N. C. 82); to join a cause of action to have one defendant declared a trustee of land with another against other defendants to recover judgment on a money demand, and with still another for possession

of the land (Young v. Young, 81 N. C. 91); to join a cause of action on a note with a cause of action against three defendants, to each one of whom it was alleged the debtor had executed a fraudulent deed (Bank v. Harris, 84 N. C. 206). And these cases are cited and approved in Outland v. Outland, 113 N. C. 75, 18 S. E. 72. See, also, Benton v. Collins, 118 N. C. 193, 24 S. E. 122; Fisher v. Trust Co., 138 N. C. 224, 50 S. E. 659.

The language used by Justice Ashe in Heggie v. Hill, 95 N. C. 306, in discussing misjoinder of parties and causes of action, is apposite to the facts presented here. He says: "The rule in such a case as existing prior to the Code was thus announced by Ruffin, C. J., in Bedsole v. Monroe, 40 N. C. 313: 'If the grounds of the bill be not entirely distinct and wholly unconnected; if they arise out of one and the same transaction, or series of transactions, forming one course of dealing, and all tending to one end; if one unconnected story can be told of the whole—the objection cannot apply.' And it has been held not to apply 'when there has been a general right in the plaintiff, covering the whole case, although the rights of the defendants may have been distinct.' Whaly v. Dawson, 2 Sch. & Lef. 370, and Dimmock v. Nixby, 20 Pick. [Mass.] 368. Nor will it apply when one general right is claimed by the plaintiff, though the individuals made defendants have separate and distinct rights, and in such a case they may all be charged in the same bill, and a demurrer for that cause will not be sustained. Parish v. Slaon, 38 N. C. 607. And to the same effect is Watson v. Cox, 36 N. C. 389. And in Oliver v. Platt, 3 How. 411 [11 L. Ed. 622], it is held that: 'When the interests of different parties are so complicated in different transactions that entire justice could not be conveniently done without uniting the whole, the bill is not multifarious.' And in Alabama it has been held that the objection of multifariousness is confined to cases where the cause of action against each defendant is entirely distinct and separate in its subject-matter from that of his codefendants. Kennedy v. Kennedy, 2 Ala. 571. \* \* \* But in addition to these authorities, we refer to what Mr. Bliss, in his work on Code Pleading (section 110), has laid down as the rule of practice in such cases. Speaking of the improper union of defendants under this section of the Code, he says: 'When several persons, although unconnected with each other, are made defendants, a demurrer will not lie if they have a common interest centering in the point in issue in the cause.'"

The same principle as to multifariousness is thus stated by the Supreme Court of Massachusetts, in Lentz v. Prescott, 144 Mass. 505, 11 N. E. 923: "The plaintiff has a demand growing out of an assignment by which every defendant was affected, and their various interests are so blended that it would be impossible to separate the investigation of

them with convenience. It is not indispensable that all the parties should have an interest in all the matters contained in the suit; it is sufficient if each party has an interest in some matters in the suit, and that they are connected with the others. Even if one is a necessary party to some portion only of the case, the bill is not therefore necessarily multifarious."

Being therefore of opinion that the complaint states a cause of action of which the court has jurisdiction, and that neither the corporation nor the trustee in bankruptcy is a necessary party, and that there is no misjoinder, we must hold that the demurrer ought to have been overruled.

Reversed.

(158 N. C. 468)

**BLACK v. CONSOLIDATED RY. & POWER CO. et al.**

(Supreme Court of North Carolina. April 3, 1912.)

**1. APPEAL AND ERROR (§ 920\*)—JUDGMENTS—PRESUMPTIONS.**

Every presumption is in favor of the regularity of the proceedings in the superior court, so that, where the record does not show the date of the appointment of a receiver of defendant corporation, it will be presumed, in support of the judgment, that it was after the commencement of the action.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3714-3721; Dec. Dig. § 920.\*]

**2. CORPORATIONS (§ 559\*)—RECEIVERS—EFFECT AS TO PENDING ACTIONS.**

Where a receiver of a corporation is appointed after the commencement of an action against it, the plaintiff is entitled to proceed against the corporation; it being proper to make the receiver a party defendant.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2241-2252; Dec. Dig. § 559.\*]

**3. CORPORATIONS (§ 569\*)—RECEIVERS—ACTIONS—PARTIES.**

Where a receiver was appointed after the commencement of an action against a corporation, it was proper for the court to direct that he be made a party, for Revisal 1905; §§ 1224, 1227, vests in him the title to all the corporate property, and makes it his duty to investigate all claims against the corporation.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1916; Dec. Dig. § 569.\*]

**4. RECEIVERS (§ 174\*)—ACTIONS—CONDITIONS PRECEDENT—LEAVE OF COURT.**

Revisal 1905, § 1227, gives the receiver of an insolvent corporation power to examine witnesses and claims. Sections 1228, 1229, and 1230, respectively, provide that the court may limit the time for creditors to present and prove claims, that every claim shall be presented to the receiver in writing, who shall allow or disallow the claims, and notify the claimants of his determination, and that the receiver shall report to the term of the superior court subsequent to any finding by him as to claims against the corporation, so that exceptions thereto may be filed. *Held* that, where a receiver of an insolvent corporation had been appointed before commencement of the action, the plaintiff must allege and prove that he presented his claim to the receiver,

that it was disallowed, and that he obtained permission from the court to bring a separate action; the purpose of the statute being to save expense, avoid litigation, and give to the various claimants the benefit of separate actions.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. §§ 333-343; Dec. Dig. § 174.\*]

**5. RECEIVERS (§ 174\*)—ACTIONS—PERMISSION OF COURT—GOOD CAUSE.**

In determining whether good cause is shown for a separate action against a receiver of an insolvent corporation, the convenience of the witnesses, additional cost, and various circumstances addressed to the trial court's discretion should be considered.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. §§ 333-343; Dec. Dig. § 174.\*]

Appeal from Superior Court, Cumberland County; Whedbee, Judge.

Action by Neill Black against the Consolidated Railway & Power Company, and W. D. McNeill, as receiver of the company. From a judgment overruling the demurrer to the complaint, the receiver appeals. Affirmed.

This action was commenced on the 22d day of July, 1909, against the Consolidated Railway & Power Company, successor to Little River Power & Transmission Company, and is to recover judgment for the value of certain material, which the plaintiff alleges he furnished the defendants, for the purpose of building a power house and repairing a dam, and to enforce a lien therefor. The complaint was filed on the 10th day of August, 1909, and no answer was filed by the defendant. At May term, 1910, of the superior court of Cumberland county, an order was made in said action, giving permission to make W. D. McNeill, receiver of the Consolidated Railway & Power Company, a party defendant, and summons was duly served on him in May, 1910. On the 9th of September, 1910, the plaintiff filed an amended complaint, alleging the appointment of McNeill, receiver, the service of the summons on him, and adopting the allegations of the original complaint. At May term, 1911, of said court, said receiver filed a demurrer to the complaint upon the following grounds: First. That said complaints do not state a cause of action, for that, as appears on the face thereof, the property which the plaintiff seeks to subject to the payment of his alleged debt is in the hands of a duly appointed and acting receiver. Second. That said complaints fail to state a cause of action, in that it appears upon the face thereof that said action is an attempt upon the part of the plaintiff to interfere with property in the hands of a duly appointed and acting receiver. Third. That said complaints do not state a cause of action, for the reason that it does not appear upon the face thereof that plaintiff obtained permission of the court appointing the receiver to make him a party defendant herefor.

Fourth. That said complaints do not state a cause of action, because the plaintiff fails to allege therein that he obtained permission of the court appointing said receiver in the cause or action in which he was appointed to make him a party defendant herein. Fifth. That said complaints do not state a cause of action, for the reason that plaintiff fails to allege therein that he obtained, before the institution of this action and in the cause in which the receiver was appointed, the permission of the court to sue the receiver. Sixth. That said complaints do not state a cause of action, in that there is no allegation that plaintiff has ever presented his claim in writing to the receiver of the defendant company, or that said receiver ever passed on same and reported his finding thereon to any term of superior court, or that the plaintiff has ever excepted to a finding and report on said claim by the receiver and demanded a jury trial thereon. Seventh. That said complaints do not state a cause of action, for the reason that it does not appear therein that the lumber alleged to have been furnished was furnished to the receiver in or for the operation of the property in his hands as receiver. Eighth. That said complaints do not state a cause of action, because there is no allegation therein that the lumber alleged to have been furnished by plaintiff was furnished with the understanding between plaintiff and defendant company that same was to be used in building or repairing buildings on the purchaser's land or otherwise improving the same. The demurrer was overruled, and the receiver excepted and appealed.

R. W. Herring and Sinclair & Dye, for appellant.

ALLEN, J. [1] Every presumption is in favor of the regularity of the proceedings in the superior court, and that the judgment rendered is one authorized by law, and as there is nothing in the record to show the date of the appointment of the receiver, or to indicate that he was not appointed after the commencement of the action, we must assume that the action was commenced when there was no receiver—if necessary to sustain the judgment.

[2] The dates of the several steps taken in the action would also seem to justify us in doing so. The action was commenced against the corporation in July, 1909, and no answer was filed suggesting a reason for not proceeding against it, and the application to make the receiver a party was not until May, 1910; a period of 10 months having elapsed after the commencement of the action, during which the receiver could have been appointed.

As it does not appear that the corporation was in the hands of a receiver at the institution of the action, the demurrer was prop-

erly overruled; the plaintiff having the right upon these facts to proceed against the corporation, and it being competent to make the receiver a party defendant. High, Receivers, § 258.

[3] It was not only within the power of the court to direct that the receiver be made a party, but it was proper to do so in view of the fact that Revisal, § 1224, vests in him the title to all the property of the corporation, and it is made his duty, under section 1227 et seq. of the Revisal, to investigate all claims against the corporation, for the purpose of protecting creditors and stockholders.

[4] If the fact was otherwise, and it appeared that the receiver had been appointed prior to the commencement of the action, we would hold that the action could not be maintained on the allegations of the complaint, as they now are.

Revisal, § 1219 et seq., regulating the appointment of receivers of insolvent corporations, clearly contemplates the settlement of all questions involving claims against the corporation in one action, and while we do not think it withdraws from the court of equity the power to permit a separate action to be prosecuted, this should not be done until the receiver has at least had the opportunity to pass on the claim.

By section 1227, the receiver is given power "to send for persons and papers, and to examine any persons, including the creditors and claimants, and the president, directors and other officers and agents of the corporation, on oath or affirmation (which oath or affirmation the receiver may administer), respecting its affairs and transactions, and its estate, money, goods, chattels, credits, notes, bills, and also respecting its debts, obligations, contracts, and liabilities, and the claims against it; and if any person shall refuse to be sworn or affirmed, or to make answers to such questions as may be put to him, or refuse to declare the whole truth touching the subject-matter of the said examination, the court may, on report of the receiver, commit such person as for contempt."

By section 1228 it is provided that: "The court may limit the time within which creditors shall present and make proof to such receiver of their respective claims against the corporation, and may bar all creditors and claimants failing to do so within the time limited from participating in the distribution of the assets of the corporation. The court may also prescribe what notice, by publication or otherwise, shall be given to creditors of such limitation of time." And by sections 1229 and 1230: "Every claim against an insolvent corporation shall be presented to the receiver in writing; and the claimant, if required, shall submit himself to such examination in relation to the claim as the receiver shall direct, and shall produce such books and papers relating to

the claim as shall be required; and the receiver shall have power to examine, under oath or affirmation, all witnesses produced before him touching the claims, and shall pass upon and allow or disallow the claims or any part thereof, and notify the claimants of his determination. It shall be the duty of such receiver to report to the term of the superior court subsequent to any finding by him as to any claim against the corporation, and exceptions thereto may be filed by any person interested, within ten days after notice of such finding by the receiver, and not later than within the first three days of the said term; and if, on any exception so filed, a jury trial shall be demanded, it shall be the duty of the court to prepare a proper issue and submit the same to a jury; and if such demand is not made in the exceptions to the report, the right to a jury trial shall be deemed to have been waived. The judge may, in his discretion, extend the time for filing such exceptions."

It is the purpose of these sections to save expense and to avoid needless litigation and costs, and to this end it is required that every claim against the corporation shall be presented to the receiver, and he is given full power to investigate. *Pelletier v. L. Co.*, 123 N. C. 601, 31 S. E. 855, 68 Am. St. Rep. 837; *Crutchfield v. Hunter, Rec.*, 138 N. C. 54, 50 S. E. 557. If he disallows a claim, the claimant may except and have his rights passed on by a jury, which gives him all the advantages of a separate action, and, if he recommends payment, the court will usually act favorably on his report, and the costs of a separate action will be saved. We are therefore of opinion that, when a receiver has been appointed before the commencement of the action, the plaintiff must allege and prove that he had presented his claim to the receiver and it had been disallowed, and that he had obtained permission from the court to institute a separate action, which ought not to be granted as a matter of course, but for good cause shown. This will enable the court, having jurisdiction of the appointment of the receiver and the administration of the assets of the corporation, to have before it the claims of all parties, and to consider the receivership as a whole.

[§] No definite rule can be adopted as to what is "good cause"; but the place where the cause of action arose, venue, the convenience of witnesses, additional costs, and other circumstances, addressed to the discretion of the court, should be considered.

We have been induced to consider this question, which is not directly presented, because of an expression in the brief of the appellant indicating that the receiver in this case had been appointed when the action was commenced; but, for the reasons first stated, the judgment is affirmed.

**Affirmed.**

(158 N. C. 488)

**BOYNTON v. HEARTT**, Public Administrator.  
(Supreme Court of North Carolina. April 3, 1912.)

**1. EXECUTORS AND ADMINISTRATORS (§ 24\*)—PUBLIC ADMINISTRATORS — DURATION OF TERM.**

In view of Revision, §§ 18-21, inclusive, which merely provided that a public administrator may be appointed for a term of eight years, but do not provide for the beginning and end of his term or for the filling of vacancies, in case of an unexpired term, one appointed a public administrator upon the death of the incumbent, pending his term, would hold for the full term of eight years, and not merely for the remainder of the unexpired term of the deceased incumbent.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 132-140; Dec. Dig. § 24.\*]

**2. EXECUTORS AND ADMINISTRATORS (§ 35\*)—REMOVAL OF PUBLIC ADMINISTRATOR.**

Though one serving as public administrator was not the legal appointee, if otherwise qualified, he should only be removed from administering a particular estate at the petition of one having a prior right to administer it.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 227-262; Dec. Dig. § 35.\*]

**3. EXECUTORS AND ADMINISTRATORS (§ 18\*)—NOMINATION OF ADMINISTRATOR—RIGHT TO NOMINATE.**

Since, under the direct provisions of Revision 1905, § 5, subd. 2, letters of administration cannot be issued to a nonresident, and since the right to nominate is dependent upon the right to administer, the nominee of a nonresident guardian of nonresident minors is not entitled to administer, as against a public administrator appointed.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 60-77; Dec. Dig. § 18.\*]

**Appeal from Superior Court, Wake County; Daniels, Judge.**

Proceedings by Emma R. Boynton for the removal of Leo D. Heartt, public administrator. From a judgment dismissing the petition, plaintiff appeals. Affirmed.

This is a proceeding to remove an administrator. Harry O. Bannister, who resided in the city of Raleigh since April, 1907, as manager of the Western Union Telegraph office, died May 2, 1911, at Richmond, Va. His father and mother, as well as his wife and infant child, and all of his brothers and sisters, had predeceased him. His sister, Mrs. Lydia M. Boynton, née Lydia M. Bannister, who died in December, 1910, residing in the city of Richmond, Va., who was married to George A. Boynton of that city, left children surviving her, Emma R. Boynton, Gussie Oscar Boynton, Frank Elisha Boynton, and Oscar Bannister Boynton; all being infants under 14 years of age. On June 1, 1911, Leo D. Heartt, public administrator, applied to Millard Mial, clerk of the superior court of Wake county, for letters of administration upon the estate of H. O. Bannister. No notice was given, or attempted to be given, to any of the next of kin; nor was any

renunciation or waiver by any one filed. The estate of H. O. Bannister consisted of some personal property in Raleigh to the value of \$200 and two insurance policies, which aggregated \$1,800. The clerk issued the letters of administration to Leo D. Heartt, the public administrator. The said Bannister was a comparative stranger in Raleigh, and had no known heirs or next of kin; and he left creditors in Raleigh whose debts aggregate about \$600, all of whom resist the petition. J. C. Marcom, who was appointed a public administrator of Wake county on April 24, 1902, died in July, 1903, and on July 11, 1903, Leo D. Heartt was appointed public administrator for the county; the appointment stating that the term expired April 24, 1910. This proceeding was begun in August, 1911, asking for the removal of Heartt, administrator, and the appointment of A. B. Andrews, Jr., who claims to be the nominee of the next of kin. The next of kin are four children under 14 years of age, who are nonresidents; and the said Andrews is recommended for appointment by their guardian, who is also a non-resident. The clerk dismissed the petition, and this ruling was affirmed by the judge of the superior court, and the petitioner appealed.

A. B. Andrews, Jr., for appellant. Armistead Jones & Son, for appellee.

ALLEN, J. J. C. Marcom was appointed public administrator of Wake county on the 24th day of April, 1902, and died in July, 1903, and Leo D. Heartt was appointed such administrator on the 11th day of July, 1903; the appointment stating that the term expired April 24, 1910, eight years after the date of the appointment of said Marcom. On the 2d day of May, 1911, H. O. Bannister died in the city of Richmond, Va., having lived in Raleigh up to a short time before his death, leaving in Raleigh a small personal estate and several creditors. He was a comparative stranger in Raleigh, and at the time of his death had no heirs or next of kin anywhere, so far as known in this state. On the 1st day of June, 1911, letters of administration were issued to the said Heartt on the estate of said Bannister, upon his application as public administrator.

The petitioners contend on these facts that the term of the public administrator is eight years; that as the said Marcom was appointed on the 24th day of April, 1902, and died in July, 1903, that the appointment of the said Heartt was for the unexpired term of Marcom, ending April 24, 1910, and that therefore he was not public administrator at the time of his application for letters of administration on the estate of said Bannister; while the said Heartt contends that he was appointed for a full term of eight years.

[1] An examination of the sections of the Revisal (sections 18 to 21, inclusive), relating to the appointment of a public administrator,

shows that he may be appointed for a term of eight years, and that no period is fixed when the term shall begin or end, and no provision is made for filling a vacancy, or for making an appointment for an unexpired term. Under these circumstances, the courts hold with practical unanimity that an appointee to a public office holds for the full term, although the prior occupant had only held for a part of his term, and, in our opinion, the principle applies with greater force to one who is not strictly a public officer, as is the case of a public administrator. *State v. Smith*, 145 N. C. 476, 59 S. E. 649. The cases are collected in the note to *State v. Corcoran*, 206 Mo. 1, 103 S. W. 1044, as reported in 12 Ann. Cas. 573. The fact that the clerk was mistaken as to the effect of the appointment, and said it would expire April 24, 1910, cannot affect the title of the administrator.

[2] If, however, it appeared that Leo D. Heartt was not public administrator at the time of his appointment as administrator of Bannister, it would not follow necessarily that he would be removed. It is found as a fact that he is a man of very high character, and is capable and competent to act as administrator; and the creditors of Bannister, instead of asking for his removal, join in a request that he be retained, and he has been appointed administrator of Bannister and has given bond as such, and it would not, therefore, be proper to remove him, except at the instance of one having a prior right to administer.

[3] This brings us to the principal question debated by counsel, which is as to the rights, under our statute, of the nominee of a non-resident guardian of nonresident minors to administer. The petitioner contends that such nominee has the right to administer, and relies on *Ritchie v. McAuslin*, 2 N. C. 220, decided in 1793, which holds that the nominee of an alien nonresident has this right; *Carthey v. Webb*, 6 N. C. 268, decided in 1813, holding that, where the next of kin are aliens and residents of a country at war with the United States, the nominee of the kindred next in degree is to be preferred to a creditor; *Smith v. Munroe*, 23 N. C. 351, decided in 1840, holding that one residing abroad may nominate; *Little v. Berry*, 94 N. C. 437, decided in 1886, that next of kin, who are residents, may nominate; *Williams v. Neville*, 108 N. C. 565, 13 S. E. 240, decided in 1891, that the next of kin, who are residents, may nominate; *In re Meyers*, 113 N. C. 548, 18 S. E. 689, decided in 1893, that the husband, a resident, may nominate the administrator of his deceased wife.

These authorities would be conclusive as to the right of a nonresident, who is next of kin, to nominate, if the qualifications and disqualifications of those claiming the right to administer had remained the same from 1793, when the first of these cases was decid-

ed, and 1893, the date of the last; but it will be found that there have been important and material changes in the statutes during this period and since then; and in considering these changes it must be remembered that no case has been found since 1868 holding that an alien nonresident may nominate, and none since 1905 holding that a nonresident may do so.

We have been unable to find any statute, prior to 1868, which prevented a nonresident, whether an alien or not, from qualifying as administrator in this state; and the diligent and learned counsel for the petitioner concedes that there is no such statute. In 1868 (C. C. P. § 457), the courts were prohibited from issuing letters of administration to "an alien who is a nonresident of this state," and the statute remained in this condition until the Revisal of 1905, when it was changed to read: "Is a nonresident of this state, but a nonresident may qualify as executor." Rev. § 5, subsec. 2. It follows that, prior to 1868, a nonresident, whether an alien or not, could qualify as administrator in this state, and, being entitled to qualify, he could, under the rules of the common law, nominate some one to act in his place; and from 1868 to 1905 a nonresident, who was not an alien, for the same reason, had the right. If, therefore, the right to nominate is dependent on the right to administer, the cases from our reports, referred to, were correctly decided, and are not in conflict with the position that a nonresident, who cannot administer under the Revisal of 1905, has no such right.

There is much conflict of authority in the different states as to whether the right to nominate is dependent upon the right to administer, some of the courts holding that the next of kin, when disqualified under the statute from acting as administrator on account of nonresidence, may nominate, and others holding to the contrary, the decisions being frequently dependent on the language of a statute expressly conferring the right to nominate; and we have no such statute.

The right to administer is not as important now as it was before the statute of distributions, as is clearly pointed out by Chief Justice Pearson in *Stoker v. Kendall*, 44 N. C. 242, and approved in an opinion by Chief Justice Nash in *Atkins v. McCormick*, 49 N. C. 274. Judge Pearson says: "The object in appointing an administrator is to have the estate of the intestate taken care of. Since the statute of distributions, it in fact makes but little difference who is appointed administrator, so that he is a fit person and gives the bond required by law. Prior to that statute, as the administrator had a right to the surplus, after the debts were paid, it was a matter of very considerable consequence to obtain letters of administration, and there were frequently contests about the right."

When it is remembered that under our statute the administrator has no interest in the estate, and that he acts under the direction of

a court, whose duty it is to see that a competent person is appointed, and that he cannot, by any act of his, affect the rights of those entitled to share in the distribution of the estate, it would be strange if one who is disqualified to act as administrator could name the person who must be appointed.

While, as we have said, there is authority to the contrary, the better view, as we think, is that the right to nominate depends on the right to administer. The law is so stated in *Croswell on Executors and Administrators* (page 92): "In many of the United States, however, by statute or by judicial decision, the person entitled to administration, whether resident in the state or not, may nominate some other person to the administration in his stead. And, if the person who is entitled to administer renounces in favor of another, the appointee may proceed to have letters which have been wrongfully granted to a third person revoked, and himself appointed instead. \* \* \* In other states, it is held that the right to administer is merely personal, and does not include the right or power on the part of the person possessing it to nominate or select another person to be appointed in his stead. When the power of nomination is conferred by express statutes, it will be limited to the persons named in the statute, and will not be extended to their representatives. \* \* \* The right of persons who are entitled to administer, but who reside out of the state, to appoint some resident of the state to take administration in their stead is in some states recognized, at least as far as a surviving husband, widow, and next of kin are concerned, without regard to statutes. But by statute in some states nonresidence in the state renders the person, otherwise entitled to administer, incompetent; and in such case his appointee is also incompetent, and the appointment is nugatory. \* \* \* Generally, if the person entitled to administration is incompetent for any cause, his right of nomination fails, and, except as above stated, no right of nomination exists."

In the case of *In re Muersing*, 103 Cal. 587, 37 Pac. 521, a nonresident next of kin attempted to exercise the power of nomination, and the court says: "The father, not being a resident of the state, was not competent or entitled to serve as administrator, and being incapable himself of administering, it was not competent for him to nominate an administrator." And other cases to the same effect are cited in the notes to *Croswell on Executors and Administrators*, *supra*.

The recent case of *Butcher v. Kunst*, 65 W. Va. 390, 64 S. E. 960, is in point, as appears from the following excerpt from the opinion: "The first question is: Had Louisa Butcher, as distributee of said estate, the right of administration or the right of nomination as claimed? Second, if she had not such right, had she, by virtue of her interest in



said estate, right of protest and advice in the appointment of an administrator and right of appeal from the adverse judgment? Prior to the amendment of section 4, c. 85, Acts of Legislature 1903 (chapter 13, now section 3258, Code 1906), if sole heir and distributee and a competent person, she would have had precedence in right of administration; but by that amendment, being a nonresident, that right was wholly taken away. That amendment added the proviso 'that no person not a resident of this state shall be appointed or act as such personal representative, unless the decedent be a nonresident of the state at the time of his death, and names in his will a nonresident as his executor.' It is quite evident that counsel on both sides in this controversy have overlooked this amendment. Without such authority given by the statute, her nomination would not bind the court in exercising sound discretion in the appointment of some suitable person. 18 Cyc. 92. The statute is plain, and does not call for interpretation. Its terms clearly precluded Louisa Butcher, a nonresident, from administering said estate, and her appointees and next of kin acquired no rights under her to administer thereon. This answers the first question."

We are of opinion, therefore, that the right to nominate depends upon the right to administer, and that the nominee of the nonresident guardian of nonresident minors was not entitled to have the appointment of Heartt revoked.

The petitioner says, however, that the disqualification of a nonresident to administer is in the same section with the disqualification of one because under 21 years of age, and that it has been held in this state, in *Wallis v. Wallis*, 60 N. C. 78, *Little v. Berry*, 94 N. C. 437, and in *Williams v. Neville*, 108 N. C. 561, 13 S. E. 240, that an infant, who cannot administer, may nominate. An examination of these cases will show that the question was not raised in either. In the *Wallis* Case, the county court appointed the widow of the intestate administratrix. In the superior court, the order was reversed because the widow was under the age of 21, and the court appointed the nominee of the mother of the intestate. In the Supreme Court, it was held that the nominee of the mother was entitled to administration, but that it ought to have been granted *durante minori tate*, and that the superior court, instead of granting the administration, ought to have directed the county court to do so. There is a statement in the opinion that the court might have granted letters to the nominee of the widow, and two cases are cited in support of the dictum (*Ritchie v. McAuslin*, 2 N. C. 220, and *Pearce v. Castrix*, 53 N. C. 71), in neither of which was the right of an infant to nominate involved, and the *Wallis* Case was approved in the *Little* Case and in the *Williams* Case, in support of the proposition

that the next of kin, who are entitled to administer, may appoint; the next of kin being, so far as the cases disclose, of full age and residents. If, however, the law is stated correctly in the *Wallis* Case, there is a distinction between the disqualification on account of nonage and nonresidence, because in the first the right to administer continues to exist, while the exercise of the right is suspended during minority, and, in the case of a nonresident, he has never had the right to administer.

Applying these principles to the facts appearing in the record, we conclude that the nominee of the guardian is not entitled to have letters of administration issued to him, and that the appointment of Leo D. Heartt ought not to be revoked.

Affirmed.

(91 S. C. 201)

#### LAWSON v. SOUTHERN RY. CO. et al.

(Supreme Court of South Carolina. April 1, 1912.)

#### RAILROADS (§ 353\*)—ROAD CROSSING ACCIDENTS—LIABILITY.

Judgment for defendants, in an action for negligent death of plaintiff's intestate, who was struck by defendant railway company's train at a public crossing, reversed, and cause remanded.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1217-1219; Dec. Dig. § 353.\*]

Hydrick, J., dissenting in part.

Appeal from Common Pleas Circuit Court of Union County; Robt. Aldrich, Judge.

"To be officially reported."

Action by Charles N. Lawson, William Lawson's administrator, against the Southern Railway Company and others. Judgment for defendants, and plaintiff appeals. Reversed and remanded.

Wallace & Barron, for appellant. Sanders & De Pass, for respondents.

FRASER, J. This is an action for damages for negligence of the defendant in the killing of the plaintiff's intestate, William Lawson, on the line of defendant's railway at a public crossing known as the "Buffalo Crossing," in the town of Union, in Union county, in this state, on the 31st day of July, 1909.

The specifications of negligence were:

"(a) In that the said defendants ran the said tender car and train of cars attached to the said locomotive engine on and over the said railroad track, and within the incorporate limits of the town of Union, and on and over the said public crossing, over which said public crossing the said William Lawson, plaintiff's intestate herein, was attempting to pass and cross in his buggy drawn by a mule, the said train being run and operated at a negligent, grossly careless, and reckless rate of speed by the said defendants, and

the said defendants then and there operating, controlling, and managing said locomotive engine, tender car, and train of cars aforesaid negligently, carelessly, recklessly, willfully, wantonly, and in a grossly careless manner caused the said tender car attached to and in front of the said locomotive engine which was running backwards to strike, run over, crush, mutilate, mangle, and instantly kill plaintiff's intestate, the said William Lawson, while he in his said buggy was at and on the said public crossing, and attempting to pass thereover.

"(b) In that the said defendants negligently, carelessly, willfully, wantonly, and in a grossly reckless manner caused the said locomotive engine to approach and pass over said public crossing, running backwards, with the said tender car in front of said engine, at the highly negligent and grossly careless and willfully reckless rate of speed aforesaid, full well knowing the danger of said public crossing; that the said crossing was much traveled, and especially on Saturdays; and that its said train was behind its schedule time.

"(c) In that the said defendants negligently, carelessly, willfully, wantonly, and in a grossly reckless manner caused the said train with the tender car in front and the said locomotive engine running backwards, at the said negligent, grossly careless, and reckless rate of speed, to approach the said public crossing within the incorporate limits of the town of Union, and to run on and over said public crossing without having a pilot or some one on the said tender car to look-out and watch the said railroad track and the said public crossing, and to advise and warn the said defendants of persons approaching towards said public crossing, and of the approach of plaintiff's intestate, the said William Lawson, towards said public crossing and of his presence at and on the said public, much-used, and dangerous crossing.

"(d) In that the said defendants, operating and controlling and managing said locomotive engine, tender car, and train of cars attached thereto, in the careless, negligent, reckless, and willful manner aforesaid, in utter disregard of human life, did negligently, recklessly, willfully, and wantonly cause the said engine with tender car and train of cars to approach the said public crossing and pass thereover without ringing the bell or blowing the whistle of said locomotive engine, and without giving any of the statutory signals as required by law on approaching a public crossing and without observing any care or caution whatsoever, regardless of their duty and the rights and safety of plaintiff's intestate, the said William Lawson, who was at and on the said public, much-used, and dangerous crossing, and attempting to pass thereover, when the said tender car, in front of said locomotive engine

and train of cars as aforesaid, suddenly emerged from said cut, rushing upon, striking, and instantly killing plaintiff's intestate, the said William Lawson, as aforesaid.

"(e) In that the said defendants negligently, carelessly, recklessly, willfully, and wantonly failed to stop the said tender car, locomotive engine, and train of cars, and failed to slacken the speed thereof, on approaching and passing over the said public, much-used, and dangerous crossing, and before striking, running over, mutilating, mangling, and killing plaintiff's intestate, the said William Lawson, while on the said public crossing as aforesaid.

"(f) In that the said defendants, full well knowing the said public and much-used crossing to be a dangerous crossing, that the approach of trains from said Lockhart Junction towards the said town of Union and the said crossing, within the incorporate limits of the said town of Union, was partially obscured from the view and observation of those traveling on the said public road and highway from the said town of Union to the said public crossing for a distance of more than 200 yards on said public road, and extending to said public crossing, and that the sound and noise of the approach of trains was muffled and deadened by the sides of the said cut through which the said railroad track passes and extends to the said public crossing did negligently, carelessly, recklessly, willfully, wantonly, and in utter disregard of human safety and public right fail and neglect to cut away, grade away, and shave down the sides of the said cut on the right of way of the defendant Southern Railway Company for a distance of a few yards up the said railroad track from the said public crossing towards the said Lockhart Junction, or cause the same to be done, or otherwise minimize the danger of said crossing (as they had the right to do and were in duty bound to do, and which could easily have been done at a small cost), whereby the approach of the said train on the said 31st day of July, 1909, could clearly and plainly have been seen and heard by plaintiff's intestate, the said William Lawson, for a distance of several hundred yards before he reached the said public crossing, at and on which he was struck and killed by the said tender car, in front of the said locomotive engine, and operated and managed by the said defendants in the careless, negligent, reckless, willful, and wanton manner aforesaid.

"(g) In that the said defendants, knowing that the approach of trains from the direction of Lockhart Junction towards the said town of Union, and the said public crossing was partially obscured from the view and observation of those approaching said public crossing on the said public highway from the said town of Union, and that the sound and noise of trains approaching said public crossing was also deadened and muffled to

those approaching said public crossing on the said public highway from the said town of Union, and also that trains approaching said public crossing make little noise, did negligently, recklessly, willfully, wantonly, and in a grossly careless manner, in utter disregard of public safety and the safety and right of plaintiff's intestate, the said William Lawson, cause and allow bushes and weeds and grass to grow up along the top and sides of the said cut and hill through which the said railroad track extends to said crossing and down to said public crossing, and on the right of way of the said defendant Southern Railway Company, and in a careless, negligent, reckless, willful, and wanton manner failed and neglected to cut down and remove the said grass, weeds, and bushes on the right of way of the said defendant Southern Railway Company, or cause the same to be done, or otherwise minimize the danger of said crossing (as they had the right to do, and were in duty bound to do, and could have done at a trifling cost), by reason of which said grass, weeds, and bushes which the said defendants allowed to remain standing on the sides and top of the said cut and down to the said crossing as aforesaid, the approach of the said train on the 31st day of July, 1909, with the said locomotive engine running backwards and tender car in front, was completely obscured and concealed from the view of plaintiff's intestate, the said William Lawson, as he approached towards, up to, and on the said public crossing, and whereby the sound and noise of the approach of the said train was further deadened and muffled to plaintiff's intestate, the said William Lawson, by reason of which said acts of negligence, willfulness, recklessness, and wantonness of the said defendants, and the said negligent, careless, reckless, willful, and wanton operation and management of the said train by the said defendants as aforesaid, the said William Lawson, plaintiff's intestate, was struck, mutilated, mangled, and killed when at and on the said public crossing by the said tender car of the said engine and train of cars aforesaid."

The defense was: (1) A general denial. (2) Contributory negligence. (3) Gross and willful negligence on the part of the deceased.

The errors complained of arise from exceptions to the charge of the judge. There are 33 exceptions; but only such as properly arise will be considered.

The first exception is as follows: "(1) In charging the jury that, if 'you come to the conclusion that the plaintiff has not made out his case by a clear preponderance of the evidence, then the verdict should be for the defendant'—it being respectfully submitted that the plaintiff was only required under the law to make out his case by the preponderance of the evidence, and that the clear preponderance rule as stated by his honor is not required by law, the error complained

of being in the use of the word 'clear.' The following is his honor's language: 'He [the plaintiff] is bound to prove by the clear preponderance of the evidence; that is, by the greater weight of the evidence.'" The judge at once explained what he meant, and, as thus defined, there was no error, and this exception is overruled.

The second and third exceptions were considered together in argument, and will be considered together here.

Exceptions 2 and 3 are as follows:

"(2) In charging the jury that 'all human agencies are fallible. No man, no work of the hands of man has ever been perfect yet, and the law does not require perfection, because, if it did, it would be impracticable, and, when a railroad has observed due care which experience has proven to be practically sufficient and an accident happens, why it is a pure accident, and nobody is responsible for it,' thereby charging the jury that the standard of due care was what 'has proven to be practically sufficient,' and, if the care that had been practically sufficient had been exercised in this case, then it would come within the realm of pure 'accident,' the errors being that he thereby charged the jury that a certain state of facts would constitute due care, and that a certain state of facts would constitute pure accident, while it is for the jury to say in all cases what facts constitute due care and pure accident, and the law does not define the standard of due care in any case as being that which 'has proven practically sufficient,' and his honor in so charging invaded the province of the jury, and charged upon the facts, contrary to the provisions of section 26, of article 5, of the Constitution of 1895.

"(3) In charging the jury that: 'If in operating its train on that occasion it was guilty of negligence, as I have defined it to you, then they are liable. If in operating their train on that occasion they observed that care and caution and prudence which experience had heretofore proved to be sufficient for their protection and the protection of all concerned, then they have not been guilty of negligence, and the plaintiff cannot recover'—the errors being twofold, to wit: (1) In that his honor thereby charged the jury that the standard of care and caution which the railroad should exercise was to be determined by past experience and experience which had previously been shown to be sufficient. (2) In that he, in so charging, thereby invaded the province of the jury in stating to them that if the defendants exercised that care and caution which had previously proven sufficient that it was not negligence, it being submitted that it was for the jury to say under all the circumstances what was and what was not negligence, and the said charge was contrary to the provisions of section 26 of article 5 of the Constitution of 1895 that judges shall not charge upon the facts."

These exceptions must be sustained. His

honor had excluded the evidence offered as to what had happened before. It was error to exclude evidence of previous transactions, and then make previous transactions the test of due care.

The fourth, fifth, sixth, and ninth exceptions will be considered together, as they are governed by the same principles of law.

"(4) In charging the jury: 'If the defendant was negligent and the plaintiff also was negligent, he cannot recover. The law does not undertake to unravel a web of negligence to which both parties have contributed, but will leave them where it found them. A railroad propelled by steam or any other powerful motive power going out and ranging through the country is dangerous, everybody knows that, and, while the railroad company, its agents and servants are held to a high degree of care, individual citizens are not absolved from their duty and responsibility to exercise care and prudence for their own protection, applying the rule both ways alike,' the errors being twofold, to wit: (1) In that, inasmuch as the complaint alleged willful negligence, plaintiff's intestate could have been negligent, and yet plaintiff would have been entitled to recover upon making out of case of recklessness, willfulness, or wantonness, and the charge of his honor errs in ignoring plaintiff's allegations, and requests to charge submitted by him in these respects. (2) In that inasmuch as plaintiff alleges recklessness, willfulness, and wantonness of defendants as a proximate cause of the death of his intestate, the rule announced by his honor in consideration of these allegations should not be applied alike."

"(5) In charging the jury as follows, to wit: 'Every man in dealing with a railroad company is presumed to know that he is dealing with a dangerous engine of destruction, and he must exercise his faculties and his sense in a manner to protect himself when he comes in contact with one of these dangerous instruments, and, if he does not do it, if heedless of apparent danger or danger which might exist, he goes and walks headlong into danger and destruction and is killed, why he is guilty of negligence himself, and, if his injury is the result of his own negligence, he cannot recover anything, even though the defendant was negligent. The law says you are both at fault, and we will leave you where we found you'—the errors being that his language was such as to impress upon the jury that plaintiff's intestate so did, and his honor thereby invaded the province of the jury and charged upon the facts contrary to the provisions of section 26 of article 5 of the Constitution of 1895 in stating to the jury what circumstances would make negligence, and also erred in that he in so charging ignored plaintiff's allegations of willfulness and wantonness of defendants and plaintiff's written request to charge thereon, the negligence of plaintiff's intestate

being no defense to willfulness and wantonness of defendants."

"(6) In charging the jury as follows, to wit: 'Now, if the plaintiff is negligent as alleged and the defendant is also negligent, I mean if the defendant is negligent as the plaintiff alleges, and the plaintiff is also negligent as the defendant alleges, then he cannot recover anything, then the plea of contributory negligence is made out, provided it is proved to your satisfaction by a clear preponderance of the evidence on the part of the defendant. If you find that the plaintiff was injured through the negligence of the defendant, and at the time the plaintiff himself or his intestate was not guilty of any negligence, of any negligence which was the proximate cause of the injury, then he is entitled to recover. That is the common-law action'—the error being that his honor by such charge ignored plaintiff's allegations of willfulness and wantonness on the part of the defendants as against which contributory negligence of plaintiff's intestate is no defense, and also ignored plaintiff's request to charge as to that phase of the case."

"(9) In charging the jury as follows, to wit: 'If the defendant by its evidence shows that the plaintiff's intestate was also negligent, that he did not take that care for his own safety which a reasonably prudent man would have done, and that his injury resulted from his own neglect, why, then, in this aspect of the case, the plaintiff would not be entitled to recover anything, because the plaintiff would be guilty of contributory negligence, provided the contributory negligence was the proximate cause of the injury without which it would not have occurred'—the error being that such instruction ignored plaintiff's allegations of willfulness on the part of defendant, as to which contributory negligence is no defense, and the requests of plaintiff to so charge; and also that gross negligence is necessary on the part of plaintiff's intestate to defeat recovery in case the jury should find the statutory signals were not given, the error complained of here being that the charge erroneously stated the effect of negligence of the deceased, who was killed at a public crossing. The allegations complained of negligence at common law, and also under the statute. Mere negligence was a defense, the defense of contributory negligence, to what in this case is called common-law negligence; that is, the failure to do those things that due care required, but not provided for by the statute. Mere negligence was not a defense to the charge of failure to do what the statute required, to wit, sounding the bell or whistle. Besides, the plaintiff had charged willfulness, and contributory negligence was not a defense to willfulness."

We might as well say just here that the plaintiff admitted that willful negligence on the part of the plaintiff was a defense, and

we cannot consider the effect of willful negligence in reference to the charge of willful negligence on the part of the defendant. The statute is as follows: "If a person is injured in his person or property by collision with the engines or cars of a railroad corporation at a crossing, and it appears that the corporation neglected to give the signals required by this chapter, and that such negligence contributed to the injury, the corporation shall be liable for all damages caused by the collision, or to a fine recoverable by indictment, as provided in the preceding section, unless it is shown that, in addition to a mere want of ordinary care, the person injured, or the person having charge of his person or property, was at the time of the collision guilty of gross or willful negligence, or was acting in violation of the law, and that such gross or willful negligence or unlawful act contributed to the injury." It will be seen by the reading of the statute that if a person is injured in his person or property by collision with the engine or cars of a railroad corporation at a crossing, and that the corporation neglected to give the signals, and that such negligence contributed to the injury, the corporation shall be liable for all damages sustained, unless it be shown that, in addition to mere want of ordinary care, the person injured was, at the time of the collision, guilty of gross or willful negligence, or was acting in violation of the law, and that such gross and willful negligence or unlawful act contributed to the injury. That statute is as clear as it can be made. The want of ordinary care, the contribution of ordinary negligence, is not a defense, and, when the judge charged the jury that "the law does not undertake to unravel a web of negligence to which both parties have contributed, but will leave them where it found them," the charge is too broad and ignored willful disregard of the rights of the deceased, and also the failure of the defendant to give the statutory signals, if there was willfulness of a failure to give signals required by the statute. It is the duty of a judge in charging a jury, when there are allegations of different kinds of negligence, to make it clear that there is a difference and to what allegations of negligence a general rule which he states must be applied. These exceptions are sustained. It is true that the case of *Edwards v. Railway*, 63 S. C. 271, 41 S. E. 458, and others, sustain the respondent's position, but these cases are so clearly and undisputably wrong that, so far as they decide this point, they are overruled. *Stare decisis* is an excellent rule. It has its limits. When the courts add to a statute words it does not contain, the decision is not binding, because the judicial department has no power to add to statutes by one decree or many.

The seventh exception is as follows: "(7) In charging the jury as follows, to wit: 'So you see, gentlemen, by that statute the law imposes upon railroad companies the duty of

blowing its whistle or ringing its bell within 500 yards of a public crossing and continue so to blow or to ring until it passes. That is a statutory duty. That is a plain duty imposed by law. If it is done, if that duty is performed and notwithstanding that any one is injured, the railroad company is not responsible, but if that statutory ringing of the bell or blowing the whistle is neglected, and a railroad train runs over a crossing, a public crossing, and injures any one, then the law says that the failure to ring the bell or blow the whistle is in itself evidence of negligence—the errors being in two particulars, to wit: (1) It was error to state to the jury that the failure to perform the statutory duty of ringing the bell or blowing the whistle as required by law was evidence of negligence, the law being that it is negligence per se. (2) It was further error, inasmuch as the complaint alleged negligence and willfulness in other particulars than the non-performance of the statutory duty, to say to the jury that if the defendants performed the statutory duty, and notwithstanding an injury followed, then the defendants would not be responsible." It is contended by the respondent that the expression "evidence of negligence" is not misleading. To this proposition the court cannot consent. Where an act is negligence per se, the jury must find negligence. Where it is mere evidence of negligence, the jury may not find that the defendant was negligent. The failure to sound the bell or whistle has been declared by this court to be negligence, and, if the jury had believed from the evidence that neither the bell nor the whistle was sounded, then they were bound to find for the plaintiff. This exception is sustained.

The eighth exception is as follows: "(8) In charging the jury as follows, to wit: 'If one approaching a railroad crossing is in a state of meditation, their thoughts turned inward upon themselves or the subject about which they are thinking, and unconsciously approach a railroad crossing, and in doing so is run over and injured, that would be simply negligence on the part of the traveler; but if one is approaching a crossing, he sees it, or by the exercise of reasonable diligence he can see it, a whistle blown, which he ignores, the bell is rung, which he does not hear or heed, the view is open so that he can see, and he does not look, why there is a conscious failure to perform a known duty to himself, and, if he is run over and injured, he cannot recover, because that is gross negligence on his part—the error being twofold, to wit: (1) It is a charge upon the facts contrary to the provisions of section 26 of article 5 of the Constitution of 1895, his language being clearly calculated to impress the jury that he is discussing the conduct of plaintiff's intestate, and that his belief was that he so did, and it could only be pertinent when so applied. (2) It is an erroneous statement of what facts would constitute gross negligence,

and is misleading; and, the matter of simple or gross negligence being a matter for the sole determination of the jury, his honor erred in stating what facts would constitute either simple or gross negligence." This exception is sustained for two reasons: The two cases cited by his honor are the same; and second, it is a charge on the facts. The judge has no right to tell the jury what would be gross negligence. This exception is sustained.

The tenth exception is as follows: "(10) In charging the jury as follows, to wit: 'Unless the plaintiff's intestate was guilty of such negligence on his part, as weighed by the same scales that you weigh the negligence of the defendant, constitutes gross negligence on his part to employ his own faculties and his own capabilities to protect himself, if he was guilty of such gross negligence as that, then he is not entitled to recover punitive damages or any damages at all under the statute'—it being respectfully submitted that such statement was erroneous, in that his honor thereby charged the jury that gross negligence on the part of plaintiff's intestate was a good defense to willfulness and wantonness of defendants as alleged, and ignored plaintiff's request to charge as to willfulness of defendants; and his honor should have instructed the jury that gross negligence of plaintiff's intestate to be a defense even to the negligence of defendants in failing to give required statutory signals must contribute to the injury as a proximate cause thereof." The first specification of error under this exception cannot be sustained. The following colloquy occurred in the trial: "Mr. Barron: There's one thing I would like to call attention to, your honor, before you close; that is, to charge the jury that even if the railroad company, the defendant, were guilty of willfulness, that contributory negligence on the part of the plaintiff would be no defense. The Court: Unless it was gross. Mr. Barron: Yes, sir; unless it was gross." The second specification of error is sustained, as it makes mere inadvertence gross negligence. Inadvertence may be gross negligence, if the jury think it was, but this was a charge on the fact.

The eleventh and twelfth exceptions are as follows: "(11) In failing and refusing to charge plaintiff's ninth request to charge, which was as follows, it being submitted to be a correct proposition of law applicable to the case, to wit: 'That if the jury find from the evidence that William Lawson plaintiff's intestate, was killed at and on a public highway crossing over the Southern Railway Company's track, or one operated by it, by collision with the engine and train of cars thereon, and that the statutory signals as required by statute were not given on the approach to and across said crossing, that would in itself be negligence in it, and also evidence of reckless negligence.'

"(12) In failing and refusing to charge

plaintiff's request to charge, numbered 12, which was as follows, it being submitted to be a correct proposition of law applicable to the case, to wit: 'That if the jury find that the statutory signals were not given by the train on approaching the place where the railroad crosses the public highway, even if it should be clearly proved that William Lawson did not look and listen, yet that would not show in itself gross negligence or want of care; but it would be a question for the jury to settle from all the evidence and circumstances in the case.'"

These requests were charges on the fact, and properly refused. These exceptions are overruled.

The thirteenth exception is as follows: "(13) In failing and refusing to charge plaintiff's request to charge, numbered 14, which is as follows, it being submitted to be a correct proposition of law applicable to the case, to wit: 'That if William Lawson, plaintiff's intestate, traveling upon the public highway, and having exercised that degree of care, caution, and prudence which a man of ordinary prudence and caution would have exercised, went upon the track of Southern Railway Company where it crosses the public highway, and he was then and there confronted by sudden peril and danger to which the negligence of said company or its servants subjected and exposed him, and through fright or any other mental emotion or operation he acted unwisely or erroneously, that would not be negligence or gross or willful negligence of his part.'" This exception must be sustained, and *Douglass v. Railway*, 82 S. C. 79, 80, 62 S. E. 15, 63 S. E. 5, is authority for this charge.

Exception 14 is as follows: "(14) In failing and refusing to charge plaintiff's request to charge, numbered 16, which was as follows, it being submitted to be a correct proposition of law applicable to the case, to wit: 'That, even if the jury should find that the statutory signals were given as required by statute on the approach of the train to the crossing at which William Lawson was killed by collision with it, yet the defendant Southern Railway Company would be liable to the plaintiff in this action for damages for said killing, if the jury should find that the death of William Lawson, plaintiff's intestate, was the proximate result of and caused by defendant, Southern Railway Company, or its servants' ordinary negligence in any other respect as alleged in the complaint, unless the jury find, further, that William Lawson was guilty of negligence on his part which contributed as a proximate cause to his injury, and without which it would not have happened, but if the jury should find that the death of William Lawson was the proximate result of the willful or reckless negligence of defendant, Southern Railway Company, or its servants, in any particular as alleged in the complaint, then no negligence on the part of William Lawson at

the time of the collision neither ordinary nor gross negligence would constitute a defense to the action, or relieve Southern Railway Company from liability for the damages for the death of William Lawson." This exception cannot be considered, for the reason stated above—that appellant had admitted that gross negligence on the part of the plaintiff's intestate was sufficient.

The fifteenth exception cannot be considered, for the same reason alleged as to the fourteenth.

"(16) In failing and refusing to charge plaintiff's request to charge, numbered 18, it being submitted that the same set forth a correct proposition of law applicable to the case, and which is as follows, to wit: 'I charge you that conscious negligence is willful negligence.'" In *Tinsley v. Telegraph Company*, 72 S. C. 354, 355, 51 S. E. 913, 914, the court says: "A conscious failure to observe due care is wantonness or willfulness. Failure to observe due care is negligence. Therefore conscious failure to observe due care is conscious negligence." Whatever the grammarians may think of this aggregation of words, they are terms of art, and not subject to their rules. This exception is sustained.

The seventeenth exception is as follows:

"(17) In failing and refusing to charge plaintiff's request to charge, numbered 20, which was as follows, the same being submitted to be a correct proposition of law applicable to the case, to wit: 'Large and extensive powers and privileges are granted to railroads and among them to condemn land for the purposes of its railroad tracks, and to cross public highways and streets; but, when it lays its track bed across a public highway or street, it is bound to use reasonable care and precaution in doing so, and to put such crossing in a reasonably safe condition for the traveling public, and this duty is a continuing one, and if you find from the evidence in this case that the defendant Southern Railway Company failed in its duty in not so keeping and maintaining the public crossing where Mr. William Lawson was killed in a reasonably safe condition by failing to cut down grass, bushes, and weeds, whereby the said crossing became a dangerous crossing, and that such failure contributed to his (Mr. Lawson's) injury and death, and if you further find from the evidence that the said William Lawson at the time he was struck by the train of said Southern Railway Company was not guilty of contributory negligence which was a proximate cause of his injuries and without which they would not have occurred, your verdict must be for the plaintiff, and I so charge you.'" This exception cannot be sustained, because not applicable to the facts proven in the case. There was no evidence in this case that the bushes and weeds of the embankment complained of were on the defendants' right of way. The plaintiff's evidence in regard to this matter

was ruled out by his honor, and to such ruling there has been no exception. The plaintiff offered the charter which showed that the railroad company was entitled to 100 feet from the center of its track on both sides, but he offered no evidence that this court can find to show that the embankment or the obstructions were within 100 feet of the center of the track and the embankment was removed or cut down by the town of Union, and this is the only act of ownership proven in the case; so that this request to charge, not being germane to any fact proven in the case, was properly refused, and this exception overruled.

The same may be said of the eighteenth exception; also the nineteenth.

The twentieth exception is as follows:

"(20) In failing and refusing to charge plaintiff's request to charge, numbered 23, it being respectfully submitted to be a correct proposition of law applicable to the case, and which was as follows, to wit: 'If you do find from the evidence, as I have just stated to you, that the said crossing at which Mr. William Lawson was killed was unsafe to the traveling public using that crossing and dangerous, then it would have been negligence on the part of the railroad company not to have corrected said evil and prevented said danger if it could have done so, and a reasonably prudent person under the same circumstances would have done so; and if it allowed it to so remain, knowing it to be dangerous and that it was a menace to those who used said public highway, then its failure to perform a known duty and to prevent a danger at said crossing of which it was aware, and could have prevented as alleged in the complaint, would be willful and deliberate negligence.'" This exception is overruled, because the evidence does not show that the obstructions were so located that they could have been removed by the defendant.

The twenty-first exception is as follows:

"(21) In failing and refusing to charge plaintiff's request to charge, numbered 26, it being submitted to be a correct proposition of law applicable to the case, and which was as follows, to wit: 'If the jury should find from the evidence that others had just passed over the public crossing where Mr. William Lawson was killed, and that Mr. William Lawson knew that they had just passed over in safety, the jury may consider that fact in determining whether Mr. Lawson believed (if he did so believe) that the coast was clear, and he too could pass over in safety; and I charge you that, if a man of ordinary reason and prudence would have gone ahead under such belief, then it would not have been negligence on his part. Negligence is the failure that care and prudence which a man of ordinary prudence and firmness would exercise under

the same circumstances.' This request was a charge on the facts, and properly refused.

The twenty-second exception is as follows:

"(22) In modifying plaintiff's request to charge, numbered 6, and in not charging the same without modification, it being submitted that the request stated a correct proposition of law applicable to the case, and that the modification thereof was error and incorrectly states the law. The request to charge was as follows, to wit: 'That if William Lawson, plaintiff's intestate, was killed by collision with Southern Railway Company's train drawn by its engine at a public crossing over its track, and the statutory signals were not given, as required by the statute on approaching said crossing at the time of the said killing, then the burden of the proof by the preponderance of the evidence is on the Southern Railway Company, if it would relieve itself from liability for damages for said killing, to show that he knew of the approach of said train to said crossing in time to have avoided the collision. The law does not presume, nor will the court assume, deceased knew of the approach of the train'—and the modification thereof being as follows, to wit: 'I charge you that is good law provided by the use, the ordinary use, of his faculties and sense, he could not have seen or known of the train; if he could he is not entitled to recover. If he could not, then that is good law.' It being further submitted as to said qualification that it destroys the rule of evidence by substituting the possibility of knowledge for the legal proof of the fact that he did know, and makes the failure on the part of the plaintiff's intestate to see or know of the approach of the train, if he could have done so, gross negligence, the same being error." This exception is sustained. It is not a proposition of law that one approaching a public highway is responsible for a collision, except in case of gross or willful negligence, and the court has no right to say that inadvertence is gross or willful negligence.

The same ruling is made in reference to exception 23. The statement is: "If he had an opportunity of seeing and didn't see, why then he should have stopped. If he has an opportunity of seeing, his business was to see, and, if he didn't exercise those faculties, why it was his own fault." The error here is in the judge's comment on the exception. He made a finding of fact which was for the jury.

Exception 24 is as follows: "(24) In modifying plaintiff's request to charge, numbered 25, it being submitted that the said request set forth a sound proposition of law applicable to case, and which should have been charged without modification, the said request being as follows, to wit: 'In every instance the care required in the operation of trains must be commensurate with the risk, and extra precautions should be used where

extra dangers exist; and a person in passing over a crossing where an extra danger exists has a right to assume that extra caution will be observed by the railroad company.' And the said modification being as follows, to wit: 'That is good law, and, when it comes to the plea of contributory negligence, the same rule applies to persons coming to the crossing. If there is an extra danger there, he must look out and use extra precautions on his own behalf'—the errors in said qualification being twofold, to wit: (1) In not limiting his qualification by saying, 'If it was shown that he knew of the danger' or words to that effect. (2) In not going further in said qualification, and instructing the jury that the failure to look out and use extra precautions, even though it were shown by the evidence that he knew of the dangerous character of the said crossing, would not be a defense in event of failure to give the statutory signals unless it amounted to gross contributory negligence, and, would not in any other case be a defense unless it amounted to a failure to exercise due care which contributed to the injury as a proximate cause thereof." In regard to this exception the request to charge and the modification are both erroneous. What care was necessary on the part of the defendant and what care was necessary on the part of the deceased were both questions of fact for the jury.

Exception 25 is as follows: "(25) In charging the defendant's second request to charge, which is as follows, to wit: 'Not only must the plaintiff prove that there was a failure to ring the bell or sound the whistle continuously for 500 yards before the engine or train reached the crossing, but he must also prove that such failure contributed as a proximate cause to the injury complained of, and, if he fails to establish these facts, then he has failed to prove the allegations of his complaint in this respect'—the error being that the law presumes from an injury received at a public crossing upon failure to give the statutory signals that such failure was the proximate cause thereof, and the instruction contained in said charge was misleading, and tended to impress the jury with the idea that affirmative evidence and evidence other than the proof of the injury so received was necessary before plaintiff could recover, and was practically an instruction to that effect." This was error. The court says in *Lee v. Railway*, 84 S. C. 137, 65 S. E. 1036: "When it appears that an injury occurred at a crossing, and that the statutory signals were not given, there arises a presumption that the failure to give the signal, which is negligence per se, contributed to the injury."

Exception 26 is as follows: "(26) In charging the defendants' first request as to the statutory cause of action, which was as follows, to wit: 'Our Supreme Court has recently declared that a railway crossing is of it-



self inherently dangerous. I therefore charge and instruct you that it is the duty of a person intending to cross a railway track at a highway crossing to be on the alert, and to be vigilant, in order to avoid being injured. The law requires of every one to exercise that degree of care and caution which men of ordinary care and prudence would, or ought to exercise, under the same circumstances in order to avoid being injured—the error being that the said charge was inapplicable to the defense of contributory negligence under the statutory cause of action, and was misleading and confusing to the jury, and was practically an instruction to the jury that the failure on the part of a person injured at a crossing to exercise ordinary prudence and caution, when the statutory signals had not been given, would defeat his action under the statute, and was erroneous in this respect." This was also error. The law does not make the want of ordinary care and prudence, but gross and willful negligence, a defense. The law seeks to make a public highway a safe place. It permits a dangerous agency to pass over it, but he who converts a public highway into a place of danger and death must see to it that no one is injured by his negligence.

Exception 27 is as follows: "(27) In charging the defendant's fourth request to charge as applicable to the statutory cause of action, the said request to charge being as follows, to wit: 'If the evidence in any case establishes the fact that the person is familiar with the surroundings and knows of the danger impending, and fails to stop, look, and listen before entering upon a railway crossing, and should further show that a man of ordinary prudence would have stopped, looked, and listened, and that such failure contributed as a proximate cause to an injury, then, under the law, he is guilty of contributory negligence—the error being that the doctrine of simple contributory negligence has no application to the cause of action for failure to give the statutory signals, and it was misleading and confusing to the jury, and was erroneous, in that it was practically and in effect a charge to the jury that plaintiff's cause of action could be defeated by simple contributory negligence on the part of his intestate.' This charge was error. The statute says: 'If such negligence contributed to the injury.' The court has no right to add to the statute the words 'as a proximate cause,' and, as this complaint contained the allegation that the statutory signals were not given, mere contributory negligence was not a defense. This exception is sustained.

The twenty-eighth exception is as follows: "(28) In charging the defendants' fifth request to charge as applicable to the statutory cause of action, and especially with the addition or qualification thereto made by his honor, the said request being as follows, to wit: 'I charge and instruct you that if the

circumstances of the case were such as to have demanded that a man of ordinary care and prudence should have exercised slight care before entering on the crossing, and if you find that the deceased did not exercise slight care, and should further find that such failure contributed as a proximate cause to his injury, there can be no recovery on account of the failure to ring the bell or sound the whistle'—and the said addition or qualification thereto by his honor being as follows, to wit: 'Properly construing that, of course, but I prefer to charge you that if upon entering upon a crossing, and that it be a known dangerous place, it is the duty of the traveler to exercise the greatest care that the circumstances might require to protect himself. The word "slight care" there might be misleading.' The error being that his honor by the said addition or qualification to the said request impressed upon the jury that plaintiff's intestate should have exercised the greatest degree of care in going upon said crossing, and thereby practically instructed the jury that, if plaintiff's intestate did not exercise the greatest degree of care before entering upon said crossing, the cause of action would be defeated, which said addition to the said request to charge was especially prejudicial to plaintiff, in that the said request was presented as applicable to the statutory cause of action, and, also, in view of the previous requests of defendants charged to the jury as applicable to the said statutory cause of action, a much greater burden of proof was required of plaintiff than is required by law." This exception is sustained. His honor was right in saying the words "slight care" are misleading. The statute makes the defense gross and willful negligence, where there is a failure to give the statutory signals, and the charge, in its general statement, included the failure to give the statutory signals.

The twenty-ninth exception is as follows: "(29) In charging the defendant's first, second, and third request to charge as to contributory negligence of plaintiff's intestate under the common-law cause of action, the said error being that the said requests ignore plaintiff's allegations of willfulness and wantonness of defendants as a proximate cause of the injury, and plaintiff's request to charge the law thereon." This exception does not comply with the rule, and is not considered.

The thirtieth exception is as follows: "(30) In failing to charge at any time during his charges to the jury the proposition of law applicable to the case to the effect or in substance as follows, to wit: 'That contributory negligence on the part of plaintiff's intestate would be no defense to willful or wanton negligence on the part of defendants which contributed to the injury as a proximate cause thereof'—which said proposition of law in effect or substance should have been given to the jury, especially in

view of plaintiff's request that the jury in substance be so charged, and also in view of his honor's reiterated instruction that plaintiff could not recover if his intestate had contributed by his negligence in any way to his injury as a proximate cause thereof, the error being that by such failure and despite plaintiff's request he was denied the benefit of such instruction to the jury." This exception will not be considered, because the plaintiff had the right to request the charge, and, having failed to do so, had no right to complain.

The thirty-first, thirty-second, and thirty-third exceptions apply solely to the conduct of the last trial, and, inasmuch as this case will be sent back for a new trial, they do not properly arise.

The judgment of this court is that the judgment of the circuit court be reversed, and the case remanded for a new trial.

GARY, C. J., and WOODS, J., concur in the result.

HYDRICK, J. (concurring and dissenting). I concur in the result. Some of the exceptions which have been sustained in the opinion of Mr. Justice FRASER are based upon isolated portions of the charge; and if these parts had been considered in connection with the whole charge, which is the rule of this court in considering exceptions to a charge, the exceptions imputing error in so charging should have been overruled.

I wish, however, especially to note my dissent from the opinion that the case of *Edwards v. Railway*, 63 S. C. 271, 41 S. E. 458, is wrong and should be overruled. That case has been frequently cited by this court with approval, and there is nothing in it at variance with the law or with any other decision of this court. Like this case, that action was brought, under the common law and under the statute, for damages for an injury by collision at a railroad crossing. The circuit judge correctly charged the law applicable to the common-law phase of the case, and also to the case as made under the statute. It appears on page 284 of the report that he charged plaintiff's third request that, if the signals required by statute were not given, plaintiff was entitled to recover, unless his intestate was guilty of gross or willful negligence, which contributed proximately to the injury. It also appears on page 285 that he charged plaintiff's fifth request, to wit: "When the law speaks of an act of negligence as contributing to the injury, it means as a direct and proximate cause thereof, without which the injury would not have occurred." The exception to that charge was overruled by this court. In the cases of *Wragge v. R. Co.*, 47 S. C. 105, 25 S. E. 76, 33 L. R. A. 191, 58 Am. St. Rep. 870, and *Strother v. R. Co.*, 47 S. C. 375, 25 S. E. 272, this court held that in an action under the statute it was not nec-

essary to show that the failure to give the statutory signals was the proximate cause of the injury. But in the subsequent case of *Bowen v. Railway*, 58 S. C. 222, 36 S. E. 590, the court said: "When the law speaks of an act of negligence as contributing to an injury, it means as a direct and proximate cause thereof." Though no reference was made thereto, this announcement of the law necessarily overruled the contrary principle which had been ruled in the *Wragge* and *Strother* Cases. No doubt, the request above quoted in the *Edwards* Case was taken from the *Bowen* Case. The rule announced in the *Bowen* Case has been followed ever since. *Burns v. Railway*, 65 S. C. 229, 43 S. E. 679; *Duncan v. Greenville*, 73 S. C. 254, 53 S. E. 367; *Turbyfill v. Railway*, 83 S. C. 328, 65 S. E. 278; *Lee v. Railroad Co.*, 84 S. C. 138, 65 S. E. 1031.

The points above mentioned are the principal, though not the only, ones discussed in the opinion of Mr. Justice FRASER to which I do not assent. I do not mention the others specifically, because they are of less importance, and I have not the time to discuss them.

(91 S. C. 351)

#### DEAL v. DEAL et al.†

(Supreme Court of South Carolina. April 3, 1912.)

#### 1. COMPROMISE AND SETTLEMENT (§ 6\*)—CONSIDERATION—SUFFICIENCY.

Insured, whose policy named his mother as beneficiary, attempted to effect a change and make his wife the beneficiary, and, believing such change had been made, delivered the policy to the wife. After his death, the insurer refused to pay the wife on the ground that the beneficiary had not been changed. The mother then promised that, if the wife would surrender the policy to her, she would procure payment and deliver the proceeds to the wife. *Held* that, irrespective of whether the beneficiary had been changed, this agreement constituted a compromise of the matter in dispute, based on a sufficient consideration, and could be enforced by the wife against the mother.

[Ed. Note.—For other cases, see *Compromise and Settlement*, Cent. Dig. §§ 35-50; Dec. Dig. § 6.\*]

#### 2. COMPROMISE AND SETTLEMENT (§ 24\*)—EVIDENCE—SUFFICIENCY.

In an action by a wife claiming to be the beneficiary of an insurance policy against the mother whom the company recognized as beneficiary, evidence on the question of whether the mother agreed to collect the proceeds for the wife's benefit *held* to justify the denial of a nonsuit.

[Ed. Note.—For other cases, see *Compromise and Settlement*, Cent. Dig. §§ 95, 96; Dec. Dig. § 24.\*]

Appeal from Common Pleas Circuit Court of Richland County; R. E. Copes, Judge.

"To be officially reported."

Action by Mary L. Deal against Margaret E. Deal and another. From a judgment for plaintiff, defendants appeal. Affirmed.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

† Rehearing denied May 1, 1912.

The following are the appellant's exceptions:

"As to testimony:

"First Exception.

"Appellants respectfully submit that his honor erred in ruling during the examination of the plaintiff, as follows: 'Q. How much insurance was in existence at the time of Dr. Deal's death on his life? Mr. Gibbs: I object. The Court: Sustained. You cannot go into other insurance, except that involved in this suit. It has taken three times more than necessary to try this case now. If we are going to bring in another case, I don't know when we will ever get through.' And in ruling, during the examination of witness J. B. Whisonant, as follows: 'Q. Do you recall having any conversation with Mrs. M. L. Deal during the month of December with reference to insurance on the life of her late husband? A. Yes, sir. Q. When was the first time you had any conversation with Mrs. M. L. Deal with regard to that matter? Mr. Gibbs: He must confine himself to this particular policy. No other policy shall be considered. The Court: Confine the matter to this insurance. I have ruled other insurance does not come in the consideration of this case. Mr. Verner: Would you allow me to state to you why I think the other insurance matter will bear some relation? The Court: We discussed that twice yesterday. Mr. Verner: I have never suggested yet why it should be done. The Court: Gentlemen of the jury, retire to your room while the matter is being discussed that I do not care to have ventilated in your presence. (Jury retired.) Mr. Verner: One matter that we are trying to find out is whether Dr. S. M. Deal intended or wished this money to go to his wife or not. The testimony was that this assignment was returned by the company to Dr. Deal, and there the matter was let drop, nothing more was done. If I can show about that time Dr. Deal took out other insurance on his life payable to his wife, wouldn't that be evidence tending to prove that he had changed his mind with reference to giving her the benefit of this particular policy, and had intended giving her in lieu of this, a larger policy? I think the testimony competent tending to show what disposition Dr. Deal intended to make of this policy. If I can show at that time he took out a larger policy payable to his wife, the inference can be drawn he intended to leave this for his mother. Mr. Gibbs: This policy we have in consideration in this case was issued June, the other policy he has reference to was November; absolutely no connection between them; and there is nothing in the contention of my friend, Mr. Verner. The Court: The logical inference that could be drawn from his taking out additional insurance in favor of his wife was that he was not satisfied with the amount already provided for, that it was not sufficient; but, in either event,

that was a separate and distinct transaction, altogether from the one we are now investigating, unless there was some act or some word of the insured at the time going to show he intended one in place of the other. Just to prove he took out additional insurance for the benefit of his wife would have no bearing whatever on the merits of this case. Let the jury come in. Let's consider this matter closed now.' The error in the ruling of the court being that in ruling as he did the presiding judge kept defendants from bringing to the jury knowledge of the fact that about the time, and, after the assignment referred to in the complaint had been returned to the insured by the insurance company, the insured took out additional insurance on his life for the benefit of plaintiff; (a) such evidence being relevant to the issues raised by the pleadings, since from it the jury could infer, in connection with the terms of the written assignment, that the insured had destroyed such assignment (as he had reserved the right in the very assignment itself to do) and changed his mind with reference to have the beneficiary of the policy changed; (b) and such evidence also being relevant, since from it the jury could infer that the insured did not intend that the policy in dispute should go to the plaintiff; (c) and such evidence, being directly in reply to testimony of plaintiff's witnesses, allowed over the objection of defendants, as to the intention of the insured in reference to the assignment.

"Second Exception.

"Appellants respectfully submit that his honor erred in ruling, during the examination of the witness, A. M. Deal, as follows: 'Witness: I said to her at that time, the fact you have surrendered the policy, surrendered possession of the policy, although you had no legal right to it, has not and shall not affect, shall not in the least affect your rights, any rights you have, and I went on, and said we can make up an agreed statement stating the policy is still in your possession and the money in the possession of the insurance company, and submit it to some board of arbitrators and leave it to them. Now, Mr. Gibbs came to me about this matter and stated to me— Mr. Gibbs: I don't think that is relevant. Witness: I think it relevant. I can say there was no necessity to have brought this suit. The Court: We have got to try it now, as it is brought, and try it on proper principles. I admonish all parties to confine themselves to the material issues of the case in the interest of time. Mr. Verner: The testimony is relevant. The Court: Ask him some question, and I will rule on it. Mr. Verner: Mr. Deal, did you, before the commencement of this action, offer to submit the controversy between yourself and your mother on the one side, and Mrs. M. L. Deal on the other, to arbitrators as to who was in possession or entitled to this money? A.

Yes, sir; I did. The first proposition I made to Mr. Gibbes was this: He told me that Mr. J. T. Selbels had told him that she was legally entitled to it and I told him— Mr. Gibbes: I object. The Court: Irrelevant. He is entitled to have access to the courts of the country if he wanted to.' The errors in this ruling being that by so ruling his honor kept from the jury knowledge of the fact that before the commencement of the action, and after the policy had been forwarded to the insurance company and the money paid, they offered and endeavored to restore plaintiff as far as possible to the same standing that she had with reference to the matter before she surrendered the policy; the evidence being relevant, in that it tended to show good faith on the part of defendants, and was in reply to the allegations of the complaint to the effect that defendants had conspired together to cheat and defraud plaintiff; the said testimony being especially relevant in view of the fact that under his honor's view of the law and facts of the case, as outlined in his charge to the jury, defendants should have restored the money to the company and the policy to the plaintiff, and treated with her at arm's length, or paid the money over to her.

**"Third Exception.**

"Appellants respectfully submit that his honor erred in ruling out during the examination of the witness A. M. Deal, two letters written during the period of the alleged conspiracy by defendant A. M. Deal to his codefendant, Margaret E. Deal, said letters being offered in evidence and relevant to the issues, since they tended to show such facts as would justify the jury in concluding that defendants had not conspired and confederated together to cheat and defraud the plaintiff, as alleged, one of said letters being written at the request of plaintiff and on her behalf, and both being part of the *res gestæ*, and therefore not subject to objection interposed by plaintiff's attorney.

"As to motions for nonsuit and direction of verdict:

**"Fourth Exception.**

"Appellants respectfully submit that his honor erred in refusing the motions for nonsuit and direction of verdict, made upon the grounds hereinabove set out in the record, the error being that there was no testimony whatsoever upon which to submit the case to the jury; the undisputed evidence in the case showing the following facts: (a) That Dr. Deal, the insured, took out a life insurance policy payable in the event of his death prior to the expiration of the endowment period of 20 years to his mother, if she were living; (b) that the life insurance policy contained a clause giving to the insured the right to change the beneficiary by returning the policy to the home office of the company at Newark, N. J., with the insured's written

request for the appropriate indorsement of the policy by the company; (c) that the insured died within the endowment period, leaving the beneficiary, defendant Margaret E. Deal, surviving him, without having had the beneficiary changed in the manner set out and agreed upon in the policy of insurance; (d) that defendant Margaret E. Deal had no knowledge of the terms of the policy contract establishing her rights therein, nor of the alleged attempt to change the beneficiary before the death of the insured, nor did she with full knowledge of her rights to the insurance money agree to forego the same and allow plaintiff to receive the benefits of said insurance policy; (e) that defendant Margaret E. Deal neither executed any assignment of her rights in the policy to the plaintiff, nor had she joined the insured in the execution of any assignment or been requested by him to do so; (f) that plaintiff had not been induced by any promise or act of defendants to surrender any rights that she had in or to the policy of insurance or the money represented by it or to change her position with reference to the matter on controversy to her detriment; (g) that defendants had not received any benefit by reason of the surrender of the policy by plaintiff to which they were not entitled as a matter of law independent of her voluntary surrender of the policy; (h) that said assignment was never delivered to or in the possession of the plaintiff.

"As to charge:

**"Fifth Exception.**

"Appellants respectfully submit that his honor erred in stating the issues to the jury, and by charging them that the issues for them to try were raised by the allegations of the complaint and the denials of the answers, and in not limiting and confining the jury to the trial of the issue ordered to be submitted to them by the opinion of the Supreme Court upon the former appeal in this case, the said issue being whether or not the defendant Margaret E. Deal had waived her right to insist upon a strict compliance with the policy contract as to the change of beneficiary and had acknowledged the plaintiff, Mary L. Deal, as the beneficiary under the policy, and had thereby caused said plaintiff to change her position with reference to her rights in the matter to her detriment; and in submitting to the jury as an issue for them to determine whether or not plaintiff, Mary L. Deal, had a cause of action against the insurance company for its failure to carry out the contract entered into by it with the insured with respect to the change of beneficiary; and also whether she had in consideration of the alleged promise of defendants to collect the money and pay it over to her agreed to withdraw her claim against the insurance company and to surrender her rights against said company,

there being no allegation in the complaint as to any cause of action that she might have had against the company and no denial thereof in the answers, the attention of the court having been called to the error by defendants' counsel before his honor submitted the case to the jury.

"Sixth Exception.

"Appellants respectfully submit that his honor erred, in that he failed and refused to construe the paper set out in the complaint and designated as the assignment of the policy so as to give defendants the benefit of the following clause, which was entirely omitted when his honor read said assignment to the jury, to wit: 'I hereby reserve the right to cancel this assignment at any time without notice to or consent of the assignee'—the foregoing clause being a part of said written assignment, to which full force and effect should have been given by the court in the interpretation thereof, and which clause changes said assignment from an unconditional assignment to a testamentary instrument which would not be effective, unless it had been shown by the testimony not to have been canceled or avoided by the insured during his lifetime; and in charging the jury in connection therewith as follows: 'But, if this assignment was sent to the home office at Newark, N. J., it would be equivalent to the written request to change the beneficiary, and would be effectual for that purpose, if the policy had accompanied it; but it was essential that the policy should go to the home office in New Jersey along with the assignment in order to accomplish that object.' The error being in instructing the jury as a matter of law that, if the assignment had been sent to the home office in Newark, N. J., it would be equivalent to a written request to change the beneficiary, and would be effectual for that purpose if the policy had accompanied it; whereas, it was a question to be determined by the jury what purpose the insured had in sending the paper designated as an assignment and the policy to the home office—whether it was his purpose to have the beneficiary changed or to assign his interest in the policy, said assignment not being in form a request to change the beneficiary, but merely an assignment of the interest of the insured.

"Seventh Exception.

"Appellants respectfully submit that his honor erred in charging the jury as follows: 'The object of sending the policy along with the written request was to enable the insurance company to make the appropriate indorsement upon the policy. Whether they did it or not was their responsibility. When he sent the written request accompanied by the policy to the home office at Newark, N. J., the beneficiary under that policy was ipso facto changed then, whether the company

made appropriate indorsement on the policy or not; but it was necessary that that written request should be made at the home office at Newark, N. J., and that the original policy should be sent with it, either at the time it was made, or thereafter, to enable them to put the appropriate indorsement on it.' The error being (a) that under the law as laid down by the Supreme Court in this case the beneficiary in the policy was not changed and could not be changed by the act of either the insured or of the company, nor could either the company or the insured waive any right of the beneficiary; the beneficiary being as much entitled to rely upon the provisions governing the change of beneficiary as the insurer or the insured. When, therefore, the insurer agreed with the insured that the policy would have to be properly indorsed before a change of beneficiary could be effected, then the beneficiary had the right to insist upon having the policy properly indorsed, and the failure of the company to have the policy properly indorsed could not be urged against the beneficiary, but against the company alone and in this connection his honor should have held as matter of law that the change of beneficiary would take effect only upon indorsement of the policy by the company; (b) and also in stating to the jury that the policy might be sent on to the home office at any time after the assignment had been sent on, when, in order to effect a change of the beneficiary, it would be necessary for both the request to change the beneficiary and the policy to be delivered to the company at its home office before the death of the insured.

"Eighth Exception.

"Appellants respectfully submit that his honor erred in charging the jury as follows: 'If Mrs. Mary L. Deal was in possession of the assignment and in possession of the policy, and if her husband sought in his lifetime to substitute her in the place of his mother as beneficiary in the case and failed of his purpose through the acts of the company, or authorized agent of the company, then she may have had or not a cause of action against the company, to prosecute which it was necessary for her to have possession of the policy and to be the owner; for Mrs. Margaret E. Deal, although the beneficiary, in order for her to collect the money due upon the policy it was necessary for her to have possession of it.' The error being: (a) In submitting to the jury an issue not raised by the pleadings, to wit, whether or not the plaintiff, Mary L. Deal, had an action against the insurance company on account of its failure to make a change in the beneficiary, when no such issues were raised either by the pleadings or by the opinion of the Supreme Court in the former appeal of this case. (b) In allowing the jury to say whether or not the plaintiff had had a cause of ac-

tion against the company, whereas, he should have held as a matter of law that no cause of action would accrue to plaintiff, Mary L. Deal, on account of the failure of the company to make the indorsement on the policy, since a cause of action growing out of the failure of the company to indorse the policy would not descend to the plaintiff as assignee of the insured, but would go to his executor or administrator. (c) In charging as a matter of law that it was necessary for the plaintiff to have possession of the policy and be the owner of it in order to recover against the company, since it was alleged in the complaint 'that thereafter, on or about the 15th day of January, 1908, realizing that the said defendants would possibly not carry into effect the said agreement so made, plaintiff notified the said company of her rights and interest in said money and urged that the same be not paid to the defendants, but to the plaintiff; that on the 20th of January, 1908, contrary to the wishes of the plaintiff, the said company paid the money to the defendant, Margaret E. Deal, through the defendant, A. M. Deal'—it being respectfully submitted that if the company had, after being notified of plaintiff's revocation of her authorization to the defendants to collect the money, paid said money over to said defendants, then the company acted at its peril, and could be made to respond in damages regardless of the possession of the policy. (d) In charging the jury that, in case the insured had failed of his purpose to change the beneficiary through the act of the company or its authorized agent, then plaintiff may or may not have had a cause of action against the company, whereas, as a matter of law, no cause of action would accrue to the plaintiff as the assignee of the insured or as the beneficiary of the policy, but to the personal representatives of the insured on account of the company's breach of its contract with the insured.

#### "Ninth Exception.

"Appellants respectfully submit that his honor erred in charging the jury as follows: 'If Mrs. Deal, the beneficiary, the mother, in order to get possession of this policy so necessary to her to collect the amount due upon it, either in person or by agent, represented to the plaintiff that, upon collection of that money, it would be for her benefit, or in collecting that money it would be for her benefit and upon receiving it would be turned over to her, procured possession of this policy, the surrender of it by the plaintiff to her, then when she collected the amount due upon this policy, if she did collect it, it was for the benefit of the plaintiff'—and also: 'Inasmuch as the defendants could not have collected that policy without the possession of it, there was something of advantage to them to get it in possession, so that, if you find that these facts existed, then I charge you

there was ample valuable consideration to support the promise made by the defendants to the plaintiff, if they made it.' The error being (a) that under the law the policy and the money represented by it belonged the moment it was issued to the beneficiary, Margaret E. Deal, and the plaintiff, Mary L. Deal, was under a legal obligation to deliver to defendant Margaret E. Deal the said policy, and therefore the surrender of the policy by the plaintiff to the defendant would not be a sufficient consideration to support the alleged promise of the defendants to collect the said money for her; and (b) in charging the jury as a matter of law that it was necessary for defendant Margaret E. Deal to have the policy in her possession in order to collect the amount due to her by the company, whereas, it is submitted it was not necessary under all circumstances for the beneficiary Margaret E. Deal to have possession of the policy in order to collect it.

#### "Tenth Exception.

"Appellants respectfully submit that his honor erred in charging the jury as follows: '\* \* \* And the proper thing up to the time of bringing this suit would have been either to have paid that money over to the plaintiff, provided the policy was acquired in that way, to pay that money over to the plaintiff in accordance with the agreement and representations made to her at the time it was obtained from her, or else if she wanted to stand upon her rights as she conceived them, put that money back in the hands of the insurance company, put the policy back in the hands of the plaintiff', then deal with each other at arm's length. The error being (a) that it was a charge upon the facts of the case, in violation of article V, § 26, of the Constitution of South Carolina, an invasion of the province of the jury for the court to say as a matter of law how the defendants could have put the plaintiff back in the same position that she occupied before the surrender of the policy, there being other ways whereby the plaintiff could have been restored to the position she occupied before she surrendered the policy; (b) and it also being error for his honor to assume that the defendants could place the money back in the hands of the company, and cause them to surrender the policy after they had paid out the money to the party to whom they contended it belonged, the plaintiff having alleged in her verified complaint and testified during trial that the company had paid out said money over her protest and after she had notified it that she had revoked her authority given to the defendants to collect for her the amount of the policy, the said error being particularly harmful because his honor had refused to allow the defendant A. M. Deal to testify as to what efforts had been made to do to all practical effects exactly what he here stated should have been done.

"Eleventh Exception.

"Appellants respectfully submit that his honor erred in charging the jury as follows: 'A valuable consideration is anything which is of advantage or benefit to the party receiving it, or the hurt or injury to the party parting with it—the subject of the agreement—anything that would be of interest or advantage to Mrs. Margaret E. Deal and A. M. Deal on the one hand, or the hurt or injury or prejudice to Mrs. Mary L. Deal, the plaintiff, on the other hand, would be a sufficient valuable consideration to support that promise, if they made it.' Since a party may receive an advantage or benefit to which they are legally entitled, and to render one this kind of advantage, would not be sufficient consideration to support a contract; and in this connection his honor should have held that, under the opinion of the Supreme Court in this case, the defendant Margaret E. Deal was entitled to the possession of the policy upon the death of the insured, and the plaintiff, Mary L. Deal, was under a legal obligation to surrender the said policy to her; and that, therefore, while the possession of the policy was of advantage to defendant Margaret E. Deal, yet the surrender thereof by the plaintiff, Mary L. Deal, was not a sufficient consideration to support the alleged promise of the defendants to collect the money for the plaintiff, Mary L. Deal, the surrender thereof by the plaintiff not being an injury to any rights which the plaintiff had.

"Twelfth Exception.

"Appellants respectfully submit that his honor erred in charging the jury as follows: 'Where two or more parties are contending for the same thing, something that is unsettled, undetermined between them, the settlement of a doubtful liability, is a sufficient consideration to support an agreement, the promise (compromise) or settlement of a family matter for the sake of peace where the rights upon the one side and upon the other are undetermined as to who will win out in the final adjustment of the controversy, where the parties come together and agree upon a settlement there is a sufficient valuable consideration to support a promise (compromise), what is called settlement of doubtful liability.' The error being that the foregoing statement of law was not responsive to any of the issues joined by the pleadings, nor to the question ordered to be submitted to the jury by the Supreme Court, since, upon the death of the insured, the question as to who was entitled to the insurance money was not unsettled or undetermined, nor was there any doubtful liability, the defendant Margaret E. Deal, the beneficiary, being solely entitled to the proceeds of the policy.

"Thirteenth Exception.

"Defendants respectfully submit that his honor erred in refusing to charge their

fourth, sixth, eighth, tenth, eleventh, twelfth, thirteenth, fourteenth, fifteenth, sixteenth, eighteenth, twentieth, twenty-first, twenty-second, twenty-third, and twenty-fourth requests as follows, to wit:

"(4) If you find that the insured, Samuel M. Deal, did not, while the policy was in force and not assigned, return the policy to the company at Newark, N. J., with the insured's written request for the appropriate indorsement of the policy by the company; or if you find that the insured, Samuel M. Deal, while the policy was in force and not assigned, returned the policy to the company at Newark, N. J., with the insured's written request for the indorsement of the policy by the company, but that the company did not change the beneficiary by making the appropriate indorsement on the policy, then I charge you that the beneficiary of the policy was never changed, and, upon the death of the insured, the beneficiary, Margaret E. Deal, became entitled to the proceeds of the policy.'

"(6) I charge you as a matter of law that inasmuch as the original beneficiary, Margaret E. Deal, did not join in the assignment of the policy, the plaintiff takes under the assignment only the interest that the insured, Samuel M. Deal, had; and, since he died before the expiration of the 20 years endowment period and left the original beneficiary surviving him, his interests died with him, and therefore his assignee, the plaintiff, is not entitled to the policy under the said assignment.'

"(8) If you find that the plaintiff did not pay, or agree to pay, the defendants for their services in the collection of said policy to induce them to collect the said policy and turn it over to her, then any promise made by them, or either of them, to collect the said policy and pay the proceeds over to her, would not be binding upon them, unless you find that acting upon such promise, if you find that such promise was made, the plaintiff was caused to surrender any right that she had or was put to expense.'

"(10) I charge you that the terms of the policy giving the insured the right to change the beneficiary have never been complied with; and, if you find that the defendant Margaret E. Deal did not know of the attempt to have the beneficiary changed, if you find that the insured did attempt to change the beneficiary, before the death of the insured and before the promise was made by the defendant, A. M. Deal, to collect the proceeds of the policy and turn them over to the plaintiff, if you find that he did make such a promise, and if you find that the defendant Margaret E. Deal did not promise to collect the proceeds of the policy and turn them over to the plaintiff, then your verdict must be for the defendants.

"(11) I charge you that any act of the

insured, whether by written assignment or otherwise, not assented to by the company and not agreed to or acquiesced in by the defendant Margaret E. Deal, will be ineffectual to deprive the defendant Margaret E. Deal of her rights to the proceeds of the insurance policy.

"(12) I charge you that the plaintiff in this case cannot recover unless she shows by the preponderance of the evidence that the defendant Margaret E. Deal knew that the policy issued on the life of her son, Samuel M. Deal, was "payable at its office in the city of Newark, N. J., to the insured on the 21st day of July, 1923, or, should he die before that time, then payable to Margaret E. Deal, his mother, if living, otherwise to the executors, administrators, or assigns of the insured," and if you find that she did not know that the policy of insurance gave to the insured as a special privilege the right "at any time while this policy is in force and not assigned, upon the return of the policy to the company at Newark with the insured's written request for the appropriate indorsement of the policy by the company to have the beneficiary changed," at the time that the promise was made to the plaintiff to collect the proceeds of the policy and turn the same over to plaintiff, if you find that such promise was made, then your verdict must be for the defendants.

"(13) I charge you: (1) That the plaintiff must prove by the greater weight of the evidence that the insured, Samuel M. Deal, executed the assignment set out in the complaint, and sent it, together with the policy, to the home office of the insurance company at Newark, N. J., with the purpose and intention of having the beneficiary in the policy changed, and that the beneficiary knew before said promise to collect the proceeds of the policy and turn same over to the plaintiff if you find that such promise was made to her, that the said Samuel M. Deal had executed the assignment and forwarded it, together with the policy, to the company at its home office at Newark, N. J. (2) The plaintiff must prove by the greater weight of the evidence that the original beneficiary, Margaret E. Deal, knew at the time said promise is alleged to have been made that the insurance company had returned the assignment to the insured, Samuel M. Deal, together with a statement that the said assignment was inoperative, if you find that the company did return the assignment with such statement. (3) The plaintiff must prove by the greater weight of the evidence that the original beneficiary, Margaret E. Deal, at the time that said promise is alleged to have been made, if you find that any such promise was made, had full knowledge of the fact that she was the sole person at that time entitled to the proceeds of the policy. (4) The plaintiff must show by the greater weight of

the evidence that the original beneficiary, Margaret E. Deal, made the said promise to collect the proceeds of the policy and turn them over to the plaintiff, if you find that any such promise was made by her, with the purpose of having the plaintiff act upon such promise or the expectation that she would act upon said promise. (5) The plaintiff must show by the greater weight of the evidence that the plaintiff was led by said promise to collect the proceeds of the policy and turn the same over to her, if you find that such promise was made, to incur some expense or to change her position with reference to her legal rights if you find that she has any legal rights, to her detriment.

"(14) As to the question of waiver by Margaret E. Deal of her right to the proceeds of the policy, I charge you that if you find as matter of fact that defendant Margaret E. Deal, by her own acts or those of her agent, promised to collect the proceeds of the policy and pay them over to the plaintiff, but that at the time of the making of such promise she did not know that the insured, Samuel M. Deal, had sent an assignment of the policy, together with the policy, to the home office of the company at Newark, N. J., if you find such to be the facts, then your verdict must be for the defendants, for the reason that before the defendant Margaret E. Deal can be held to have waived her rights the plaintiff must make it appear by the preponderance of the evidence that the defendant knew of her rights.

"(15) I charge you that the plaintiff must prove by the preponderance of the evidence that the defendant Margaret E. Deal authorized and directed the defendant A. M. Deal to state to the plaintiff that the money represented by the policy would be collected by the defendants and paid over to the plaintiff, if you find that such statement was made by A. M. Deal, or that the defendant Margaret E. Deal acquiesced in and ratified the statement of the defendant, A. M. Deal, with full knowledge of said promise.

"(16) I charge you as a matter of law that the assignment set out in the complaint and relied upon by the plaintiff as the basis of her claim to the insurance policy is ineffectual to convey to her the said insurance policy and the proceeds thereof, because the assignment could convey only the rights of the insured, Samuel M. Deal, and, inasmuch as it is admitted that the insured died within the endowment period leaving the original beneficiary surviving him, the assignment is inoperative to convey any interest to the plaintiff."

"(18) If you find that the insured executed the assignment set out in the complaint and sent out, together with the policy, to the company at its home office in Newark, N. J., and that notwithstanding



the receipt, of the assignment and policy by the company at its home office in Newark, N. J., if you so find it failed to indorse the change of the beneficiary on the policy, then the attempted change of the beneficiary would be ineffectual, and the defendant Margaret E. Deal would be entitled to the proceeds of the policy notwithstanding the attempted change, unless with full knowledge, both of the insured's attempt to have the change made and of the company's refusal to indorse the policy, she promised to give the proceeds of the policy to the plaintiff and the plaintiff acted upon such promise to her detriment.

"(19) If you find that the defendant (plaintiff) employed the defendant A. M. Deal as her attorney to collect the proceeds of the insurance policy for her, and that he collected the amount thereof by reason of his employment so to do, and if you find further that the plaintiff, Mary L. Deal, did not demand the money so collected by him of the defendant A. M. Deal previous to the institution of this action, then you cannot find a verdict against the defendant A. M. Deal.

"(20) I charge you as a matter of law that upon the death of the insured, Samuel M. Deal, leaving the original beneficiary named in the policy, Margaret E. Deal, surviving him, she became entitled to the possession of the insurance policy, because she was entitled to the proceeds thereof, unless she had with full knowledge of her rights thereto promised to give the same to the plaintiff, and that the plaintiff had acted upon that promise to her detriment.

"(21) If you find that the insurance company returned the assignment to the insured, Samuel M. Deal, with a statement that the same was inoperative, and that after it had been returned to him he destroyed the same (as he had reserved the right in the said assignment to do without notice to or the assent of the assignee) with the intention of depriving the plaintiff of any interest in the policy, then I charge you that whatever interest the plaintiff had by reason of the assignment was thereby destroyed.

"(22) If you find that the assignment referred to in the letters of Margaret E. Deal in evidence was an assignment executed, both by the insured and the defendant Margaret E. Deal, the original beneficiary, then I charge you that the plaintiff cannot recover unless she proves by the preponderance of the evidence that both the insured and the defendant Margaret E. Deal executed an assignment of the policy.

"(23) If you find that the assignment referred to in the letters of Margaret E. Deal in evidence was an original assignment, and that, when she wrote the said letters, she meant that the money was held subject to the original assignment, and not to any typewritten copy thereof, then I charge you

that the plaintiff cannot recover on the basis of the statement contained in the letters, unless the plaintiff has satisfied you by the preponderance of the evidence that she has produced the original assignment.

"(24) I further charge you that unless the plaintiff has proved to your satisfaction by the preponderance of the evidence that, when the defendant Margaret E. Deal wrote the said letters to the plaintiff, she had full knowledge of her right to the insurance money represented by the policy and intended to waive them in favor of the plaintiff, you cannot find that the plaintiff is entitled to the proceeds of the policy by reason of the statements contained in said letters."

"The error being that since said requests contained sound propositions of law applicable to the case as made out by the pleadings and evidence his honor should have submitted the same to the jury."

James S. Verner and Alfred Wallace, Jr., for appellants. Hunter A. Gibbes, for respondent.

GARY, C. J. On a former appeal in this case (87 S. C. 395, 69 S. E. 886), it was heard upon the following agreed statement of facts:

"The appeal herein is from a judgment on a verdict rendered in favor of the plaintiff-respondent at the spring term of the court of common pleas for Richland county, 1909. The plaintiff alleges that Dr. Samuel M. Deal took out an insurance policy, wherein he named his mother, Margaret E. Deal, as beneficiary, and agreed with the insurance company that in the event of his surviving the endowment period of 20 years, then the amount of the insurance policy should be payable to him, but that, in the event of his death during the endowment period, the said policy should be payable to his mother, if she were then living, otherwise to his executors or administrators. In the application for the policy, and in the policy itself, the insured reserved the right to change the beneficiary by sending the policy to the home office of the insurance company at Newark, N. J., with his written request for a change of beneficiary, so that the proper indorsement might be made by the company on the policy. At the time of taking out the insurance policy, Dr. Deal was unmarried, and subsequently married, and thereafter, as claimed by the plaintiff, executed the assignment of the policy set out in the complaint, and sent the said assignment to the home office of the company, but did not, however, as claimed by the defendants-appellants, send the policy to Newark, N. J., for the purpose of having the change of beneficiary noted thereon. Thereafter Dr. Deal died and the insurance company, not recognizing the attempted assignment, paid the proceeds thereof to the defendant Margaret E. Deal, the beneficiary, under the policy, who had gotten

possession of the policy, and made up proof of death. The plaintiff-respondent alleged that not only was she entitled to the proceeds of the policy by reason of the assignment, and by reason of the fact that Dr. Deal had orally assigned the same to her, but also alleges that the defendants-appellants had committed fraud against her in obtaining the possession of the policy from her, and asked judgment not only for the amount of the policy and interest, but also for \$500 as punitive damages. The defendants-appellants deny, both that the plaintiff is entitled to the proceeds of the policy, and that they were guilty of fraud, in obtaining possession of the same, and claim that the defendant Margaret E. Deal was under the law entitled to the proceeds of the policy."

On that appeal, the court had under consideration the question "whether his honor, the presiding judge, erred in charging the jury that in order for Dr. Deal, the insured, to avail himself of the privilege of changing the beneficiary, it was not necessary for him to return the policy to the company, with a written request that the change be indorsed upon it; that he could effect a change of beneficiary, either by a written assignment or by a delivery of the policy, with the intention of making such change." The court ruled that the policy did not contemplate an assignment by the insured, as the proper mode of changing the beneficiary, and therefore that the charge to the jury was erroneous. The court, also, had under consideration the question whether there was error in refusing the motion for a nonsuit, and, in disposing of this question, said: "There was testimony tending to show that the defendant Mrs. Margaret E. Deal acknowledged the plaintiff as the beneficiary under the policy, and waived the right to insist upon proof of strict compliance, with the requirements of the policy, as to the change of beneficiary."

[1] After the decision of the court on the former appeal, the plaintiff amended her complaint by adding another paragraph which is as follows: "That, if the defendant Margaret E. Deal had a right to insist upon a strict and formal compliance with the provisions of the said policy with reference to the change of beneficiary, such right was distinctly and voluntarily waived and surrendered by her assuring the plaintiff that the insurance money would be collected for plaintiff's benefit, and thereby obtaining the policy from the plaintiff." On the last trial of the case the jury rendered a verdict in favor of the plaintiff for \$1,232.28, and this appeal is from the judgment entered thereon. The appellant's exceptions will be reported.

[2] The first question that will be considered is whether there was error on the part of his honor, the presiding judge, in refusing the motion for a nonsuit. There was testimony to the effect that after Dr. S. M. Deal became insured he married, and was desirous

of changing the beneficiary, so as to make the policy payable to his wife, instead of his mother, and consulted the agent of the insurance company as to the proper mode of making the change; that the agent informed him that there were two ways of effecting the change—one by forwarding the policy with a request in writing to make the change, and the other by an assignment of the policy, which was simpler and just as effective; that, upon the advice of the agent, the insured pursued the latter method; that it is the custom for the local agents to attend to the making of such changes; that the assignment and policy were delivered to the local agent, for the purpose of being forwarded to the home office, in order that the change might be made; that the agent forwarded the assignment to the home office through the general agent, but did not send the policy; that the assignment was returned to the agent with the statement that it would be necessary for the beneficiary to join in the request; that the policy and the assignment were afterwards delivered to Dr. Deal, who delivered the policy to his wife, and died under the belief that the change had been properly made; that, although the plaintiff was in possession of the policy, the insurance company refused to pay her, on the ground that it was payable to Mrs. Margaret E. Deal; that Mrs. Margaret E. Deal, knowing these facts, made the following offer, through her agent Mr. A. M. Deal: That if the plaintiff would let her have the policy, she would collect the money for the plaintiff's benefit, and pay it over to her—that relying upon this assurance, and believing that the defendants were acting in good faith, she surrendered the policy to them.

If there was testimony tending to show such a consideration as the law recognized for the promise of the defendant Mrs. Margaret E. Deal through her agent, Mr. A. M. Deal, that if the plaintiff would let her have the policy, she would collect the money for the benefit of the plaintiff, and pay it over to her, then the motion for the nonsuit was properly refused. "There are cases to the effect that, in order to support a compromise in avoidance of litigation, the claim must be an actual one, founded upon a colorable right, about which there is room for honest doubt, and actual dispute, and with some legal or equitable foundation, and not one which is without foundation, and is known to be so, or is in its nature an illegal claim, out of which no cause of action can arise, in favor of the person asserting it. The usual test, however, as to whether a compromise and settlement is supported by a sufficient consideration is held to be, not whether the matter in dispute was really doubtful, but whether or not the parties bona fide considered it so, and that the compromise of a disputed claim made bona fide is upon a sufficient consideration, without regard to whether the claim be in suit or not. The law favors the avoid-

ance or settlement of litigation, and compromises in good faith for such purpose will be sustained as based upon a sufficient consideration, without regard to the merits of the controversy or character or validity of the claims of the parties, and even though a subsequent judicial decision may show the rights of the parties to have been different from what they, at the time, supposed. The real consideration which each party receives under such a compromise is, according to some authorities, not the sacrifice of the right, but the settlement of the dispute." 8 Cyc. 307-312. "In order to render valid the compromise of a claim, it is not essential that the matter should be really in doubt. It is sufficient if the parties consider it so far doubtful as to make it the subject of a compromise. And, after a compromise has been entered into in good faith, in an action to enforce the satisfaction, the merits of the original controversy cannot be called into question." Enc. of Law, 713, 714. These authorities show that there was ample consideration for the settlement of what all parties with the facts before them then supposed was a doubtful right. There are numerous other exceptions, covering about 20 pages, but, under the view this court takes of the issues raised by the pleadings, it will not be necessary to consider them in detail, as the questions presented by them, even if erroneously decided by his honor, the presiding judge, are not shown to be prejudicial to the rights of the appellants.

The vital questions in the case are whether the plaintiff and the defendant Mrs. Margaret E. Deal entered into the agreement heretofore mentioned, whether such agreement was based upon a sufficient consideration, and whether, if there was a sufficient consideration, the facts constituted waiver. There was no error in the charge in this respect.

Judgment affirmed.

WOODS, HYDRICK, and WATTS, JJ., concur. FRASER, J., concurs in the result.

(91 S. C. 270)

**PARNELL v. ATLANTIC COAST LINE R. CO.**

(Supreme Court of South Carolina. April 8, 1912.)

**1. CARRIERS (§ 187\*)—DAMAGES TO SHIPMENT—EVIDENCE.**

In an action against a carrier for damages to a shipment, evidence held to present a question for the jury as to the condition of the shipment when received by the initial carrier.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 851, 852; Dec. Dig. § 187.\*]

**2. CARRIERS (§ 185\*)—DAMAGES TO SHIPMENT—PRESUMPTIONS AND BURDEN OF PROOF.**

A carrier delivering to the consignee in a damaged condition a shipment received by it from a connecting carrier is presumed to have received the shipment in good condition,

and has the burden of showing that it was damaged before received by it.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 835-850; Dec. Dig. § 185.\*]

**3. CARRIERS (§ 187\*)—DAMAGES TO SHIPMENT—EVIDENCE.**

Where a terminal carrier produces evidence to rebut the presumption that damages to a shipment occurred after its receipt by it so clear and conclusive as to convince any reasonable man that it is not responsible for the damages, the court should order a nonsuit or direct a verdict.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 851, 852; Dec. Dig. § 187.\*]

**4. APPEAL AND ERROR (§ 1001\*)—REVIEW—JURY QUESTIONS.**

In an action against a terminal carrier for damages to a shipment, where the evidence does not show, but merely makes it very probable, that the damages occurred before the receipt of the shipment by it, the verdict for plaintiff cannot be reviewed on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3922, 3928-3934; Dec. Dig. § 1001.\*]

Appeal from Common Pleas Circuit Court of Darlington County.

"To be officially reported."

Action by Mamie A. Parnell against the Atlantic Coast Line Railroad Company. From a judgment for plaintiff, defendant appeals. Affirmed.

W. F. Dargan, for appellant. J. Monroe Spears and Miller & Lawson, for respondent.

WOODS, J. The plaintiff on December 27, 1908, delivered to the St. Louis & Iron Mountain Railroad Company at Collinston, La., a piano inclosed in a box, consigned to herself at Lamar, S. C. The piano was delivered by the Southern Railway, an intermediate carrier, to the defendant, the terminal carrier, at Sumter, S. C. On arrival at Lamar it was found to be considerably injured; and the plaintiff in this action recovered against the defendant a judgment for actual damages fixed by the jury at \$350.

The appeal depends on the defendant's position that the circuit judge should have granted a nonsuit or directed a verdict on the ground that its evidence was overwhelming and admitted of no other conclusion than that the piano had been damaged before it was received by it at Sumter. The plaintiff testified that the piano was in good condition, and properly packed in a new box when it was shipped; and the agent of the initial carrier testified that it was shipped by him from Collinston in good condition.

[1] On the part of the defendant there was evidence from a number of railroad agents who handled the shipment that the box was old, too large for the piano, and that the packing was very badly done. This conflict of testimony made a distinct issue of fact which only the jury could decide as to the condition of the shipment when it was received by the initial carrier.

[2] In a case like this, it is well-nigh im-

possible for the owner of property to ascertain on which of several connecting carriers property in transit was injured, and to meet this difficulty the courts have generally held that the burden is on the carrier which delivers the goods to the consignee to respond to any damage which occurs in transit unless it can affirmatively show that the goods were injured while in the hands of some other carrier. *Willette v. Southern Ry.*, 66 S. C. 477, 45 S. E. 93. This presumption against the terminal carrier stands as evidence throughout the trial to be weighed by the jury along with any rebutting evidence of the defendant tending to show that the damage was done while the goods were in the hands of another carrier.

[3] Nevertheless, when the rebutting evidence is so clear and conclusive that no reasonable man could fail to come to the conclusion that the damage had not been done by the terminal carrier, then it would be the duty of the court to order a nonsuit or direct a verdict for the defendant (*Baker v. Western Union Tel. Co.*, 87 S. C. 174, 69 S. E. 151), and the defendant contends that the evidence offered to rebut the presumption of damage while the goods were in the hands of the terminal carrier was so conclusive as to come up to this standard. In weighing evidence to ascertain whether the terminal carrier has, beyond all doubt, overcome the presumption, it ought always to be borne in mind that the presumption is based on the fact that the shipper usually has no other protection, and no other means of meeting any testimony of the railroad agents as to the place where the damage occurred.

[4] Assuming all the testimony of the railroad agents to be true, it falls short of conclusively showing that the damage was not done on the terminal road. It is true that the agents testified, and the waybills indicate, that the box was in bad condition when it was delivered to the Southern Railway, the intermediate carrier, and by it to the defendant, the terminal carrier; but not one of the agents examined the piano itself or could testify as a fact known to him that the defect in the packing or the breaking of the box had resulted in injury to the piano before it reached the terminal carrier. It is true the evidence of the witnesses seemed to make it very probable that the damage was done before the piano was delivered to the defendant, but it was the province of the jury, and not of the judge, to weigh the probability against the presumption to the contrary, and there is no ground for this court to disturb the conclusion the jury reached.

It is the judgment of this court that the judgment of the circuit court be affirmed.

GARY, C. J., and HYDRICK and WATTS, JJ., concur. FRASER, J., did not hear the case.

(91 S. C. 273)

# JONES v. POSTAL TELEGRAPH CABLE CO. et al.

(Supreme Court of South Carolina. April 9, 1912.)

## 1. REMOVAL OF CAUSES (§ 29\*)—RESIDENCE OF PARTIES—CODEFENDANTS.

A telegraph company and its pole inspector are jointly liable for injuries to a lineman from the negligence of the inspector in failing to discover a defect in a pole, and hence a motion to remove an action against both to the federal court on the ground that the company was a foreign corporation was properly denied where the inspector was a resident of this state.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 69, 72, 74; Dec. Dig. § 29.\*]

## 2. APPEARANCE (§ 23\*)—WAIVER OF OBJECTIONS.

In an action in the court of common pleas of A. county against two defendants, one of whom was a foreign corporation and the other a resident of F. county, where both defendants appeared generally and answered on the merits without moving to transfer the cause to F. county, the objection to the jurisdiction of the court was waived.

[Ed. Note.—For other cases, see Appearance, Cent. Dig. §§ 111-117; Dec. Dig. § 23.\*]

## 3. MASTER AND SERVANT (§ 103\*)—LIABILITY FOR INJURIES—DUTY OF INSPECTION.

A telegraph lineman who has assumed the entire responsibility of inspecting poles before climbing them cannot recover for injuries caused by a falling pole.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 175; Dec. Dig. § 103.\*]

## 4. MASTER AND SERVANT (§ 235\*)—LIABILITY FOR INJURIES—DUTY OF INSPECTION.

Where a rule of a telegraph company requires linemen before climbing poles to inspect them both above and below the ground, a lineman is bound to use reasonable care in examining a pole before climbing it, although the company also employed a regular inspector.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 710-722; Dec. Dig. § 235.\*]

## 5. MASTER AND SERVANT (§ 289\*)—LIABILITY FOR INJURIES—EVIDENCE.

Evidence in a lineman's action for injuries held to present a question for the jury whether he used reasonable care in inspecting a pole before climbing it.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1089-1132; Dec. Dig. § 289.\*]

## 6. MASTER AND SERVANT (§ 285\*)—LIABILITY FOR INJURIES—DUTY OF INSPECTION.

Where the rules of a telegraph company require a lineman to inspect poles before climbing them, but it also employs an inspector to examine the poles, the lineman does not assume the entire responsibility of inspection, and hence it is for the jury to determine whether the fall of a pole which injured the lineman was due to his failure or the failure of the company to perform their respective duties.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1002, 1003, 1007, 1016, 1035, 1043, 1053; Dec. Dig. § 285.\*]

## 7. APPEAL AND ERROR (§ 1062\*)—SUBMISSION TO JURY—HARMLESS ERROR.

In a lineman's action for injuries, where he testified that he was familiar with the rule

requiring linemen to inspect poles before climbing them, and that it was his duty to inspect them, the submission to the jury of the question whether he had such notice, and was charged with such duty, was not reversible error, since the jury could not have been misled.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4212-4218; Dec. Dig. § 1062.\*]

Appeal from Common Pleas Circuit Court of Aiken County; Thos. S. Sease, Judge.

"To be officially reported."

Action by Joseph A. Jones against the Postal Telegraph Cable Company and another. From a judgment for plaintiff, defendants appeal. Affirmed.

C. E. Dunbar and J. B. Salley, for appellants. Hendersons, for respondent.

WOODS, J. The main questions involved in this appeal from a judgment for damages for personal injuries are: (1) Were the defendants entitled to an order from the circuit judge for the removal of the cause to the Circuit Court of the United States? (2) Was the Circuit Court without jurisdiction to hear the action against the defendant Postal Telegraph Company because it was a foreign corporation? (3) Should a nonsuit have been ordered on the ground that the plaintiff had undertaken the duty of inspecting the defective pole by the fall of which he was injured, and therefore was himself responsible for the failure to discover and remedy the defect, or on the ground that the evidence showed beyond dispute that he was guilty of contributory negligence in ascending a pole manifestly unsafe?

The plaintiff thus sets out in the second and third paragraphs of his complaint the delicts of the defendant, and the manner in which he was injured thereby: "That at the times hereinafter mentioned, and especially during the year 1904, and in the spring of said year, the defendant M. A. Ray was in the employment of the said Postal Telegraph Cable Company as an inspector of the line generally of said company between the city of Augusta, Ga., and the city of Charleston, S. C., said line passing through the county of Aiken and following a general direction from Augusta, Ga., to Charleston, S. C., along the postal roads going by White Pond, in the county of Aiken, at the point hereinafter referred to, and that it was the habit and custom and practice of the said defendant company to use an inspector, such as the defendant, M. A. Ray, with a force of hands and implements used for the said purpose, to inspect the line of said telegraph company along the route as aforesaid, and that said M. A. Ray, as such inspector of said company, with a gang of hands in the early part of the spring of 1904, inspected said lines, and had with him such implements and material whereby he could finally

ascertain whether a telegraph pole used for the purpose of suspending the wires used by said company was sound and all right below the ground to any distance, but that said M. A. Ray, as inspector of said company for said purposes, notwithstanding he inspected said line, with said gang of hands, and could have ascertained whether anything was the matter with the telegraph pole of said defendant company, hereinafter referred to, negligently failed to inspect the same, and to ascertain whether it was rotten below the surface of the ground. That the plaintiff herein, Joseph A. Jones, some time previous to the 14th day of June, 1904, was employed by the defendant company as a workman, and that on said day he was employed by said company to go along the line of poles and wire of said company in the county of Aiken, and state aforesaid, by himself, with a vehicle solely in his charge, and with such implements as he had to find out if anything was wrong in said line and to repair the same. That he proceeded in the performance of his work, and that when he reached a point at a pole of said company situate about a mile and a half west of White Pond, on the Southern Railway, he noticed that there was a joint of wire that had to be straightened out and changed, and for said purpose he had to mount said pole, and that with such instruments as he had, and which were furnished him by the defendant company, he ascended said pole, and attended to his business in connection with the wire, and, as he was descending the pole, the same fell to the ground, and his leg was caught under said pole and broken above the knee in three places, and his hip joint was dislocated, and he was wounded and bruised in other parts of his body. That said pole fell because it was rotten below the ground, and unfit for a lineman to climb up upon. That deponent used every care and caution he could in testing said pole with his pike and otherwise, and noticed nothing whatsoever as to any defects therein, whereas the inspection of the pole afterwards showed that it had been rotten down in the ground for a long time, which defect could have been ascertained by the inspector, Mr. Ray, and his gang of hands, who passed over the road in their capacity representing the defendant company not very long before the time of the injury to this plaintiff, and this plaintiff alleges and charges that the cause of his injury was the negligence of the defendant company and the negligence of its inspector, M. A. Ray, in not ascertaining that said pole was rotten, so that it was a menace to life and limb, and in not having the same removed and a new pole replaced, or old pole reset."

Judge Sease refused a motion for the removal of the cause to the Circuit Court of the United States, made on the averment,

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

supported by affidavits, that the defendant Postal Telegraph Company was a foreign corporation; that the defendant Ray was not a resident of this state, but of the state of North Carolina; and that, even if Ray should be held to be a resident of this state, the complaint alleged no joint liability of the two defendants to the plaintiff. Counsel stipulated that the appeal from the order of Judge Sease should be heard along with any appeal that might be taken on the merits after trial of the cause. The record contains an order of Judge Brawley, United States District Judge, remanding the cause from the Circuit Court of the United States to the court of common pleas for Aiken county. Passing by the point that there was a failure to make the motion for removal within the time prescribed by the federal statute, and the effect to be given to Judge Brawley's order, and considering the application for removal on its merits, we think the defendants failed to show grounds for removal. The effort to prove that Ray was a nonresident failed, for it appears from the affidavits that his family residence was in the city of Florence, and that his business was entirely in this state.

[1] The position that the complaint does not allege a joint liability of the Postal Telegraph Company and Ray is also untenable. The allegation is that the Postal Telegraph Company failed in its duty to the plaintiff in allowing a defective pole to remain on its line, which plaintiff's duty required him to climb, and that this failure to supply a safe place to work was due to the joint delict of the telegraph company and Ray in failing to make a reasonably careful inspection of the pole. The telegraph company, it is true, could not delegate its duty of supplying a reasonably safe place to work to its employé Ray, so as to relieve itself of that duty; but it does not follow that Ray was not individually liable for injury resulting to his fellow servant from any failure on his part to make a reasonably careful inspection. The telegraph company owed the duty to the plaintiff to use reasonable care in inspecting its poles, so as to supply its servants with a safe place to work, and the defendant Ray owed his fellow servants the duty of protecting them from any injury by making a reasonably careful inspection. The failure to make a reasonably careful inspection would be therefore a breach of duty of both defendants for which they would be jointly liable. *Able v. Southern Ry.*, 73 S. C. 173, 52 S. E. 962; *Baber v. Southern Ry.*, 76 S. C. 4, 56 S. E. 540, 11 Ann. Cas. 960; *Carter v. Atlantic C. L. Ry.*, 84 S. C. 546, 66 S. E. 997; *Chesapeake, etc., Ry. v. Dixon*, 170 U. S. 131, 21 Sup. Ct. 67, 45 L. Ed. 123; *Ala. G. S. Railway Co. v. Thompson*, 200 U. S. 206, 26 Sup. Ct. 161, 50 L. Ed. 441, 4 Ann. Cas. 1147; *Ill. Cent. Ry. v. Sheegog*, 215 U. S. 308, 30 Sup. Ct. 101, 54 L. Ed. 208;

*Chicago Ry. Co. v. Willard*, 220 U. S. 426, 31 Sup. Ct. 460, 55 L. Ed. 521.

[2] There is no foundation for the position that the court of common pleas for Aiken county had no jurisdiction to try the action because the defendant Postal Telegraph Company was a foreign corporation, and the defendant Ray was a resident of Florence county. Both the defendants appeared generally and answered on the merits, without reservation, in the suit brought in Aiken county, and made no motion to transfer the cause to Florence county. Thus they waived objection to the jurisdiction of the court of common pleas for Aiken county. *Jenkins v. Atlantic C. L. Ry. Co.*, 84 S. C. 343, 66 S. E. 409.

[3] On the merits of the case, the defendants by a number of exceptions bring up the question in different forms that the circuit judge should have granted a nonsuit, or should have charged the jury that the plaintiff could not recover (1) because he had assumed the duty of inspecting the pole, and therefore could not complain of an injury caused by a defect which he should have discovered; (2) because, even if the defendant was negligent, the evidence showed beyond dispute that the plaintiff was guilty of contributory negligence. If the evidence had admitted of no other inference than that the plaintiff had assumed the entire responsibility of inspection, and had suffered injury from his own delict in failing to discover the defect then he could not recover. *Keys v. Winnisboro Granite Co.*, 72 S. C. 97, 51 S. E. 549; *Green v. Catawba Power Co.*, 77 S. C. 426, 58 S. E. 147; *Quick v. Millfort Mill Co.*, 78 S. C. 472, 59 S. E. 365. This rule has been applied in discussing the duties of linemen of telegraph poles in *McGuire v. Bell Tel. Co.*, 167 N. Y. 208, 60 N. E. 433, 52 L. R. A. 437; *Britton v. Central, etc., Tel. Co.*, 131 Fed. 844, 65 C. C. A. 598; *McIsaac v. Northampton E. L. Co.*, 172 Mass. 89, 51 N. E. 524, 70 Am. St. Rep. 244; *Lynch v. Traction Co.*, 153 Mich. 174, 116 N. W. 983, 21 L. R. A. (N. S.) 775, and note, and other cases. But it is manifest that the inflexible rule cannot be laid down that in all cases linemen are charged with the entire responsibility for due inspection of poles before going upon them, for the responsibility would depend on the rules and practice of the companies which they serve, the knowledge of the linemen of such rules and practice, the experience of the linemen, and perhaps other circumstances. So in *Berley v. Western U. Tel. Co.*, 82 S. C. 360, 64 S. E. 157, it was held that the evidence made a question for the jury to decide whether the lineman knew or should have known of the rule forbidding him to climb a pole without inspection, and whether he was negligent in not making such an examination as would have discovered the defect.

[4, 5] The evidence in this case shows that

on the line between Augusta, Ga., and Charleston, S. C., the defendant company had two systems of inspection and repair. The defendant M. A. Ray, as foreman with a force of men equipped with all necessary implements, was charged with the duty of traveling along the line and discovering and repairing all defects in poles and wires so as to keep the line safe and efficient. The second method or system was that in which the plaintiff was employed. He was required to go along the lines alone in a conveyance, and his duty, as he describes it, was that of "keeping up the lines, clearing away the undergrowth, replacing bad joints, or any other work I could do on the lines." A rule of the company contained this admonition: "Linemen are especially cautioned to ascertain before climbing a pole whether it is safe, by inspecting its condition (both above and below the ground) and its guying and bracing." This evidence admits of no other inference than that the plaintiff had assumed such duties in keeping the line in repair that he was bound to use reasonable care in examining a pole before ascending it. He thus describes his precautions and the work he undertook to do: "I tied my team by the road, and I got out and taken my pike pole, and tested a pole on the corner, which was leaning towards the woods. Wires on that pole were very slack. I dug around the pole with a shovel, and examined it as best I could without digging it entirely up. I dug about a foot and a half from the top of the ground. I went down about a foot and a half below the solid ground, and I tried to break it. Then I tried to cut into it with a shovel, and it seemed to be perfectly sound. Q. How did you test it with your pike? A. Sticking the pike in the pole and tried to break it with my strength, and then I tested it with a shovel. I put in an anchor on the road side, in order to make sure. The wires on each side of the pole had some bad joints in them. There was two. In order to take out the joints and put in a good piece of wire, I let the wires down off the pole to the ground with a grab line; that is, a rope. After the wires were let down, I started to come down." Although it turned out that the pole fell as the plaintiff began his descent, and that it was very old, and a mere shell, yet in the face of this evidence the court could not say that the evidence left no doubt that the plaintiff had not used due care in making his inspection, and that, therefore, even if the negligence of the defendant be assumed, he was guilty of contributory negligence. It is true that the pole was leaning, and that the plaintiff ought to have known that the weight of a man on such a pole would subject it to a great strain; but, in view of this evidence as to the tests he made of its strength and condition, the court cannot say that the entire evidence admitted of no other inference than that the bad condition or insecurity of the

pole was so obvious that the plaintiff was guilty of contributory negligence in ascending it.

[6] Nor can it be said that the plaintiff assumed the entire risk of the sufficiency of the inspection, when he was not charged with the entire responsibility of keeping the poles in repair. The contract of employment contemplated that the plaintiff should take certain precautions for his own safety, and the plaintiff assumed the risks of any defects which he would have discovered by due care in the examination which it was his duty to make; but the contract of employment also contemplated that the defendant should take certain precautions as a means of providing for the safety of plaintiff's place of labor by the inspection and work of Ray and his force, and the plaintiff did not assume the risk of a lack of due care on the part of this independent agency of the defendant. Ray, testifying for the defendant, admitted that, if his force of linemen had not been negligent in its inspection, the defect in this pole would have been discovered and remedied, and the accident prevented. It is therefore manifest that the evidence made an issue of fact whether the injury resulted from the failure of the plaintiff to perform the duty he had undertaken, the risk of the due performance of which he assumed, or from a failure of the defendants and their independent agents to perform the duty of inspection and repair they had assumed in order that plaintiff might have a safe place to work. We shall not discuss in detail the numerous exceptions to the charge on the questions of contributory negligence and assumption of risk, since all of them obviously hinge on the law, as we have endeavored to state it, and the charge of the circuit judge was in accordance with our view of the law.

[7] The circuit judge charged the jury that they were to decide as issues arising out of the evidence whether the plaintiff had notice of the rule requiring linemen to examine poles before ascending them, and whether the plaintiff had assumed any duty of inspecting the poles as well as the wires. The defendant complains of this charge because the evidence admitted of no other inference than that the plaintiff did have notice of the rule, and that it was his duty to inspect the poles. Inasmuch as the plaintiff expressly admitted that he was familiar with the rule, and that it was his duty to inspect the pole before ascending it, and that he did inspect it, it is impossible that the jury could have found otherwise.

The other exceptions to the charge impute errors which reference to the context will show so clearly were not committed that particular discussion of them is not necessary.

It is the judgment of this court that the judgment of the circuit court be affirmed.

GARY, C. J., and HYDRICK, J., concur.

(31 S. C. 248)

**CITY OF UNION v. SARTOR et al.**

(Supreme Court of South Carolina. April 5, 1912.)

**MUNICIPAL CORPORATIONS (§ 178\*)—OFFICERS—BOARD OF PUBLIC WORKS—AUTHORITY.**

Civ. Code 1902, §§ 2008-2012, provide that cities may construct and operate city water-works and electric light works; that the city council shall call elections to vote bonds to meet the cost of the same, and shall turn the bonds over to the board of public works; that the board of public works shall be elected and have power to sue and be sued, and to construct and operate and fully control and manage such works, and that it shall be its duty to furnish light and water to citizens and the city, and to exact payment and to make monthly statements to the city council of receipts and disbursements, but have no power to incur indebtedness without the concurrence of the council; that the city council may levy taxes, pay interest on the bonds, and create a sinking fund under the control of the board; that cities may procure locations and facilities for such works, and may furnish water and lights to individuals, firms, and private corporations for reasonable compensation. Const. art. 8, § 5, provides that cities may acquire such works upon a majority vote of the citizens authorizing an indebtedness therefor. *Held*, that a demurrer to a complaint by a city to restrain its board of public works from cutting off water and electric lights from the city on account of the refusal of the council to pay charges, arbitrarily fixed by the board, the amount of which was in dispute between the board and the council, was improperly sustained; it being the duty of the board to resort to the courts to determine the reasonableness of the charges.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 441-448; Dec. Dig. § 178.\*]

Appeal from Common Pleas Circuit Court of Darlington County; John S. Wilson, Judge.

"To be officially reported."

Action by the City of Union against W. H. Sartor, chairman, and others. From an order sustaining a demurrer to the complaint, plaintiff appeals. Reversed.

This action was for an injunction restraining the defendants, as the commissioners of public works for the city of Union, from cutting off and discontinuing the supply of water and lights furnished the city, on account of the city council's refusal to pay charges which were a matter of dispute between the board and the council.

J. Ashby Sawyer and Wallace & Barron, for appellant, S. Means Beaty, W. W. Johnson, and John Gary Evans, for respondents.

GARY, C. J. This is an appeal from an order sustaining a demurrer to the complaint, on the ground that it does not state facts sufficient to constitute a cause of action. The complaint will be set out in the report of the case.

The grounds of demurrer were: "(1) That the defendants are, under the statute law of this state, a body politic and corporate, and no duty is imposed upon them to do and perform the acts and obligations set

forth in the complaint; (2) that under the statutes of this state, in such cases made and provided, the defendants have the right and power to charge any and all persons and corporations, and upon the failure of such persons and corporations to pay such price the defendants, under the law, have the right to discontinue such service."

Sections 2008, 2009, 2010, 2011, and 2012 of the Code of Laws, are as follows:

"All cities and towns shall have full power and authority to construct and operate water works and electric light works within the corporate limits of said cities and towns for the use and benefit of said cities and towns and its citizens, and to purchase, own and operate apparatus for generating either electricity or gas for the use and benefit of said cities and towns and its citizens, or to contract for the erection of plants either for water works or sewerage or lighting purposes, or sewerage, one or both, for the use of said cities and towns, and to supply the citizens thereof; and to meet the cost of same the said cities and towns may issue coupon bonds, bearing interest at a rate not to exceed six per centum per annum, payable in any legal tender money of the United States forty years after date, with the privilege of redemption after twenty years from date: Provided, that before any bonds shall be issued under the provisions of this section, the city or town council of said municipality shall submit the question of the issue to the qualified registered electors of such cities and towns, at an election to be held by said city or town council, appointed and conducted in accordance with the laws of force governing municipal elections: And Provided, that before any elections shall be held under the provisions of this section a majority of the freeholders of said city or town, as shown by the tax books of said city or town, shall petition said city or town council that the said election be ordered; and if a majority of electors voting at said election vote for said issue of bonds the city or town council shall so declare by ordinance, and shall issue said bonds and turn them over to the board of commissioners of public works of said city or town hereinafter established. \* \* \*

"Section 2009. At such elections for bonds, the elector shall vote for three citizens of such town or city, whose terms of office shall be respectively two, four and six years, and until the general election for municipal officers next following the expiration of the short term, and until their successors are elected and qualified. The classification above designated as to the terms, shall be ascertained by the commissioners after election by lot. At each general election for municipal officers following the expiration of the term of the commissioners holding the short term, and at every such election every two years thereafter, one such com-



missioner shall be elected for a term of six years, and until his successor is elected and qualified. The officers so elected, and their successors in office, shall be known as the commissioners of public works of such municipality, and by that name may sue and be sued in any of the courts of this state. At the first meeting of the commissioners after election, and after any election for a full term, they shall organize by the election of one of their number as chairman. The clerk or recorder of the municipality shall act as secretary of the commissioners. The mayor and aldermen of the city, or the intendant and wardens of a town, shall fill any vacancy occurring in said commissioners by death, resignation or otherwise, by appointment for the unexpired term. The persons elected or appointed to such office shall qualify by taking the same oath as the election officers of the municipality take. The mayor of the city or the intendant of the town shall notify the persons so elected as members of the commissioners of public works of their election within ten days after the result of such election is declared.

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"Section 2010. Said board of commissioners of public works shall be vested with authority to build or contract for building said water works and said electric light plant, and to operate same, and shall have full control and management of same. They may supply and furnish water to the citizens of the said cities and towns, and also electric, gas or other light, and may require and exact payment of such rates, tolls and charges as they may establish for the use of water and lights. They may sell and dispose of said bonds and apply the proceeds, or so much thereof as may be necessary, towards the purchase of or payment for said plants: Provided, that the said board shall make a full statement to the city or town council at the end of each month of their receipts and disbursements of all kinds during the preceding month. They shall have no power to incur any indebtedness without the concurrence of such council."

"Section 2011. The said city or town council are hereby authorized to assess, levy and collect, in addition to the annual tax levied for other purposes, a sufficient annual tax from the taxable property of said cities or towns to meet the interest to become due upon said bonds, and also to raise the sum of at least one-fortieth part of the entire bonded debt as a sinking fund in aid of the retirement and payment of said bonds. Said sinking fund shall be under the control and management of the board of commissioners of public works, and shall be applied to the said bonds, or invested to meet the payment of same when due."

Section 2012, as amended by the act of 1909, p. 42, is as follows: "Section 2012. The said cities and towns shall have the

power and authority to purchase and hold suitable lands and water within the limits of the county and to erect such aqueducts, dams, canals, buildings, machine shops and other works, and to construct and lay such conduits, mains and pipes, as may be necessary to obtain and secure a supply of water and power for operating said water works and electric light works. And said cities and towns shall have power to erect poles and wires along any of the adjacent highways and in said cities and towns, and shall have the right to condemn any property and lands, the drainage from which would contaminate the water supply of said city or town. \* \* \*

Section 5, art. 8, of the Constitution, is as follows: "Cities and towns may acquire by construction or otherwise, and may operate, water works systems and plants for furnishing lights, and may furnish water and lights to individuals, firms and private corporations, for reasonable compensation: Provided, that no such construction or purchase shall be made, except upon a majority vote of the electors in said cities, or towns, who are qualified to vote, on the bonded indebtedness of said cities or towns."

The power of a municipality to operate an electric plant for furnishing lights to private residences did not exist in this state until the Constitution was adopted in 1895.

In the case of *Mauldin v. City Council*, 33 S. C. 1, 11 S. E. 434, 8 L. R. A. 291, the court held that the municipality had the express power to purchase and implied power to operate an electric plant, so far as it was used for lighting its streets and public buildings; but, so far as it was used for furnishing lights to private residences and places of business, at a compensation, it was not for the public use of the city; and therefore its purchase and maintenance were, to that extent, ultra vires.

The sections of the Code of Laws, hereinbefore set out, were first embodied in the act of 1896, entitled "An act to authorize all cities and towns, to build, equip, and operate a system of water works and electric lights, and to issue bonds to meet the cost of same." In that act is this provision, conferring corporate existence on the commissioners of public works: "The officers so elected and their successors in office shall be known as the commissioners of public works, and by that name may sue and be sued in any of the courts of this state."

The powers conferred upon the commissioners of public works were intended to make them a part of the municipal government. The act conferred upon the commissioners of public works certain powers in regard to furnishing lights to private individuals which they could not have exercised prior to the adoption of the Constitu-

tion, and cannot now exercise, unless they must be regarded as agents of the cities and towns.

It will be observed that the Constitution provides that cities and towns alone are authorized to furnish electric lights to individuals, firms, and private corporations for reasonable compensation; yet the statute provides that these powers shall be exercised by the commissioners of public works, an independent corporation which is not under the supervision nor subject to the control of the city of Union, but deriving its powers directly from the statute. *Hardy v. Reamer*, 84 S. C. 487, 66 S. E. 678.

Turning to the title of the act of 1896 (page 83), it will be seen that it only intended that power to operate electric plants should be given to cities and towns; yet in the body of the act, not only is full power conferred upon cities and towns, but like authority is given to the commissioners of public works, a corporation created by that act. But, as the constitutionality of that act has not been attacked, the questions whether the commissioners of public works are authorized to exercise the rights and privileges conferred on cities and towns by section 5, art. 8, of the Constitution, or whether the title of the act of 1896 is obnoxious to section 17, art. 3, of the Constitution, which provides that "every act or resolution having the force of law shall relate to but one subject, and that shall be expressed in the title," are not, at this time, properly before the court for consideration.

The circumstances under which a public service corporation may refuse to supply a private individual with water are thus stated in the case of *Poole v. Water Co.*, 81 S. C. 438, 62 S. E. 874, 128 Am. St. Rep. 923: "While a public service water company has the right to cut off a consumer's water supply for nonpayment of recent and just bills for water rents, and may refuse to engage to furnish further supply until said bills are paid, the right cannot be exercised so as to coerce the consumer into paying a bill which is unjust, or which the consumer in good faith and with show of reason disputes, by denying him such a prime necessity of life as water, when he offers to comply with the reasonable rules of the company as to such supply for the current term. *State ex rel. Gwynn v. Citizens' Tel. Co.*, 61 S. C. 98 [39 S. E. 257, 55 L. R. A. 139, 85 Am. St. Rep. 870]; *McEntee v. Kingston Water Co.*, 165 N. Y. 27, 58 N. E. 785; *Wood v. City of Auburn*, 87 Me. 287 [32 Atl. 906] 29 L. R. A. 376. The inconvenience arising from subjecting the water company to the necessity of resorting to the regular courts to collect disputed claims is not to be compared to the hardship to the consumer, as a member of the public, involved in permitting the water company to be judge in its own cause, and to coerce the disputant into submission by denying him water."

These principles apply with greater force when the commissioners of public works threaten to deprive the city of the electric lights, which it was furnishing. It would defeat one of the very objects for which, it is contended, the commissioners of public works were invested with corporate powers of a public nature, to wit, to furnish lights, not only to private parties, but also to the city or town. The statute authorizes the commissioners of public works to sue and be sued; and it has not been made to appear that it has exhausted its remedies, nor that it was necessary to resort to measures so drastic as to defeat one of the objects of its existence. On the contrary, it appears that its action was arbitrary, and that there was error in sustaining the demurrer.

Judgment reversed.

WATTS, J., did not sit in this case.

WOODS, J. I concur in the conclusion reached by the Chief Justice that the demurrer to the complaint should be overruled; but I am unable to assent to the proposition laid down in his reasoning that the board of commissioners of public works created by the statute is a separate corporation. The determination of the legal status and powers of boards of commissioners of public works and their relation to the municipality and to the city council is of great importance, not only to the parties before the court in the settlement of this bitter litigation, but to the citizens of the towns and cities where such boards have been elected. I venture to think that a careful perusal of the statutes set out in the opinion of the Chief Justice will make unnecessary any argument to establish the following propositions as to the status and power of the boards of commissioners of public works and their relation to the municipality and the city council:

(1) The general power conferred by the statute "to construct and operate water-works and electric light works" is conferred on the cities and towns as municipalities. The city council is not the municipality, but merely an agency of the municipality, and its members are merely officers of the municipality. The mayor and aldermen have no authority, except that conferred by the statute, either expressly or by necessary implication.

(2) The city council is not expressly given, in section 1982 of the Civil Code, or elsewhere, any authority or power in the management of municipal waterworks or electrical light works; and no such authority can be implied, because in section 2010 the General Assembly denied the city council such power by conferring it on the board of commissioners of public works.

(3) The board of commissioners of public works is not in any sense a separate corporation, but a mere municipal agency, and its

members are mere elective officers of the municipality, through whose management and control the General Assembly has required that the municipality shall operate and manage its waterworks and electric light works.

(4) This power is derived from section 2010 of the Civil Code, which provides: "Said board of commissioners of public works shall be vested with authority to build or construct for building said water works and said electric light plant, and to operate same, and shall have full control and management of same. They may supply and furnish water to the citizens of said cities and towns, and also electric, gas or other light, and may require and exact payment of such rates, tolls and charges as they may establish for the use of water and lights. They may sell and dispose of said bonds and apply the proceeds, or so much thereof as may be necessary, towards the purchase of or payment for said plants: Provided, that the board shall make a full statement to the city or town council at the end of each month of their receipts and disbursements of all kinds during the preceding month. They shall have no power to incur any indebtedness without the concurrence of such council." The power thus conferred includes all powers necessarily incident to operation and management, and among these the power to fix rates for the use of light and water. In fixing rates, the board is charged, not only with the obligations and duties devolving upon public service corporations, but also those which devolve upon public officers; and they must make the rates reasonable and free from unfair discrimination.

(5) Included in this power to operate, manage, and fix rates is the power to make a reasonable charge for water and lights furnished for municipal purposes; and the duty to pay such charges, as a municipal liability, devolves on the city council as the general fiscal agency invested by the law with the collection and disbursement of the municipal revenue. This power to make charges and demand payment of the city council is not arbitrary; on the contrary, the manifest purpose of the statutory requirement that "the said board shall make a full statement to the city or town council at the end of each month of their receipts and disbursements of all kinds during the preceding month" was not only to provide a safeguard against official misconduct and a stimulant to official efficiency by giving publicity to official action, but its purpose was also to enable the city council to scrutinize the account and object to excessive charges.

(6) The question whether an officer or official board has done that which the statute requires of them is judicial, and the performance of official duty will be adjudged by the courts at the instance of persons having a legal interest in such performance. It follows that the courts, at the instance of the city council, will enforce the performance by

the board of commissioners of public works of the official duty not to make arbitrary and unreasonable charges against the city for water and lights, and at the instance of the board of commissioners of public works will enforce the performance by the city council of its official duty to pay the board reasonable charges for lights and water.

(7) Since discretion is conferred on the board of commissioners of public works in determining what charges are reasonable under all the circumstances—that is, what is the reasonable proportion of the entire expense of operating and developing the plants that should be borne by the city, and what by private consumers—and since the presumption is that officers do their duty, when the city council alleges that the demands made for the service to the municipality are arbitrary and excessive, it assumes the burden of proving them to be so.

(8) But this discretion of the board of commissioners of public works does not extend to impairment of public safety and comfort by cutting off the municipal water and lights on account of even an arbitrary refusal of the city council to pay reasonable charges. The municipal use of water and lights being the primary purpose for which the plants are authorized and constructed, no breach of duty by other officers can excuse the board of commissioners of public works in failing to use their utmost efforts to so manage the plants as to meet that purpose. Its recourse must be to the courts to require the city council to perform its duty of payment.

(9) On the other hand, the board being empowered to manage the plants, and being under the most exacting duty of supplying light and water, and being forbidden to incur any debt, except with the consent of the city council, it is manifest that the city council should not refuse to respect and pay the charges fixed by the board, except on the clearest and most convincing proof that the charge was unreasonable and arbitrary. Except in such a case, its recourse must be to the courts to require the board of commissioners of public works to perform its duty of making a reasonable charge.

The complaint in this case alleges that the board of commissioners of public works is about to cut off entirely the supply of water and the electric current necessary for municipal purposes. Under the construction of the statute above set out, this allegation was sufficient to constitute a cause of action for injunction.

HYDRICK, J., concurs.

FRASER, J. I concur in the result in the opinion of the Chief Justice. I know that the city council is not the corporation; but it is "the agency through which the municipal functions are exercised." Am. & Eng. Ency. of Law, vol. 20, p. 1210. It is also

true that "the council is the general agent of the municipality for all purposes and exercises all the corporate powers, not expressly committed by law to other boards or officers." Cyc. vol. 28, p. 316.

I pass over the question as to the constitutionality of the act. What did the Legislature do?

The Constitution provides that cities and towns may acquire and operate water and light plants, and may furnish water and lights to individuals, firms, and private corporations for a reasonable compensation. The city operates for its own use and furnishes to others for a compensation. The owner may pay expenses; but he does not furnish to himself for a compensation, toll, or rate.

Did the Legislature create a separate body, independent of the city council and coextensive in territorial limits (water and lights ought to reach every part of the city)? If the Legislature has done this, it has sown the seeds of continual conflict, and the harvest will be endless trouble and litigation. I do not think the Legislature has done this, but simply created a board to take charge of the actual construction and operation of the plants, because it seemed to the Legislature that a small body of men, acting practically as a continuing body, can manage a business enterprise better than a large and continually changing body can do. The board is allowed to charge the citizens a rate or toll, but not the city. I see no authority, either in the statute or the Constitution, to warrant this governmental agency to charge the owner a flat rate, or any other rate, for the output of its own plant. That it is not an independent body is shown by the fact that the act provides that the board shall make a full statement to the city or town council at the end of each month of the receipts and disbursements of all kinds during the preceding month. They shall have no power to incur *any* indebtedness without the concurrence of such council. The council, by name, assesses, levies, and collects the necessary taxes, and when an extension is necessary the city (which, we have seen, means the city council) secures the new rights.

Even if I took the other view, I think the injunction ought to have been made permanent.

(91 S. C. 265)

#### STATE v. RAVAN.

(Supreme Court of South Carolina. April 9, 1912.)

#### 1. INTOXICATING LIQUORS (§ 211\*)—CRIMINAL PROSECUTIONS—INDICTMENT.

An indictment charging accused with keeping a distillery where alcoholic liquors were manufactured sufficiently charges a violation of act March 2, 1909 (26 St. at Large, p. 60) § 1, prohibiting the keeping of liquors contain-

ing alcohol which if drunk to excess will produce intoxication.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 251; Dec. Dig. § 211.\*]

#### 2. INTOXICATING LIQUORS (§ 236\*)—CRIMINAL PROSECUTIONS—EVIDENCE.

In a prosecution for unlawfully keeping alcoholic liquors, evidence held sufficient to support a conviction.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. §§ 300-322; Dec. Dig. § 236.\*]

#### 3. INTOXICATING LIQUORS (§ 137\*)—CRIMINAL OFFENSES—ELEMENTS.

To constitute a violation of act March 2, 1909 (26 St. at Large, p. 60) § 1, prohibiting the manufacture of liquor, it is not necessary that the process of manufacturing should be complete, and hence a person letting the water out of a still and scraping the still is engaged in the manufacture of liquor and is guilty of a violation.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 147; Dec. Dig. § 137.\*]

#### 4. INTOXICATING LIQUORS (§ 137\*)—STATUTORY PROVISIONS—"MANUFACTURE."

The word "manufacture" as used in act March 2, 1909 (26 St. at Large, p. 60) § 1, prohibiting the manufacture of liquor, means the process of making by art, or reducing materials into form fit for use, by hand or machinery.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 147; Dec. Dig. § 137.\*]

For other definitions, see Words and Phrases, vol. 5, pp. 4344-4346; vol. 8, p. 7716.]

Hydrick and Fraser, JJ., dissenting.

Appeal from General Sessions Circuit Court of Spartanburg County; R. C. Watts, Judge.

"To be officially reported."

Will Ravan was convicted of crime, and he appeals. Affirmed.

Carson & Boyd, for appellant. Solicitor J. C. Otts, for the State.

WOODS, J. The question in this case is whether the circuit judge was in error in refusing to direct a verdict of acquittal on the trial of the defendant for violation of the dispensary law. Section 1 of the act of 1909 (26 Stat. 60) provides: "That it shall be unlawful for any person, firm, corporation or association in this state to manufacture, sell, barter, exchange, receive, accept, give away to induce to trade, deliver, store, keep in possession in this state, furnish at public places or otherwise dispose of any spirituous, malt, vinous, fermented, brewed or other liquors and beverages, or any compound or mixture thereof which contains alcohol and is used as a beverage, and which if drunk to excess will produce intoxication, except as hereinafter provided."

[1] The indictment charges that the defendant, Will Ravan, "did willfully and unlawfully keep and maintain a place at his place, and near his home, a distillery where alcoholic liquors are manufactured, made,

and distilled, sold, bartered, and given away, and where persons were permitted to resort for the purpose of drinking alcoholic liquors as a beverage, and where alcoholic liquors were kept for sale, barter, and delivery, thereby then and there keeping and maintaining a common nuisance. \* \* \* We think it is too fine a verbal distinction to say that the charge of keeping a distillery where liquors are manufactured and kept did not plainly indicate to the defendant that he was charged with manufacturing and keeping in his possession alcoholic liquors.

[2] There was direct evidence that the defendant was actually occupied at the time he was arrested in the manufacturing of liquor. One of the constables testified: "We went to the distillery about 6 o'clock in the morning; no one was there; the still was in the furnace; and we hid ourselves in the bushes around there in sight of the distillery, and at 8:30 Mr. Ravan came with a — under one arm and kindling under the other. The still was full of water, and he let the water out of the still and picked up a piece of copper about the size of that [indicating] and was scraping in the still, and we rushed in on him. There was another man with us—Mr. Meret—he was the man that caught him; but we were all right there. Q. What kind of a still was that? A. Copper still, about 60-gallon. Q. What other elements were there used to make liquor? A. We found seven fermenters, and I reckon fully 700 or 800 gallons of beer. Q. What is that beer? A. That is still beer what they make whisky out of."

[3] To constitute the offense of manufacturing liquor it is not necessary that the product of the manufacturer should be complete.

[4] Manufacture is "the process of making by art or reducing materials into form fit for use, by the hand or by machinery" (26 Cyc. 519); and one employed in this process is manufacturing.

But aside from that, the possession of the still, having in it the water indicative of use for distilling and the emptying out of the water in order to replace it with fresh water was circumstantial evidence which, unexplained, tended to prove that the defendant had but recently used the still in the manufacture of liquor.

Judgment affirmed.

GARY, C. J., concurs in this opinion. WATTS, J., disqualified.

HYDRICK, J. (dissenting). The defendant was convicted upon an indictment which charged that he "did willfully and unlawfully keep and maintain a place at his place, and near his home, a distillery where alcoholic liquors are manufactured, made, and distilled, sold, bartered, and given away, and where persons were permitted to resort for the purpose of drinking alcoholic liquors as

a beverage, and where alcoholic liquors were kept for sale, barter, and delivery, thereby then and there keeping and maintaining a common nuisance against the form of the statute in such case made and provided, and against the peace and dignity of the state."

The testimony on the part of the state tended to prove no more than that Ravan was caught at a distillery where there were some fermenters and 700 or 800 gallons of beer; that he came to the distillery early in the morning with some kindling under his arm, as if to kindle a fire under the still; that he let the water out of the still and began to scrape it out with a piece of copper, when the officers ran in and captured him.

Defendant moved the court to direct a verdict of not guilty, because no crime had been proved against him. The motion was refused, and the court charged the jury that, if the testimony satisfied them beyond a reasonable doubt that defendant had a distillery where alcoholic liquors were manufactured, they should convict him; that the sole question for them to determine, and upon it depended the guilt or innocence of defendant, was whether he was engaged in the manufacture of alcoholic liquors; that it was not necessary that the process should be completed, but that if he had engaged in the process, and it had been only partially completed, the offense was committed.

The verdict should have been directed as requested. No crime was proved. In fact, no crime was charged. There can be no other construction put upon this indictment and upon this evidence unless the court departs from the universally accepted and time-honored rules for construing indictments and criminal statutes. It will be observed that the indictment does not charge the defendant himself with manufacturing alcoholic liquors, but merely with keeping and maintaining a place—a distillery where alcoholic liquors are manufactured, made and distilled, etc.—"thereby then and there keeping and maintaining a common nuisance." There is no proof that he owned or kept the distillery, or that it was on his premises. It will be observed also that the statute which is set out below, does not make the keeping of a place where liquors are manufactured a nuisance. Hence the indictment charges no crime.

The only section of the Criminal Code under which the indictment could be laid is section 785, which reads: "All alcoholic liquors and beverages, whether manufactured within this state or elsewhere, or any mixture by whatsoever name called, which, if drunk to excess will produce intoxication, are hereby declared to be detrimental, and their use and consumption to be against the morals, good health and safety of the state, and contraband. That it shall be unlawful for any person, firm, corporation, or association within this state to manufacture, sell, barter, exchange, receive, accept, give away to induce

trade, deliver, store, keep in possession in this state, furnish at public places, or otherwise dispose of any spirituous, malt, vinous, fermented, brewed, or other liquors and beverages, or any compound or mixture thereof, which contains alcohol and is used as a beverage, and which, if drunk to excess, will produce intoxication, except as hereinafter provided."

There was not a scintilla of evidence that a drop of liquor had ever been manufactured or distilled at the place in question. In misdemeanors where an attempt is not an indictable offense, the law recognizes the existence of the point of repentance; and hence, unless the statute expressly makes the attempt or the engaging in the process of manufacturing liquors a crime, one is not guilty of violating the law until the manufacture is completed, because he could repent at any moment, short of completing the process, stop and save himself from the penalty of the law. Moreover, under section 785, it was necessary to allege and prove that defendant manufactured liquors which contained alcohol, and which are used as a beverage, and which, if drunk to excess, will produce intoxication. There is no such allegation, nor is there a tittle of proof tending to show what kind, if any, liquor had ever been made, or indeed that any had been made, or that if drunk to excess it would produce intoxication. If all that is to be assumed, and, from the moral aspect of the case, perhaps it may be cohat of the legal aspect, and what becomes of the presumption of innocence with which the law clothes every citizen who is charged with crime, and which it has said must remain around him, until it is removed by proof of his guilt, beyond a reasonable doubt?

FRASER, J. (dissenting). I concur in the result with Mr. Justice HYDRICK. I think the jury were fully warranted in finding from the evidence that some one kept at the still "a place where liquors were manufactured," but there was no evidence that the defendant did. The keeping of such a place is not forbidden in the statute. The statute makes the doing of certain things a crime. It also makes the "keeping of a place" where certain things are done a crime. The statute makes a distinction between the two, and it seems to me the court ought to observe it, especially in criminal cases.

(91 S. C. 235)

#### STATE v. FERGUSON.

(Supreme Court of South Carolina. April 3, 1912.)

#### 1. HOMICIDE (§ 300\*)—INSTRUCTIONS—SELF-DEFENSE.

In a trial of one for murder, it was error for the court to so instruct as to leave a doubt whether the jury may not have inferred therefrom that the accused did not have the same

right to defend himself as though the deceased had not been his father.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 614, 616-620, 622-630; Dec. Dig. § 300.\*]

#### 2. CRIMINAL LAW (§ 823\*)—INSTRUCTIONS—SELF-DEFENSE.

An instruction that the defendant could not plead self-defense if he used language so opprobrious that it was likely, under the circumstances, to create a difficulty, and if the difficulty in which the killing occurred actually ensued from its use, was harmless, where the court immediately afterwards correctly instructed that the defendant could not plead self-defense if he used opprobrious language which might reasonably be expected to bring on a difficulty, and which did bring on the difficulty which resulted in the killing.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1992-1995, 3158; Dec. Dig. § 823.\* Homicide, Cent. Dig. §§ 718, 719.]

#### 3. HOMICIDE (§ 112\*)—SELF-DEFENSE—PLEA.

By the use of opprobrious language, one may be precluded from pleading self-defense in a homicide case, though the language was not addressed to the decedent, but was addressed to the decedent's wife in his presence.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 145-150; Dec. Dig. § 112.\*]

#### 4. HOMICIDE (§ 300\*)—INSTRUCTION—SELF-DEFENSE—"DIFFICULTY."

An instruction upon self-defense which used the word "difficulty" to refer to a "physical encounter," which resulted in one party being killed, was not erroneous.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 614, 616-620, 622-630; Dec. Dig. § 300.\*]

For other definitions, see Words and Phrases, vol. 3, p. 2065.]

#### 5. HOMICIDE (§ 276\*)—SELF-DEFENSE—LIABILITY FOR QUARREL—JURY QUESTION.

In the trial of one for killing his father, it was for the jury to determine whether defendant's statement to his mother that "You are a damn lie" was language so opprobrious that it might have reasonably been expected to bring on the difficulty so as to preclude reliance on self-defense.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 569; Dec. Dig. § 276.\*]

#### 6. CRIMINAL LAW (§ 789\*)—WORDS AND PHRASES—"REASONABLE DOUBT."

Reasonable doubt is one founded in reason and one for which a good reason can be given, and cannot be said to be a "painful anxiety."

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1846-1849, 1851, 1880, 1904-1922, 1960, 1967; Dec. Dig. § 789.\*]

For other definitions, see Words and Phrases, vol. 7, pp. 5958-5972; vol. 8, p. 7779.]

#### 7. CRIMINAL LAW (§ 20\*)—"MALICE."

Though one's heart may be full of sin, it is not legally malicious, unless it prompts the willful or intentional doing of a wrongful act without just cause or excuse.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 90, 91; Dec. Dig. § 20.\*]

For other definitions, see Words and Phrases, vol. 5, pp. 4298-4304; vol. 8, pp. 7712, 7713.]

#### 8. HOMICIDE (§ 340\*)—HARMLESS ERROR.

Error in defining malice was harmless where defendant was convicted of manslaughter only.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 715-717, 720; Dec. Dig. § 340.\*]

## 9. HOMICIDE (§ 287\*)—INSTRUCTION.

An instruction to the jury in a homicide case to judge a man's heart "by what he says and does, and what you know of him, and what you know of yourselves, and what you know of human passion and human conduct," when considered with the entire charge, was not improper and did not advise them to judge the defendant's heart from their personal knowledge of him without regard to the evidence.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 592; Dec. Dig. § 287.\*]

## 10. HOMICIDE (§ 244\*)—BURDEN OF PROOF—SELF-DEFENSE.

Where one on trial for homicide pleads self-defense, he must prove his plea by a preponderance of the evidence.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 507-509; Dec. Dig. § 244.\*]

## 11. HOMICIDE (§ 151\*)—BURDEN OF PROOF—ACCIDENTAL HOMICIDE.

Since the state has the burden of proving criminal intent in a homicide case, a defendant claiming accidental homicide is not required to establish this claim by the burden of proof.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 276-278; Dec. Dig. § 151.\*]

Appeal from General Sessions Circuit Court of Abbeville County; Geo. W. Gage, Judge.

"To be officially reported."

J. H. Ferguson was convicted of manslaughter, and he appeals. Reversed.

Wm. N. Graydon and M. L. Bonham, for appellant. R. A. Cooper, for the State.

HYDRICK, J. Defendant was tried for the murder of his father. He was convicted of manslaughter, and appeals from the sentence. His contention was that the killing was accidental, and also that he was acting in self-defense, when the pistol which he pointed at his father to stop his deadly assault upon him was accidentally discharged. At the trial, his mother testified that the defendant and his father were quarrelling in defendant's house; that she made an assertion to which defendant replied: "You are a damn lie." This was the opprobrious language to which the presiding judge referred in his charge to the jury.

The exceptions are all to the charge, which follows, the language specifically excepted to being italicized:

"Gentlemen of the jury: The indictment charges two things, first, that James Ferguson killed John Ferguson; and, secondly, that he killed him with malice aforethought. If you are satisfied about the first issue that the son did kill the father, before you take up the other issue with what intent he did it you will refer to an issue which the son makes himself in the pleading. His plea is that he was excusable in doing it, because what he did he did in defense of himself, and while that which happened, to wit, the shooting and death of his father, was not anticipated or intended by him, yet he took steps to defend himself, and in the doing of which death came to his father. It

is a peculiar plea; I have never seen one like it before; but I think I can state it to you clearly. In the first place, not every man can plead self-defense; only those who are without fault in bringing on the difficulty. Start at the inception of this difficulty; how was it brought on? Was it brought on by the wrongful conduct of the son? *If the son used language towards the father, or towards the mother in the father's presence, of so opprobrious a character as was likely under all the circumstances to create a difficulty, and if a difficulty actually ensued from the use of that language, and in the difficulty the son killed the father, the son may not plead self-defense.* I do not tell you that the son did bring on the difficulty; I do not tell you that the son used any language to bring it on; and I do not tell you that the death flowed out of the language in the difficulty. Those are questions for the jury, and the jury must find those facts. All that I tell you is that if you find those facts against the son, *if you find that he was guilty of the use of opprobrious and blamable language, that such language might reasonably be expected to bring on a difficulty, that it actually did bring on the difficulty, and that the difficulty resulted in the death of the father, then the son cannot plead self-defense.* If you find those facts against him, you rule self-defense out. If you find those facts for the son, then you go one step further. Now, the son was in his own house; he had the right to protect himself; he had the right to stand his own ground. Did the father assault the son with a knife? That is a pregnant issue in this case. Did the father have an open weapon in his hand, dangerous to life, and did he assault the son with it? Much of your verdict will depend upon how you find that issue. If he did not, the plea of self-defense falls to the ground. But if the father did have an open knife, and if he was about to cut the son, and if the son thought so—reasonably thought so—he had the right to do one of two things; he had the right to save his life. How? He had the right to save his life even by striking his father down, as lamentable a thing as that is, as awful a thing as that is—not in law I mean, I mean in society. A son, to save his life, even has the right, if he see proper to do it, to take his father's life; he has the right to slay his father. Now, if he has the right to slay his father, he has the right to use other means to prevent his father from killing him. If, instead of pointing the pistol at his father and shooting his father to save the felony of the father upon himself, he points the pistol at his father to bluff the father, to deter him, that is the same sort of right, and if the pistol goes off unwittingly, the case is not altered. His right cannot be minimized if the pistol went off unwittingly, when he would have

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

been excused if it had gone off wittingly. So if you find those to be the facts, if you find that the old man, the father, assaulted the boy with an open knife, was about to cut him, and the son seized the pistol to bluff the father, and to save himself from death or serious bodily harm, and if he killed the father under those circumstances, you write a verdict of not guilty. But the true history of the case is for the jury. And I revert back to the fact: Did the father have the knife? Did the father draw the knife upon the son? Did the son believe the father was going to kill him, and did he reasonably believe it—would the ordinary man, like circumstance, have come to the same conclusion and did the son believe the necessity was upon him to do what he did? The last thing a man must do is to kill. As I told you before, the son being in his own house, he did not have to retreat. Before a man kills his fellow, he must get out of the way; he must do everything to avoid that final tragedy, unless he be in his own house, and then he can stand his ground, and if the assailant comes upon him, he may stand and strike. *Now, if this plea is made out, write a verdict of not guilty. The son has made the plea; he has set it up as a shield between him and the penalties of the law; and he must prove it. He must satisfy you by a preponderance of the testimony that the thing is as he pleads it, or he must do it by so strong a proof as to raise in your minds a reasonable doubt about his guilt.* If you sustain the plea, and the son is excusable, say "not guilty." If you are unable to do that, if the testimony of the witnesses leads you to the sure conclusion that the son was without right in what he did, then you go one step further and inquire about the character of the killing.

"As you heard me tell a jury yesterday, there are two unlawful killings; one is called murder, and the other is called manslaughter. If one man kills another out of a malicious heart, it is murder. *And a malicious heart, Mr. Foreman and gentlemen, is a heart that is full of sin; that is wrong with God and man. Malice—the law book's picture is black. Artists have tried to draw it—the picture of the human heart—and they picture the malicious heart in black, and they picture a lawful heart in white. You have got to judge of a man's heart by what he says and does, and by what you know of him, and what you know of yourselves, and what you know of human passion and human conduct.* If the testimony in this case satisfies you that this man killed his father, killed him wrongfully, and killed him out of a malicious heart, you ought to say so. If the testimony leaves you in reasonable doubt about that, you ought to say so, and give him the benefit of it. The state charges it is done in malice, and the state must prove it beyond a reasonable doubt. If the testimony surely sat-

isfies you that the killing was in malice, say 'guilty,' and the penalty is death, unless you recommend him to mercy, and then it is lifetime imprisonment. But if the testimony leaves you *in painful doubt* on that subject, in what the law calls a reasonable doubt, about the purpose or intent of the party when he struck the blow, then you make one further inquiry.

"The other unlawful killing is called manslaughter. It exists where two men get into a fight; where one assaults the other; where the one assaulted becomes hot in passion; where he looses the grip upon himself, and, in a moment of passion, he strikes and kills his assailant. That is manslaughter, and the penalty for that is imprisonment not less than 2 nor more than 30 years, in the discretion of the court.

"Now, the reasonable doubt, gentlemen, and I am done. This man is charged with a grave crime, and the object of trials is to exclude all uncertainty as much as it is within the power of mortal man to do, and the mandate of the law is, if you have a reasonable doubt about his guilt, if the testimony leaves you wavering and uncertain, *in painful anxiety*, as to what the truth is, in that case you write a verdict of not guilty. If the testimony leads you to the certain and sure conviction that this man has violated the law, and that he has the blood of his father upon his hands without legal excuse, it is likewise your duty to say so. You may say 'guilty,' and that means the defendant shall die upon the gallows. You may say 'guilty with recommendation to mercy,' and that means he shall be confined in the penitentiary all his days. You may say 'guilty of manslaughter,' that means he shall be imprisoned for a series of years, not less than 2 nor more than 30; and you may say 'not guilty.' Take the record, gentlemen, and find a verdict."

[1] The first exception assigns error in that, throughout the charge, his honor dwelt upon the social and moral aspect of the offense with which defendant was charged, and continually spoke of the parties to the fatal encounter in the social and moral relation of father and son, instead of in the legal relation of deceased and defendant, thereby impressing upon the mind of the jury the idea that a son who had killed his father was not to be tried by the same rules of law and evidence that govern in the trial of other cases of homicide. The charge shows that the deceased and defendant were referred to throughout as father and son. Such a reference to the parties, though in accordance with the facts, was, nevertheless, unfortunate. While it may not have had any weight with the jury, it may have impressed upon them the idea that a son was not entitled in law to the same right of defending himself against an unlawful attack of his father as against that of any other person. The law is no respecter of persons. Whatever we may say or think as to the social



and moral aspect of the case, the law gives a son the same right to defend himself against the unlawful and deadly assault of his father that it does to defend himself against the unlawful and deadly attack of any other person. In such a case the son is entitled to be tried by the legal rather than by the social and moral standard. We cannot say that the charge, in its general scope and tone, did not impress upon the jury an erroneous idea that the defendant did not have the right to defend himself against an unlawful assault made upon him by his father, just as if it had been made by any other person.

The next exception is that the charge limited defendant's defenses to that of self-defense, and eliminated the plea of accidental killing. It appears from the charge that this exception is not well taken.

[2] The third and fourth exceptions question the correctness of the charge as to the use by defendant of opprobrious language which may have brought on the difficulty. The first part of the charge complained of was not in strict accord with the rule laid down in *Rowell's Case*, 75 S. C. 510, 56 S. E. 23, but the slight variance in stating the rule was immediately afterwards corrected by saying that the language used must be such as might reasonably be expected to bring on a difficulty, and actually result in bringing on the difficulty. We are satisfied that no prejudice resulted to defendant from the language complained of.

[3] It is contended, however, by defendant that the rule must be limited to opprobrious language used towards the deceased himself, and not to a third person in his presence. We cannot accept this view. Opprobrious or insulting language directed to a man's wife or daughter, or to some other person in his care and under his protection, in his presence, might and probably would provoke a difficulty even more quickly than if directed to himself; and the person who used it might reasonably expect that it would, and therefore he would be at fault in bringing on the difficulty.

[4] These exceptions also seek to make a distinction between the word "difficulty" which is used in the charge, and the words "physical encounter" which are used in the *Rowell Case*. The distinction is unsubstantial and without merit.

[5] The contention of the fifth exception that the language used was not so opprobrious that it might have reasonably been expected to bring on a difficulty cannot be sustained, for that is a question of fact, which was properly submitted to the jury. Language which might, under some circumstances and between some persons, be passed without expecting a difficulty, should, under other circumstances and between other persons, be reasonably expected to result in a physical encounter. Whether it should or should not is ordinarily a question of fact for the jury.

[6] It is unfortunate that his honor depart-

ed from the time-honored and approved definitions of a reasonable doubt. This court has defined it to be a strong, well-founded, and substantial doubt, arising in and growing out of the testimony in the case. It is therefore a doubt founded in reason and one for which a good reason can be given. Therefore a reasonable doubt cannot be said to be a "painful anxiety." An individual whose mind is excessively susceptible or abnormally sensitive might be in a state of "painful anxiety" about a matter, when an ordinarily sensible person would not hesitate, or have any reason to doubt the truth of the matter.

[7] His honor was likewise unfortunate in departing from the approved and well-understood legal definitions of malice. It is well for the trial judge to point out to the jury the difference between the popular and the legal meaning of the word. But a man's heart may be full of sin. It may be wrong with God and man. It may be what some artists would depict as black. Yet, unless it prompts "the willful or intentional doing of a wrongful act, without just cause or excuse," it is not a legally malicious heart.

[8] But the error in defining malice is not ground for reversal, because the defendant was convicted of manslaughter only, and the jury must have found that the killing was not done in malice.

[9] The next exception assigns error in the charge that the jury must judge of a man's heart "by what you know of him, and what you know of yourselves, and what you know of human passion and human conduct." Fairly construed, we do not think the language conveyed or was intended to convey the idea that the jury should judge of the defendant's heart by what they individually and personally knew of him, without regard to the evidence, which is the error assigned. Taken in connection with the context, it conveyed the idea that the jury were to judge the defendant's heart by his language and conduct, by what they knew of him from the evidence, and by their own observation and experience of human passion and conduct, and that is the test which is universally applied in determining the motive of human action.

[10] The last exception assigns error in charging that the defendant must prove his plea or defense by the preponderance of the evidence. That charge would have been correct if we could safely say that it was understood and applied by the jury only to the plea of self-defense. But, considering the charge as a whole, we cannot satisfactorily conclude that the jury may not have understood from it that the defendant must also prove the plea that the killing was accidental by the preponderance of the evidence.

[11] The plea of accidental homicide, if indeed it can properly be called a plea, is certainly not an affirmative defense, and therefore does not impose the burden of proof up-

on the defendant, because the state cannot ask for a conviction unless it proves that the killing was done with criminal intent. *State v. McDaniel*, 68 S. C. 304, 47 S. E. 384, 102 Am. St. Rep. 661. Turning to the charge, it will be seen that his honor spoke of the plea of accidental killing in the same connection with the plea of self-defense, and, at the conclusion of his remarks upon that subject, he instructed the jury: "Now, if this plea is made out, write a verdict of not guilty. \* \* \* He [the defendant] must satisfy you by the preponderance of the testimony that the thing is as he pleads it." Taking the charge on this subject as a whole, the jury may have concluded that the burden was upon defendant to prove that the killing was accidental, which is not the law.

Judgment reversed.

GARY, C. J., and WOODS, WATTS, and FRASER, JJ., concur.

(91 S. C. 231)

### NICHOLSON v. VILLEPIGUE.

(Supreme Court of South Carolina. April 1, 1912.)

#### 1. EJECTMENT (§ 65\*)—PLEADING—ALLEGING TITLE.

In an action to recover real property, an allegation of ownership is an allegation of title.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. §§ 165-174; Dec. Dig. § 65.\*]

#### 2. STIPULATIONS (§ 18\*)—CONCLUSIVENESS—EFFECT—MATTERS CONCLUDED.

In an action involving title to land, an agreement of the parties that the deeds may be proved by either the originals or the records does not preclude an objection that a deed from the sinking fund commission is invalid because the record shows that it was not signed by a sufficient number of the commissioners.

[Ed. Note.—For other cases, see Stipulations, Cent. Dig. §§ 41-54; Dec. Dig. § 18.\*]

#### 3. OFFICERS (§ 108\*)—MODE OF EXERCISING POWERS.

A deed to land from the sinking fund commission need be signed only by a majority of the commissioners.

[Ed. Note.—For other cases, see Officers, Cent. Dig. § 184; Dec. Dig. § 108.\*]

#### 4. EVIDENCE (§ 83\*)—PRESUMPTION OF PERFORMANCE OF DUTY.

Where the record of a deed from the sinking fund commission shows that it was signed by only three of the six commissioners, but the probate shows that it was signed by four, it will be presumed that the commissioners performed their duty, and that the deed was executed by a majority of the commissioners.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 105; Dec. Dig. § 83.\*]

#### 5. EJECTMENT (§ 65\*)—PLEADING—ALLEGATIONS OF POSSESSION.

In an action involving the possession of land, an allegation that a party is seised in fee is an allegation of possession.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. §§ 165-174; Dec. Dig. § 65.\*]

#### 6. APPEAL AND ERROR (§ 927\*)—NONSUIT—PRESUMPTION.

On appeal from a nonsuit, plaintiff's evidence is assumed to be true.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2912, 2917, 3748, 4024; Dec. Dig. § 927.\*]

#### 7. EJECTMENT (§ 9\*)—NECESSITY OF TITLE.

As against a person who has taken wrongful possession of land, the previous possessor need not prove a good title in order to recover possession.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. §§ 16-29; Dec. Dig. § 9.\*]

Appeal from Common Pleas Circuit Court of Kershaw County; R. E. Copes, Judge.

Action by J. N. Nicholson against K. S. Villepigue. From a judgment for defendant, plaintiff appeals. Reversed and remanded.

Thos. J. Kirkland and E. D. Blakeney, for appellant. Clarke & Von Tresckow, for respondent.

FRASER, J. This is an action to recover possession of land. Kent says it, the law of real estate, is by far the most artificial and complex branch of our law. It ought to be free from artifice, and as simple as the genius of the wisest can make it. The appellant's attorney said "there is only one action now under the Code." That is true; but simplicity does not dispense with matters of substance. It is still required that the plaintiff shall allege his right, and prove the right that he alleges. In this case the complaint alleged "that the plaintiff is the owner and seised in fee of a tract of land," describing it; that the defendant for some years past has been unlawfully entering upon portions of said land, and cutting down and destroying wood; that the defendant has taken possession of 40 acres of said land. At the conclusion of the plaintiff's testimony, a motion was made for a nonsuit. This motion was granted because the plaintiff had not proved title.

[1] 1. Plaintiff alleged ownership. This was an allegation of title. Had plaintiff proved title? Plaintiff proved (a) a deed to himself from James G. Gibbs; (b) a deed from the sinking fund commission to James G. Gibbs; (c) a deed from the sheriff to the sinking fund commission (tax title). The tax title being prima facie good title, the plaintiff rested. The respondent attacked the deed from the sinking fund commission on the ground that it was signed by only three of the six commissioners.

[2] The original deed was not produced, but, under an agreement of counsel, copies from the records were used. The appellant contends that the respondent had no right to raise the question under the agreement. The agreement to allow the use of the "originals or the records" does not preclude any objection to defects apparent on the face of the records or originals, and the defect will be considered.

[3] The statute provides for a commission of six, and authorizes them to sell. In the case of *Geter v. Commissioners of Tobacco Inspection*, 1 Bay, 356, 1 Am. Dec. 621, the court uses this language: "In this act the power is given to the commissioners. The court cannot, therefore, by intendment say that the act of four commissioners is valid, when the act gives the authority to five." In that case, however, an officer was discharged for nonperformance of duty, and the court considered it as if it were a trial for a crime, and the commissioners were acting as a jury, and a unanimous verdict was required. In *Bank v. Evans*, 28 S. C. 524, 6 S. E. 322, the court says: "Where a body or board of officers is constituted by law to perform a trust for the public or to execute a power or perform a duty prescribed by law, it is not necessary that all should concur in the act done. The act of the majority is the act of the body." We take this to be the rule and follow it here. It certainly is in accord with the leading authorities in other states. The question arises, Is this deed executed by a majority?

[4] There were six commissioners. The record shows three names signed to the deed to Gibbs. The probate shows four. That a mistake has been made is indisputable. The probate is sworn to. The record is not. We must, therefore, resort to presumptions of law to solve this problem. The law presumes the correctness of the record, but the record is contradictory. There is no presumption that one has sworn falsely. There is a presumption that public officers have performed their duty. At least three public officers acknowledged the receipt of valuable consideration, delivered a deed to a probate that showed the signatures of a majority of the board, and it must be assumed, until the contrary appear, that a majority did sign the deed. The circuit judge erred in holding that the plaintiff failed to prove title prima facie, and the first exception is sustained.

[5, 6] Plaintiff alleges that he is "seised in fee." 2 Washburn on Real Property, p. 583, says: "Seisin and possession are nearly identical." This court in *Railroad Company v. Garner*, 27 S. C. 50, 2 S. E. 634, holds that, when plaintiff alleges that it is "seised in fee," it alleges possession. The allegations are that, the plaintiff being in possession, the defendant unlawfully entered upon his land, cut down his wood and timber, and took from him the possession of 40 acres, more or less. Plaintiff's evidence showed that he took a deed from James G. Gibbs for a certain definite tract of land in 1896; that he put an agent in possession of the tract in 1898, who has been in possession ever since; that he rented a small part to the defendant some years ago (1899); that he offered to sell the land to the defendant, who declined to purchase on the ground that the plaintiff had no title; that subsequently the defend-

ant trespassed upon the land, and took possession of a portion of it. The plaintiff was entitled to have the trial court pass upon this question, but there is no ruling on the subject. The court might stop here, but the appellant has made the real question a subject of appeal, and we will consider it. Not one of these statements may be true, but on a motion for a nonsuit they are assumed to be true.

[7] The question is, Can one who finds that his neighbor has a defective link in his chain of title take the possession of the land from him, and put the previous possessor on proof of his title? To that question, the answer is, "He cannot." In *McColman v. Wilkes*, 3 Strob. 473, 474, 51 Am. Dec. 637, the court says: "Possession is prima facie evidence of title. A plaintiff in possession without any title may maintain trespass against a wrongdoer. Evidence by the defendant that plaintiff is holding without right or against right cannot avail the defendant, unless he can show that the title is in himself or somebody under whom he acted." We know of no case that overrules this decision. It would be only confusing to multiply authorities or extend this opinion. In the recent case of *Beaufort Land & Investment Co. v. New River Lumber Co.*, 86 S. C. 358, 68 S. E. 637, 30 L. R. A. (N. S.) 243, Mr. Justice Woods makes a review of the cases that makes further citation unnecessary.

The first and third exceptions are sustained, and the second is overruled.

The judgment of this court is that order of nonsuit herein be set aside, and the case remanded for a new trial.

GARY, C. J., and WOODS, HYDRICK, and WATTS, JJ., concur.

(70 W. Va. 480)

BOARD OF EDUCATION OF ELK DIST.,  
MINERAL COUNTY, v. HARVEY.

(Supreme Court of Appeals of West Virginia.  
March 12, 1912.)

(Syllabus by the Court.)

1. WITNESSES (§ 154\*) — COMPETENCY — TRANSACTIONS WITH DECEDENT.

A party to a suit is competent to testify in his own behalf against a board of education in relation to a personal transaction between himself and a deceased member of such board.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. § 661; Dec. Dig. § 154.\*]

2. SCHOOLS AND SCHOOL DISTRICTS (§ 67\*) — BOARD OF EDUCATION — APPOINTMENT OF AGENT.

A board of education, at a regular meeting, may lawfully appoint one of its members its agent to procure necessary ground on which to erect a public schoolhouse; and, if such agent, acting within the scope of his authority, procure a lease of ground, upon reasonable terms with a landowner, he thereby binds his principal.

[Ed. Note.—For other cases, see *Schools and School Districts*, Cent. Dig. §§ 168, 169; Dec. Dig. § 67.\*]

### 3. PRINCIPAL AND AGENT (§ 100\*)—AUTHORITY OF AGENT.

Authority to an agent to procure a lease of ground carries implied power to agree with the landowner upon the terms of the lease.

[Ed. Note.—For other cases, see *Principal and Agent*, Cent. Dig. §§ 262-273, 345, 364, 368-374; Dec. Dig. § 100.\*]

### 4. SCHOOLS AND SCHOOL DISTRICTS (§ 67\*)—CONTRACTS BY AGENT—RATIFICATION.

If a board of education erect a schoolhouse upon ground acquired for it by its duly appointed agent, and use it for public school purposes for a term of years, it thereby impliedly ratifies the contract made by its agent with the landowner, provided its terms be such as the board itself could lawfully make.

[Ed. Note.—For other cases, see *Schools and School Districts*, Cent. Dig. §§ 168, 169; Dec. Dig. § 67.\*]

Brannon, J., dissenting in part.

Error to Circuit Court, Mineral County.

Action by the Board of Education of Elk District, Mineral County, against Martha T. Harvey. Judgment for defendant, and plaintiff brings error. Affirmed.

William MacDonald, for plaintiff in error.

F. C. Reynolds, for defendant in error.

**WILLIAMS, J.** The board of education of Elk district, Mineral county, sued Mrs. Martha Harvey before a justice of the peace for the value of a public schoolhouse, and obtained judgment. Mrs. Harvey appealed to the circuit court, and, on a new trial therein had, the court directed a verdict for defendant, and entered judgment thereon, and plaintiff has brought the case here on writ of error.

[1] The schoolhouse had been built on defendant's lot by the board of education about 18 years before this suit was instituted, but had not been used for public school purposes for about 4 years. Just before the bringing of the suit, the board of education had advertised the schoolhouse for sale; whereupon defendant took possession of it, claiming it as her property. No deed of sale or lease was made to the board of education for the lot on which the schoolhouse was built, and no memorandum of any agreement with Mrs. Harvey appears upon its records. The only evidence of any agreement between them is the testimony of Mrs. Harvey, who says that Steven Dixon, her brother, who was at that time president of the board of education, orally agreed with her that, if she would permit them to erect the schoolhouse upon her lot, she might have the building whenever it ceased to be used for schoolhouse purposes; and that she received no other consideration for the use of the lot. This testimony is not denied. But objection is made to it on the alleged ground that, Dixon being dead, Mrs. Harvey is not a competent witness to prove the personal transaction between them. This objection is not well taken. Section 23, c. 130, Code 1906, removes the common-law disability upon parties to suits, and permits them to testify in their own behalf, except

in relation to certain matters, when such matters are to be used as evidence against certain designated persons. But the testimony in this case does not fall within the exception. True Mrs. Harvey is a party to the suit, and her testimony relates to a personal transaction had with a person who was deceased at the time her testimony is given. But these circumstances alone do not disqualify her. There is still another qualification which must exist before her testimony would be rendered inadmissible, and that is that it must be *against* a person who stands in a certain designated relation to the deceased person with whom the personal transaction was had. If the testimony is not against such a person, it is clearly admissible under the broad enabling provision of the statute. Before Mrs. Harvey's testimony could be excluded, it would have to appear that it was evidence against "the executor, administrator, heir at law, next of kin, assignee, legatee, devisee or survivor" of Steven Dixon. The board of education occupies none of these relations to one of its deceased members. Mrs. Harvey was therefore competent to testify concerning the oral agreement between herself and the deceased president of the board of education.

[2-4] But counsel for plaintiff in error insist that a board of education can only act collectively and that one member cannot make a contract binding the board. This is generally true. But may it not have ratified the contract made between defendant and its deceased president? The contract proven by defendant's testimony is clearly such a contract as the board had power to make. Plaintiff says there is no proof that it made the contract. But it does not deny that its president made it for its benefit. Did Dixon not act as agent for the board in making the agreement, and did it not subsequently ratify it? A board of education, like any other corporation, may act through its agent; and if the act be one the board itself can lawfully perform, and the agent do not exceed the limits of that power delegated to him, in performing it, he thereby binds his principal. 35 Cyc. 963. Witness I. E. Oats, who was a member of the board of education when the schoolhouse was built, and was also a member at the time this case was tried in the court below, testifies that at a board meeting they decided to build the schoolhouse, and that Mr. Dixon remarked that he would procure the lot on which to build it; that Mr. Dixon told them afterwards that he had procured the lot; but in what way witness did not know. Witness was then asked if the board had ever acted upon any terms respecting the lot, and answered: "No; never anything said. We left it to him to get the lot, and he simply told us he had gotten it." This proves that the board constituted Dixon its agent for the purpose of acquiring the lot,

and vested him with the power, necessarily incident thereto, to agree upon the terms with the owner of the lot. The subsequent erection of the schoolhouse on the lot, and the continued occupancy of it for a period of 16 or 18 years, was an implied ratification of the contract made by Dixon. If Dixon did not report the terms of the contract made with defendant to the board of education at a meeting for ratification, it was simply the case of a failure of the agent to make full report to his principal, a matter for which defendant is in no sense responsible. The board had constructive, if not actual, notice of the terms of the contract, because its own agent, acting within the scope of his powers, had made the terms. Moreover, the contract, thus informally made by its agent, was ratified by the board by accepting its benefits. It immediately thereafter erected a schoolhouse, and used the lot for a long series of years. This is an implied ratification. 35 Cyc. 963; *Johnson v. Cedar School Corporation*, 117 Iowa, 819, 90 N. W. 713; *Jones v. Iosco School District No. 3*, 110 Mich. 363, 68 N. W. 222; *Haney School Furniture Co. v. School District*, 138 Mich. 241, 94 N. W. 726; *Keyser v. Senapee District No. 8*, 35 N. H. 477.

The board should have taken a written lease from defendant, and should have kept a record of its proceedings. But its failure to do so certainly cannot defeat the rights of defendant. The burden is on plaintiff to prove its case; and it has signally failed to prove any kind of an agreement with defendant which would give it a right to occupy her lot. If the contract proven by defendant's testimony is not the one on which the board acted, there was no contract whatever.

Mrs. Harvey testifies that she was to receive no other consideration for the use of the lot than the building, when it ceased to be used for public school purposes. The character of the building, the length of time the board of education made use of it, taken in connection with the rental value of the ground, prove that the consideration for the use of the land was indeed very reasonable. Section 33, c. 45, Code 1899 (Code 1906, c. 45, § 33), authorizing boards of education to sell schoolhouses that are not needed for public schools, and giving the purchaser right to remove them, in certain instances, has no bearing upon this case. The Legislature cannot empower a board of education to sell property that it does not own. The statute presupposes title in the board for the public use. There is no proof whatever to sustain plaintiff's case, and the judge was justified in directing a verdict for defendant.

We affirm the judgment.

BRANNON, J. I agree to the decision, but not to point 2. I question the power of

a board of such narrow power, which must act in a body, to constitute an agent with power to finally bind it, in absence of ratification. Point 2 is too broad.

(70 W. Va. 496)

STAR GROCER CO. v. BRADFORD et al.  
(Supreme Court of Appeals of West Virginia.  
March 12, 1912.)

(Syllabus by the Court.)

1. PRINCIPAL AND SURETY (§ 20\*)—CREATION OF RELATION—EXECUTION OF WRITTEN INSTRUMENT.

Sureties in a bond are not released by omission of the principal to execute it, if he is bound by law or a collateral contract, recited in the bond, for the performance of the duty recited in the condition thereof.

[Ed. Note.—For other cases, see *Principal and Surety*, Cent. Dig. §§ 39-42; Dec. Dig. § 20.\*]

2. PRINCIPAL AND SURETY (§ 20\*)—CREATION OF RELATION—EXECUTION OF WRITING.

Such technical incompleteness in the bond, under such circumstances, imposes upon the obligee no duty of inquiry as to whether it was delivered by the sureties on condition that the principal should execute it, nor to require him to do so, since the sureties suffered no substantial prejudice from such omission.

[Ed. Note.—For other cases, see *Principal and Surety*, Cent. Dig. §§ 39-42; Dec. Dig. § 20.\*]

3. EVIDENCE (§§ 250, 265\*)—ADMISSIONS—NATURE AND FORM.

Receipts, statements, and other evidences of liability in the handwriting of the principal are admissible evidence against the sureties, and prove prima facie liability on their part.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 976-982, 1029-1050; Dec. Dig. §§ 250, 265.\*]

4. EVIDENCE (§ 171\*)—BEST AND SECONDARY EVIDENCE—RELATION OF WITNESS TO SUBJECT-MATTER.

Relation of a witness to the subject-matter of his testimony, such as his incumbency of an office in a private corporation on whose behalf, as a party to the suit, he is to testify, may be shown by his oral evidence.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 460, 528; Dec. Dig. § 171.\*]

Error to Circuit Court, Ritchie County.

Action by the Star Grocer Company against W. Bradford and another. Judgment for plaintiff, and defendants bring error. Affirmed.

Robinson & Prunty, for plaintiffs in error. Kreps & Russell and Adams & Cooper, for defendant in error.

POFFENBARGER, J. [1] The bond constituting the basis of this action, and given by a traveling salesman to secure faithful performance of his written contract with his principal, contains, in the obligatory clause thereof, the name of the salesman, described as principal, and the condition recites his employment, his duty to collect accounts for his employer, and the existence of an article

of agreement between them, giving its date, but is signed by the two defendants herein only as sureties. Its obligation as to them is denied on two grounds: (1) Its acceptance by the obligee in an obviously incomplete condition; and (2) acceptance thereof by the obligee with knowledge of its execution and delivery, upon condition that other persons, who did not do so, were to execute it as sureties along with the defendants and the principal, one O. J. Willson.

Incompleteness of a bond on its face, when tendered to the obligee, is sufficient to put him upon inquiry as to whether those whose signatures it bears intended to be bound by it in such condition. This is particularly and universally true when the names of persons, apparently contemplated as additional sureties appearing in the body of the bond or elsewhere, have not been signed to it. *Wendlinger v. Smith*, 75 Va. 309, 40 Am. Rep. 727; *Nash v. Fugate*, 32 Grat. 595, 34 Am. Rep. 780; *Ward v. Churn*, 18 Grat. 801, 98 Am. Dec. 749; *Hicks v. Goode*, 12 Leigh, 479, 37 Am. Dec. 677. The apparent imperfection is suggestive of a delivery upon condition, and imposes upon the obligee the duty of inquiry as to whether there was such a qualified delivery, omission of which releases the sureties; and parol evidence is admissible to prove the condition, which diligent inquiry would have revealed.

Nothing on the face of this bond, however, indicates incompleteness as to the sureties, or failure of any person to sign it as surety. But lack of the signature of the principal renders it in a sense incomplete, and this fact is relied upon as having the same effect as incompleteness in respect of sureties. As to whether lack of the signature of the principal raises the same duty on the part of the obligee, and discharges the sureties in case of omission thereof, the authorities are in conflict. In some jurisdictions and under some circumstances, the sureties are held not bound. *Wood v. Washburn*, 2 Pick. (Mass.) 24; *Ferry v. Budget*, 21 Conn. 602; *Brown v. Jetmore*, 70 Mo. 228, 35 Am. Rep. 425; *Russell v. Annable*, 109 Mass. 72, 12 Am. Rep. 665; *Bryant v. Kinyon*, 127 Mich. 152, 86 N. W. 531, 53 L. R. A. 801; *Bean v. Parker*, 17 Mass. 591; *People v. Hartley*, 21 Cal. 585, 82 Am. Dec. 758; *Johnson v. Township*, 39 Mich. 187, 33 Am. Rep. 372; *Lyman v. Williams*, 84 Ill. App. 82. On the contrary, many cases hold the bond good and valid as to the sureties, without the signature of the principal, when the latter is bound by law or his special contract for the debt or default for which the bond was given. *State v. Bowman*, 10 Ohio, 445; *Trustees v. Shelb*, 119 Ill. 579, 8 N. E. 189; *Pima County v. Snyder*, 5 Ariz. 45, 44 Pac. 297; *Cockrill v. Davie*, 14 Mont. 131, 35 Pac. 958; *Mitchell v. Building Stone Co.* (Tex. Civ. App.) 129 S. W. 148; *Wright v. Jones*, 55 Tex. Civ. App. 616, 120 S. W. 1139; *Williams v. Marshall*, 42 Barb. (N.

X.) 524; *Brewing Ass'n v. Hayes*, 97 Fed. 859, 38 C. C. A. 449. The decided weight of authority throughout the country, and especially of the later cases, is that the sureties are bound by such an instrument, if the principal is bound by law or his special contract for the debt or default for which the sureties have obligated themselves.

[2] The argument of inconvenience or violation of technical rules is answered by the court in *State v. Bowman*, cited, as follows: "Great reliance is placed upon the fact that, if the instrument is not executed by the principal, it will affect the remedy over against him by the securities. There would be great force in this argument, if the remedy were destroyed; but if it is not, the force and the extent of his liability to them are unimpaired. Whether they could use the bond, per se, as evidence of his liability presents a question merely of convenience in the use of the right, but does not affect the right itself, any more than would the loss or destruction of the bond." That the sureties can recover from the principal what they have been compelled to pay on account of their suretyship in a bond, not executed by the principal, is asserted in *Harnsberger v. Yancey*, 33 Grat. 527. This being true, the sureties are not, in any substantial sense, prejudiced by inability of the obligee to sue the principal along with them on the bond. The ground of their release, in case of the omission of a surety to sign, as contemplated by the parties, is the injury resulting to those who signed, in case they were bound, because of their inability to exact contribution from the omitted cosurety, since he is not bound at all. This result cannot be predicated of the omission of the principal to sign, when the law or another contract binds him as firmly and fully as the bond would have bound him, had he executed it, and for the benefit of the sureties under the law of subrogation, as well as that of the obligee. Every rule and exception is coextensive only with the reason underlying it; and, as there is no substantial reason for discharge of the sureties under such circumstances, they should be held liable. The equitable remedies for subrogation and indemnity are as fully available and efficacious as if the principal had executed the bond. In no substantial sense, therefore, are the sureties affected by the omission.

The record discloses no direct evidence of notice to the obligee of any agreement with the two defendants, the obligors in the bond, for additional sureties. The charge of such notice stands upon the theory of agency on the part of the principal debtor to obtain the bond. Having sought employment by the obligee, he had been required, as a condition, to give a bond with two sureties, to be approved by his employer. He submitted the names of the two defendants, but no others, so far as the evidence indicates, and they,

after investigation as to their financial ability, were accepted. Then Wilson, the principal debtor, went and procured their signatures to the bond as prepared by the obligee. He obtained and gave this bond as a condition of his employment. Prior to that time, he had not been unconditionally employed, nor permanently employed at all. Obviously, therefore, the procurement of the bond was primarily his business, and not that of his employer, and accordingly he must be held to have acted for and on behalf of himself, and not of his prospective employer, in the procurement of it. No authority sustaining the contention of the plaintiff in error for the theory of agency, under such circumstances, has been produced or found. *Newlin v. Beard*, 6 W. Va. 110, invoked for the purpose, does not do so. Before the principal debtor in that case was directed to obtain sureties on the bond, it had been accepted as complete, without any sureties on it. Here there had been no such acceptance. There the obligee, having completed a contract, made the debtor his agent to obtain sureties. Here the principal acted for himself, because no contract had been completed. He was making a contract for his own benefit. The facts here shown apply the rule stated in *Lytle v. Cozad*, 21 W. Va. 183, declaring the principal to be the agent of the sureties.

[3] Wilson defaulted and left the country. His successor, as salesman for the territory he had traveled, called upon the customers of his employer, and obtained from them evidence of the collections made by Wilson in the form of invoices receipted by him and checks in payment of invoices, made payable to his employer and collected by him, after his indorsement of his employer's name by him as agent. These receipted invoices and checks were admitted as evidence of liability on the bond. A statement in the handwriting of Wilson, showing a balance against him of \$460.75, for which he gave his check, together with the protested check, were also introduced as evidence, supplemented by proof of lack of funds in the bank on which the check was drawn to pay it. In one instance, the customer testified to the payment of a bill not accounted for by Wilson. In all the instances in which checks appeared to have been given and indorsements made by Wilson, his handwriting was proved. In addition to this evidence, the bookkeeper of the employer, with the books in his possession and at hand, testified to the delivery and shipment of all the goods, the purchase money of which was shown to have been collected, as aforesaid. Admissibility and sufficiency of this evidence are challenged on account of its alleged secondary character. It is unnecessary to enter upon an inquiry as to the classification of evidence referred to in the brief. The receipts, checks, and statement in the handwriting

of the principal constitute admissions by him, made within the period of his employment and in the course thereof, and are admissible against the sureties, according to all authority, and sufficient, in the absence of any contradiction thereof, to fix liability upon them. "Accounts, entries, and written statements by the principal are prima facie evidence against his sureties; in some states being conclusive." 32 Cyc. 137. See, also, *Brandt on Suretyship*, §§ 797-800; 1 Greenleaf, Ev. §§ 187, 188. To the admission in argument of the admissibility of this evidence against Wilson, if he were a party, we add these authorities, conclusively showing it to be likewise admissible against his sureties. Clearly admissible, covering the full amount of the recovery and wholly uncontradicted, it precludes any possible verdict, other than the one rendered; and therefore the error, if any, in admitting the testimony of the bookkeeper as to the delivery of the goods was obviously harmless. Hence there is no occasion for inquiry as to its admissibility.

[4] The testimony of McConnaughey, president of the plaintiff company, was objected to for lack of documentary proof of his position as president. According to well-settled practice, his own evidence as to that was sufficient to establish it prima facie, because the fact was collateral in character. His office in the corporation was not in issue. The sole purpose of proof of his position was to show how or why he had done certain things and possessed certain knowledge. To establish such a status for such purpose, the highest and best evidence is not required. Generally, it is conceded. In qualifying experts, physicians and lawyers are not required to produce their licenses. Their oral testimony suffices everywhere.

These conclusions destroy the basis of all the numerous assignments of error. The court properly refused to set aside the verdict, and rendered judgment upon it. It did not err in holding the defendants liable on the bond. There was no error in admitting the receipts and checks to establish the liability and its extent. There was no error in permitting McConnaughey to testify. If there was any error in the admission of Brohard's testimony as to sales of goods, Wilson's written admissions and the testimony of a customer, all uncontradicted, covered all of that. Some of the instructions asked for by the defendants and refused were in direct conflict with the law as here stated, and others declared legal propositions having no foundation in the evidence. It would subserve no good purpose to quote and analyze them. From what has been said, it is apparent that there was no evidence of any fraud in the procurement of the bond. If there was any error in the rulings upon objections to evidence, it was harmless for the reasons herein stated. Practically all

of such objections were based upon the untenable positions already disposed of.

Seeing no error in the judgment, we affirm it.

(70 W. Va. 502.)

**DELANEY v. UNITED STATES EXPRESS CO.**

(Supreme Court of Appeals of West Virginia.  
March 12, 1912.)

*(Syllabus by the Court.)*

**1. CARRIERS (§ 176\*)—CARRIAGE OF GOODS—CONNECTING CARRIERS.**

Where one carrier receives goods for transportation part of the way to destination, and delivers the goods at the end of its carriage to another carrier for carriage to destination, the contract is several; and there may be a suit only against the carrier that is liable for delay of transportation.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 768-774; Dec. Dig. § 176.\*]

**2. CARRIERS (§§ 103, 105\*) — CARRIAGE OF GOODS—DELAY—ACTION—DAMAGES.**

Where a written complaint is filed, in an action before a justice, against a carrier for delay of transportation of goods, in order to recovery, not of general, but special, damages resulting from such delay, there must be in the complaint some specification of the grounds for special damages; and there must, also, be notice to the carrier, at the time of shipment, of circumstances calling for speed of transportation.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 436-438, 451-458; Dec. Dig. §§ 103, 105.\*]

**3. CARRIERS (§ 95\*) — CARRIAGE OF GOODS—DELAY—CARE REQUIRED.**

The rule that a carrier is an insurer of safe delivery of goods committed to it for transportation does not apply to liability for delay of transportation. In such case, the carrier is not bound to the highest possible or utmost care for rapid transportation, but only for reasonable and ordinary care and diligence to avoid delay.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 396-433; Dec. Dig. § 95.\*]

**4. CARRIERS (§ 158\*)—CARRIAGE OF GOODS—LIMITATION OF LIABILITY—DELAY.**

A bill of lading for goods shipped, given by a carrier, fixing their value, and providing that the carrier shall in no event be liable beyond that value, relates to loss of the goods, and does not preclude recovery for delay of transportation, or fix amount of damages for delay.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 663-667, 699-703½, 708-710, 718, 718½; Dec. Dig. § 158.\*]

Error to Circuit Court, Barbour County.

Action by A. L. Delaney against the United States Express Company. Judgment for plaintiff, and defendant brings error. Reversed, and new trial granted.

Fred O. Blue and Arthur D. Dayton, for plaintiff in error. Wilcox & Musgrave, for defendant in error.

BRANNON, P. A. L. Delaney brought action before a justice against the United States Express Company and the Adams Ex-

press Company, and the case went on appeal to the circuit court. In that court, the plaintiff entered a nonsuit as to the Adams Express Company, and recovered a verdict and judgment against the United States Express Company, which company appeals to this court.

[1] We do not understand that it is meant by defense counsel that it was error to allow a nonsuit or dismissal as to the Adams Express Company. If we regard the cause of action as for a tort, Delaney could sue both companies, or either, and could dismiss as to either. But we regard the action as *ex contractu*, not a joint contract by two companies, but several; and there could be dismissal as to one. The Adams Company undertook carriage only from Elkins to Belington, the United States Company from Belington to Salem—separate contracts. What is meant by counsel in first assignment of error is that the United States Company is not liable, but the Adams Company, and that the nonsuit released the company really liable. This is immaterial, because the question at last is, Is the United States Express Company liable? This first assignment of error is the refusal of a new trial. It is claimed that it was never shown that the drill for boring wells came to the hands of the United States Express Company. The drill was delivered at Elkins to the Adams Company, which had its terminus of carriage at Belington, it being the initial carrier, and carriage was to be continued from Belington to Salem by the United States Company, the final carrier. Express freight put in the car at Elkins by the Adams Company for carriage beyond Belington would not be taken out at Belington, but would remain in the car, and the car go on to Grafton. When the drill reached Belington, the waybill made by the Adams Company upon the delivery to it at Elkins was handed over by the Adams Company to the United States Company, and the United States Company receipted to the Adams Company for the drill as delivered to it for carriage on. The car remained at Belington only five minutes, and the expressage was not rebilled at once; but it was assumed that it was on the car, and receipted for by the United States Company, as delivered to it, on the faith of the waybills made on shipment from Elkins. The article was not rebilled on sight or touch of the article. In fact, by mistake, the drill was put off the car at Belington, and lay there 10 days or more before it was learned by Delaney where it was, or by the United States Company. It was hidden under a pile of brick, placed over it in tearing down a house. The United States Company says the drill never came to it. But it receipted for it. It was its duty to see the drill before receipting for it; its duty to find it, if lost. If not found



at Grafton or Salem, its duty was to look it up, not the shipper's duty. A claim is made that the drill was billed only to Belington, not to destination beyond; but under the verdict, based on evidence, we must say that it was waybilled to Belington, with destination plainly apparent on it of destination to Salem. Thus whatever liability exists rests on the United States Company.

[2] But what is the liability? It is claimed that the verdict is excessive and not warranted by law. Under the showing made on the trial, only the rental, so to call it, of the drill for the time of delay, excluding a fair time for transportation to and from and work of repair. What was its use worth? Its value could not come in. It was not lost; yet evidence of its full value was admitted, and, it is apparent, was allowed in the verdict. On no other hypothesis can the sum of the verdict be accounted for. The plaintiff gave evidence of and was allowed for pay of idle hands during the whole period of delay, and for profits that might have been realized during the delay. This allowance was contrary to law, and evidence of it improperly admitted, for two reasons: First, there is no specification of facts calling for such special damages. Such damages are not general, but special, under particular circumstances. Hutchinson on Carriers (section 1367) says: "But where the damages, though the natural consequences of the act complained of, are not the necessary result of it, they are termed 'special damages,' which the law does not imply; and therefore, in order to prevent a surprise upon the defendant, they must be particularly specified in the declaration, or the plaintiff will not be permitted to give evidence of them at the trial." The fact that the suit is before a justice does not dispense with this essential requisite. There must be a specification in some way. "Special damages, whether resulting from tort or breach of contract, must be particularly averred, in order that the defendant may be notified of the charge, and come prepared to meet it." *Roberts v. Graham*, 6 Wall. 578, 18 L. Ed. 791. There was a complaint filed; but, whilst it and the bill of particulars, in most general terms, claim damages for delay of transportation, they make no pretense of specifying pay of employés or loss of profits during the delay. There was thus no basis for such evidence.

A second reason why evidence of and allowances of such pay of hands were improper is that when Delaney shipped the drill he did not give the notice required by law to the express company of reasons calling for speedy transportation. He did not specify to the carrier that he had idle employés, and a contract for profit requiring the drill in its execution. In his own testimony, he says he told the company that he "wanted the drill right back." This was

no specification of special circumstances. It was only a general remark which any one on any shipment might make. That would not suggest idle workmen or estimated profits. Hutchinson on Carriers (section 1367) says: "It may be stated, therefore, as the well-settled rule that special damages can be recovered from the carrier when the transportation has been delayed, only where it has been shown that the shipper informed the carrier, at the time the contract was made, of the special circumstances requiring expedition in the shipment." See, also, section 1369. 8 Cyc. 450 says: "The carrier will not be liable for the profits lost by reason of failure to perform a special contract, or on account of other special circumstances not apparent from the transaction itself, unless he has notice of the facts which caused the loss, and this notice should be given when the goods are delivered for transportation." "The fact that the carrier was notified of the special circumstances demanding greater diligence is thus seen to be a crucial one; and that the carrier was so informed must be both alleged and proved." Hutchinson on Carriers, § 1367. We cannot say that the carrier contemplated, without such notice, such losses. The law says that without such notice there is no right to recover damages not reasonably contemplated. "Only such losses can be recovered as were reasonably contemplated by both parties at the time the contract for carriage was made as likely to arise from a breach, and not losses arising out of circumstances then wholly unknown to the carrier. Damages will be given only for the reasonable and proximate, and not for the remote, consequences of the breach of duty."

The verdict was \$137.50. Delaney's evidence would make only \$125—that is \$50, the full value of the drill, its worth new, though it had been worn three years, and \$75 for pay of hands—and there must have been some allowance for profit. Anyhow, all this evidence of full value of the drill and pay of hands and profits went in, and was considered by the jury, and was inadmissible, and the verdict rendered against principles of law.

[3] Instructions 1 and 3 say that the carrier must use utmost care and diligence in delivery. The law is, as to the time of transportation, that only ordinary, reasonable care and diligence is required. 6 Cyc. 442. "The rule that carriers are insurers for safe delivery does not extend to time of delivery." *Bonar v. Merchants' Co.*, 46 N. C. 211; *Johnson v. East. Tenn. Co.*, 90 Ga. 810, 17 S. E. 121; *San Antonio Co. v. Turner*, 42 Tex. Civ. App. 532, 94 S. W. 214; *Missouri Co. v. Kyser*, 43 Tex. Civ. App. 322, 95 S. W. 747. Instruction 2 allows "all damages naturally or approximately relating to such delay." To say nothing of indefiniteness,

this would allow recovery, contrary to principles above stated, on improper evidence.

[4] The bill of lading says that the shipper agreed that the value of the drill was \$50, and that the liability of company should not, "in any event," exceed that sum. On this account, the claim is that the verdict could not be more. We do not think this is involved in this case. It relates to loss of the article shipped, not delay. The drill was not lost. We do not think this stipulation would bear on damage for delay of transportation.

Judgment reversed, verdict set aside, and new trial granted according to principles above stated.

(70 W. Va. 489)

### HARNE v. PIKE.

(Supreme Court of Appeals of West Virginia.  
March 12, 1912.)

(Syllabus by the Court.)

#### ASSIGNMENTS (§ 71\*)—RIGHT TO COMMISSION.

If a broker be employed by contract in writing to sell land on commission, and before or after procuring from his principal the execution of an option contract to a prospective purchaser, for a valuable consideration, sells and assigns to the optionee in such contract, all his right, title and interest in and to his commission contract, he cannot thereafter, on consummation of such sale recover of his principal the commissions stipulated for in his brokerage contract.

[Ed. Note.—For other cases, see Assignments, Cent. Dig. §§ 130-133; Dec. Dig. § 71.\*]

Error to Circuit Court, Mercer County.

Action by J. Lee Harne against Henry G. Pike. Judgment for plaintiff and defendant brings error. Reversed and remanded.

Bernard McClaugherty, for plaintiff in error. Sanders & Crockett, for defendant in error.

MILLER, J. Plaintiff sued defendant in assumpsit, for brokerage commissions for making sale of certain town lots in the city of Bluefield. The court below rejecting all instructions proposed by defendant, peremptorily instructed the jury that plaintiff was entitled to recover seven hundred dollars, the amount sued for, with interest from the time the same was payable, less thirty-eight dollars and seventy-five cents, a part of the off-set claimed by defendant, and that they should so find by their verdict. Accordingly the jury found for plaintiff, six hundred and eighty-four dollars and sixty-five cents, on which the court pronounced the judgment complained of.

On the trial plaintiff relied solely on a contract in writing, of October 3, 1906, between Loula C. Pike, the owner of the property, and defendant, her husband, of the one part, and A. S. Booker and W. S. Foutz, real estate brokers, of the other part, which contract after partial execution by Booker and

Foutz had come to plaintiff, first, by assignment by Booker of his interest to Foutz, on February 18, 1909; afterwards, by assignments by Foutz to Harne, first, of a half interest therein, on March 3, 1909, and, second, of his whole interest therein on September 13, 1909.

The original contract of October 3, 1906, employed Booker and Foutz, practically with unlimited powers, to plat into lots with streets and alleys a certain tract of land, and to sell the lots for one-third cash, and the balance in two equal payments on a credit of one and two years, to be represented by negotiable notes, bearing interest, the deferred payments to be secured by deeds of trust on the property conveyed, the costs and expenses of making the sales, deeds of conveyance, deeds of trust, recording the same when not payable by the purchasers, to be borne by said Booker and Foutz, the parties of the first part in no event to be liable for any part thereof.

The contract further provided that Booker and Foutz were to proceed with great diligence to make sale of the lots, and that after deducting from the price five per centum for commissions, they should turn over the residue of the cash payments and notes taken, to the parties of the first part, until the aggregate thereof, not including interest borne by the notes or collected by them and paid over, should amount to \$32,000.00, the amount which the contract provided should be realized by them from the sales so to be made; whereupon, on demand, the contract further provided, said first parties should convey to Booker and Foutz, their heirs or assigns, or to such persons as they might designate, by metes and bounds, and with covenants of general warranty, all lots or parcels of land remaining unsold, as a further consideration or compensation for their services in the premises.

In the said several assignments of said contract the assignees thereof, for the consideration therein recited, respectively assumed any and all obligations thereof remaining unperformed, and in the final contract of September 13, 1909, between Foutz and Harne, Foutz covenanted that he had the right to convey said interest, and that the balance due him therefor, over and above the sum of \$15,378.00, due on unsold real estate was not more than \$85.07, payment of which sums, subject to a condition unimportant here, was thereby assumed by said Harne.

Having thus acquired the entire interest of the brokers in said contract, and assumed their unperformed obligations therein, Harne, shortly afterwards began negotiations with the defendant Pike, who, in the mean time, by the death of his wife, and as her sole devisee, had become sole owner of the unsold lots, for the sale and purchase thereof, resulting

finally, on October 23, 1909, in a contract in writing between Pike and E. W. Mollohan, whereby Pike agreed until December 23, following, for the consideration of \$14,000.00, to be paid as stipulated, to sell and convey to Mollohan, all of said unsold lots, further describing them as the lots remaining unsold and referred to in the contract of October 3, 1906, purchased and then owned by plaintiff. This contract further provided that if the option thereby given should be exercised by Mollohan, within the time specified, Pike should convey to him said lots by deed with covenants of general warranty.

Plaintiff, within the time stipulated, elected to exercise his right of purchase given by said option contract, and by deed of January 1, 1910, Pike, Harne and wife, Foutz and wife, and Booker and wife, joining therein, for the consideration aforesaid, executed to Mollohan, a deed for said lots, reciting said several contracts and the several assignments thereof, and the desire of Mollohan, that those joining with Pike should join in said deed, for the purpose of conveying, releasing and quit-claiming all right, title and interest of every kind, if any, they or either of them might have in the property conveyed, and their joinder therein for that purpose.

On the consummation of the contract of sale by the making, execution and delivery of the deed to Mollohan the whole of the entire purchase money, represented by the cash payments placed to the credit of Pike in the bank of which Harne was cashier, and certificates of deposit of said bank, for the residue, was turned over to Pike, without claim by Harne or deduction of any thing by him for commissions. Some six weeks after delivery of the deed by Pike, however, and two days after the maturity and protest of one of the notes turned over to Pike and wife on prior sales, and which Pike had notified Harne he should protect, Harne presented Pike a bill for the commissions sued for, demanding payment, which was declined. Wherefore this suit.

On the trial, besides the small bill of offsets filed, Pike's defense, which he undertook to cover by his rejected instruction, was that when Harne began his negotiations for a lump sale and purchase of said lots, he represented to Pike that he proposed to form a syndicate, with Mollohan, as president, to purchase the lots, and that when on October 23, 1909, by the representations of Harne and the propositions of Mollohan communicated through him, he was induced to enter into said option contract, at a price that would net him over fifteen hundred dollars less than by the terms of the original contract of October 3, 1906, he and his wife were to realize for the property, and that he was thereby led to believe that Harne represented Mollohan and himself as members of a syndicate, or as officers of the bank, of which they were respectively president and cashier, and whose credit and certificates of deposit

he was to and did accept in payment, and that he was in no way to be held liable, as he was not at the close of the transaction, for payment of commissions; otherwise he would not have sold the lots to Mollohan at the price agreed upon.

On the stand as a witness Pike swears, that he never saw Mollohan, that Harne communicated the proposition as coming from Mollohan, urged him to reduce the price, procured for him the option contract, and finally in the consummation of the contract, was apparently acting for Mollohan and associates, and himself paid over to Pike the money, deducted nothing, and at the time making no claim for commissions. In this connection he testifies as follows: "Q. To whom did you make the deed for this property? A. I supposed I was signing it to Mr. Mollohan, and Mr. Smith and the directors of the bank. He told me himself that he was getting up a syndicate to handle the lots. Q. Did he say anything about him being interested? A. No sir, he was just talking to me. Of course I knew he was one of them as he has money invested in it."

Harne in his testimony denies any interest in the purchase now or at any time. He admits that some time in the summer before the option contract with Mollohan was prepared by him, he told Pike and others that he proposed to form a syndicate to buy the lots, but says he failed to do so. He admits there was no agreement for commissions except by the contract of October 3, 1906, and gives as his only plausible reason why if he claimed commissions he did not take them out of the purchase money, as provided by that contract, that he was then acting in the capacity of cashier of the bank. His evidence taken as a whole, however, rather persuades us to believe that if Harne intended to make any claim for commissions, he wished to avoid raising any question as to his right thereto until after the deed had been fully made and executed, and the title to the lots made secure in Mollohan, leaving Pike, until he had accomplished this result, in ignorance of his claim and acting under the impression at least that his sale to Mollohan was for the benefit of a syndicate, in which he and Mollohan were both interested. His transactions with Booker and Foutz beforehand in securing the assignments of said contract, and with Mollohan afterwards, convince us that Harne's object was not to obtain the right to earn commissions, but to get rid of the brokers, and to acquire the right to purchase the lots under the contract, and that he had Mollohan, the president of his bank, distinctly in mind as the head of company or syndicate to purchase the property. He was not a real estate agent or broker, but cashier of a bank. That such was his purpose, is manifested not only by what he admits he told Pike and others before obtaining the option contract, but by his transactions with Mollohan before and after that

contract was made. We refer particularly to the fact, not noted or referred to by counsel on either side, that on October 20, 1909, two days before the option contract, of October 23, 1909, Harne by an endorsement in writing thereon, for a valuable consideration, thereby assigned to said Mollohan, all his right, title and interest in and to the contract of March 3, 1909, whereby he acquired from said Foutz a half interest in said contract of October 3, 1906; and that subsequently on October 30, 1909, but seven days after securing said option contract, and more than two months before the final execution thereof by the making, execution and delivery of the deed from Pike and others, to Mollohan, and payment of the money by Harne to Pike, Harne by a like endorsement in writing thereon, for a valuable consideration, thereby also assigned to said Mollohan, all his right, title and interest in and to said contract of September 13, 1909, whereby he acquired from said Foutz, all the latter's interest in said contract of October 3, 1906. These documents were all introduced in evidence by plaintiff, and there is no attempt to explain their meaning, if indeed they are susceptible of explanation other than what their language imports; so that it is thus made to appear that plaintiff, in the first instance, before procuring from Pike the option contract to Mollohan, had sold to the latter a half interest in the contract of October 3, 1906, and by his second assignment to Mollohan, made before acceptance by him of the option and deed to him by Pike, had actually sold to Mollohan his entire interest in said brokerage contract, which of course necessarily included his right, if any, to commissions earned or to be earned in sales made in compliance with terms thereof. Has not plaintiff by this evidence proven himself out of court? We do not see how we can otherwise interpret his evidence.

We certainly need cite no authority for so plain a proposition, that if a broker be employed by contract in writing, to sell land on commission, and before or after procuring from his principal the execution of an option contract to a prospective purchaser, for a valuable consideration sells and assigns to the optionee in such contract, all his right, title and interest in and to his commission contract, he can not thereafter, on consummation of such sale, recover of his principal the commissions stipulated for in such contract.

Another proposition, affirmed in *Parker v. National Mutual Building Ass'n*, 55 W. Va. 134, 46 S. E. 811, and approved and applied in *Noyes v. Caperton*, 68 W. Va. 13, 69 S. E. 364, which we think fatal to the claims of plaintiff, is, that an agent employed by the owner to sell real estate, on commission, at an agreed price, can not recover his commissions without proving an actual sale made at the price stipulated, unless it appears that he has been wrongfully prevented by the

principal from making sale thereof, at that price, and that but for such interference the sale would have been made, or that the principal waived strict performance of the contract. In the case at bar, Pike says that in making the contract with Mollohan he was responding to a proposition made by him, through Harne, independently of the contract of October 3, 1906, and it is manifest that he did not intend to waive strict performance of the commission contract; in effect he distinctly says so, and the conduct and previous representations by Harne, not withdrawn, that he was going to form a syndicate to take over the property, we think justified Pike in his conclusions.

Another proposition equally well settled by authority, and having some application to the facts in this case, is that as a general rule, a man can not become the purchaser of property for his own use and benefit, which has been entrusted to him to sell, his position as purchaser and agent for the vendor being wholly inconsistent. Story on Agency (9th Ed.) § 31, page 34, note 2, and cases cited; *Farnsworth v. Hemmer*, 1 Allen (Mass.) 494, 79 Am. Dec. 756, and notes; 2 Am. & Eng. Ency. Law and Pract. (1909) 1122, and cases cited in note 12. The only exception to this general rule which we have found noted in any of the decisions, is that where the broker acts openly and himself buys the property, the vendor accepting him as such, he will be entitled to commissions, upon clear proof that such was the understanding of the vendor at the time of the sale. Walker Law of Real Estate Agency, 66, citing *Grant v. Hardy*, 33 Wis. 668. The only authorities cited for this proposition by the Wisconsin court are its two prior decisions of *Hardy v. Stonebraker*, 31 Wis. 640, and *Stewart v. Mather*, 32 Wis. 344. The testimony of defendant in this case, however, with the attendant facts and circumstances satisfies us that he did not understand, or agree with Harne that he should be paid commissions, if a sale should be made to his proposed syndicate, or that he should have commissions on the sale to Mollohan, at a price less than that called for in the brokerage contract. He understood that the sale to Mollohan was upon a new and independent proposition, without reference to that contract, and, as we have already indicated, we think he was justified by the facts and circumstances in this conclusion.

It follows, therefore, that the court below erred in directing a verdict for plaintiff and pronouncing judgment thereon. Whether there was error in rejecting defendant's instructions, is unnecessary to decide, for as we view the case it must turn and finally be tried on the principle covered by the one point of the syllabus, and not on the theory covered by the rejected instructions, except as to the right of the defendant to the off-set conceded and allowed by the jury in their verdict, and which may be covered by some

of said instructions. The judgment will therefore be reversed and the case remanded for a new trial.

(70 W. Va. 484)

TAYLOR v. BELVILLE et al.

(Supreme Court of Appeals of West Virginia.  
March 12, 1912.)

(Syllabus by the Court.)

1. EXEMPTIONS (§ 63\*) — LIENS — CONSTITUTIONAL LAW.

Code 1906, c. 71, § 6, forbidding the giving of a lien by a husband or parent on property that has been set aside as exempt from distress or levy, is not contrary to constitutional inhibition.

[Ed. Note.—For other cases, see Exemptions, Cent. Dig. § 89; Dec. Dig. § 63.\*]

2. EXEMPTIONS (§ 116\*) — SETTING ASIDE — PROCEDURE.

Personal property can only be set aside as exempt from distress or levy by delivering to the officer holding process to which it is subject the sworn list and claim prescribed by Code 1906, c. 41, § 24.

[Ed. Note.—For other cases, see Exemptions, Cent. Dig. § 137; Dec. Dig. § 116.\*]

3. EXEMPTIONS (§ 116\*) — CLAIM.

The right to exemption of property from legal process depends on statutory authority and is not availing unless claimed in accordance therewith.

[Ed. Note.—For other cases, see Exemptions, Cent. Dig. § 137; Dec. Dig. § 116.\*]

Brannon, J., dissenting.

Appeal from Circuit Court, Cabell County.

Bill by C. B. Taylor against Samuel Belville, trustee, and others. Decree for defendants, and plaintiff appeals. Affirmed.

J. W. Perry, for appellant. Wyatt & Graham, for appellees.

ROBINSON, J. The bill sought an injunction against a sale of personal property under a deed of trust, on the ground that the property had been set apart as exempt from distress or levy. The injunction prayed for was awarded. Defendants demurred to the bill. The demurrer was sustained, the injunction dissolved, and the bill virtually dismissed by striking the case from the docket. Plaintiff, appealing, says all this is erroneous.

That an injunction is a direct remedy to prevent the sale of exempted property cannot be questioned. A statute so prescribes. Code 1906, c. 133, § 1. That a deed of trust is void when given by a husband or parent on property which has been set apart as exempt from distress or levy in the manner provided by law, is also prescribed by statute. Code 1906, c. 71, § 6.

[1] It is submitted, however, that this latter statutory provision is unconstitutional and void. We do not so hold. There is nothing in the Constitution limiting the power of the Legislature so to enact. It has power to say that an exemption claimed by a debtor against legal process shall not be

waived by him. That is all the act does. The act is an exertion of the power of regulation expressly given to the Legislature by the Constitution itself in the matter of exemptions from forced sale. Article 6, § 48. "The people in their Constitution, as far as future debts may affect it, have the right to provide for any sort of homestead, guarded as they please, subject to or without restrictions; to prohibit the owner of the homestead from incumbering it, or to permit it to be done; and, unrestricted by the Constitution, the Legislature has the same power." *Moran v. Clark*, 30 W. Va. 358, 4 S. E. 303, 8 Am. St. Rep. 66. The same must be equally true as to personal property exemptions.

But let us note the words of this statute: "Any deed of trust, mortgage, or other writing, made by a husband, or parent, to give a lien on property which has been set apart as exempt from distress or levy, under the twenty-third section of the forty-first chapter, shall be void as to such property." This law does not invalidate a deed of trust unless it is one given "on property which has been set apart as exempt from distress or levy" pursuant to another section of the law. That other section is this: "Any husband or parent residing in this State, or the widow, or the infant children of deceased parents, may set apart and hold personal property to the value of not exceeding two hundred dollars, to be exempt from execution or other process, except as hereinafter provided." Plainly, to invalidate the deed of trust it must be one given on property that has been set apart as exempt from distress or levy. The exemption cannot be claimed as against the deed of trust in the first instance. It must have been claimed against distress or levy in relation to the property—against a distress or levy to which the property was subject before the deed of trust was given thereon.

[2] Now, plaintiff's bill wholly fails to assert facts which show invalidity of the deed of trust under the statute. It does not show that the deed of trust was given on property that had been set apart as exempt from distress or levy. It does not allege that any legal process was ever outstanding to call for an exercise of the right of exemption. It does say that an exemption list had been filed. But with whom, is not disclosed. It does say the creditor was pressing his claim. But it does not show that he had any judgment or other basis of legal process against plaintiff. As much as may be inferred from the allegations of the bill is that the exemption list was filed with the debtor. Such a method of asserting exemption is not the one provided by law. That method does not exempt the property. It must be done in the way the Legislature has prescribed. It must be done by filing the sworn list and claim with an officer having process by which the

property may be subjected to sale. The law plainly sets forth the way to claim exemption. If not followed, what is there to prevent the officer from proceeding to sell and the debtor from losing the benefit of exemption? Code 1906, c. 41, §§ 24 and 25.

[3] The provision of the Constitution as to exemptions from forced sale is not self executing. *Speidel v. Schlosser*, 13 W. Va. 686; *Holt v. Williams*, 13 W. Va. 704. It simply imposed on the Legislature the duty to pass an act giving exemptions. That act having been passed, the debtor must look to it for his right and the method of asserting it. The right to claim the exemption is merely a personal one. He is not compelled to take advantage of it. He may let his property go to sale, though entitled to exemption, either by choice or neglect. *Speidel v. Schlosser*, supra. "There is no power vested in his wife or children, or other member of his family, to require him to hold it exempt." *White v. Owens*, 30 Grat. 43. His dominion over the property as the owner thereof has not been taken away so that he cannot waive the exemption, neglect to claim it, or fail to assert it in the proper way. He must follow the method prescribed by the law when he desires to claim exemption or the right will be lost to him. Since the entire right depends on statutory authority, it must be claimed in accordance therewith.

The Legislature has not said that the exhibition of an exemption list to the creditor, or to a trustee in a deed of trust for his benefit, will save the property from sale thereunder. Yet that is indeed the case the plaintiff makes. If plaintiff had facts on which to make a good case and did not present them, the fault must lie with him. It does not appear that the bill can be amended. Moreover, plaintiff did not ask to amend, and the court below could do nothing but sustain the demurrer and dismiss the bill, as it properly did. The decree must be affirmed.

BRANNON, J., (dissenting). I cannot agree that before the exemption can be claimed against a deed of trust the property must have been set apart as exempt under prior execution or other judicial process. I assert that it may be claimed though there has been no prior judicial writ. I cannot think that it was ever intended to give an exemption against an execution and none against a deed of trust. A deed of trust deprives a family of its absolute necessities as well as an execution—does the very thing which the Constitution says shall not be done. The Constitution says that a party may hold personal property of the value of \$200 "exempt from forced sale." Any writ or deed of trust by force of which the parent may lose the property is a "forced sale" under the Constitution. What the difference? Both deprive the parent of the property. It is "process"

under chapter 41, § 23, Code, declaring that a parent may hold personal property of \$200 value exempt from "execution or other process." "Other process" besides execution is here allowed. What "other process"? I say anything under which, by law, a sale may be made. The Constitution gives exemption from any "forced sale," and we must give the Code section a construction which will not violate the Constitution; which will not be a rigid construction narrowing the effect of the Constitution. That would be contrary to the fixed rule giving very liberal construction to those exemption laws in favor of the poor debtor. And another rule, that we must give a statute made to carry out a right under the Constitution such a construction as will effectuate the full right conferred by the Constitution. The Code (chapter 71, § 6) declares void any deed of trust on "property which has been set apart as exempt from distress or levy under the twenty-third section of the forty-first chapter." That section 23 simply declares what the Constitution declares; that is, the exemption right. It means what the law sets apart; if not that, it is satisfied, if at any moment before actual sale the parent sets apart the property claimed. *Moran v. Clark*, 30 W. Va. 359, 4 S. E. 303, 8 Am. St. Rep. 66, does not apply in this case. It holds that a sale of a homestead under deed of trust is not a "forced sale" under the Constitution. I doubt; but no statute prohibited a deed of trust on a homestead; whereas, as to personal property, statute prohibits a deed of trust. That case dealt not with a statute declaring a deed of trust void, as in this case. Code, c. 133, § 1, gives injunction against "the sale of property set apart as exempt in case of husband, under chapter 41." Any sale under any legal procedure. Just so it be set apart before sale under the broad declaration of exemption by section 23.

It is suggested that the Constitution gives power to the Legislature to pass regulations upon the subject. That does not give the power to invade or impair the right. And we must not construe the statutes as so doing.

(137 Ga. 796)

CITY OF ALBANY et al. v. BROWN et al.  
(Supreme Court of Georgia. March 13, 1912.)

(Syllabus by the Court.)

1. TAXATION (§ 278\*)—PLACE OF TAXATION—SHARES OF CORPORATE STOCK.

By the existing laws of Georgia shares of stock in a manufacturing corporation organized under the laws of this state, the property of which lies within the limits of Dougherty county, but not within the limits of the city of Albany, and which is required by law to be returned for taxation by its president, is nontaxable by the city of Albany in the hands of residents of that municipality.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 454, 455; Dec. Dig. § 278.\*]

## 2. APPEAL AND ERROR (§ 1152\*)—MODIFICATION.

It was proper to enjoin the levy and collection of the tax; but, as the hearing was in vacation, a judgment granting a permanent injunction should not have been rendered, and the judge having improvidently rendered such a judgment, whereas only a temporary injunction should have been granted, direction is given that it be modified accordingly.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4498-4506; Dec. Dig. § 1152.\*]

Error from Superior Court, Dougherty County; Frank Park, Judge.

Action by S. B. Brown and others against the City of Albany and others. Judgment for plaintiffs, and defendants bring error. Modified and affirmed.

J. T. Mann, for plaintiffs in error. Pope & Bennet, for defendants in error.

ATKINSON, J. The City of Albany sought to tax certain shares of the capital stock of the Planters' Oil Mill Company and the Albany Phosphate Company while in the hands of residents of that city. Each of these corporations had its principal office and place of business in Dougherty county, Ga., but not in the city of Albany. One of them had some taxable property in the city, but the other did not; the principal part of its property being located in Dougherty county, outside of the city limits of Albany. The property of these corporations, by section 10 of the general tax act of 1909 (Acts 1909, pp. 36-65), was required to be returned for taxation by the presidents of such corporations. The judge at chambers granted an order purporting to permanently enjoin collection of the tax, and the city excepted.

[1] It was held, in *Georgia Railroad Co. v. Wright*, 125 Ga. 589, 54 S. E. 52, that at the time of the rendition of that decision, May 24, 1906, there was no law of force in this state requiring shares of stock in domestic corporations to be returned for taxation by the state, when the president or other officer of the corporation was required to return the property of the corporation either to the comptroller general or to the tax receiver of the county. It was said, in the opinion in that case, that a share of stock in a corporation has no inherent or intrinsic value, and, when that which gives it value has been taxed, the General Assembly is not required, under the Constitution, to tax it again through the medium of the shareholder, though the Legislature may do so. No law has since been enacted providing for taxation by the state of shares of stock in domestic manufacturing corporations whose property is required by law to be returned for taxes by their presidents. While the state may tax such shares of stock if it desires to do so, the decision in the case of *Georgia Railroad Co. v. Wright*, supra, and the statutes therein referred to, and subse-

quent enactments providing in substance as set forth in section 10 of the general tax act of 1909 (Acts 1909, pp. 36-65), indicate the adoption of a policy by the state not to tax them. In the absence of any legislation expressly authorizing it, they would not be taxable. The new charter of the city of Albany is not sufficient for that purpose. It contains the provision: "The taxing power of said city, except as herein limited, shall be as general, complete, and full as that of the state itself" (Acts 1910, p. 353, § 23); but, in view of the policy of the state that shares of stock in manufacturing corporations in this state shall not be taxed through the medium of the shareholder, this provision of the charter of Albany is not to be construed as conferring upon the city power to tax them. It is immaterial that the property of the corporations required by law to be returned for taxation by their respective presidents was, for the most part, without the limits of the city of Albany, and hence not taxable by that municipality; the city being unable to tax such shares of stock at all, because of the power of the Legislature to refrain from taxing them, and the policy of the law that they should not be taxed.

[2] An injunction was properly granted against the city, restraining the collection of the municipal tax. The judge, however, was not authorized to grant a permanent injunction in vacation; but the injunction should have been a temporary one, and direction is therefore given that the order be so modified as to make it a temporary instead of a permanent injunction.

Judgment affirmed, with direction. All the Justices concur.

(137 Ga. 799)

## PETERSON v. CALHOUN.

(Supreme Court of Georgia. March 13, 1912.)

(Syllabus by the Court.)

**BANKRUPTCY (§ 421\*)—DISCHARGE OF BANKRUPT—EFFECT—PROPERTY SUBSEQUENTLY ACQUIRED.**

An execution in personam, founded on a debt provable in bankruptcy, where the plaintiff in *fi. fa.* had notice of the proceedings in bankruptcy, cannot be enforced against the property of a bankrupt acquired subsequent to his discharge, and an affidavit of illegality setting up this defense should not have been stricken.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 772-774, 776, 777, 779; Dec. Dig. § 421.\*]

Error from Superior Court, Montgomery County; J. H. Martin, Judge.

Action by W. P. Calhoun against W. D. Peterson and another. From a judgment dismissing an affidavit of illegality of an execution in favor of plaintiff, defendant Peterson brings error. Reversed.

F. H. Saffold and A. C. Saffold, for plaintiff in error. M. B. Calhoun and Eschol Graham, for defendant in error.

EVANS, P. J. A *fi. fa.* in favor of W. P. Calhoun against W. D. Peterson and T. P. McBride was, on July 5, 1907, levied on an undivided four twenty-sevenths interest in a certain tract of land, as the property of W. D. Peterson. Peterson filed his affidavit of illegality to the levy on the following ground (the others having been abandoned): "On the 2d day of November, 1907, affiant filed, in the United States Court for the Southern District of Georgia, his voluntary petition in bankruptcy, and on said date was duly adjudged a bankrupt, and, after having fully conformed to all the requirements of the bankrupt act, he was, on the 20th day of February, 1908, granted a discharge in bankruptcy; that said discharge operated to discharge him from all debts which existed prior to the 2d day of November, 1907, which were provable in bankruptcy; that plaintiff's debt existed prior to that time; that he was notified of the pendency of the bankruptcy petition, and had full opportunity to be heard. Affiant alleges that he has been discharged from the debt of plaintiff in *fi. fa.*, and that property levied upon was not scheduled in his petition in bankruptcy aforesaid, nor owned by him at said time; and for the reason aforesaid said *fi. fa.* is proceeding illegally against him and said property or interest in said land." The plaintiff demurred to this ground of the illegality, because it appeared that the *fi. fa.* was issued and entered upon the general execution docket more than four months prior to the adjudication of bankruptcy, and that the levy preceded the adjudication of bankruptcy, and because it is not alleged that the plaintiff proved his debt in the bankrupt court. The court dismissed the illegality.

This was error. Relatively to property owned by the bankrupt and incumbered by lien created more than four months before the filing of the petition in bankruptcy, the bankrupt's discharge does not affect or interfere with the enforcement of the lien. *Philmon v. Marshall*, 116 Ga. 811, 43 S. E. 48. But a discharge in bankruptcy will release a bankrupt from all provable debts except those specifically excepted in the Bankruptcy Act. 1 Fed. Stat. Ann. 578 (U. S. Comp. St. 1901, p. 3428). One of these exceptions is a debt which has not been fully scheduled in time for proof and allowance, with the name of the creditor, if known to the bankrupt, unless such creditor had notice or actual knowledge of the proceedings in bankruptcy. We think the allegations of the affidavit of illegality sufficiently aver that the property levied on is property acquired after the bankrupt's discharge, and that the plaintiff in *fi. fa.* had notice of the proceedings in bankruptcy. There is no contention that the plaintiff's *fi. fa.*, which runs only against the person, was not a provable debt; and, such being the case, it

was released by the bankrupt's discharge, and cannot be enforced against property acquired since the discharge. *McLendon v. Turner*, 65 Ga. 577.

Judgment reversed. All the Justices concur.

(137 Ga. 760)

### CRAWFORD v. SCOTT.

(Supreme Court of Georgia. March 2, 1912.)

(Syllabus by the Court.)

#### CHattel Mortgages (§ 260\*)—FORECLOSURE—AFFIDAVIT OF ILLEGALITY—DISMISSAL.

The holder of a mortgage on personalty proceeded to foreclose his mortgage by affidavit under section 3286 of the Civil Code of 1910. The mortgagor interposed an affidavit of illegality under sections 3289 and 3300, in which he asserted that the mortgage showed that it was given on books and accounts, as well as on certain described personalty, that the sheriff had sought to levy the execution issued on the summary foreclosure on certain books and accounts, that the accounts and choses in action had been contracted since the giving of the mortgage, that accounts and choses in action were not subject to mortgage, and especially that those created since the mortgage was given were not covered by it. *Held*, that it was error to dismiss such illegality, on motion, on the ground that it was not the proper remedy of the defendant, without passing upon its merits.

[Ed. Note.—For other cases, see *Chattel Mortgages*, Cent. Dig. §§ 535, 536; Dec. Dig. § 260.\*]

Fish, C. J., and Atkinson, J., dissenting.

Error from Superior Court, Bartow County; A. W. Fite, Judge.

Proceedings by Mrs. Lizzie E. Scott against J. W. Crawford to foreclose a chattel mortgage. To an order denying the motion of plaintiff in *fi. fa.* to dismiss an affidavit of illegality, defendant brings error. Reversed.

J. M. Lang, for plaintiff in error. G. H. Aubrey, for defendant in error.

LUMPKIN, J. J. W. Crawford gave to J. E. Scott a mortgage containing the following description of the property: "One stock of drugs, medicines, drug sundries, fixtures, show cases, iron safe, soda fountain, cigars, scales, oil tanks, and any and all merchandise of any character whatsoever, incident to or connected with the drug store under the name of the pharmacy, including all medicines, books, and accounts of any and all character whatever; the said drug store being situated in the Bradley Building, city of Adairsville, Bartow county." Scott transferred the mortgage to Mrs. Lizzie E. Scott. She proceeded to foreclose under Civil Code 1910, § 3286. An execution was issued, and a levy made by the sheriff. The defendant filed an affidavit of illegality under sections 3289 and 3300. One ground of illegality was as follows: "Defendant shows, further, that the sheriff has levied on his books of account, and that plaintiff is seeking to sell his ac-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes



counts and choses in action; the same aggregating the sum of five hundred (\$500) dollars. Defendant shows that these have been contracted since the execution of the mortgage being foreclosed, and that they are not subject to such mortgage, because they were not in existence, and could not have been mortgaged before they ever existed, and that an account or chose in action is not capable of being mortgaged." The plaintiff in *fi. fa.* moved to dismiss the affidavit of illegality, upon the ground that it was not the proper remedy. The motion was sustained, and the defendant excepted.

The question before this court is whether affidavit of illegality was the proper mode of defense. The merits of the various grounds were not specifically passed on by the court below. When the holder of a mortgage on personalty proceeds to foreclose it under Civil Code 1910, § 3286, he makes an affidavit, and an execution issues. If no defense is interposed, this execution is treated as final process. It does not merely declare that a certain amount is due by the defendant to the plaintiff, but asserts and proceeds to enforce a lien for that amount on the mortgaged property. If an affidavit of illegality is interposed in accordance with the statute, this process ceases to be final and becomes *mesne* process, and the case is returned to the proper court for trial. Upon the trial, if the plaintiff prevails either in whole or in part, he gets a judgment, which does not merely declare that the defendant owes him a certain amount of money, but also that he has a mortgage lien for the amount so found, and that such lien is foreclosed. It will thus be seen that a judgment of foreclosure in favor of the plaintiff essentially involves two things—that an amount is due, and that he has a mortgage which is foreclosed therefor. To say that the process is *mesne*, and subject to the defenses of the defendant, that if the plaintiff gains his case it is adjudicated that he has a good mortgage on the property, and that it is foreclosed on the property described, as well as that the amount for which it is foreclosed is settled, but that the defendant can only attack the amount, and can have no adjudication in his favor as to the lien, is to declare that in a lawsuit a judgment can adjudicate a lien in favor of one party, but cannot adjudicate in regard to it in favor of the other. It would, indeed, be extraordinary if the issues in a lawsuit were of such character that a judgment could settle them in favor of the plaintiff, but could not settle them in favor of the defendant.

As early as the case of *Bailey v. Lumpkin*, 1 Ga. 392, the question of the extent of the defenses which might be made by a defendant under a proceeding to foreclose a mortgage on realty was decided. It is true that the defense there set up was one of usury; but Nisbet, J., in the opinion said: "But the view of this subject, which to the mind of

this court is decisive, is this: The process of foreclosure in England is by bill in chancery. Our statute dispenses with the equitable proceeding, and gives a more easy, direct, and less expensive process of foreclosure at law. This legal mode is in lieu of the bill in chancery. This is, therefore, what we are in the habit of calling an equitable statute. It is not in derogation of the existing law, and therefore to be construed strictly; but it is declaratory of it, and remedial, and therefore to be construed liberally. It affirms the law of foreclosure, by providing a different remedy, under which the mortgagee, instead of being forced into a court of chancery to foreclose, is admitted at law to all the rights which he had before the statute in equity, as to this subject-matter. Can we infer that the Legislature intended to give this new and summary mode of foreclosure to the mortgagee, and not give equivalent rights of defense to the mortgagor? To create for the plaintiff an easy, rapid mode of foreclosure, and to still hold the defendant to the necessity of going into a court of equity to assert his rights against it? The Legislature intended to do no such iniquitous thing. Upon the creation of a new remedy, we think the rights of defense which belonged to the old remedy, unless expressly inhibited, attached to the new. As the plaintiff is here let into the rights, at law, which he before had in equity, so the defendant is let in also, at law, to those rights which he before had in equity."

In *Dixon v. Cuyler*, 27 Ga. 248, it was declared that in a proceeding to foreclose a mortgage on real estate it was competent for the mortgagor to "show, for cause why the rule absolute should not be granted, that the mortgage debt was usurious, that it was founded upon a gaming consideration, that it was contracted to compound a felony, or that the mortgage was given under duress, or had been released, or to avail himself of any other defense which goes to show that the mortgagee is not 'entitled' to the judgment of foreclosure, or that the amount claimed is not due." In the opinion Lumpkin, J., said: "There is enough in the act to justify this interpretation. It is one taken by this court the first year of its organization, and the only one which will save the statute from being looked upon as a nuisance." The act under consideration in the two cases above cited contained the expression: "In case of any dispute as to the amount due on any mortgage, if the mortgagor shall appear within the time prescribed by this act and make affidavit that he hath made payments which have not been credited, or that he is entitled to sets-off, which in equity should be allowed," etc.

In *Mell v. Moony*, 30 Ga. 413, the second headnote is as follows: "As against a proceeding of foreclosure on personal property, the mortgagor may at law go into the consid-

eration of the mortgage, or rely by way of defense upon any fact or principle of law which would entitle him to relief in a court of equity." The affidavit then under consideration set up that the mortgagee had violated the condition of his obligation, and that the right had accrued to the mortgagor to claim \$1,000 and to have it allowed against the claim which the mortgagee was seeking to enforce against him. While it may be said that this was a recoupment, the basis of the decision was the broad equitable right of defense which had been announced in regard to real estate foreclosures, and which was now declared to be applicable as well to defenses as against summary foreclosures of chattel mortgages. In the opinion Lumpkin, J., said: "Our courts have invariably held that the mortgagor might go into the consideration of the mortgage, and rely upon any fact or principle of law which would entitle him to relief; and although the case of *Dixon v. Cuyler*, 27 Ga. 248, was upon the foreclosure of real estate, still the general principles announced in that case apply equally to a proceeding to foreclose on personal property. For in this no previous notice is required, and of course the proceeding cannot conclude the mortgagor. Indeed, it would seem from the terms of the statute that his right to be heard does not arise until the execution issues. It is conceded that the mortgagor could obtain relief in equity; but why drive him into that forum, when the remedy at law is ample, and when the statutory proceeding to foreclose mortgages was substituted for that in chancery? Ought not the same defenses to be allowed at law that could before have been set up in equity?" See, also, *Alston v. Wheatley*, 47 Ga. 646; *Mordecai v. Stewart*, 37 Ga. 364; *Finney v. Cadwallader*, 55 Ga. 75.

We think that the principles ruled in the cases above cited are conclusive in that now before us. The proceeding was one to foreclose a mortgage on personalty by affidavit. In such a case the plaintiff does not merely state that the defendant owes him a certain sum, but makes affidavit "of the amount of principal and interest due on such mortgage." The defendant can reply by counter-affidavit. If the mortgage is invalid, or the property offered to be mortgaged is such as cannot be mortgaged, nothing is "due on the mortgage," whether there is any indebtedness by note of account or not. To put a literal and restricted construction upon Civil Code, §§ 3289 and 3300, and hold that the expression that "the defendant may file his affidavit of illegality, in which he may avail himself of any defense that he could have set up in an ordinary suit upon the demand secured by the mortgage, and show that he is not justly indebted to the plaintiff in the sum claimed in said affidavit of foreclosure," restricts the defendant to contesting merely the amount alleged to be due, but prohibits him from contesting the validity of the mortgage as to

all or a part of the property sought to be subjected to the lien, would be contrary to the decisions above cited. It is to be noted that it is declared that the defendant may show that he is not justly indebted to the plaintiff in the sum claimed "in said affidavit of foreclosure." So that it is not merely the indebtedness, but the indebtedness named in the mortgage, which he may contest. If he cannot set up this defense in the present suit, where can he set it up? If he is unable to make the defense here, but does contest the amount, and the plaintiff obtains a judgment that the defendant owes him so much, and the mortgage is foreclosed, we do not see how he could afterwards go behind the judgment. Apparently it would be an adjudication without ability to prevent it, as the only remedy would be to go into a court of equity, or a court administering equitable relief, and ask for an injunction against the proceeding at law, and there set up his defense. But this is the very thing which this court has several times declared it was not the intention of the statute to require the defendant to do.

In *Arnold v. Carter*, 125 Ga. 319, 54 S. E. 177, it was held that by an affidavit of illegality to the foreclosure of a mortgage on personalty the mortgagor may avail himself of the defense of recoupment, but that he cannot plead set-off in such a proceeding, nor can he have the foreclosure enjoined in order to avail himself of a set-off in equity, where the plaintiff is neither insolvent nor a nonresident. Speaking for himself, the writer gravely doubts the correctness of that ruling, and it is by no means sure that it is not so conflicting with the former rulings cited that it will not have to yield to them whenever the exact case is again presented. But, however that may be, the ruling that the defendant cannot plead a set-off in no way adjudicates that the defendant cannot set up any defense which would prevent the plaintiff from having a judgment of foreclosure upon the property upon which the lien is asserted, either for the whole or a part of the amount.

For these reasons, the ruling of the presiding judge was error.

Judgment reversed.

EVANS and BECK, JJ., concur. HILL J., did not preside.

FISH, C. J., and ATKINSON, J. (dissenting.) We cannot agree to the opinion of the majority of the court in this case. Civil Code, § 3300, provides: "When an execution shall issue upon the foreclosure of a mortgage on personal property, as hereinbefore directed, the mortgagor, or his special agent, may file his affidavit of illegality to such execution, in which affidavit he may set up and avail himself of any defense which he might have set up, according to law, in an ordinary suit upon the demand secured by

the mortgage, and which goes to show that the amount claimed is not due." Section 3289 is to the same effect. "Under section 3286 the mortgagee, or his agent or attorney at law, in order to foreclose a chattel mortgage, must 'make affidavit to the amount of principal and interest due on such mortgage, which affidavit shall be annexed to such mortgage, or a copy thereof verified as correct by the affidavit thereon of the owner or his agent or attorney.' And upon the filing of such affidavit the proper officer issues the mortgage execution. The mortgagor, as provided in section 3300, may arrest the progress of such execution by making a counter-affidavit setting up 'any defense which he might have set up, according to law, in an ordinary suit upon the demand secured by the mortgage, and which goes to show that the amount claimed is not due.' In this way the mortgage execution, which, in the absence of a counteraffidavit provided by statute, is final process, is converted into mesne process, and the affidavit of foreclosure, the mortgage execution issued thereon, and the affidavit of illegality are returned to the proper court, and the issues presented by the affidavit of foreclosure and the illegality are to be there tried 'as other cases of illegality.' 'If the mortgagor fails to set up and sustain his defense, as hereinbefore authorized the mortgaged property shall be sold,' etc. Civil Code, § 3302. The method for raising such issues is provided by statute, and it should be strictly adhered to.

The mere fact that such a statutory proceeding is in lieu of a former equitable proceeding is no reason why the statutory proceeding should not be strictly construed; for perhaps every statutory proceeding is a substitute for some form of legal or equitable proceeding. But this is not a sound reason for giving the statutory proceeding the same broad and liberal construction which was applicable to the former legal or equitable proceeding for which the statutory proceeding is a substitute. Of course, we do not mean to say that, after the mortgage execution is arrested in the manner pointed out by the statute, the mortgagor, after the matter has been properly taken to the court, cannot then have the foreclosure proceedings or the levy under the execution dismissed for any valid reason. A landlord, in order to distrain for rent, must, under the statute, make an affidavit of the amount of rent due; and this court has decided in numerous cases that the only way the tenant can stop the progress of the distress warrant is by making an affidavit that the rent or some part thereof distrained for is not due. The reason for so holding has always been stated to be that such defense is the only one given to the tenant by the statute. We are unable to see why a tenant should be limited to the only defense provided by statute, and the mortgagor should not be also re-

stricted to the defense the statute specifically provides he may set up. The position we take is supported in *Guerard & Polhill v. Polhill*, R. M. Charit. 237. And while the ruling there made is not authoritative, because made by a trial judge, the reasons for the holding are most cogently stated by Judge Charlton, and to our minds are conclusive. The principle which we maintain is decided in *Arnold v. Carter*, 125 Ga. 319, 54 S. E. 177, which case was concurred in by a full bench. See, also, *Weaver v. Roberson*, 134 Ga. 149, 158, 67 S. E. 662.

No ruling made in any of the cases cited in the majority opinion, in our judgment, is in conflict with the position we take in this case. While in some of such cases broad language is used, whatever was said should be taken in connection with the actual decision made. In every one of such cases the defense which the court held could be set up by the mortgagor was one which he might have set up in an ordinary suit upon the demand secured by the mortgage, and which went to show that the amount claimed was not due. In *Bailey v. Lumpkin*, 1 Ga. 392, it was held: "Upon a rule to foreclose a mortgage, under the statute in Georgia, the mortgagor may show, by way of defense, that the contract upon which it was given was usurious." In *Dixon v. Cuyler*, 27 Ga. 248, in a proceeding to foreclose a mortgage on realty, it was held, in effect, that recoupment could be set up as a defense. In *Mell v. Mooney*, 30 Ga. 413, it was held, in effect, that recoupment could be set up by way of affidavit of illegality to the foreclosure of a chattel mortgage. To the same effect was the ruling in *Mordecai v. Stewart*, 37 Ga. 364, as to the foreclosure of a mortgage on realty. In *Alston v. Wheatley*, 47 Ga. 646, it was held that usury and recoupment could be set up by way of an affidavit of illegality to the foreclosure of a chattel mortgage. And in *Finney v. Cadwallader*, 55 Ga. 75, a defense of recoupment was held to be good to the foreclosure of a mortgage on realty.

In order for the mortgagor, upon the foreclosure of a chattel mortgage, to avail himself of the point that the property levied on is not covered by the mortgage, he must, in our opinion, go into a court of equity, as no such defense is provided by Civil Code, § 3300.

(127 Ga. 315)

#### FLORIDA CENT. R. CO. v. CHEROKEE SAWMILL CO.

(Supreme Court of Georgia. March 14, 1912.)

(Syllabus by the Court.)

#### 1. RAILROADS (§ 138\*)—LOCATION—CONSTRUCTION OF CONTRACTS.

A railroad company entered into a written contract with a sawmill company, which had a sawmill and certain standing timber located on the line of the railroad, by which contract the sawmill company was to be permitted to operate its trains for logging purposes only over

the tracks of the railroad company "between Thomasville and the stations known as Roddenberry, Ga. (13 M. P.), Copeland, Fla. (19 M. P.), and another point about 26 miles south of Thomasville, with the right of ingress and egress to the tracks of the party of the first part (the railroad company), and to use any side tracks within said limits whenever necessary to enable trains to pass each other within their limits." Held, that this contract did not give to the sawmill company the right of ingress and egress to the tracks of the railroad company by building tramways connected therewith at any and all points along the line of railroad, but only at the points mentioned.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 436-439; Dec. Dig. § 138.\*]

**2. INJUNCTION (§ 136\*)—PRELIMINARY INJUNCTION—SUBJECT OF RELIEF—ACTS OF CORPORATIONS.**

The evidence tending to show that the parties had mutually departed from the strict terms of the contract, and that the railroad company had permitted the sawmill company to join tramways to the main line of the railroad at certain places other than those specifically named, and to continue to use them, and that the sawmill company had expended a considerable sum of money on the faith thereof, was sufficient to authorize the presiding judge to grant an interlocutory injunction against the railroad company, to restrain it from interfering with the sawmill company in operating its trains for logging purposes, in accordance with the provisions of the contract, from the three points designated, and from other points which had been adopted and in use, in consequence of such mutual departure from the terms of the contract; the judge at the same time enjoining the sawmill company from tapping the railroad at other points.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 305, 306; Dec. Dig. § 136.\*]

**3. INJUNCTION (§ 136\*)—INTERLOCUTORY INJUNCTION—GROUNDS.**

Under the evidence, there was no abuse of discretion in not denying the interlocutory injunction on the ground that the sawmill company was carrying on its logging trains employees, feed, water, and supplies incident to and forming a legitimate part of "the logging purposes" provided for in the contract, and that such carriage constituted a breach of the contract or of the interstate commerce law.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 305, 306; Dec. Dig. § 136.\*]

**4. APPEAL AND ERROR (§ 954\*)—DISCRETION OF TRIAL COURT—INTERLOCUTORY INJUNCTION.**

It was not alleged or proved that the contract itself constituted a violation of the interstate commerce law, with such distinctness as to authorize this court to reverse the action of the presiding judge in granting an ad interim injunction. Both sides set up the contract, but each asserted certain violations of it and certain illegal conduct on the part of the other.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3818-3821; Dec. Dig. § 954.\*]

**5. INJUNCTION (§ 152\*)—INTERLOCUTORY INJUNCTION—HEARING—MANDATORY INJUNCTION.**

Upon the hearing of an application for an interlocutory injunction, the presiding judge cannot grant a mandatory injunction, commanding a party to do certain things, or appointing a third person to see that they are done, or the like.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 337, 343; Dec. Dig. § 152.\*]

**6. INJUNCTION (§ 151\*)—INTERLOCUTORY INJUNCTION—HEARING—ISSUES OF FACT.**

On the hearing of an application for an interlocutory injunction, the presiding judge should not undertake to finally adjudicate issues of fact, but should pass on such questions only so far as to determine whether the evidence authorizes the grant or refusal of the interlocutory relief.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 336; Dec. Dig. § 151.\*]

**7. JUDGMENT MODIFIED.**

Direction is given that the judgment be modified in accordance with the above rulings.

Error from Superior Court, Thomas County; W. E. Thomas, Judge.

Action by the Cherokee Sawmill Company against the Florida Central Railroad Company. Judgment for plaintiff, and defendant brings error. Affirmed, with directions.

The Florida Central Railroad Company and the Cherokee Sawmill Company entered into a written contract, the body of which was as follows: "This agreement, made and entered into upon this the 15th day of January, 1908, between the Florida Central Railroad Company, party of the first part, and the Cherokee Sawmill Company, party of the second part, both of the said parties being corporations respectively chartered under the laws of this state, witnesseth: First. That the party of the second part has hereby given the right of trackage, that is to say, to operate its trains for logging purposes only, over the tracks of the said party of the first part, between Thomasville and stations known as Roddenberry, Ga. (13 M. P.), Copeland, Fla. (19 M. P.), and another point about 26 miles south of Thomasville, with the right of ingress and egress to the tracks of the party of the first part, and to use any side tracks within the said limits whenever necessary to enable trains to pass each other within their limits. Second. That whenever the locomotive or locomotives and cars of the said party may enter upon said tracks, they shall be operated under the control and direction and subject to the order of the officials and agents of said party of the first part. Third. That the parties hereto shall be respectively liable, both as between themselves and as between third parties and themselves, for any loss, injury, or damage, whether to persons or property, arising from the negligence or other fault, and the loss resulting therefrom shall be paid by the party at fault, and each shall and will fully indemnify and protect the other against any loss, damage, or expense incurred by reason thereof; and, further, if any such injury, loss, or damage is sustained by either party through the joint negligence of the servants employed respectively by them, the same shall be borne by each in proportion in which its fault or negligence has contributed thereto, but if sustained by third persons not parties hereto, then the loss shall be borne equally by both parties hereto. Fourth. That

the party of the second part shall and will furnish engine crews, conductors, and flagmen for all of their trains operated within said limits, at their own expense, such engine crews, conductors, and flagmen to be acceptable to the party of the first part. Fifth. Party of the second part is relieved from furnishing conductors on its trains until such time as it may be deemed necessary and notice to that effect is furnished by said party of the first part. Sixth. That if any damage, loss, or injury arises either to persons or property from the failure of the party of the second part to operate its locomotives and trains within the limits aforesaid with due care and in accordance with the direction that may be given therefor by said party of the first part, then said loss, injury, or damage shall be wholly borne and paid by the second party, and the first party saved and held harmless by it therefrom and from any expense, cost, or charge incident to or arising therefrom. Seventh. That the party of the second part shall pay to the party of the first part the sum of \$10 per year for the aforesaid privilege, a further consideration being that all of the manufactured products of the party of the second part shall be shipped over the line of the party of the first part. Eighth. It is further agreed by the party of the second part that it will furnish free to the party of the first part water for its locomotives from the tanks of the party of the second part, also wood at actual cost of production. Ninth. That all bills arising and becoming available by virtue of this contract in favor of either party shall be rendered at the end of each month, and paid with reasonable promptness after the receipt thereof." This was signed and sealed.

The sawmill company filed an equitable petition against the railroad company, alleging that the defendant was interfering with its exercise of the right provided by the contract, and had notified the plaintiff to desist from the further use of the railroad for hauling logs, that the defendant was insolvent and unable to respond in damages, and that irreparable damage would follow. There were other allegations not necessary to be set out. Injunction was prayed, and also a proper construction of the contract. The defendant admitted the making of the contract, but denied a breach on its part. It alleged various breaches by the plaintiff, including making connection with its track at points other than those mentioned in the contract; the hauling, upon the logging trains, of hands used in the logging business, without the payment of passenger fares; the hauling of various articles to its camp, without paying freight tariffs as required by law; the operating of the log trains with an engineer who was habitually intoxicated; and the use of defective equipment, endangering the business and property of the railroad company as an interstate and intrastate carrier. On the hearing there was conflicting

evidence. The presiding judge rendered the following judgment: "It is manifest that the litigation is the outcome of factional conditions of contending with respect to the plaintiff and defendant. I am impressed that it is the duty of the court to pass such orders, in the light of the contractual relations of the parties, and under the guidance of same, which will preserve and protect the interests of both plaintiff and defendant. The contract over which the litigation arises has been in existence for approximately three years, and has daily served the interest of both the plaintiff and the defendant. The original contract provided for intersections of the tram lines of the plaintiff with the main line of the defendant at the thirteenth mile post, and at the nineteenth mile post, and at another point about 20 miles south of Thomasville, and gave to the party of the first part, the plaintiff, the right of trackage over its line for logging purposes only from these points to its mill at Thomasville, with certain other restrictions. Certainly the parties of the first part, with the observance of the other restrictions of the contract, are entitled to its right of trackage from the points designated in the contract. Moreover, it is manifest that the mutual interest of the parties justified it, and the strict terms of the contract were mutually departed from, and the plaintiff permitted to tap the main line of the defendant company at points and places other than those specifically named in the contract, notably at the eighth mile post on the line of the defendant company, and, in consequence, expended necessarily outlays of money in preparing tramroads, buying iron, constructing the tramroads and other expenditures incident to such enterprise; and this seems, unquestionably and without contradiction, to have been with the concurrence and agreement of plaintiff and defendant, the parties to original contract, and without protest until the beginning of this litigation. It is therefore held that the plaintiffs have the right under the contract, during the life of the same, to the right of trackage in the manner specified in the contract from the thirteenth mile post and the nineteenth mile post and another point about 20 miles south of Thomasville, and from the eighth mile post and from such other points upon the line as have, by the mutual concurrence of the parties, been used by the plaintiff as a tapping point for the intersection of its logging train in the pursuit of its business, pursuant to the purposes of the contract. And the defendant company is hereby restrained and enjoined from any interference whatever with the plaintiffs in the use and enjoyment of its right to operate its trains for logging purposes, as construed by this order, and from the three points designated in the contract, and from the eighth mile post and from such points as have already been adopted and in use, in consequence of the mutual departure from

the terms of the contract in the same manner as was done in the case of the junction at the eighth mile post. It is further held that the notice on the part of the defendant company to the plaintiffs, at the beginning of this litigation, has the legal effect to re-mand the plaintiffs to a literal observance of the terms of the original contract from that date, and that accordingly, thereafter and from hence forward, the plaintiffs are restrained and enjoined from tapping the lines of the defendant company at any point and place other than those specified in the contract and such others as have already been tapped in the manner heretofore pointed out. It is further ordered that the equipment of the plaintiff company be subject to the inspection of O. C. Land, agreed upon by both parties at the hearing of contempt proceeding growing out of the temporary restraining order in this case, to make such inspection, and that the plaintiff company be restrained and enjoined, under penalty of contempt, from using any equipment, engines, or machinery in any wise dangerous to traffic or interest of the defendant, or engineers addicted to intoxication; and if the plaintiff and defendant are unable to agree with respect to the condition of such equipment, boilers, etc., the court will appoint an inspector to examine the boilers as well. Paragraph second of the contract between the plaintiffs and defendant, and attached as Exhibit A to the plaintiffs' declaration, is ordered observed by the plaintiffs. It is further ordered that the defendant company be restrained and enjoined from any interference with the plaintiffs in carrying upon their train employes, feedstuffs, and outlays incident to and to be used in connection with gathering, carrying, loading, and hauling the logs to be conveyed by the plaintiffs to their mill under the provisions of the contract and in contemplation of the parties thereto. It is held that the carrying of employes, feed, water, and supplies, and such incidents to the gathering, handling, hauling, loading, and carrying of the logs in controversy, are incident to the logging purposes provided for in the contract between the plaintiff and the defendant and covered by the terms of the contract, and the rights of the plaintiff are to be held inviolate with respect to the same. Let both parties, their officers, servants, agents, and employes, observe this order."

The railroad company excepted.

Theodore Titus and Branch & Snow, for plaintiff in error. Fulwood & Skeen and Roscoe Luke, for defendant in error.

LUMPKIN, J. [1-3] In the main, there was no error, or abuse of discretion, on the part of the presiding judge in granting an interlocutory injunction in part, but not to

the full extent desired. He sought to preserve the status and protect the parties until the final hearing. The evidence on vital points in the case was conflicting. Each party alleged that the contract was valuable to it; but they differed about its construction, and each claimed that the other was violating it. While the interstate commerce law was invoked, it was not so much to attack the entire contract as to deny a certain construction of it, or that certain acts could be done under it. A railroad company which is an interstate common carrier cannot enter into a contract with a shipper which constitutes an unlawful or undue preference under the interstate commerce act. *Southern Pacific Terminal Co. v. Interstate Commerce Commission*, 219 U. S. 498, 31 Sup. Ct. 279, 55 L. Ed. 310.

[4] Whether or not there is any such discrimination in the present case is not raised or shown with such distinctness as to authorize this court, on exception to the grant of an interlocutory injunction maintaining the status until final trial, to reverse the action of the presiding judge. The rulings made in the headnotes need no elaboration.

[5, 6] In two respects the presiding judge fell into error. He could not on that hearing adjudicate finally any question of fact, but could only pass on such questions so far as to determine the propriety of granting or refusing the interlocutory relief sought. *Bleyer v. Blum*, 70 Ga. 558; *Payton v. Ford*, 134 Ga. 587, 68 S. E. 300. And also he could not grant a mandatory injunction. Civil Code 1910, § 5499. Under some circumstances, he may grant an order restraining unlawful acts by one or both parties. He may refuse relief to a party who comes into court seeking equitable relief, but who is unwilling to do equity. If he finds an injunctive order is being used to work wrong or oppression, upon application he may modify or revoke it. But he has not the power, upon such an interlocutory hearing, to command parties to do certain things, and to appoint a person to see that they do so. Such affirmative action might be quite desirable, where parties indulge in what the judge terms in his opinion a "factional" controversy, but the law has not made provision for it. Probably the statement of the presiding judge as to his determination of what were the facts was not intended as a finality, and the mandatory feature of the order was an inadvertence. But it is better that they should be modified, so as to be in strict accordance with law.

[7] Except as indicated in the headnotes, and in this opinion, there was no error in granting the interlocutory order. Direction is given that the presiding judge modify his order, so as to make it conform herewith.

Judgment affirmed, with directions. All the Justices concur.

(137 Ga. 774)

**McCLENDON v. STATE.**

(Supreme Court of Georgia. March 12, 1912.)

*(Syllabus by the Court.)***SUFFICIENCY OF EVIDENCE.**

No exception is taken to any ruling on evidence, or to any instruction or refusal to charge; the sole complaint being that the evidence was insufficient. The evidence examined, and *held* sufficient to support the verdict.

Error from Superior Court, Dooly County; U. V. Whipple, Judge.

Spurgeon McClendon was convicted of crime, and brings error. Affirmed.

Busbee & Busbee, for plaintiff in error. Max E. Land, Sol. Gen., and T. S. Felder, Atty. Gen., for the State.

EVANS, P. J. Judgment affirmed. All the Justices concur.

(137 Ga. 777)

**BRINSON v. BRINSON RY. CO.**

(Supreme Court of Georgia. March 12, 1912.)

*(Syllabus by the Court.)***INJUNCTION (§ 135\*)—TEMPORARY INJUNCTION—DISCRETION OF COURT.**

Upon the hearing of the petition for a temporary injunction, the evidence upon material issues was conflicting. There was therefore no abuse of discretion in refusing such injunction.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 304; Dec. Dig. § 135.\*]

Error from Superior Court, Burke County; H. C. Hammond, Judge.

Action by A. S. Brinson against the Brinson Railway Company. From the judgment, A. S. Brinson brings error. Affirmed.

Wm. H. Fleming, for plaintiff in error. Hitch & Denmark and Y. E. Barger, for defendant in error.

FISH, C. J. Judgment affirmed. All the Justices concur.

(137 Ga. 822)

**WEST v. INMAN.**

(Supreme Court of Georgia. March 14, 1912.)

*(Syllabus by the Court.)***1. LANDLORD AND TENANT (§§ 162, 165\*)—ELEMENTS OF NEGLIGENCE—CONDITION OF PREMISES—FIRE ESCAPES.**

The owner of a building, who has provided fire escapes in accordance with the provisions of section 3151 of the Code, and who has rented certain stores above the second story in said building to firms engaged in a legitimate manufacturing business, is not bound to exercise supervision over the portions of the building rented, so as to insure that the passages or entrances to the fire escapes are at all times kept open.

(a) Nor is such owner liable in damages to an employé in said building, working on a floor above the second floor, who suffered injuries from fire in consequence of obstructions placed in the passageway to the fire escape by a ten-

ant who had rented that portion of the building around and about the fire escape.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 629, 630-641; Dec. Dig. §§ 162, 165.\*]

**2. PLEADING (§ 8\*)—ACTIONS FOR NEGLIGENCE.**

The allegation that "defendant negligently failed to provide in said building \* \* \* ample means of extinguishing fire" was open to attack by special demurrer, which criticised the allegation on the ground that it was a mere conclusion of the pleader, and which called for more specific information as to what means of extinguishing fires were actually provided.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 12-28½; Dec. Dig. § 8.\*]

Error from Superior Court, Fulton County; J. T. Pendleton, Judge.

Action by Ada West against L. M. Inman. Judgment for defendant, and plaintiff brings error. Affirmed.

Jas. L. Key, for plaintiff in error. Payne, Little & Jones, for defendant in error.

BECK, J. Ada West brought suit to recover damages for personal damages alleged to have been received in consequence of having inhaled smoke and fumes from a fire in a building of which the defendant was the owner, and in which she was at work on the third story as an employé of a manufacturing company occupying a part of said third story as tenant. It was alleged: That another tenant of the owner of the building occupied the second story and that portion of the third story which was "around and included the entrance to the fire escape of said building." That "there were two means of ingress and egress provided for said building and for said place at which petitioner was at work, to wit, one a stairway inside of said building, and the other a fire escape stairway on the outside of said building. Said fire escape could be reached only through one window or door on said third story, and through a space which was occupied by the Silverman-Lonsberg Company, as aforesaid. That on the day aforesaid a fire broke out in said building, on the second story thereof, and in the place occupied by the Silverman-Lonsberg Company. That from said fire issued vast volumes of smoke, heated air, and fire, which penetrated and filled the entire third floor of said building where petitioner was at work. That said fire and smoke and hot air cut off the stairway of said building entirely, and it was impossible to flee from said building by the stairway inside of said building. That the only means of escape left was the fire escape, on the outside of said building. That the fire escape on said building was completely cut off and obstructed from access and use by petitioner by boxes, goods, merchandise, and other material, which were piled up against the door and window leading to said fire escape, and made access to said fire escape absolutely impossible." General and special demurrers were filed, and

to an order sustaining them the plaintiff excepted.

[1] 1. If the plaintiff is entitled to recover in this case, it is in consequence of a violation of the statutory provisions contained in section 3151 of the Code. At common law, the failure to provide fire escapes on the part of the owner of a building, not particularly exposed to danger from fire from the character of the work being carried on in it, did not render the owner liable in damages to an employé of the tenant who might receive injuries incurred in consequence of such failure. *Yall v. Snow*, 201 Mo. 511, 100 S. W. 1, 10 L. R. A. (N. S.) 177, 119 Am. St. Rep. 781, 9 Ann. Cas. 1161, and cases cited in note. So that the liability of the owner in the present case, if any exists, is entirely statutory, and depends upon the construction of the Code section (section 3151), which reads as follows: "Owners of every building more than two stories in height, not including the basement, used in the third or higher stories, in whole or in part, as factory or workshop, shall provide more than one way of egress from each story of said building, above the second story, by stairways on the inside or outside of said building, and such stairways shall be, as nearly as may be practicable, at opposite ends of each story, and so constructed that, in case of fire, the ground can be readily reached from the third and higher stories. Stairways on the outside of said buildings shall have suitable railed landings at each story above the first, and shall connect with each of said stories by doors or windows opening outwardly, and such doors, windows, and landings shall be kept at all times clear of obstructions. All the main doors of such buildings, both inside and outside, shall open outwardly, and each story shall be amply supplied with means for extinguishing fires." We are clear that under the express provisions of this statute it is the duty of the owner of a building of the character of the buildings referred to in the statute to provide fire escapes in accordance with the provisions of this statute, and that in case of injury to an occupant of a building, resulting directly from said failure, on account of a fire in the building which necessitated the use of fire escapes, there would be a corresponding liability on the owner. And we are equally clear that where the owner of a building has properly equipped it with fire escapes in accordance with law, and has rented any of the stories above the second story to tenants who have leased the same for legitimate manufacturing purposes, the owner is under no obligation to exercise any supervision over the conduct of his tenants in the use of the particular floor which he may have rented to any one of them. Where there is an outside stairway erected as a fire escape, it is, of course, contemplated that the entrance to the building from the landing at each story shall in some way be closed at such hours as the

building or some particular story is unoccupied, as at night, for instance, when the men and women working in the building have left and gone home. At such times, the opening by a window or by a door from the landing of the outside staircase or fire escape would be closed in most instances, unless the business conducted therein is of such magnitude as to require or justify the employment and presence of a special watchman. In all such cases would it be the duty of the owner of the building to go upon the premises which he had rented to some one else, and see that his tenant had unlocked the door or unfastened the window shutter, so that there could be free access to the landing of the fire escape? We apprehend that, before a statute passed in derogation of the common law could be given a construction which would place upon the owner of buildings duties so onerous, the language of the statute itself imposing the duties should be express and unequivocal. The allegations of the petition show that a portion of the third story, on which the plaintiff was at work, had been rented to a named tenant, "which said portion of the third story was around and included the entrance to the fire escape of said building; \* \* \* that the fire escape on said building was completely cut off and obstructed from access and use by petitioner by boxes, goods, merchandise, and other material, which were piled up against the door and window leading to said fire escape, and made access to said fire escape absolutely impossible; \* \* \* that the defendant, in violation of petitioner's legal right, obstructed the passage of said fire escape, and permitted the same to be obstructed, so that petitioner could not reach the same and escape." The allegations last quoted are to be construed as meaning, not that the owner himself, in person or by his agents, had piled up boxes, goods, etc., so as to obstruct the passage to the fire escape, but that the tenant, who during the period of his tenancy had the right to use and control the floor about the passage that led to the fire escape, had obstructed the passage. And this is the construction put upon this allegation in the brief of counsel for plaintiff in error. That being the case, under what we have said above, so much of the plaintiff's petition as sought a recovery on the ground that the owner was liable because of the obstruction of the passage leading to the fire escape was demurrable, and the court did not err in so holding.

[2] 2. In another paragraph of the petition it is alleged: "Defendant negligently failed to provide in said building and on the floors thereof, and particularly on the second floor, where said fire broke out, ample means of extinguishing fires. That said fire was finally extinguished by the fire department of the city of Atlanta, and that petitioner was finally rescued from said burning building by the fire department of the city of Atlanta." This paragraph was specially de-



murred to on the ground, among others, that "the allegation that the defendant negligently failed to provide in said building and on the floors thereof, and particularly on the second floor, where said fire broke out, ample means of extinguishing fires, constitutes a conclusion of the pleader, and is not predicated upon any facts to substantiate the same, \* \* \* and that it does not appear what means of extinguishing fires, if any, said defendant should have furnished, nor what constitutes ample means of extinguishing fires." The court sustained this special demurrer, but allowed the plaintiff 20 days within which to file amendments. No amendments were filed. We are of the opinion that the special demurrer pointed out specifically existing defects in the paragraph of the petition referred to, and that the plaintiff was allowed a reasonable time within which to amend the same; and, she having failed to amend within the time so allowed, this part of his petition was stricken therefrom, which left the case to stand upon the allegations complaining of the failure upon the part of the owner of the building to keep the passage or entrance to the fire escape free from obstructions. And as that part of the case last referred to, under the ruling made above, was properly stricken on general demurrer, the entire case, without reference to certain other grounds of special demurrer, stood dismissed, as it should have stood under this decision.

Judgment affirmed. All the Justices concur.

(137 Ga. 301.)

WRIGHT, Comptroller General, v. SOUTHERN RY. CO.

(Supreme Court of Georgia. March 13, 1912.)

(Syllabus by the Court.)

TAXATION (§ 301\*)—LEVY—AMENDMENT—VALIDITY.

The ordinary of Stephens county made a general assessment for the year 1909 against the taxpayers of the county, specifying so much per \$100 for the various purposes named. There was no recommendation of the grand jury with respect to the taxes for "county purposes," referred to in Civil Code 1910, § 508, and for these purposes the levy assessed an amount in excess of 50 per cent. of the state tax for that year. Under this levy the defendant in error paid all taxes assessed against it for other than general "county purposes," and paid all of the amount for that purpose which was legally levied against it, refusing to pay the balance. Thereafter in the following year, and after all taxes (other than those represented by uncollected fl. fas. issued under the original levy) had been collected from all other taxpayers, the ordinary made what he called an amendment of the levy, by shifting from the items making up the general "county purposes" sufficient amounts or percentages to reduce the amount specified for such purposes to the legal limit, adding the amounts so taken to the other purposes named, but leaving the entire amount of tax to be paid the same. *Held*, this proceeding was not a legitimate amendment of the

original levy, but amounted to an attempted new levy against a single taxpayer; and a fl. fas. based thereon, for the amount of the illegal taxes which the defendant in error had refused to pay, was unenforceable.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 483-495, 499-508; Dec. Dig. § 301.\*]

Error from Superior Court, Fulton County; J. L. Pendleton, Judge.

Action by William A. Wright, Comptroller General, against the Southern Railway Company. Judgment for defendant, and plaintiff brings error. Affirmed.

Jno. W. Owen and Claude Bond, for plaintiff in error. McDaniel & Black and E. A. Neely, for defendant in error.

HILL, J. The ordinary of Stephens county levied a tax on all the taxable property of the county for the year 1909, in which the various purposes for which the tax was levied were enumerated, and the amount per \$100 for each purpose was set forth. Under this levy something over \$8,000 was claimed against the Southern Railway Company, of which amount, on or about December 20, 1909, it paid all except \$3,102.40, the payment of which it resisted as being illegally levied; it representing an amount levied for "general county purposes" in excess of the amount which the county, in the absence of a grand jury recommendation, could legally levy for that purpose, the legal amount which it could so levy being 50 per cent. of the state taxes for the year in which the levy was made. The amount proportioned to "general county purposes" under this levy amounted to \$7.50 on the \$1,000, while the state tax was \$2.50 per \$1,000, and the difference of \$5 per \$1,000 so levied was claimed by the Southern Railway Company to be illegal and void. This excess of \$5 per \$1,000 aggregated the amount of tax the payment of which the railway company refused. On February 2, 1910, the ordinary made a so-called amendment to the original levy, wherein he recited the fact of the previous levy, and that, "in the direction, use, and division of said levy and assessment, and the taxes raised and collected thereunder, it is necessary to amend said levy, so as to make each item included in said assessment specific as to the rate per cent. and the divisions of the items, as to its purpose, and for the needful and legal uses of the same by the county, as required by law." The alleged amendment then proceeded to redistribute the percentages or amounts (stating them with respect to the basis of \$1, instead of \$100, as in the original levy) for the various purposes mentioned, but left the total amount of taxes sought to be collected so as to foot up the same as in the original levy. He so shifted the various percentages as to reduce the amount to be collected for objects which are known as "general county purposes" to

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes 74 S.E.—34

the legal limits of 50 per cent. of the state tax, but, as compared with the original levy, increased the percentage specified for other named purposes, left some as formerly, and added one purpose not mentioned in the original levy, specifying a per cent. to be collected therefor. Under the so-called amendment, a fl. fa. in the name of Wm. A. Wright, comptroller general, was issued against the Southern Railway Company and levied upon certain of its property. The company filed an affidavit of illegality, in which it contended, among other defenses, that there was no necessity for any amendment to the original levy, and that it amounted to an attempt by that method to enforce against the company the collection of the amount of taxes illegally levied against it under the original levy, and that the new levy upon which the fl. fa. was endeavoring to proceed was void. The court below sustained the illegality, and the plaintiff in error excepted.

The case was tried on an agreed statement of facts, in which it was admitted that all taxes collected from taxpayers of Stephens county up to the date of the agreement had been collected under the original levy, that all fl. fas. against property owners, issued for unpaid taxes (except those against the Southern Railway Company), were issued under the original levy, and that no attempt had been made to collect taxes from any one under the new levy, except the Southern Railway Company. The law provides that 50 per cent. of the state taxes can be levied for county purposes for which the counties are not specially empowered to levy a tax (commonly known as "general county purposes"), without recommendation of the grand jury, but no more. Civil Code 1910, § 508. It also provides that the percentage to be levied for each purpose shall be stated. Section 514. Also it provides that the amount levied shall only be used for the purpose for which it is collected. Section 516. There are certain extraordinary purposes, which do not fall within the 50 per cent. limit, such as erecting public buildings, and the like, and a tax for the support of paupers, which is limited to 25 per cent. of the state tax. In this case the ordinary made a levy, and specified the purposes for which it was made and collected. It was collected for these purposes from every taxpayer making payment, except the railroad company. The railroad company, perceiving the levy was illegal, offered what could be legally levied for "general county purposes," and then paid all of the taxes levied for the extraordinary purposes which fell outside of "general county purposes," refusing to pay that part of the taxes levied for the last-named purposes which it was illegal to levy. After having collected from every other paying taxpayer all of the taxes for certain purposes named in the original levy, and after having collected from the railroad company all that he could legally collect under that levy, the ordinary pro-

ceeded to do what he calls "amending his levy." There was no need of any amendment to make it specific, or to make it clear, because, while it did not say so much per cent., it stated what was charged on the \$100. There was no real need of any amendment to the levy for purposes of specification; or, if there was any need at all, it was simply to prescribe the percentage which he had levied for each purpose, and that was the only additional specification which was necessary, if any was. But, instead of doing this, after collecting all he legally could from the railroad under the levy made, he proceeded to make an entirely new levy, so as to distribute, under respective heads where it might have been originally lawfully levied, the illegal amount which he had sought to enforce against the railroad company under the original purposes; and it was not really an amendment of the levy, but was an entirely new levy against one taxpayer alone.

It is no answer to say that the total amount of tax to be paid was not changed. Any other taxpayer, at the proper time, could have resisted and defeated it just as well as the railroad company, instead of making voluntary payment of the illegal tax and thereby waiving his right to attack it. But the possibility that the county collected illegal taxes from other taxpayers gave the ordinary no authority at all to equalize by collecting a proportionate amount under the guise of legal taxation from a taxpayer who did resist. That all the other taxpayers yielded to the illegal levy and paid it without protest furnishes no reason why the ordinary should shift the illegal assessment around, so as to make one taxpayer pay the same amount which had been unlawfully collected from the other taxpayers. When one taxpayer finds that he has been illegally assessed, for the levying authorities to simply shift the items around so as to make him pay the same amount, by introducing new items and changing the amounts of assessment for specific purposes, is not a legitimate amendment of the tax assessment, but is a new assessment against a single taxpayer; and this is shown to be true by the fact, as far as can be gathered from the showing of disbursements of county funds set out in the agreed statement of facts, the county did not expend the amounts collected for the purposes named in the so-called amended levy in accordance with assessments made therein, but in its expenditures more nearly followed the amounts which were derived, according to the first assessment, as belonging to the respective funds from the per cent. levied for each purpose. And the effort is now made to collect this additional amount from the one resisting taxpayer, not according to what the county really needs for the purposes specified in the new levy, or with reference to what has been expended for such purposes, but merely to cover in the il-

legal amount which the county seeks to recover against one taxpayer.

Counsel for the plaintiff in error rely on the case of *Yow v. Sullivan*, 129 Ga. 187, 58 S. E. 662, as authority for their contention that the last levy is merely an amendment of the original levy, and is permissible. That case differs widely from the present, in that the amendment merely specified the percentage levied for each purpose in the original levy, which the county authorities had failed to specify in the first instance. This court had held (*Sullivan v. Yow*, 125 Ga. 326, 54 S. E. 173) that on this account the levy as it first stood was unenforceable. In the present case it was clear what amount each taxpayer was required, under the original levy, to pay for a particular purpose; but there was an illegal assessment for items comprising "general county purposes." The original levy had been acted on and enforced, or apparently acquiesced in, as to all the taxpayers of the county other than the defendant in error, and the county in its expenditures had treated the funds as collected for the respective purposes according to the percentages named in the first levy—at least this is a fair inference from the admitted facts, which cannot be clearly analyzed, on account of the failure to keep accurate and separate accounts of disbursements in all instances; and to presume otherwise would be to put the county authorities in the attitude of violating the legal requirement that county funds shall be expended for the purposes for which they are levied and collected, it appearing that under the percentages shown on the second assessment the amount apportioned to certain purposes would greatly exceed what has been expended therefor, and should leave in the county treasury a sum largely in excess of the balance actually on hand as shown by the agreed facts. Under the facts of this case, we are clear that there was no legitimate amendment of the original tax levy, and that it was correctly adjudged by the trial court that the *fi. fa.* against the defendant in error was illegal.

Judgment affirmed. All the Justices concur.

(137 Ga. 791)

**LOWNDES LUMBER CO. v. MASSE & FELTON LUMBER CO. et al.**

(Supreme Court of Georgia. March 13, 1912.)

(*Syllabus by the Court.*)

**VENUE (§ 22\*)—DOMICILE OF PARTIES—CO-DEFENDANTS.**

An equitable action by a vendor of timber against his vendee and the latter's sub-vendees taking with notice, to cancel all the sales, including that to the sub-vendees, for an infection inhering in the first conveyance and common to all, and to restrain the sub-vendees in possession from cutting the timber pending the suit, may be located in the county of the sub-vendees' residence.

[Ed. Note.—For other cases, see *Venue*, Cent. Dig. §§ 35-37; Dec. Dig. § 22.\*]

Error from Superior Court, Grady County; Frank Park, Judge.

Action by the Lowndes Lumber Company against the Masse & Felton Lumber Company and others. Judgment for defendants, and plaintiff brings error. Reversed.

The Lowndes Lumber Company filed its petition for cancellation and injunction, in the superior court of Grady county, against the Masse & Felton Lumber Company, a corporation with an office and agent in Grady county, the Grady County Lumber Company, a partnership, the members of which are residents of Grady county, the Kelly-Clark Lumber Company, and Arthur Kelly, of Grady county. It was alleged: The plaintiff purchased from the Grady Lumber Company 7,722 acres of pine timber, upon the terms contained in a bond for title, which it took as evidencing the contract of purchase. Subsequently the plaintiff entered into a contract for the sale of the timber to the Masse & Felton Lumber Company, and assigned to that corporation the bond for titles which it held from the Grady County Lumber Company. By the terms of this contract the Masse & Felton Lumber Company agreed to purchase all of the timber and timber privileges, and to pay to the plaintiff \$2.50 per M feet, log measure, on a stumpage basis. "The terms of payment were: The Masse & Felton Lumber Company giving \$20,000, \$10,000 of said amount represented in four notes delivered to your petitioner, and \$10,000 payable to Grady Lumber Company, and the payment of the balance in monthly installments of \$2,500 each, beginning on the 10th day of February, 1909; of said \$2,500 installment, \$1,200 of same, with interest, being payable directly to Grady County Lumber Company until said payments, with the cash already paid to said Grady County Lumber Company, were sufficient to discharge the purchase price of the timber in full, and the remainder of each of said monthly installments of \$2,500 payable to your petitioner on the 10th day of each and every month, beginning with the 10th day of February, 1909." The Masse & Felton Lumber Company has paid to the Grady County Lumber Company the installments of payment due to them, but has defaulted in its installments due to the plaintiff since February 10, 1909, aggregating \$32,000 and has broken the contract of purchase, by refusing to make payments to the plaintiff agreeably to its terms. The plaintiff has offered to repay the Masse & Felton Lumber Company all sums advanced by it on account of the purchase price of the timber, and has demanded that said company surrender possession of the timber and a cancellation of the assignment to it of the bond for title. The Masse & Felton Lumber Company is rapidly cutting the timber, manufacturing it into lumber, and causing a waste of the

plaintiff's property. The Masse & Felton Lumber Company has been negotiating a sale of the timber to the Kelly-Clark Lumber Company and Arthur Kelly, and that, if the sale has been consummated, it was with the knowledge of the plaintiff's rights and equities. The prayers were for a cancellation of the contracts of sale between the plaintiff and the Masse & Felton Lumber Company, and the latter company and the Kelly-Clark Lumber Company; for injunction against the Grady County Lumber Company from executing any deed of conveyance to the Masse & Felton Lumber Company; for injunction against all defendants against further cutting the timber and changing the status of the property; and for alternative relief against the Masse & Felton Lumber Company in damages, in the event the plaintiff is not entitled to the relief of cancellation.

The petition was amended by making the Morris Lumber Company, a corporation of the state of Alabama, with an office and agent in Grady county, a party defendant, and by alleging that the timber was being cut by the Kelly-Clark Lumber Company under some arrangement, unknown to plaintiff, with the Morris Lumber Company, which had purchased the timber from the Masse & Felton Lumber Company with knowledge of plaintiff's rights and equities in the same; and a cancellation of the conveyance from the Masse & Felton Lumber Company to the Morris Lumber Company was prayed. The petition was again amended by alleging that the Kelly-Clark Lumber Company is a partnership, whose members are stockholders of the Morris Lumber Company; that they are cutting the timber under a contract with the Morris Lumber Company, and that they were fully advised, at the time of making their contract with the Morris Lumber Company, of the plaintiff's rights and equities. Cancellation of this contract was prayed; also that the partners of the Kelly-Clark Lumber Company be enjoined from further cutting the timber. It was further alleged in the amendment that, according to the contract between the plaintiff and the Masse & Felton Lumber Company, the latter company was to keep accurate accounts of the timber cut, showing the amounts which would be due to the plaintiff, and that by the sale and surrender of possession of the property it has put it out of its power to comply with this provision of the contract. It has failed and refused to keep an account of the cutting, and has attempted to delegate this power to transferees, who are strangers to the plaintiff. The Masse & Felton Lumber Company and the Kelly-Clark Lumber Company are not cutting the timber in the manner prescribed in the plaintiff's contract with the Masse & Felton Lumber Company, in that merchantable timber of the kind and quality described in the lease is not

being cut, but only the best and most accessible timber is being cut, leaving uncut large quantities of poorer and more inaccessible timber. Arthur Kelly was stricken as a defendant.

The Masse & Felton Lumber Company specially pleaded that it was a corporation of Bibb county, Ga., and that the superior court of Grady county was without jurisdiction to entertain the suit. Subject to its special plea, it filed its demurrer and answer. The Morris Lumber Company also pleaded to the jurisdiction of the court, and filed an answer subject to its special plea. The local defendants also pleaded to the jurisdiction, on the ground that no substantial relief was prayed against them. On the interlocutory hearing the court passed the following order: "It appearing to the court that Masse & Felton Lumber Company, one of the defendants herein, is a corporation organized and with its principal office in the county of Bibb, state of Georgia, this court is of the opinion that it is without jurisdiction to entertain said bill; and the prayer for temporary injunction is therefore denied, upon the sole ground of want of jurisdiction in this court, and without a consideration of the evidence of the case upon its merits." The plaintiff excepted.

Moore & Pomeroy and M. L. Ledford, for plaintiff in error. Lane & Park, R. C. Bell, and Denmark & Griffin, for defendants in error.

EVANS, P. J. (after stating the facts as above). The plaintiff alleges that it sold and conveyed certain timber to the Masse & Felton Lumber Company, which in turn sold and conveyed it to the Morris Lumber Company, which delivered possession of it under a contract to the Kelly-Clark Lumber Company, who are cutting the same. The Morris Lumber Company is a corporation of the state of Alabama, with an office and agent in Grady county. The Kelly-Clark Lumber Company is a partnership, the members of which reside in that county. The suit is located in Grady county, and the petition contains prayers for the cancellation of the several conveyances and contracts of purchase, and for the writ of injunction to preserve the status pending the suit. The plaintiff bases its right to have the last two sales canceled on its right to rescind its contract of sale made with the Masse & Felton Lumber Company. The suit is therefore to cancel three conveyances for an infection inhering in the first conveyance, but which affects the others, because the vendees therein are alleged to have taken with notice. We are not concerned with the question whether the plaintiff is entitled to a rescission of its contract with the Masse & Felton Lumber Company, or whether its vendees are bona fide purchasers; for the reason that the judge

certifies that he did not pass on the merits of the case, but found that the Masse & Felton Lumber Company was a Bibb county corporation, and held that the court was without jurisdiction to entertain the suit. So that the question submitted under the assignment of error is whether the court did have jurisdiction to pass on the merits of the case. The Morris Lumber Company is a foreign corporation, with an agent and place of doing business in Grady county, and the members of the partnership Kelly-Clark are residents of that county, and the suit is located in the county of these defendants. Is there substantial relief prayed against them? It is sought to cancel their contracts, under which they claim title to and possession of the timber. This is a claim for substantial relief. The prayer for injunction is incidental to the relief of cancellation. A suit to cancel a deed or conveyance may be located in the county of the grantee's residence. *Coker v. Montgomery*, 110 Ga. 20, 35 S. E. 273. It was proper to join the Masse & Felton Lumber Company as a party defendant, as the plaintiff's right of cancellation of the contracts of sale, by virtue of which the resident defendants claim title to and possession of the timber, depends upon the cancellation of the assignment of the plaintiff's bond for title to them. Where there are several persons, residing in different counties, interested in the subject-matter of an equitable petition, a court of equity, having all the parties before it, and having acquired jurisdiction for the purpose of canceling a deed, will decree full and perfect relief to all the parties touching the subject-matter involved. *Fulgham v. Pate*, 77 Ga. 454. In reversing the judgment we are not to be understood as passing upon the merits of the case; and our decision simply extends to holding that the court had jurisdiction, under the allegations of the pleadings, to entertain the suit.

Judgment reversed. All the Justices concur.

(137 Ga. 798)

MIZE et al. v. BANK OF WHIGHAM.

(Supreme Court of Georgia. March 13, 1912.)

(Syllabus by the Court.)

INJUNCTION (§ 136\*)—INTERLOCUTORY INJUNCTION—GROUNDS.

Where, on an interlocutory hearing for injunction, it appears that the plaintiff and the defendant claim title to a lot of land in the possession of the defendant's tenant, and the defendant is neither alleged nor shown to be insolvent, nor any equitable ground for injunction is shown, it is error to enjoin the defendant and his tenant from going on the land, unless he monthly deposits a stated amount of rent with a named bank, and also does an affirmative act (arrange to complete a house), concerning which there is neither proof nor any reference in the pleadings.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 305, 306; Dec. Dig. § 136.\*]

Error from Superior Court, Decatur County; Frank Park, Judge.

Action by the Bank of Whigham against F. A. Mize and another. Judgment for plaintiff, and defendants bring error. Reversed.

Russell & Custer, for plaintiffs in error. R. B. Terrell, for defendant in error.

EVANS, P. J. This is an action by the Bank of Whigham to enjoin F. A. Mize and his tenant from going upon and cultivating a lot of land. The bank alleged that it bought the land from A. D. Oliver, who exhibited to it a warranty deed from Mize, and paid Oliver the purchase money; that since its purchase Mize has rented the land, and his tenant is now cultivating it; that the tenant's cultivation of the land constitutes a recurring trespass; and that the tenant is insolvent.

The defendants by answer denied the allegations of the petition and the plaintiff's right to injunction. They averred that Mize agreed to sell the land to Oliver, and made to him a deed, receiving from Oliver a check on the Bank of Climax, a private bank of which Oliver was the sole owner; that Mize believed that the check would be paid upon presentation; that at the time of the delivery of the check Oliver had no money in the bank, was hopelessly insolvent, and did not intend then or thereafter to pay for the land, and Mize has never received payment; that at the time Oliver received the deed from Mize he was indebted in a large sum to the Bank of Whigham, and on the same day he procured the deed from Mize he conveyed the same property to the Bank of Whigham to further secure his indebtedness to the bank. Mize prayed for a cancellation of his deed.

At the preliminary hearing the plaintiff submitted evidence tending to sustain the allegations of the petition, and the court passed an order that Mize, on or before the 1st day of December, 1911, arrange to complete the house upon the land, and thereafter to deposit with the First National Bank of Bainbridge a certain sum of money to the joint credit of Mize and the Bank of Whigham, and, should Mize fail and refuse to comply with either or both of the foregoing orders, that he be enjoined from further going upon the land until the further judgment of the court. Exception was taken to this order.

There is nothing in either the pleadings or the evidence concerning the construction of any house upon the land. Therefore the provision in the order that the defendant within a certain time arrange to complete the house is an adjudication upon matter entirely without the case. It is neither charged in the petition, nor was there any evidence submitted, that the defendant Mize was insolvent. It is alleged that his tenant is insolvent; but

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

the tenant is a mere nominal party. Mize is the principal defendant, against whom all the substantial relief is prayed. He is in possession of the land. It is not charged that he is committing any waste upon the premises. The plaintiff presents no equitable reason why the rent of the land should be impounded during the litigation between Mize and itself. It was accordingly error for the court to require of the defendant that he build a house and deposit the rent, in default of which he should be enjoined "from further going upon the land."

Judgment reversed. All the Justices concur.

(137 Ga. 812)

**MIZE v. HERRING.**

(Supreme Court of Georgia. March 14, 1912.)

*(Syllabus by the Court.)*

**INJUNCTION (§ 49\*)—NATURE OF REMEDY—ADEQUATE REMEDY AT LAW.**

A solvent claimant of land, in possession of it through his tenant, who is not committing waste or doing any act tending to injure the property, will not be enjoined from entering upon the land at the instance of another claimant, alleging himself to be the true owner. The latter's remedy at law is complete.

[Ed. Note.—For other cases, see Injunction Cent. Dig. § 102; Dec. Dig. § 49.\*]

Error from Superior Court, Decatur County; Frank Park, Judge.

Action by F. C. Herring against F. A. Mize. Judgment for plaintiff, and defendant brings error. Reversed.

Russell & Custer, for plaintiff in error. R. R. Terrell, for defendant in error.

**EVANS, P. J.** The exception is to the grant of an interlocutory injunction. The plaintiff alleged that the defendant, F. A. Mize, sold a certain lot of land to A. D. Oliver, and executed his warranty deed; that Oliver entered into possession of the premises and proceeded to build a house, which is partly unfinished; that Oliver was adjudicated a bankrupt, and Frank S. Jones was appointed as trustee; that the trustee under proper order sold the lot of land to C. A. Knight; that at the time the land was seized by the trustee Oliver was in possession of the same; that Knight afterwards sold the land to petitioner, and put him in possession thereof; that the plaintiff is thus the owner of the land and in possession of the muniments of title; that he posted two notices on the house, warning persons not to trespass upon the premises; that Mize afterwards posted upon the house a similar notice, warning trespassers off the land; that on the 30th of October the plaintiff had to leave the town of Climax, where the land was situated, and on his return in the afternoon he found that the defendant had been

upon the land and had torn down the trespass notices which had been posted by the plaintiff; that the defendant's entering upon the land and putting up his notice warning trespassers, and tearing down notices that had been posted by the plaintiff, were willful acts of trespass, and attempts on the part of the defendant to exercise ownership over the plaintiff's land, when he knew that he had no title to it; that these acts of trespass are an injury to plaintiff's title, which will cause irreparable damage and will require a multiplicity of suits for damages, unless the defendant is restrained from trespassing on the premises. The prayer was to enjoin the defendant from trespassing as set out in the petition, and from interfering with the plaintiff's possession of the land.

The defendant filed his answer under oath averring that he is the owner of the land; that one Oliver, with a purpose to cheat and defraud him, induced him to make a deed to the land and accept in payment therefor Oliver's check on the Bank of Climax, a private bank, of which Oliver was the sole owner; that Oliver induced the defendant to deposit the check in his bank; that Oliver was insolvent at the time; that there were no funds in the bank for payment of the check, but this was unknown to the defendant; that shortly thereafter it was discovered that Oliver was an escaped convict, and he fled from Climax and abandoned the property, of which he had sought to defraud this defendant; that the defendant entered into possession thereof, and was in possession at the time Oliver was adjudicated a bankrupt and a trustee appointed; that at the trustee's sale he gave public notice that he was in possession of the property, and that Oliver had no title thereto, and warned the public of the nature of his claim; that the land was purchased by Knight, who quitclaimed his interest to the plaintiff. He admitted removing the notices which the plaintiff had put upon the land, and that he had placed thereon notices warning persons not to trespass thereon. He averred that he was solvent and able to respond in damages to the plaintiff for any judgment the court may award against him. He denied that the plaintiff had sustained any damages, or that any multiplicity of suits will ensue from his possession of the land, and averred that the remedy of the plaintiff was full and ample to protect whatever rights he might have.

On the interlocutory hearing the plaintiff introduced evidence tending to support the allegations of his petition, and the defendant introduced no evidence. The court passed an order "that the said F. A. Mize be and is hereby restrained from further entering upon said land, except that his tenant may enter thereon to gather the crop growing upon same within a reasonable time, and the petitioner herein is permitted to com-

plete the house upon said property pending the further judgment of the court." To this judgment the defendant excepted.

The adjudication by the court that the defendant's tenant may enter upon the land for the purpose of gathering his growing crop is an adjudication that the defendant is in possession of the land, or at least that portion of it upon which the crop is growing. The house was alleged to be unfinished; but its character, the point to which the work of construction had advanced, or the necessity of its immediate completion to prevent deterioration or waste, was neither alleged nor proved. The plaintiff did not allege or prove that the defendant was insolvent; on the other hand, the defendant answered under oath that he was solvent and fully able to respond to any judgment which the plaintiff may recover against him by reason of the facts alleged. The only acts charged to be trespasses are the defendant's retention of possession, the tearing down of the plaintiff's placard of warning to trespassers, and substituting therefor his own placard forbidding trespassers on the land. Therefore the case as made before the judge on the interlocutory hearing is one where two persons are claiming title to the same land, one of whom is in possession, and who is solvent and doing no act to the injury of the property, and the other claimant is seeking to enjoin the one in possession, who is solvent, from further remaining in possession and exercising acts indicating ownership, which are not injurious to the property. The remedy of the plaintiff by action at law to recover the land and mesne profits, or to recover damages for any act of trespass, is full and complete, and there is no necessity for injunctive relief.

Furthermore, the scope and effect of the judgment complained of is to evict the defendant in actual possession, and permit the plaintiff to enter for the purpose of completing the house. "The office of an injunction being, under the Code of this state, merely to restrain and not to compel performance of an act, this remedy is not available for the purpose of evicting a party from the actual possession of land, the right to which is in dispute between himself and another; and consequently such a result cannot be indirectly accomplished by an order restraining the party so in possession 'from further interfering with said lot of land, house, and crop' thereon. Such an order, being mandatory in its nature, would afford relief not within the proper scope of the writ of injunction. Civil Code 1895, § 4922." *Vaughn v. Yawn*, 103 Ga. 557, 29 S. E. 759; *Glover v. Newsome*, 134 Ga. 376, 67 S. E. 935. The court erred in granting the temporary injunction.

Judgment reversed. All the Justices concur.

(127 Ga. 832)

KERR et al. v. BLACK et al.

(Supreme Court of Georgia. March 20, 1912.)

(Syllabus by the Court.)

INJUNCTION (§ 136\*)—LANDLORD AND TENANT (§ 86\*)—RECOVERY OF POSSESSION—INTERLOCUTORY INJUNCTION.

In a controversy between landlords and tenants as to whether the tenancy would terminate at the end of the then current year, or whether the tenants had a right to continue the rental for an additional term, under an option to do so contained in a written contract, upon an equitable proceeding filed by the landlords, it was error, at a mere interlocutory hearing, to grant an injunction of such a character as to oust the tenants from possession and give it to the landlords; and this is true, although the landlords alleged that the contract, as written, contained a mistake, and sought to obtain a decree correcting it. Such relief could be granted only on a final trial.

(a) Certain landowners entered into a written contract with tenants to cultivate land "for a term of three years, with the privilege of five years," upon certain terms and conditions. Before the close of the third year, the landlords filed an equitable petition against the tenants, alleging that the latter had not complied with their contract, that the term would expire at the end of the then current year, and that in a conversation between one of the landlords and the tenant, who acted as spokesman in making the contract, and who managed the farm for the defendants, the tenant told the landlord that he would not want the farm after that year; that the defendants were nevertheless plowing and making preparations for the crop for the following year; that the landlords had been damaged by reason of the tenants' allowing lands to lie idle, and failing to properly cultivate the crops in preceding years; and that they would be damaged, in an amount which could not be estimated, if they could not recover the land, because they had made a contract of rental with another party for the succeeding year. Temporary and permanent injunction, and a decree that the defendants be required to vacate, were prayed. By amendment the plaintiffs alleged that the written contract did not correctly state the agreement of the parties; that the agreement was that the tenants should have a term of three years, with the privilege of five years, if agreed upon between the parties; that the words, "if agreed upon between the parties," were omitted by accident and mistake in drawing the contract; and that the contract was not binding upon either party after the lapse of three years, because lacking in mutuality. It was prayed that the contract be reformed in accordance with the allegations stated, and be so construed. Upon an interlocutory hearing under a rule nisi, the presiding judge passed the following order: "After due hearing had, it is ordered and adjudged that the defendants named in the original petition be and they are hereby restrained from plowing or planting on the described land of the plaintiffs, or in any way interfering with the plaintiffs in the free use and disposal of their land, or cultivation or rental of same." This order was passed in November of the third year of the rental. *Held*, that such order was erroneous. *Mize v. Herring* (March 14, 1912) 74 S. E. 534.

(b) If, upon sufficient consideration, a landlord rents to a tenant certain land for a term of three years, with the privilege of five years, such privilege is not void on the ground that it is lacking in mutuality and not binding on the landlord. It is based on the general consideration, and is an integral part of the contract.

Wellmaker v. Wheatley, 123 Ga. 201, 51 S. E. 436.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 305, 306; Dec. Dig. § 136;\* Landlord and Tenant, Cent. Dig. §§ 270-275; Dec. Dig. § 86.\*]

Error from Superior Court, Murray County; A. W. Fite, Judge.

Action by John Black, executor, and others, against Andrew Kerr and others. From a judgment for plaintiffs, defendants bring error. Reversed.

W. E. Mann, for plaintiffs in error. Maddox, McCamy & Shumate, C. D. McCutchen, and O. N. King, for defendants in error.

LUMPKIN, J. Judgment reversed. All the Justices concur.

(137 Ga. 784)

#### MCCRARY v. STATE.

(Supreme Court of Georgia. March 13, 1912.)

(Syllabus by the Court.)

#### 1. CRIMINAL LAW (§ 1153\*)—WRIT OF ERROR—REVIEW—DISCRETION OF TRIAL COURT.

Whether counsel will be permitted to propound leading questions to a boy "of immature years," while testifying, is a matter which addresses itself to the sound discretion of the court; and the allowance of such questions will not be held erroneous, unless the discretion is abused.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3061-3066; Dec. Dig. § 1153.\*]

#### 2. CRIMINAL LAW (§ 824\*)—TRIAL—INSTRUCTIONS—NECESSITY FOR REQUEST.

An omission to charge on the subject of the impeachment of witnesses, in the absence of any request so to charge, will not require a new trial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1996-2004; Dec. Dig. § 824.\*]

#### 3. GROUNDS FOR NEW TRIAL—NO CAUSE FOR REVERSAL.

None of the other grounds of the motion for a new trial present sufficient cause for a reversal, or are such as to require a separate discussion.

#### 4. HOMICIDE (§ 832\*)—PUNISHMENT—DISCRETION OF JURY.

The evidence was sufficient to support the verdict.

(a) It was urged that, if the evidence authorized the jury to find the defendant guilty of murder at all, there should have been a recommendation to mercy and a punishment by imprisonment for life, instead of a finding involving the death sentence. While the jury would have been authorized, under the evidence, to make such recommendation, this is a matter as to which they are vested by law with discretion, and it cannot be declared, as matter of law, by a reviewing court, that they erred in not so recommending. Penal Code 1910, § 63.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 699-704; Dec. Dig. § 832.\*]

Error from Superior Court, Crisp County; U. V. Whipple, Judge.

Tom McCrary was convicted of murder, and brings error. Affirmed.

J. T. Hill and J. W. Dennard, for plaintiff in error. Crum & Jones, Max E. Land, Sol. Gen., and T. S. Felder, Atty. Gen., for the State.

LUMPKIN, J. Judgment affirmed. All the Justices concur.

(137 Ga. 774)

#### BUCHANAN v. STATE.

(Supreme Court of Georgia. March 12, 1912.)

(Syllabus by the Court.)

#### 1. CRIMINAL LAW (§ 1169\*)—NEW TRIAL—GROUNDS—RECEPTION OF EVIDENCE.

Where certain evidence is admitted, but subsequently the judge rules it out, and so informs the jury, and instructs them that they should not consider it in arriving at their verdict, as a general rule this will not require a new trial.

(a) If there are any exceptional cases in which a new trial will be granted, where evidence is erroneously admitted and then ruled out, this, in the light of the recitals of the grounds of the motion for new trial and of the judge's note appended thereto, is not such a case.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 8141; Dec. Dig. § 1169.\*]

#### 2. RAPE (§ 51\*)—CRIMINAL PROSECUTION—SUFFICIENCY OF EVIDENCE.

The evidence was sufficient to authorize the verdict. The female alleged to have been raped testified positively to the commission of the crime. There was evidence of other witnesses tending to corroborate her testimony, including evidence of a complaint by her to her mother of an improper proposal to her by the accused (her own father) several years before the time of the alleged offense, followed by a severe whipping of her by him, and evidence that, on occasions when she and her father had been alone together, she was found by others in tears, or with the appearance of having been crying; that the father was a man who drank heavily, and on one occasion ran his family away from home; that he had in his possession certain things sometimes used in connection with sexual intercourse, and which she testified that he exhibited to her; and that an illegitimate child was later born to the girl; and there was no evidence pointing to any other man as having been intimate with her. She also explained delay in reporting the crime on account of the former beating and repeated threats. While some parts of her testimony may not have been entirely satisfactory, yet the evidence as a whole was sufficient to support the verdict; and, the presiding judge having approved it, a new trial will not be required. None of the grounds of the motion for a new trial require a reversal.

[Ed. Note.—For other cases, see Rape, Cent. Dig. §§ 71-77; Dec. Dig. § 51.\*]

Error from Superior Court, Heard County; B. W. Freeman, Judge.

L. B. Buchanan was convicted of rape, and brings error. Affirmed.

S. Holderness and W. C. Wright, for plaintiff in error. J. R. Terrell, Sol. Gen., W. C. Hodnett, T. S. Felder, Atty. Gen., D. B. Whitaker, and Willis Smith, for the State.

LUMPKIN, J. Judgment affirmed. All the Justices concur.



(137 Ga. 777)

## CRAWLEY v. STATE.

(Supreme Court of Georgia. March 13, 1912.)

(Syllabus by the Court.)

## 1. HOMICIDE (§ 163\*)—EVIDENCE—ADMISSIBILITY—CHARACTER OF DECEASED.

The defendant's statement and the testimony of certain witnesses introduced by him put in issue the character of the decedent, and the court properly admitted evidence offered by the prosecution to show the character of the deceased as to peaceableness and violence.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 310-317; Dec. Dig. § 163.\*]

## 2. HOMICIDE (§ 300\*)—TRIAL—INSTRUCTIONS.

The court did not err in charging the jury as follows: "Proof of the violent and turbulent character of the deceased is admissible only when it is shown prima facie that the deceased was the assailant, that the accused had been assailed, and that the defendant or defendants were honestly seeking to defend himself or themselves. But if you find from the evidence that the defendants were the aggressors, and that the defendants overtook the deceased, and one of them began or entered into a difficulty with the deceased, with a preconceived intent of having a difficulty, or began the attack without provocation from the deceased, if he was a bad character, then the bad character of the deceased would not offer the defendant any excuse for taking his life, if he or they took his life; for it is the same offense to kill a bad person as it is to kill a good person." It aptly states the law as to the issue there dealt with, and was authorized by the evidence.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 614-632; Dec. Dig. § 300.\*]

## 3. CRIMINAL LAW (§ 922\*)—NEW TRIAL—INSTRUCTIONS—JUSTIFICATION.

While the charge of the court upon the subject of justifiable homicide, as laid down in sections 70 and 71 of the Penal Code, was not entirely free from criticism, lacking both in comprehensiveness and accuracy, it was not, under the evidence and the statement of the prisoner, such error as to require the grant of a new trial, especially in view of the fact that the court fully covered the law of justifiable homicide as laid down in the Code sections just referred to.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2210-2218; Dec. Dig. § 922.\*]

## 4. HOMICIDE (§ 338\*)—HARMLESS ERROR—ADMISSION OF EVIDENCE.

Even if the admission in evidence of a "no bill" returned by the grand jury against the decedent, charged with the murder of a brother of the defendant, was irrelevant, it was not of sufficient materiality to be ground for a reversal.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 709-713; Dec. Dig. § 338.\*]

## 5. SUFFICIENCY OF CHARGE—EVIDENCE.

The charge fully covered and fairly submitted the material issues in the case, and the evidence authorized the verdict of guilty.

## 6. DISCRETION OF COURT—GROUND FOR NEW TRIAL—NEWLY DISCOVERED EVIDENCE.

There was no abuse of discretion in refusing to grant a new trial upon the newly discovered evidence submitted to the court.

Error from Superior Court, Pike County; R. T. Daniel, Judge.

Jim Crawley was convicted of murder, and brings error. Affirmed.

J. F. Redding, E. H. Dupree, E. M. Owen, and T. E. Patterson, for plaintiff in error. J. W. Wise, Sol. Gen., Cleveland & Goodrich, and T. S. Felder, Atty. Gen., for the State.

BECK, J. Jim Crawley was jointly indicted with Reginald Crawley and Stiles Mitchell for the murder of William Carden. The three defendants were tried together, and Stiles Mitchell and Reginald Crawley were acquitted. Jim Crawley was convicted; the jury recommending that he be imprisoned in the penitentiary for life. A motion for a new trial was filed by Jim Crawley, and upon the hearing it was overruled. The only eyewitnesses to the killing, who were near enough to see and hear all that occurred, were the three defendants named in the indictment. Each of these made a statement tending to show that at the time of the shooting the decedent was attempting to feloniously attack one of the three defendants, who were riding together in a buggy, with intent to shoot and kill one or both of the Crawleys, who are brothers.

[1] 1. The court properly permitted counsel for the state to introduce evidence tending to develop before the jury the question as to whether the slain man was of a peaceable or a violent disposition and character. The privilege of showing the character of the deceased in the first instance was the prerogative of the defendant alone. But the defense had shown, before the state attempted to introduce such evidence, that the deceased had made numerous threats against the life of the accused; and the accused in his statement declared that the decedent was a dangerous man, "and I knew he would shoot me the first chance he got. \* \* \* He had threatened to do so many times, to so many people who had told me, lots of them. I could take hours of your time and give you the names of what he told them. \* \* \* Now, going back to the time when Mr. Carden shot and killed my brother, I want to say that he has hounded me around and made these threats, which have come to me from all directions, that he was going to kill me." Then follows, in the statement of the prisoner, a further enumeration of instances when he was waylaid by Carden and his footsteps were pursued; instances showing that Carden was a man of violent character, and relentless in his determination to finally take advantage of a fitting opportunity for the purpose of slaying the accused. Witnesses had been introduced, before this statement was made, who gave testimony corroborating the prisoner's statement in regard to the making of threats against the life of the accused. In no other way could the defense have more effectually put the character of the decedent in issue. It has been held that the defendant can put his own character in issue by

his statement alone (Jackson v. State, 76 Ga. 552); and if he can put his own character in issue merely by his statement, it would seem that he could put that of the slain man in issue. But the defense did not limit the attack upon the character of the deceased to the defendant's statement. There was proof of circumstances tending to show that Carden was a man of violent character. "Where the defendant has offered evidence of threats against himself, made by the deceased, the prosecution has been permitted to introduce evidence of the good character of the latter." 3 Enc. Ev. 14, and citations. After the defense had thus distinctly put the character of the slain man in issue, and had introduced, for the consideration of the jury, testimony which tended to demonstrate that the deceased was a man of violent character, in the interest of truth, and for the purpose of aiding the jury in their efforts to reach a correct conclusion as to this material issue, the court properly refused to exclude evidence offered to show that the deceased was a man of an entirely different character from that portrayed in the statement of the accused and by his witnesses.

[2] 2. Movant insists that the court erred in charging the jury as follows: "Proof of the violent and turbulent character of the deceased is admissible only when it is shown prima facie that the deceased was the assailant, that the accused had been assailed, and that the defendant or defendants were honestly seeking to defend himself or themselves. But if you find from the evidence that the defendants were the aggressors, and that the defendants overtook the deceased, and one of them began or entered into a difficulty with the deceased, with a preconceived intent of having a difficulty, or began the attack, without provocation from the deceased, if he was a bad character, then the bad character of the deceased would not offer the defendant any excuse for taking his life, if he or they took his life; for it is the same offense to kill a bad person as it is to kill a good person." We see no error in this charge. It states the law, and the evidence authorized it. There was evidence to authorize the jury to find that Carden was walking peaceably along the public highway, with his coat on his arm, with his back towards the three men approaching him in a buggy, and that he was shot in the back of the head; and the prisoner himself stated that when the buggy was within 20 or 25 yards of Carden he recognized Carden. "Of course, I thought of the threats he had made towards me." And while this statement, that he thought of the threats, is connected with other statements in which the accused disclaimed any evil intention, the jury were authorized to believe the part that was unfavorable and to disbelieve the other part. They were au-

thorized to believe that, considering his position and the relative position of the three men, the single man would not have been the aggressor against the three. And, further, they were authorized to find the existence in the breast of the accused of bitter enmity against the man who was slain. For when the latter was found, he was found dead, with a wound in the back of the head and three wounds in his breast.

[3] 3. Exception is taken to the following charge of the court: "If you believe from the evidence that the deceased made a violent assault upon the defendants, such an assault as I have heretofore described, and that at the time the circumstances, as they appeared to him, were sufficient to excite the fears of a reasonable man that his own life and person and that the life and person of his brother were in danger, and he acted under the excitement of such fear, and not in a spirit of revenge, and if you believe that the defendant had the right to shoot to save his own life, or that of his brother, if you believe this is the truth of the case, you would be authorized to acquit the defendant." The exception is: "On the ground that, this being the summing up of the whole charge by the court, it tended to limit and explain the former parts of his charge that the jury must believe all three of the theories—that is, that violent assault was being made, and that defendant acted under the influence of the fears of a reasonable man that it was necessary for defendant to shoot to save his own life or that of his brother, and thus a burden greater than that fixed by law was placed upon him; and, further, that the effect of this charge was that it was not sufficient that the defendant acted under the fears of a reasonable man that his own life or person or that of his brother was in danger, and not in a spirit of revenge, but that the defendant must show in addition that the truth was that it was necessary to shoot to save his own life or that of his brother, and thus the law as defined in section 71 of the Code is excluded or limited in its application to the circumstances of this case, and deprives the defendant of the benefit of this law." This charge is not entirely exempt from the criticisms made upon it, and is not an accurate statement of the law of justifiable homicide as laid down in sections 70 and 71 of the Penal Code. The jury might have been led to conclude, from the last part of the charge, wherein the court said, "And if you believe that the defendant had the right to shoot to save his own life or that of his brother, \* \* \* you would be authorized to acquit the defendant," that this imported an actual necessity for the killing, which is the law applicable to cases falling under section 73 of the Penal Code, and the court was not then dealing with cases of that character.

But in the present case we do not think

this inaccuracy is sufficient to cause a reversal of the judgment in refusing a new trial, because in the excerpt with which we are now dealing, the court briefly, but accurately, summed up the contentions of the defendant himself, as made in his statement, and instructed the jury that, if these contentions were true, the defendant should be acquitted. The defendant in his answer said that Carden had threatened him, had in many instances showed an intent to take the life of the accused, had pursued him, and dogged his footsteps; that at the time of the killing, when the buggy occupied by the defendant and his companions was about to pass Carden on the right, the defendant thought of the threats which had been made against him by Carden, and hoped to pass Carden without being recognized; and that as the buggy drew abreast of Carden, one of the defendant's companions spoke to Carden, and said, "Hello, old man, where are you going?" at which Carden turned around very hurriedly "and threw his hand to his pocket this way [indicating], and said 'Damn you, I've got you at last!' \* \* \* As Carden threw his hand back that way at his pocket, and made the remark, 'Damn you, I've got you at last!' I reached in the foot of the buggy and got up Redge's pistol as soon as possible, and fired three times in quick succession. At that Mr. Carden fell. Then Redge hollered, 'My God!' and jumped out of the buggy and started towards Mr. Carden. As he did that, Mr. Carden came up and said, 'Damn you, I will get one of you!' Then I fired over the back of the buggy the fourth shot, and Mr. Carden fell." And then, after referring to a brief conversation and to their departure from the spot, the defendant added: "Gentlemen, as Mr. Carden made attempt to get his gun, I could not take any chances. I didn't have time to wait to see whether he was going to shoot. I knew he was a dangerous man, and would shoot me the first chance he got, and as quick as possible I reached and got Redge's pistol and shot Mr. Carden from the buggy. I shot him in self-defense, in defense of myself and defense of my brother. As I stated, I had rather have run from him the balance of my life than to kill him. Still I could not take any chances. I wanted to live myself. I appreciated my life, and didn't want him to kill me. I knew at that time he meant to do it. \* \* \* I had to shoot Mr. Carden to save myself and my brother." Upon reading this extract from the statement of the prisoner, it is clear that the court, in stating that, if the defendant shot to save his own life or that of his brother, the jury would be authorized to acquit him, made a succinct and palpably true statement of the law as applicable to that part of the case. And, that being true, we do not think that the mere fact that the excerpt from the charge of the court, set forth in the ground

of the motion with which we are concerned, considered as an abstract charge of the law of justifiable homicide as contained in Penal Code, §§ 70, 71, is not entirely accurate, should work a reversal in this case, especially in view of other portions of the court's charge, wherein he had fully and explicitly given the defendant the benefit of the doctrine of reasonable fears.

Thus the court charged: "While provocation by words, threats, menaces, or contemptuous gestures will in no case be sufficient to reduce a homicide below the grade of murder, I charge you that while words, threats, or menaces will not mitigate the offense, and while even the heat of passion supposed to be irresistible presents no excuse for homicide, nevertheless words, threats, or menaces may justify a killing, if the circumstances be such as to reasonably arouse the fears of a reasonable man that a felony is about to be committed upon him. And in this case, as in all cases, the motive that actuated the slayer is for your determination, and it is for you to say whether or not the circumstances were sufficient to justify the existence of such fears; and if you believe, or if you have a reasonable doubt, that the homicide was committed by defendant, Jim Crawley, not in a spirit of revenge, but under the fears of a reasonable man that his life was in danger, or that a felony was about to be committed upon him, then you will acquit the defendant. \* \* \* If the facts and circumstances surrounding defendant at the time of the shooting, if he did shoot, were such as to excite the fears of a reasonably courageous man that a felonious assault was intended to be inflicted upon him, and he shot under the influence of those fears, the verdict should be justifiable homicide; that is, not guilty. \* \* \* It would be no excuse for the defendant that he acted under the fear, unless the evidence shows that the circumstances were sufficient, at the time the fatal shot was fired, to excite the fear of a reasonably courageous man that a felony was then about to be committed upon him by the deceased; and it must appear that the defendant really acted under the impression of those fears in doing the killing, and not in a spirit of revenge. The defendant would be justifiable, however, whether in fact there was any real danger or not, if the circumstances proven were sufficient to excite the fears of a reasonable man that a serious bodily injury amounting to a felony was about to be inflicted upon them, or one of them, at the time the fatal shot was fired."

[4] 4. Even if the admission in evidence of a "no bill" returned by the grand jury of the county in the case of William Carden (the decedent), charged with the murder of Virgil Crawley (a brother of the defendant), was irrelevant, it was not of sufficient materiality to be ground for a reversal. We do not see how this paper could have prejudiced

the minds of the jury against the Crawleys on trial.

[5, §] 5, 6. The rulings made in headnotes 5 and 6 require no discussion.

Judgment affirmed. All the Justices concur.

(137 Ga. 308)

**WOOD v. BOARD OF EDUCATION OF WASHINGTON COUNTY et al.**

(Supreme Court of Georgia. March 13, 1912.)

*(Syllabus by the Court.)*

**1. MANDAMUS (§ 72\*)—SUBJECTS OF RELIEF—ACTS OF OFFICERS—DISCRETIONARY ACTS.**

An officer vested with a discretionary power may, in a proper case, be compelled by mandamus to exercise such discretion. But the writ of mandamus does not lie to control the conduct of an officer, vested with a discretion, in the exercise thereof, unless such exercise has been so capricious or arbitrary as to amount to a gross abuse.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. § 134; Dec. Dig. § 72.\*]

**2. SCHOOLS AND SCHOOL DISTRICTS (§ 48\*)—OFFICERS—QUALIFICATIONS—EXAMINATION.**

At least 90 days before the election of a county school commissioner, all candidates for the position are required to be examined by the president of the county board, or by some one appointed by him or the board for that purpose, upon written or printed questions. All applicants standing the examination are required to make 85 per cent. before they shall be declared by the board to be eligible to hold the office, and it is the duty of the county board of education to declare those who fail to make the necessary per cent. ineligible.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. §§ 100-111; Dec. Dig. § 48.\*]

**3. MANDAMUS (§ 75\*)—SUBJECTS OF RELIEF—ACTS OF OFFICERS—BOARD OF EDUCATION.**

In grading the examination papers, no exact method is prescribed for arriving at the valuation to be placed upon an answer to a question, unless it is perfect or an absolute failure. The matter of gradation of particular answers, and the determination of whether a candidate has made the necessary percentage, are left largely in the discretion of the board, and the exercise of such discretion will not be controlled by mandamus, unless it falls within the rule stated in the first headnote above.

[Ed. Note.—For other cases, see Mandamus, Dec. Dig. § 75.\*]

**4. CHARGE OF COURT—SUFFICIENCY.**

The charge of the presiding judge was in general accord with the rulings above made. If there were any verbal inaccuracies, when taken in connection with the entire charge, they were not such as to furnish ground for a new trial. Nor was there merit in the grounds of the motion for a new trial which set up that the judge had omitted to charge certain pertinent principles of law.

**5. MANDAMUS (§ 187\*)—REVIEW—QUESTIONS OF FACT.**

The evidence was not such as to require a finding in favor of the applicant for the writ of mandamus, and the jury having found in favor of the respondents, and the presiding judge having approved their finding, this court will not interfere.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. §§ 427-437; Dec. Dig. § 187.\*]

Error from Superior Court, Washington County; B. T. Rawlings, Judge.

Application by Wade H. Wood for writ of mandamus to the Board of Education of Washington County and others. Judgment for respondents, and relator brings error. Affirmed.

Wade H. Wood applied for the writ of mandamus against the members of the board of education of Washington county. He alleged, in brief, as follows: He is a resident, citizen, and taxpayer of that county, and also has an interest in the office of county commissioner of education, commonly known as county school commissioner, being the person commissioned to hold office until the end of the present term, with the right to stand for election for another term. The county board of education has jurisdiction over the public school system of the county. One of the official duties is to hold examinations of all candidates for the office of county school commissioner, at least 90 days before the day of the election. An examination was held by them on June 30, 1910. The petitioner and J. C. Harman stood the examination, both being candidates for the office of county school commissioner. The petitioner made more than 85 per cent., according to the true and correct grading, marking, and rating made by the board, and is eligible to hold the office. Harman failed to make 85 per cent. in the examination, according to the true and correct grading, marking, and rating made by the board, and he is therefore ineligible to hold the office. It is the official duty of the board to declare eligible any candidate who made 85 per cent. in the examination, and to declare ineligible any candidate who failed to make such per cent. At a meeting of the board the petitioner made a formal demand upon them to discharge this official duty, by declaring him eligible and by declaring Harman ineligible to hold the office. The board failed and refused to declare Harman ineligible. It was prayed that they be required to do so by a writ of mandamus. By amendment it was alleged that Harman failed to make 85 per cent. in his examination, by the true and correct grading thereof, and that his papers and answers to the questions propounded were not of the value of 85 per cent., and that "the result, if any, made by said board was incorrect, and arbitrarily made."

The board of education answered, in brief, as follows: The examination was held, and both Wood and Harman passed it, and made the required legal grading to render them eligible to hold the office of county school commissioner. The grading of two examinations was set forth in detail, showing the average mark of Wood to be 94 <sup>9</sup>/<sub>11</sub>, and that of Harman to be 87 <sup>2</sup>/<sub>11</sub>. As the result of such examination and grading, the board declared both candidates to be eligi-

ble. They refuse to declare Harman ineligible, because he is eligible, and has been so declared. They deny that the grading was the exercise of an arbitrary decision, but say that it was the result of "careful, thoughtful, and intelligent consideration of the questions and answers, in an effort to arrive at the true valuation and merit of each and every question; that the results above set out represent its most conscientious finding, without favor or prejudice to any party or parties."

The case was submitted to a jury, and a verdict was rendered in favor of the respondents. The applicant moved for a new trial, which was refused, and he excepted.

J. J. Harris and A. R. Wright, for plaintiff in error. E. W. Jordan, T. W. Evans, and W. M. Goodwin, for defendants in error.

LUMPKIN, J. (after stating the facts as above). [1] It is declared by the Code of this state that mandamus does not lie "to a public officer who has an absolute discretion to act or not, unless there is a gross abuse of such discretion; but it is not confined to the enforcement of mere ministerial duties." Civil Code 1910, § 5441. "Ordinarily the writ of mandamus is a remedy for official inaction. It does not lie to control the conduct of an officer vested with a discretion, except where the exercise of that discretion has been so capricious or arbitrary as to amount to a gross abuse." *City of Atlanta v. Wright*, 119 Ga. 207, 45 S. E. 994; *Patterson v. Taylor*, 98 Ga. 646, 25 S. E. 771; *Dale v. Barnett*, 105 Ga. 259, 31 S. E. 167.

[2] At least 90 days before the day of election for county school commissioner, it is required by law that all candidates shall be examined by the president of the county board, or by some one appointed by him or the board for that purpose, upon written or printed questions, which shall be furnished to the board by the state school commissioner. The general subjects to be covered by the examination are stated, and it is declared that "all applicants standing said examination shall be required to make 85 per cent. in said examination before they shall be declared eligible to hold the office of county school commissioner by said board of education. Those who fail to make the per cent. shall, by the board, be declared ineligible to hold said office of county school commissioner."

[3] No exact basis or method of grading the examination papers is prescribed. This is left, to a considerable extent, to the sound discretion of the board. Indeed, it might be very difficult to prescribe by legislative enactment any exact system by which the answer to a given question should be graded. An applicant may answer the question partly correctly, and yet not entirely so. Shall his answer be rejected altogether, be-

cause not perfect? Or shall it be accepted as perfect, when it is not so? Or how can a Legislature or court declare, in such a case, the exact percentage which shall be allowed for the answer? Suppose that a problem in mathematics should be given, and the applicant should adopt the correct method of solution, and correctly pursue it throughout, except that in some final addition or division he should make a slight error; can a Legislature, or a court, or a jury determine with precision how such an answer shall be graded, or what mark shall be placed upon it? Necessarily a considerable latitude of discretion must be involved in such cases. Sometimes a question must be answered so categorically that the answer is essentially entirely right, or entirely wrong; but many questions are not of that character. A jury of the vicinage, though composed of "good men and true," and sworn a true verdict to make according to the evidence, might find no small difficulty in supervising the grading fixed upon answers by the board and the declaration by them of the average mark which had been attained by the candidates.

[4] Much evidence was introduced as to the manner in which a gradation of the examination papers had been reached, and as to whether the final declaration was correct. The charge of the court was in substantial accord with the law as above declared. There may have been some slight departure from perfect verbal accuracy, but there was nothing of such a character as to require a reversal. Courts and juries will not undertake to merely supervise and declare erroneous every discretionary decision of the board of education in regard to an examination.

[5] We do not think that the evidence was of such a character as to require a finding that the board of education exercised their discretion so capriciously or arbitrarily as to amount to a gross abuse. Nor were any of the complaints made of excerpts from the charge of the court, or of omissions to charge certain things, such as to require a new trial.

Judgment affirmed. All the Justices concur.

(137 Ga. 744)

GARRISON et al. v. PERKINS, Ordinary, et al.

(Supreme Court of Georgia. March 2, 1912.)

(Syllabus by the Court.)

1. COUNTIES (§ 192\*)—TAXATION—POWER TO LEVY TAX.

Any county in the state may make requisition for its quota of the male convicts to be employed upon the public roads of the county, and it is competent for the county authorities having charge of the roads and revenues of the county to levy a tax to defray the expense incurred in the maintenance, keeping, and equip-

ment of the force of hands obtained from the state.

[Ed. Note.—For other cases, see Counties, Cent. Dig. §§ 300-302; Dec. Dig. § 192.\*]

## 2. BRIDGES (§ 20\*)—CONSTRUCTION—CONTRACT.

County authorities having charge of the roads and revenues of a county cannot build bridges of the character referred to in section 387 of the Code of 1910, except by letting out the contract therefor according to the provisions of section 387 et seq.

[Ed. Note.—For other cases, see Bridges, Cent. Dig. §§ 37-47; Dec. Dig. § 20.\*]

## 3. BRIDGES (§ 20\*)—LIABILITIES—MATERIALS FOR BRIDGE.

Where the ordinary of a county, having charge of county matters, bought steel and other material, and used the same in the construction of bridges of the character just referred to, the purchase price of such material was not a valid charge against the county, which could be enforced by the vendor of the material.

(a) And where money was borrowed from another person to pay for such material, it was not competent for the ordinary to levy a tax whereby to raise funds to repay such loan.

[Ed. Note.—For other cases, see Bridges, Cent. Dig. §§ 37-47; Dec. Dig. § 20.\*]

## 4. TAXATION (§ 301\*)—LEVY—AMENDMENT.

The court did not err in allowing and directing an amendment of the tax levy; but in the present instance the amendment was not sufficiently specific.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 483-495, 499-508; Dec. Dig. § 301.\*]

## 5. TAXATION (§ 301\*)—LEVY—PUBLICATION OF NOTICE.

Where the ordinary has advertised a copy of the order containing the tax levy at the door of the courthouse for the time prescribed by the statute, failure to publish the same in a public gazette will not render the levy void.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 483-495, 499-508; Dec. Dig. § 301.\*]

## 6. EMPLOYMENT OF CONVICTS — RENTING FARM.

Under the evidence in the case, the court was authorized to find that the ordinary had not been guilty of any illegal act in renting the farm upon which to work the convicts.

## 7. TAXATION (§ 301\*)—LEVY—VALIDITY—QUESTION OF FACT.

Whether the tax levy, as it will stand when amended, will be exorbitant, will be a question of fact, to be decided upon the evidence to be submitted on the next hearing of the case.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 483-495, 499-508; Dec. Dig. § 301.\*]

*(Additional Syllabus by Editorial Staff.)*

## 8. CONVICTS (§ 10\*)—CONTRACTS FOR LABOR—"ANY COUNTY."

In Act Sept. 19, 1908 (Acts 1908, p. 1119), relating to the letting out of convicts to counties and municipalities, and providing that any county may rent a farm on which to work the convicts, "any county" means every county in the state, and is not limited to counties having any particular system of road laws.

[Ed. Note.—For other cases, see Convicts, Cent. Dig. §§ 19, 20, 22-29, 32; Dec. Dig. § 10.\*]

For other definitions, see Words and Phrases, vol. 1, pp. 412-433; vol. 8, pp. 7575-7577.]

## 9. BRIDGES (§ 20\*)—PUBLIC WORKS — STATUTORY PROVISION—"SHALL."

In Civ. Code 1910, § 387, providing that the proper officers shall cause courthouses, bridges, etc., to be built or repaired by letting out the contract therefor to the lowest bidder, the word "shall" is not to be construed as "may," but the statute is mandatory.

[Ed. Note.—For other cases, see Bridges, Cent. Dig. §§ 37-47; Dec. Dig. § 20.\*]

For other definitions, see Words and Phrases, vol. 7, pp. 6459-6469; vol. 8, p. 7799.]

## 10. TAXATION (§ 303\*)—LEVY—SUFFICIENCY.

An amended item of tax levy, apportioning a certain amount to build and repair bridges by letting out to the lowest bidder, by hiring hands, by the purchase of material and use of convicts on the county chain gang, and a certain sum to extraordinary work on the public roads, which cannot be done by the road hands subject to road duty, such work to be done by the use of convicts on the county chain gang or otherwise, is not sufficiently definite, since it gives no indication of the rate required for work on public roads by the use of convicts, and does not show what portion would be required for bridges, which could only be built under contract let out as prescribed by Civ. Code 1910, § 387 et seq.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 497; Dec. Dig. § 303.\*]

Fish, C. J., and Lumpkin, J., dissenting in part.

Error from Superior Court, Banks County; C. H. Brand, Judge.

Action by J. M. Garrison and others against Logan Perkins, Ordinary of Banks County, and others. Judgment for defendants, and plaintiffs bring error. Reversed.

J. M. Garrison, B. F. Suddeth, and F. M. Henderson filed their equitable petition against Logan Perkins, ordinary, and George W. Wiley, tax collector, of Banks county, seeking to enjoin the enforcement of a certain tax levy, and also to enjoin the payment of certain money to the Atlanta National Bank.

At the hearing the following statement of facts agreed upon by both parties was introduced in evidence:

"(1) It is agreed that the county of Banks has not adopted any of the alternative road laws.

"(2) That the county affairs are managed by the ordinary.

"(3) That Banks county, through her ordinary, has requested and obtained her share of the state convicts, in accordance with the Acts of 1908, averaging about 20 convicts per annum, with misdemeanor convicts.

"(4) That the four bridges referred to in the defendant's answer cost about \$4,000. That the material, such as steel beams, lumber, etc., was purchased by private contract, by the ordinary; the material for each bridge costing over \$300. The bridges were built by said ordinary, by the use of the convict labor, together with one superintendent. No contract for the erection of any of said bridges was made or let to the lowest bidder, and no contract for the building of said bridges was entered on the minutes of said

ordinary, and no order of any sort was entered on said minutes requiring the purchase of any material; the only orders on the minutes relating to the bridges being the orders set forth in the answer relative to borrowing money to pay for the same. The money borrowed from the Atlanta National Bank, and now due said bank, was used in part to pay for said bridges mentioned. The greater portion of the sum of \$3,837, set forth in defendants' answer as having been paid out for public improvements, etc., during the year 1910, was paid out on the four bridges above referred to. There is still due the Onega Bridge Company \$1,200, balance for the steel bridge mentioned as being one of the bridges.

"(5) It is further agreed that the cost of the convicts for the year 1910, including guards, feed, clothing, tools, etc., amounted to the sum of \$6,229.34, and that this cost was paid out of the money borrowed from the Atlanta National Bank during the year 1910, and for which sums said bank holds the obligations of Banks county, as set forth in said petition and answer.

"(6) It is further agreed the expense of court, county officers, paupers, coroners, etc., amounted to the sum of \$7,092, which has been partly paid from the funds obtained from the Atlanta National Bank, and partly from the taxes raised for such purposes during the year 1910.

"(7) It is further agreed that the tax levy of September 29, 1910, item 2, of 70 cents on the \$100, will amount to about \$12,000, and is intended to be used by the ordinary to pay for some small repairs on the courthouse and jail, to pay the sum of \$1,200 due for said steel bridge material, and the balance to repay the Atlanta National Bank the sum of \$3,837.07 expended on bridges, etc., and \$6,229.34 expended for the care and use of convicts, as set forth in the defendants' answer, and other expenses that may be chargeable to said item 2."

Affidavits were introduced by the plaintiffs to show that certain work done upon the roads of the county as extraordinary work was not work of that character, within the meaning of the expression "extraordinary work," as used in the statutes; and affidavits were introduced by the defendants to show that the work classed by the ordinary as extraordinary work was of the character claimed, and that other work which the ordinary had had done by convict labor was in the nature of public improvements, and to show that certain roads which were opened up and worked out were a public utility.

The tax levy brought under review by the petition is included in an order passed September 29, 1910, and the levy is as follows:

"Item 1. Ten cents on the hundred dollars to pay the legal indebtedness of the county due or to become due during the year.

"Item 2. Seventy-five cents on the hundred dollars to pay for building and repairing

bridges, courthouse, jail, or other public improvements.

"Item 3. One cent on the hundred dollars to pay sheriff's, jailer's, or officers' fees that may be legally entitled to, etc.

"Item 4. One-half cent on the hundred dollars to pay coroners all fees that may be due them by the county for inquests.

"Item 5. One cent on the hundred dollars to pay the expenses of the county for bailiffs at court, nonresident witnesses in criminal cases, fuel, servants' bill, stationery, etc.

"Item 6. One cent on the hundred dollars to pay jurors per diem compensation.

"Item 7. Five cents on the hundred dollars to pay expenses incurred in supporting the poor of the county.

"Item 8. One-half cent on the hundred dollars to pay charges for educational purposes, to be levied only in strict compliance of the law.

"Item 9. Six cents on the hundred dollars to pay any other legal charges against the county."

It is contended that the levy is void upon the following grounds, among others:

(1) Because said tax levy does specify the per cent. levied on the state tax for each specified purpose enumerated therein. (2) Item 2 is void for the reason that it fails to specify the per cent. levied upon the state tax; further, because it does not purport to be levied for the items mentioned according to the language of the Code, in that it omits the words "according to contract." (3) Because the levy of 75 cents on the \$100 is an exorbitant tax, and an unnecessary tax, and in violation of section 505 of the Code of 1910.

After the hearing upon the pleadings and the evidence, the court below rendered the following judgment:

"It is ordered that the injunction prayed for, enjoining the ordinary from paying the amount due the Atlanta National Bank is refused, and the restraining order heretofore granted, restraining the ordinary from paying the amount due said bank, is hereby dissolved. Being of the opinion that the ordinary was authorized to levy a tax for the purpose of building and repairing bridges, and for the purpose of maintaining the convicts on the roads of the county, but that the levy for this purpose should have been more specific than as set forth in the levy as made it is ordered that item 2 of the tax levy, as exhibited to the petition, be amended by the ordinary, so as to specify in different items the amount that is to be collected for each of the items set forth therein, not changing the aggregate of said item, to wit, 75 cents on the \$100; that is to say, let the item show how much of this aggregate amount is to be used for building and repairing bridges, how much for courthouse and jails, and how much for other public improvements, such as the work of convicts upon the road, and the like. When the item of the tax levy

above referred to is amended as herein directed, the above injunction, praying that the tax collector and the ordinary be enjoined from collecting the taxes due by the plaintiffs in the petition, be and the same is hereby refused, and the restraining order heretofore granted, restraining the collection of the taxes due by the plaintiffs, is hereby revoked and set aside. It is further ordered that the restraining order heretofore granted is hereby revoked, so far as it applies to any part of the tax levy, except that embraced in item 2 of said levy, and is revoked as to said item when the same shall have been amended as herein provided."

This judgment was excepted to, upon the ground, among others, that the court was not authorized to allow the ordinary to amend his tax levy.

The ordinary amended item 2 in pursuance to the order of the court, and, as amended, that item reads as follows:

"Item 2. Seventy-five cents on the hundred dollars to pay for building and repairing bridges, courthouse, jails, or other public improvements. The amount embraced in this item shall be divided and apportioned among the different subjects embraced herein as follows: Repairing courthouse and jail, 2 cents. Building and repairing bridges by letting out to lowest bidder, by hiring hands, by purchase of material and use of convicts on the county chain gang, or in any other way that may be for the public good and agreeable to law, 50 cents. Extraordinary work on the public roads, which cannot be done by the road hands subject to road duty, such work to be done by the use of convicts on the county chain gang or otherwise, as may be to the best interest of the county, 23 cents."

Other exceptions, in so far as they are material, are referred to and discussed in the opinion.

H. H. Dean, for plaintiffs in error. A. J. Griffin, Howard Thompson, and Cobb & Erwin, for defendants in error.

BECK, J. (after stating the facts as above). [1] The most important question in this case grows out of the attack made upon the validity and the sufficiency of item 2 of the tax levy brought into consideration, and the issue which is joined by counsel for the defendant upon the attack made. The right of the county of Banks to take over its quota of convicts under the provisions of the act of the General Assembly relating to the employment of convicts, approved September 19, 1908 (Acts 1908, p. 1119), hereafter referred to as the act of 1908, and to incur the necessary expenses for the maintenance and use of the force of convicts acquired under the provisions of that act, is brought into question. Neither at the time of making the requisition for the convicts nor subsequently thereto was either of the alternative

road systems in force in this county. The system of working the public roads which prevailed prior to the adoption of the alternative road law, which for convenience may be called the "old system," prevailed in Banks county at the time of its requisition for its share of the convicts; and it is contended by counsel for plaintiffs that the county, not having adopted either of the alternative road laws, was without authority to take the convicts under the provisions of the act of 1908 and incur expense in connection with their use upon the public roads and bridges or in other public works of the county. On the other hand, counsel for the defendants insist that the act of 1908 worked an entire revolution in the systems of working the roads in any county which might make requisition for its quota of convicts, irrespective of the system of working the public roads prevailing in the county at the time of making the requisition. We differ entirely with the views of counsel for the plaintiffs upon this subject. And while we do not agree with counsel for the defendants that the act of 1908 worked an entire revolution in the prevailing system for working public roads in any county making requisition for convicts, we do think that any county in the state, whatever its road system might be at the time, could make requisition for convicts under the provisions of the act of 1908, and, having obtained the convicts in accordance with its application, could employ them conformably to the purposes of that law, keeping in view other laws upon our statute books which relate to the same subject and matters germane thereto.

Treating the statute embodied in the act of 1908 as applicable to Banks county and its system of working the public roads, this statute and those already in force, relating to kindred subjects, must be construed together. In the act of 1908, we find the following provisions: "That all male felony convicts, except such as are now required by law to be kept at the state farm, may, after March 31, 1909, be employed by the authority of the several counties and municipalities upon the public roads, bridges, or other public works of said counties or municipalities as hereinafter provided. On or before the 10th day of February, 1909, and annually thereafter, prior to the 10th of February the prison commission shall communicate with the county authorities of the state and ascertain those counties desiring to use convict labor upon their public roads, and said counties shall, through their proper authorities, advise the prison commission in writing, stating whether they desire to use such labor upon their roads, and the number desired." Section 2. "That any county may purchase, rent, and maintain a farm upon which to work any number of its convicts in connection with working its convicts upon its public roads, bridges, and other public works, and in support of the county institu-



tions." Section 9. The language employed in the portions of the act we have quoted shows that it was the plain purpose of the Legislature that any county might obtain convicts to be employed by it upon its roads, bridges, and other public works.

[8] The expression "any county" means every county in the state, and its effect is not limited to counties having any particular system of road laws. There is nothing in the act which seems to contemplate that any plan of working the public roads taking convicts from the state, which might be in force at that time in the county, should be destroyed or abandoned. Such a construction as that would result, possibly, in some counties, in the entire neglect for years of many of their roads. In case a county could obtain but a small number of convicts, because of demands made by other counties for their quotas, and such county had a large number of roads, it would be possible that the greater part of the roads could not be worked and rendered fit for use for a long period of time. But certainly the act contemplated a step forward in the improvement of our public road system, and intended to put it in the power of every county to make progress in the direction of maintaining safe and available highways. The main purpose of the act, as shown by its title, is "to provide for the future employment of felony and misdemeanor male convicts upon the public roads of the several counties of the state." While this act may not be a tax act, strictly speaking, it gives, in unmistakable terms, certain rights to any county desiring to use convict labor upon its public roads, and in language equally unambiguous it imposes certain correlative duties; and from the plain language conferring those rights and imposing those duties follow certain necessary implications. Among the necessary implications from the language in reference to the employment of convict labor upon the public roads by the counties is that measures must be taken which are indispensable to effectuate the purposes of the act in any county claiming the benefits of the act. Road machinery, tools, camps, a farm, such as is referred to in section 9 of the act, would have to be procured. Material would have to be purchased to be used in building up and improving the roads. Of course, the quantity, quality, and character of the tools, implements, machinery, and materials procured would necessarily rest largely in the discretion of the proper county authorities, varying in amount, character, and cost, according to the needs of each county, and depending in a large measure upon the character of the roads and the number of convicts employed. If, under the provisions of this act, the counties have the rights and the corresponding duties which we have indicated above, it would seem to follow that they would have the power to raise by taxation the funds

necessary to defray the cost incurred in procuring and maintaining the equipment indispensable to the effective employment of the convicts.

In the case of *Pennington v. Gammon*, 67 Ga. 456, it is said: "Under various acts of the General Assembly of this state, the last of which was passed in the year 1879, any county may organize a chain gang to be composed of convicts, who may be employed in working the roads, streets, or on other public works. The power to make provision for their support, safe-keeping, and *for their constant and diligent employment*, was vested originally in the ordinaries of the counties, but now in the commissioners of roads and revenues wherever they have been provided for. Code, §§ 4814, 4815; Acts 1874, p. 24; Acts 1878-79, p. 167. By virtue, therefore, of the duty imposed, a correlative right exists, even if not specially empowered, in these commissioners, not only to levy taxes for the support of these convicts, but to provide means for their doing the work specified, and *for their constant and diligent employment* therein." We have been asked to review and overrule the *Pennington Case*; but it seems to us that the conclusions reached embody a sound principle of law, and should be permitted to stand. "If what the law requires to be done can only be done through taxation, then taxation is authorized to the extent that it may be needed, unless it is otherwise expressly declared. The power to tax in such cases is not an implied power, but a duty growing out of the power to contract. The one power is as much express as the other. *Ralls County v. U. S.*, 105 U. S. 733, 26 L. Ed. 1220. Neither counties nor municipal corporations of any character possess this power [the power to tax] to any extent, unless conferred by the Constitution or the laws of the state, and therefore such power can only be exercised when delegated in plain and unmistakable terms, or when it results by necessary implication from other powers expressly granted." *Albany Bottling Co. v. Watson*, 103 Ga. 505, 30 S. E. 270. See, also, in this connection, *Wright v. Floyd County*, 1 Ga. App. 582, 58 S. E. 72.

Section 654 of the Code of 1910 provides: "The county authorities of the several counties, having charge of the roads and revenues of each of said counties, are authorized and required to provide for the grading of the public roads of their respective counties, where said roads are too steep, too rough, or too boggy for practical use or the hauling of ordinary loads; and said officials are authorized and required to provide for any other extraordinary work on the public roads of their respective counties which cannot be done by the road hands subject to road duty under the laws of this state." And section 655 provides: "Said officials may have said work enumerated in the preceding section done by use of the county chain gang, by

contract let to the lowest bidder, or otherwise as may be to the best interest of their respective counties; and said officials shall be authorized to pay for said work out of any funds of their said counties not otherwise appropriated." These two sections are taken from the Acts of 1880-81 (Acts 1880-81, p. 139). Subsequently it was enacted that, "on the application of one or more citizens of any county of this state against the county commissioners of roads and revenues of such counties where by law supervision and jurisdiction is vested in such board of commissioners of roads and revenues over the public roads of such counties and the overseers of the public roads complained of, or the ordinaries of such counties where by law supervision, control and jurisdiction over such public roads is vested in the ordinaries and the overseers of the public roads that may be complained of, either, both, or all of said named parties, as to the facts and methods of working the public roads in the respective counties may justify, which application or petition for mandamus shall show that one or more of the public roads of such county of such petitioner's residence are out of repair, and do not measure up to the standards and do not conform to the legal requirements as prescribed by sections 632, 633, and 654, and are in such condition that ordinary loads, with ordinary ease, cannot be hauled over such public roads, the judges of the superior courts of this state are hereby authorized and given jurisdiction, and it is hereby made their duty, upon such showing being made, to issue the writ of mandamus against such parties having charge of and supervision over the public roads of such county, and to compel by such proceedings the building, repairing and working of such public roads as are complained of, up to that standard now required by existing laws of this state as embodied in said sections, and so that ordinary loads, with ordinary ease and facility, can be continuously hauled over such public roads; and the judges of the superior court shall, by proper order, in the same proceedings compel the work done necessary to build, repair and maintain such public roads up to the standard so prescribed." Civil Code 1910, § 5441.

Construing these two sections together, it would seem that, independently of the act of 1908, is the imperative duty of the county authorities having charge of county affairs to do such work on the public roads as might be denominated extraordinary work. And if such extraordinary work was necessary, and there were no funds in the county treasury "not otherwise appropriated," funds necessary to the doing of the extraordinary work might be raised by taxation to meet the necessary expenses incident to the doing of such extraordinary work. But whether construing sections 654 and 5441 together would authorize this conclusion, certainly when sections 654 and 5441 and the act of 1908, authorizing

the employment of convicts, are construed together, no other conclusion can be reached than that the funds needful to carry out such work can be raised by taxation. Otherwise we would have a distinct provision in our Code making it the duty of the superior court to issue a peremptory order, upon a proper showing and proof supporting that showing, to the authorities having in control the matter of working the roads to do certain work, and yet leaving those authorities, where no funds were in the treasury of the county unappropriated, without the means of purchasing material and taking other necessary measures to effectually do the work which they might be ordered to perform. We have referred to sections 654 and 5441, in connection with the act of 1908, as strengthening the reasoning which leads to the conclusion that, while in none of the sections last referred to nor in the act of 1908 is there expressly given the power to tax, the taxing power to accomplish the purpose of the statutes last referred to is necessarily implied. But the work upon which the convicts may be employed under the act of 1908 is not confined merely to the doing of "extraordinary work" upon the public roads, in the sense in which the term "extraordinary work" is used in section 654.

[2] Thus far our opinion coincides, in the main, with the position taken in this case by counsel for the defendants. But we cannot go to the extent of holding that the ordinary of Banks county was authorized to purchase the necessary materials, such as steel, timber, and cement, and from them, by the employment of convict labor, construct bridges which, under the provisions of sections 387 et seq. of the Code of 1910, must be built or repaired by letting out the contract therefor to the lowest bidder, or in accordance with "sealed proposals" invited under the provisions as to specifications, etc., required by the section last referred to. Section 387 reads as follows: "Whenever it becomes necessary to build or repair any courthouse, jail, bridge, causeway, or other public works in any county in this state, the officer having charge of the roads and revenues and public buildings of such county shall cause the same to be built or repaired by letting out the contract therefor to the lowest bidder, at public outcry, before the courthouse door, after having advertised the letting of said contracts as hereinafter provided: Provided, that such county authorities shall have authority to reject any and all bids at such public letting; and if in their discretion the public interest and economy require it, such county authorities may build or repair any public buildings, bridges, causeways, or other public property in the county, by contract or sealed proposals, to be invited under the same provisions as to specifications and like informations as are provided in the following sections." The requirement of this statute, that the building of any bridge or oth-

er public work shall be by contract let out as provided in this and the following sections, is mandatory.

[9] It is insisted that the word "shall," where it appears in section 387, can be construed as "may," and should be so construed in order to reconcile the language of that section with section 747 of the Code of 1910, which contains the following language: "The ordinaries of the several counties have authority to appoint the places for the erection of public bridges, county ferries, turnpikes, and causeways, and to make suitable provision for their erection and repairs by letting them out to the lowest bidder, hiring hands, or in any other way that may be for the public good and agreeable to law." It is insisted that these two sections must be construed in *pari materia*, and that they may be harmonized by construing "shall" as "may" in section 387. While it is sometimes permissible to substitute "may" for "shall" in the construction of statutes, it is not permissible to so construe the word "shall" in the present instance. Section 387 is taken from the act of 1879 (Acts 1878-79, p. 159), and is entitled "An act to regulate the manner of letting out contracts to build or repair public bridges, causeways, or public works in the several counties of this state," etc. But the body of the act (and the act is now embraced in the Code of 1910) contains the language which we have quoted above, which not merely regulates the manner of letting out contracts, but commands that in the instances specified bridges and other public works shall be repaired or built by letting out the contract. In view of the evils which it is probable the Legislature had in view as a possible result of erecting bridges and other public works without letting out contracts therefor after due publication, it can scarcely be doubted that by the use of the word "shall" a legislative mandate, and not a mere permission, was imported into this statute.

Besides, in its ordinary signification, "shall" is a word of command, and the context ought to be very strongly persuasive before that word is softened into a mere permission. And, moreover, the substitution of "may" for "shall" in that part of section 387 now under consideration is not necessary to the harmonious construction of the two statutes embraced in sections 387 and 747. Section 747 is taken from an older act than section 387, and it is insisted that section 387 repeals section 747. But if both sections can stand, both having been embodied in the Code, they should be allowed to do so, and that construction be adopted which destroys neither. It may frequently happen that bridges are to be built in connection with the public roads which do not cost \$300. Such bridges may be built under provisions made by the proper county officers, "by hiring hands, or in any other way that may be for the public good and agreeable to law"—

using words taken from section 747. And under the construction which we have given the act of 1908, instead of hiring hands, the county officers having in charge the public roads of the county may, in connection with other work upon the public roads, employ convict labor in building and repairing the bridges which cost less than \$300. This construction does no violence to either of the two sections last under consideration, and has the effect of harmonizing those two sections, and leaves the mandatory provisions of section 387, providing that bridges shall be built by letting out the contract therefor, to stand unimpaired.

[3] With those provisions in section 387 thus clearly defined, it necessarily follows that the ordinary of Banks county was without authority to construct bridges costing over \$300, by purchasing steel and other material from which to construct such bridges by the use of the labor of the convicts. His contract for the purchase of this steel and other material was unauthorized by that law; and those who sold the steel and other material to him could not enforce, as against the county, a contract for the purchase price of the same. We do not think that the persons furnishing the steel and material for the building of such bridges as referred to in section 387 would stand in any better position than contractors building or repairing bridges where sections 387, 388 and 389, Civil Code of 1910, have not been complied with, and the law expressly declares: "And it shall be unlawful to let out any contract for building or repairing any public building, bridge or other public work, unless the provisions of these sections are complied with; and any contractor doing, or having done, any work of the kind in any other manner shall not be entitled to receive any pay therefor." To hold that materialmen and manufacturers of material to be employed in the construction of bridges or other public buildings could, without respect to the strict provisions of the statute, furnish materials of their manufacture to the ordinaries of the various counties of the state and collect for the same, and that the ordinaries could use such materials in the building of bridges and other public buildings by hiring hands or the employment of convicts, would enable the ordinaries or other officers having control of public roads and county matters to erect whatever public structures they saw fit, and the taxpayers of the county would be subject to a tax levy ordered to defray the cost of such structures. This would in effect wipe from the statute books section 387, with its wise and salutary provisions, which secure, among other benefits, competitive bidding for the erection of public buildings, bridges, etc., coupled with the notice, contemplated by the statute, to be given to the public and those who may be interested, which might have the effect to check extravagance upon the part of officers

having in charge the county revenues, and the further effect of preventing other evils plainly in contemplation of the lawmaking body at the time of the passage of the act of 1879.

It follows, from what we have said above, that the expenses necessarily incurred in the keeping, maintenance, and equipment of the convicts is a valid charge upon the county, and that it was legal for the ordinary to levy a tax to raise the money to meet that obligation, but that a claim against the county for the purchase price of steel and other material for the bridges erected by the ordinary, which cost as much as \$300 or more, is not a valid claim against the county. No question is made in the pleadings as they stand that it was competent for the ordinary to pay so much of the loan from the Atlanta National Bank as had been used in the discharge of valid claims against the county; and in the brief of counsel for the plaintiffs it is distinctly conceded "that the question as to whether the Atlanta National Bank should be enjoined depends upon the legality of the tax levy. \* \* \* If the money was properly expended, the bank should be reimbursed; if the money was illegally expended, it was an illegal debt, and the citizens cannot pay the taxes for that purpose." This concession is based upon counsel's construction of the decision in the case of *Butts County v. Jackson Banking Co.*, 129 Ga. 810, 60 S. E. 149, 15 L. R. A. (N. S.) 567, 121 Am. St. Rep. 244. We do not, however, construe the statement of counsel just quoted as going to the extent of conceding that a loan of money to be used in defraying current expenses (not merely to supply a casual deficiency of revenue) would be a legal charge against the county. For it is distinctly held in the *Butts County Case* that "county commissioners have no authority to contract in behalf of a county for a loan of money (not to supply a casual deficiency of revenue) to be used in defraying current expenses, although the notes which evidence the loan be payable within the current year, and the general design be to discharge them from the anticipated revenue of that year." The contentions of the plaintiffs in this regard can be made clear at the next hearing of this case; for the judgment must be reversed because of the court's refusal to enjoin the tax levy as it stood even after the amendment was made, as it appears in the record.

[4, 10] We do not think that the court erred in allowing the ordinary, by proper order, to amend his tax levy (*Sullivan v. Yow*, 125 Ga. 326, 54 S. E. 173); but in the present instance we do not think that the levy was sufficiently specific after the amendment. Especial attention is called to the second and third subdivisions under item 2, which blend and confuse the tax necessary to build and repair bridges which are to be let out to the lowest bidder with those that may be built

by hiring hands, including the "use of convicts on the county chain gang," the expression "by the use of convicts on the county chain gang" occurring in both of these subdivisions. This is confusing, and gives no indication of the rate of tax required by the important item of work on the public roads by the use of convicts, and it does not show what proportion of the tax that will be raised by the levy of 50 cents on the \$100 would be required for bridges, which could only be built under contract let out as prescribed in section 387 et seq. of the Code of 1910. Before the levy can be enforceable, it must be so amended as to distinctly show for what purposes the tax is to be raised, and be free from the equivocal items that might be broad enough to embrace a tax levy to raise money for purposes which, under this decision, are declared to be invalid and illegal.

[5] Where the ordinary has advertised a copy of the order containing the tax levy at the door of the courthouse for the time prescribed by the statute (Code, § 515), failure to publish the same will not render the levy void. We think that the provisions for advertising may be treated as directory; but in our opinion ordinaries and other county authorities having charge of the revenues of the county should comply, not only with the mandatory requirements of a statute, but, as far as practicable, with those provisions of the statute which can be construed to be only directory, in all cases where measures for raising taxes are concerned. This objection applies only to the failure of the tax levy to show the per cent. upon the amount of the state tax for the year. Sufficient data are given in the levy in the present case to clearly show the per cent. upon the amount of the state tax, but it would have been better to express that per cent. in words and figures.

[6] Under the evidence the court was authorized to find that the ordinary had not been guilty of any illegal act in renting a farm upon which to work the convicts. Acts 1908, p. 1124, § 9.

Judgment reversed. All the Justices concur (FISH, C. J., and LUMPKIN, J., specially), except HILL, J., not presiding.

LUMPKIN, J. I concur in the reversal of the judgment, but I regret that I cannot concur in all that is said in the opinion of the majority of the court. The point on which I especially disagree with them is that they hold that the act of 1908 confers upon county authorities the power to levy taxes in addition to those previously authorized by law. Acts 1908, p. 1119; Penal Code 1910, § 1205 et seq. From this ruling I dissent. There is not a word, either in the caption of the act or its body, directly or indirectly referring to the power of county authorities to impose taxes. Prior to 1908 the state hired out or leased the labor of the felony convicts, under certain regulations. By the act

passed in that year it was declared that the prison commission might work certain felony convicts on the state farm, and that others might "be employed by the authority of the several counties and municipalities upon the public roads, bridges, and other public works of said counties or municipalities." Provisions were made for assigning convicts to counties, upon application; for authority on the part of the commission to have work done on roads, etc., on application by counties not taking convicts; for authority on the part of a county to purchase and maintain a farm, in connection with working its convicts; for other matters of regulation; and for conferring upon municipalities the right to hire from the prison commission any number of convicts, which might not be otherwise disposed of, at the price of \$100 per capita per annum. If this alone authorized an ordinary to levy a tax, which he was not otherwise empowered to do, no limitation was placed upon his action in this regard. Either this act did not confer additional powers of taxation upon ordinaries, or else, by mere implication, it conferred upon them (where they administer county affairs) an unlimited power of taxing the people of their respective counties, to any extent which they might deem proper, in that connection. If the mere conferring of power to apply for, obtain, and work convicts upon the roads, etc., amends the tax laws as to counties, apparently it must also be construed as amending every municipal charter in the state, so as to confer a similar additional right of taxation beyond the present charter limits, if they should see fit, and be able, to obtain convicts.

The general rule is that the power to tax must be clearly conferred, or the property of the citizen cannot be burdened with assessments. The enactment by the Legislature of a law (not in conflict with the Constitution) which declares that a county may do a certain thing places that thing within the range of county activities, but does not alone affect the laws touching the raising of taxes for county purposes. If the Legislature desires to confer additional taxing power on the ordinaries, it is for them to do so. Suppose that the Legislature should pass an act declaring that counties might build and repair public buildings and bridges, maintain and support prisoners, establish quarantines; work roads, support paupers, have county police, and establish sanitary measures, thus declaring certain legitimate subjects of county administration, but say nothing as to the present tax laws; would such mere declaration operate to confer on the ordinaries unlimited powers of taxation for such purposes? The decision in *Pennington v. Gammon*, 67 Ga. 456, does not control the present case on the point now under consideration. There a county chain gang was inaugurated, under

certain provisions of law. The county commissioners levied a tax for the support and maintenance of convicts or prisoners, but it was found to be insufficient, and they were proceeding to make a temporary loan to supply a casual deficiency. No contest was made as to the tax which had been levied, but injunction was sought as to the making of the temporary loan to meet the deficiency.

I am authorized to state that Chief Justice FISH concurs in this opinion.

(137 Ga. 786)

### GIBBONS v. STATE.

(Supreme Court of Georgia. March 13, 1912.)

#### (Syllabus by the Court.)

#### 1. HOMICIDE (§ 268\*)—EVIDENCE—DYING DECLARATIONS—FOUNDATION.

Sufficient foundation was laid for the admission, as a dying declaration, of the decedent's statement that the accused "shot her because she asked him for a match."

[Ed. Note.—For other cases, see *Homicide*, Cent. Dig. § 562; Dec. Dig. § 268.\*]

#### 2. CRIMINAL LAW (§ 412\*)—EVIDENCE—DECLARATIONS—STATEMENTS BY ACCUSED.

Statements made by the accused after the commission of the act upon which the indictment was founded, and which were not in the nature of *res gestæ*, were inadmissible in evidence.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 894-972; Dec. Dig. § 412.\*]

#### 3. HOMICIDE (§ 174\*)—EVIDENCE—ACTS OF ACCUSED.

The court did not err in refusing to permit a witness for the defendant to testify that "immediately after the shooting took place the defendant went to the husband of the deceased and called him down to the scene of the shooting."

[Ed. Note.—For other cases, see *Homicide*, Cent. Dig. §§ 359-371; Dec. Dig. § 174.\*]

#### 4. HOMICIDE (§ 309\*)—TRIAL—INSTRUCTIONS—INVOLUNTARY MANSLAUGHTER.

There was nothing in the evidence to authorize a charge as to the law of involuntary manslaughter.

[Ed. Note.—For other cases, see *Homicide*, Cent. Dig. §§ 649-656; Dec. Dig. § 309.\*]

Error from Superior Court, Jefferson County; B. T. Rawlings, Judge.

Charles Gibbons was convicted of murder, and brings error. Affirmed.

Charles Gibbons was tried for the offense of murder, it being charged in the indictment that he shot and killed Jane Long with a pistol. The jury returned a verdict of guilty, without a recommendation. He made a motion for a new trial, which was overruled.

On the trial, Jim Powell testified as follows: "I know Charles Gibbons; there he is. I knew Jane Long; she is dead. I can't tell the date or the month of her death. I don't know exactly what time; but she died on Sunday evening after she was shot. I don't know the month; but it was in this year, 1911. I wasn't there when she died. I saw her when the shooting occurred. I

was there when it happened; but I wasn't at her home when she died. She didn't lie down and die right away. The shooting was done late in the night, and she lived from that time until Saturday evening following. Charles Gibbons shot her. I saw the shooting. I was there, sitting right side of her, when she was shot; and she fell across my lap and said, 'Oh! Lord, Jim; I am shot.' She said that to Charlie Gibbons right at the time. At the time of the shooting, Jane Long was sitting down. She had my pipe and tobacco in her hand at the time, but nothing else, as I know of. She was doing nothing to Charlie Gibbons, when he shot her, as I know of. She hadn't done anything to him at all, as I know of. It was dark. I don't know what she was doing; but she wasn't doing anything, as I know of, and, if she was doing anything, I could have seen it. It would be according to what she was doing. I was looking at her, and she had my pipe and tobacco; but she didn't have anything else in her hand. She wasn't saying anything to Charles at the time he shot her, as I know of; only asked him for a match. He didn't give it to her. He told her he didn't have a match, but he would light her pipe. I didn't hear him say what he would light it with; but he said he would light her pipe, and she was shot shortly afterwards. It wasn't as much as a minute afterwards before he shot her. I seen his pistol. I would know his pistol if I were to see it again. This is his pistol [identifying pistol shown]. That is the same gun that he shot the woman with. He was right close to her when he shot her, not a step apart hardly."

Another eyewitness to the killing was Bob McBride, who testified, in part, as follows: "I know Jane Long. I was present the night she was killed. I saw her when she got shot. Charlie Gibbons shot her with a pistol. I was standing about as far from him when the shooting took place as from here to that gentleman there, I guess [indicating the stenographer]. She wasn't doing anything to Charles when he shot her. As to what Charles was doing at the time he shot her, he got up and walked off, and went around and shot her. He got up off the steps. I couldn't tell who all there was sitting on the steps; but the steps was full of people. I don't know who all was there. Charlie was the only man that got up and walked off up there in front of her. As to what she said to Charles to make him shoot her, she asked Jim, she says, 'Jim Powell,' she says, 'Jim, I want to smoke. Give me some tobacco and your pipe.' Jim says, 'I have got tobacco and pipe, but I haven't got any match,' and she says, 'Charlie, give me a match,' and Charlie got right up off of the steps, walked off, and he walked by me, and as he come by me he says, 'All right, I will give you a light,' and he give himself a quick turn that way, and the pistol fired, and she hollered

and says, 'Jim, Charlie has shot me! Charlie has shot me!' Charlie then didn't say nothing. Charlie hadn't then said nothing still. \* \* \* He was sitting on the steps below Jim Powell and Jane, on the second step from the ground, and Jim sitting on the second step from him. Jane asked this man, Charlie Gibbons, for a match. He didn't say that he didn't have any match. He just got right up, and walked around, and says, 'I will give you a light,' and then he whirled. He had his hand already along here, and, when he says, 'I will give you a light,' he whirled and shot her. He didn't pull his pistol out and stick it at her. I will show you how he done it [indicating]. The pistol didn't fire until he turned around. He didn't take his pistol out at all. I was looking at the barrel of the pistol in his hand. The woman said, 'Oh! Jim; Charlie has shot me.' Charlie didn't say right away, 'I didn't shoot you.' He waited awhile, and after a while he said, 'You say I for shoot you?' And he said, 'I didn't for shoot you.' He says, 'Jim shot you.' I said I looked at the place where this woman was shot after she was shot. It struck her right along here [indicating right side], and came out right along here. She was hit on the right side, and it came out back here, on the left-hand side. That is the way it went. She was shot in front [indicating]. Right after the shooting, this man Gibbons turned around and said, 'If I knew who shot that woman, I would shoot him.'"

George Long, the husband of the decedent, testified in part as follows: "She was not hoping all the time she would get well. She did not say so. She said she was going to die all the time. That is what she told everybody that came in there; that she knowed she could not live, the way she was shot. She said she was going to die. She was bright and conscious all the time, and talking as good as I am, only she was in pain. She told me that Charlie shot her because she asked him for a match. That is what she said in her statement to me. I saw where the bullets went in." On cross-examination of the witnesses referred to, there were some variations in the statements of the facts testified to on the direct examination, but in substance the testimony given on direct examination was unchanged.

Several witnesses were introduced for the defense, who testified positively that they were where they could see the defendant at the time of the shooting; that he did not have a pistol—he did not shoot; that the decedent, immediately after exclaiming that she was shot, said that she did not know who shot her; and that she never stated that the defendant shot her, until some other person had said that the defendant shot her. It was shown that immediately before the shooting took place the accused performed several acts of considerate kindness for the decedent, evincing friendly and kindly feel-

ings towards her. The defendant made a statement in which he denied the shooting, narrated at length the events at the house, at which there was an entertainment given on the evening on which the decedent was shot, and stated at length various acts upon his part, showing his friendly feeling towards the decedent, just before she was shot. Witnesses for the defendant also testified that the shot came from a direction immediately in her front, and that the accused was standing at her side, and not in the direction whence the shot came.

R. N. Hardeman, for plaintiff in error.  
Hines & Jordan, A. Herrington, Sol. Gen.,  
and T. S. Felder, Atty. Gen., for the State.

BECK, J. (after stating the facts as above).  
[1] 1. Sufficient foundation was laid for the admission, as a dying declaration, of the decedent's statement that the accused "shot her because she asked him for a match." "A prima facie case is all that is necessary to carry dying declarations to a jury. When this has been made out, the declarations are admitted, and the ultimate determination as to whether or not the person making them was in articulo mortis and realized that death was impending is for the jury." *Findley v. State*, 125 Ga. 579, 54 S. E. 106.

[2] 2. The second ground of the motion for a new trial is as follows: "Because the following material evidence offered by the movant was illegally withheld from the jury against the demand of the movant, to wit: Movant offered to prove by the witness Sarah Henkins that the defendant found the deceased at the frolic house just previous to the fatal shot, in a drunken condition; that he got her a chair, took her to the window, took care of her, and took her down to the house where the shooting occurred, in a drunken condition. When this testimony was offered, the court was then and there informed as to what the witness would testify; and the court ruled as follows on the admission of this evidence: 'I will sustain the objection only as to what the defendant told this witness after the shooting.'" The real meaning of the complaint against the court's ruling is somewhat obscure, because, in the evidence set forth in this particular ground of the motion, there is no reference to anything that was said by the defendant after the shooting, and yet the court's ruling is that objection to the testimony was sustained "only as to what the defendant told this witness after the shooting." We might dismiss this ground without further consideration, and with the mere statement that it appears that all of the evidence offered was admitted; and this appears to be the fact after examination of the brief of the evidence. But we take it that, in connection with the testimony set forth in the motion, the defense offered to prove certain sayings of the defend-

ant, made to the witness after the shooting, and that the evidence in regard to the sayings of the defendant was excluded. Clearly the court was right in excluding anything that might have been said by the defendant after the act; it not being contended that these sayings were in the nature of *res gestæ*.

[3] 3. The court did not err in refusing to permit a witness for the defendant to testify that "Immediately after the shooting took place the defendant went to the husband of the deceased and called him down to the scene of the shooting." *Lingerfelt v. State*, 125 Ga. 4, 53 S. E. 803, 5 Ann. Cas. 310.

[4] 4. Under the evidence the jury could only have found, either that the defendant did not fire the fatal shot, or that the killing was unprovoked murder. The plaintiff in error insists that he was entitled to a charge upon the subject of involuntary manslaughter, and complains that the court nowhere in his instructions to the jury gave the law of involuntary manslaughter in charge. There was no evidence authorizing such a charge. There was no suggestion that the shooting was unintentional in the commission of an unlawful act, or of a lawful act without due caution and circumspection; and the court very properly refused to give instructions to the jury which would have authorized them to indulge in pure conjecture.

Judgment affirmed. All the Justices concur.

(11 Ga. App. 30)

EZZARD v. STATE. (No. 4,034.)

(Court of Appeals of Georgia. April 2, 1912.)

(Syllabus by the Court.)

1. FORGERY (§ 49\*)—TRIAL—VERDICT—CONSTRUCTION.

Where one is tried under an indictment for forging a deed and uttering the forged paper as true with fraudulent intent, a verdict finding the accused guilty "of uttering and publishing said deed" is a mere nullity, and amounts in law to an acquittal.

[Ed. Note.—For other cases, see *Forgery*, Cent. Dig. § 129; Dec. Dig. § 49.\*]

2. CRIMINAL LAW (§ 190\*)—FORMER JEOPARDY—MOTION FOR NEW TRIAL.

Where a verdict in a criminal case is in legal effect an acquittal, the accused cannot be again tried for the same offense, even though a new trial be granted upon his own motion. The exception in the Bill of Rights which prevents a plea of former jeopardy, where a new trial has been obtained at the instance of the defendant, applies only where there has been a conviction.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 375; Dec. Dig. § 190.\*]

3. CRIMINAL LAW (§ 1182\*)—WRIT OF ERROR—DISPOSITION OF CAUSE—DIRECTION.

The judgment of conviction being void on its face, a motion in arrest of judgment was the proper remedy; but since the court should declare void a judgment which is a mere nullity, whenever the matter is regularly brought to its attention, direction will be given that a judgment be entered discharging the defendant

and declaring the judgment of conviction void and of no effect.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3203-3214; Dec. Dig. § 1182.\*]

Error from Superior Court, Fulton County; L. S. Roan, Judge.

T. W. Ezzard was convicted of uttering a forged deed, and brings error. Affirmed, with directions.

F. A. Quillian and Moore & Branch, for plaintiff in error. H. M. Dorsey, Sol. Gen., and E. A. Stephens, for the State.

POTTLE, J. The indictment was for fraudulently making and forging a deed to real estate and uttering and publishing the deed as true, with fraudulent intent. The verdict was: "We, the jury, find the defendant guilty of uttering and publishing said deed. We further recommend to treat as a misdemeanor." Judgment of conviction was duly entered upon the verdict and a misdemeanor sentence imposed. During the term a motion for a new trial was made. At a subsequent term, and while the motion for a new trial was pending, the accused filed a motion to set aside the judgment of conviction, upon the ground that the legal effect of the verdict was an acquittal. Both motions came on for a hearing at the same time, when a new trial was granted, and the motion to set aside overruled. The latter judgment is brought to this court for review.

[1] 1. The point as to the validity and effect of the verdict is controlled by the decisions of the Supreme Court in *Couch v. State*, 28 Ga. 367, and *Stephens v. State*, 56 Ga. 605. In the first case the verdict was: "We, the jury, find the defendant guilty of publishing and passing the receipt in question, knowing it to be a forgery; but we recommend him to mercy." It was held that the verdict was a nullity, and amounted to an acquittal, since it failed to find that the paper was published as true and with fraudulent intent. In the *Stephens* Case the verdict was "guilty of passing a forged order, knowing it to be such," and the same ruling was made. See, also, *O'Connell v. State*, 55 Ga. 191. These decisions are authoritative and conclusive, and it may, therefore, be taken as settled that the verdict against the present plaintiff in error was a nullity, and in legal contemplation amounted to an acquittal of the offense charged in the indictment.

[2] 2. Both state's counsel in their brief and the trial judge in his order recognize the applicability of these decisions; but they hold that the motion to set aside was properly overruled upon the authority of *Williams v. State*, 121 Ga. 579, 49 S. E. 689, where it was held: "Where one convicted of a criminal offense made a motion in arrest of judgment and a motion for a new trial,

and insisted upon both motions, it was not error for the judge, over objection of the movant, to first hear and decide the motion for new trial, though the filing of the motion in arrest was prior to the filing of the motion for new trial. And where under such circumstances a new trial was granted, it was not error to then dismiss the motion in arrest, as the effect of the grant of the new trial was to set aside the judgment." In that case two were indicted jointly for murder as principals in the first degree. The jury found one "guilty of voluntary manslaughter as principal in the second degree." The motion in arrest was upon the ground, not that the verdict was on its face a nullity, but that the indictment did not charge the defendant as a principal in the second degree. The verdict was not a nullity, and the Supreme Court did not rule that it was a nullity. There being no difference in punishment between principals in the first and second degree (*Penal Code* 1910, § 43), no distinction between them need have been made in the indictment. *Leonard v. State*, 77 Ga. 764; *McWhorter v. State*, 118 Ga. 55, 44 S. E. 873. The verdict in the *Williams* Case was probably good, even under the indictment in that case; but, without reference to this, the Supreme Court decided simply that as the accused, upon his motion for a new trial, had gotten rid of a verdict, which was valid on its face, he could not also thereafter have set aside the judgment entered upon the verdict. This was necessarily so, because when the verdict fell the judgment went with it. The situation is very different here. The verdict was in legal effect an acquittal, and the motion for a new trial was itself a nullity, just as much so as if the jury had in terms said: "We, the jury, find the defendant not guilty." If such a verdict had been returned, and a judgment of conviction entered, it would shock both lawyer and layman to hold that by causing a new trial to be granted the defendant estopped himself from claiming that he had been acquitted by the verdict.

[3] Technically, the present motion to set aside, filed after the term, cannot be maintained, because a motion in arrest, filed during the term, was the proper medium through which to search for errors appearing on the face of the record. But the real purpose of the motion is to obtain judicial sanction for the contention that the verdict is a nullity. Where a judgment or verdict is absolutely void on its face, courts are not overtechnical in reference to the means by which or the time when their attention is called to the infirmity. A defendant should never be deprived of his liberty under a verdict which in effect amounts to an acquittal. But we can reach the right result without in any wise disturbing rules of practice. We will affirm the

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes



judgment, but at the same time direct that when the remittitur is filed in the trial court a judgment be entered discharging the plaintiff in error from custody, upon the ground that the verdict rendered against him amounted to an acquittal of the crime charged in the indictment, and that when entered such a judgment shall operate as a bar to any further trial of the accused under that indictment. The exception in the Bill of Rights that one accused of crime may be more than once tried for the same offense, when the verdict is set aside on his own motion, applies where he has obtained a new trial "after conviction." Where he has been acquitted, he cannot lawfully be again tried for the same offense, even on his own motion.

Judgment affirmed, with direction.

(10 Ga. App. 831)

HUNTER v. STATE. (No. 3,646.)

(Court of Appeals of Georgia. April 2, 1912.)

(*Syllabus by the Court.*)

1. HOMICIDE (§§ 86, 145, 269\*) — ASSAULT WITH INTENT TO MURDER—ELEMENTS OF OFFENSE—QUESTION FOR JURY.

The specific intent to kill is an essential ingredient of the offense of assault with intent to murder. The existence or nonexistence of this intent is a matter of fact, to be determined by the jury from the evidence, and is not the subject of any legal presumption arising merely from a part of the evidence. The law will charge an evil-doer with all the natural consequences of his unlawful act which the act produces, but it does not impute to him by mere presumption an intention to add a consequence to his unlawful act which was not in fact produced.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 112, 262-264, 563; Dec. Dig. §§ 86, 145, 269.\*]

2. ASSAULT AND BATTERY (§ 92\*)—CRIMINAL RESPONSIBILITY—SHOOTING AT ANOTHER.

The evidence, though circumstantial, fully authorized the conviction of the defendant.

[Ed. Note.—For other cases, see Assault and Battery, Cent. Dig. §§ 137-139; Dec. Dig. § 92.\*]

Error from Superior Court, Terrell County; W. C. Worrill, Judge.

Marcellus Hunter was convicted of shooting at another, and brings error. Affirmed.

H. A. Wilkinson and D. S. Griggs, for plaintiff in error. J. A. Laing, Sol. Gen., and R. R. Arnold, for the State.

RUSSELL, J. The defendant was convicted of the offense of shooting at another, with a recommendation that he be punished as for a misdemeanor. The trial judge, as he had a right to do, disregarded the recommendation, and sentenced the defendant to serve four years in the penitentiary, or in such other place as the Governor might direct. The defendant's motion for new trial was overruled, and he excepts to the judgment refusing a new trial.

The motion for new trial is based upon the

usual general grounds, and no complaint is made as to any of the judge's rulings, or as to his instructions to the jury. The insistence of the defendant is that, admitting all the testimony for the state to be true, the circumstances in proof are not inconsistent with his innocence, and that for that reason the verdict is contrary to law, as being without evidence to support it. It is also urged that, inasmuch as the evidence does not show that the weapon as used was likely to produce death, the defendant could not legally be convicted. Passing for the present the question as to the sufficiency of the evidence generally to warrant the conviction of the defendant, we will deal first with the contention that the defendant should either have been convicted of assault with intent to murder or have been acquitted.

[1] Upon review of the evidence, we are satisfied that the defendant might properly have been convicted of the statutory offense of shooting at another, although indicted for assault with intent to murder. One of the differences between assault with intent to murder and the offense of shooting at another is that in the former the evidence must satisfy the jury of the existence of a specific intent on the part of the accused to kill the person assaulted, whereas one may be guilty of the offense of shooting at another in any case where he assaults another with a firearm without intent to kill, but not in his own defense or under other circumstances of justification as provided in the Code. The very fact (referred to in the brief of counsel for plaintiff in error) that the evidence does not show that the weapon used was such as was likely to produce death may furnish the reason why the jury found the defendant in the case at bar guilty of shooting at another, instead of guilty of assault with intent to murder. The real issue in the case is as to the identity of the person who shot Will Reed. The jury in this case had first to determine who was the person who did the shooting, and then the grade of the offense, if they found an offense had been committed. In order to find the accused guilty of assault with intent to murder (there being no such presumption as arises in a case where death results), the jury had to find that a specific intent to kill existed in the mind of the party who made the assault. Besides the fact, referred to by counsel for the plaintiff in error, that the evidence failed to disclose that the weapon with which the assault was made was one likely to produce death, the character of the wound and the kind of shot used both support the conclusion that there was not an intent to kill. Other evidence in the case lends color to the inference that it was perhaps the intent of Will Reed's assailant to frighten him away from his home by putting him in terror of his life. Certainly the plaintiff in error can-

not complain that by reason of the state's failure to prove a specific intent to kill he was only found guilty of shooting at another, when if this specific intent had been shown to the satisfaction of the jury and beyond a reasonable doubt the prisoner could have been subjected to the severer penalties imposed for assault with intent to murder. Conceding that the evidence does not show a specific intent to kill, and that the fact that the weapon which was used was not shown to have been used in a manner likely to produce death would in some cases tend to show that, on the contrary, there was either no intention to kill, or a fixed intention not to kill, still, as ruled by Chief Justice Bleckley in *Gilbert v. State*, 90 Ga. 692, 16 S. E. 652: "Without a specific intent to kill as charged in the indictment, the offense of assault with intent to murder cannot be committed. The existence of such intent is a matter of fact to be determined by the jury from all the evidence before them, and not matter for legal inference or presumption from only a part of the evidence, or even from the whole of it."

[2] 2. The case against the accused depended wholly upon circumstantial evidence; but we think the circumstances were sufficiently conclusive to authorize the jury to find the defendant guilty, and to exclude any other reasonable supposition except that he was guilty. Of course, the credibility of the witnesses was a matter solely for the jury, and for that reason we cannot consider the fact that the testimony of some of the witnesses may have been different upon the trial now under review from what it was on the prior investigation which resulted in a mistrial; but assuming, as we must, that the jury believed the witnesses who testified in behalf of the state, the hypothesis of the defendant's guilt reasonably excludes every other supposition. The party who was assaulted was shot through a window after he had retired to his bed. He was wounded with No. 7 shot, which was loaded in a shell and held in the shell with wadding. The gun was discharged close to the window, and set fire to the curtains. The defendant had worked for Reed, the party who was shot, and had been ordered from Reed's home on account of supposed intimacy with or advances to Reed's wife. The defendant knew exactly where Reed slept and the situation of his bed. He also had threatened Reed with violence on more than one occasion when Reed would complain of his attention to his wife. The very day of the shooting the defendant borrowed a single-barrel shotgun from one of the witnesses, from another he procured a shell which contained No. 7 shot, and from a third witness he borrowed a mule. At the time of the shooting the defendant lived some miles from Reed's home, and one of the witnesses saw the defendant go by his house on the mule the night of the

shooting. When he borrowed the mule he stated that he intended to go in the opposite direction from that in which Reed lived, but when the witness saw him he was on the road towards Reed's house. Another witness saw the defendant, shortly before the shot, about 150 yards from Reed's house, and upon the approach of this witness the defendant crossed the sidewalk and apparently attempted to conceal something. There was also testimony to the effect that tracks leading from the window where Reed was shot to where the mule apparently had been tied a short distance away were made by the accused. These are the most salient circumstances. However, there are quite a number which would authorize the conclusion that the defendant shot the prosecutor in order to enjoy unmolested the society of his wife.

Judgment affirmed.

POTTLE, J., not presiding.

(11 Ga. App. 11)

GASKIN v. STATE. (No. 3,998.)

(Court of Appeals of Georgia. April 2, 1912.)

(Syllabus by the Court.)

HOMICIDE (§ 292\*)—TRIAL—INSTRUCTIONS.

Where, in the trial of a person indicted for the offense of assault with intent to murder, by shooting at another with a deadly weapon, the evidence authorizes an inference that the accused shot without malice and without a specific intention to kill, it is error, requiring the granting of a new trial, to refuse to charge the law in reference to the statutory offense of shooting at another.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 597, 598, 600, 601; Dec. Dig. § 292.\*]

Error from Superior Court, Berrien County; W. E. Thomas, Judge.

R. B. Gaskin was convicted of assault with intent to murder, and brings error. Reversed.

J. P. Knight, W. G. Harrison, and E. K. Wilcox, for plaintiff in error. J. A. Wilkes, Sol. Gen., for the State.

POTTLE, J. The accused was convicted of assault with intent to murder one Albritton. The only question with which we find it necessary to deal is whether, under the evidence, the judge should have charged the jury that they might find the accused guilty of the statutory offense of shooting at another. The accused was drunk, and shot at, or in the direction of, the prosecutor; the bullet striking within a few inches of him. It is apparent, from the evidence, that after becoming drunk the accused started out on a promiscuous shooting expedition. There was no motive for him to kill the prosecutor. It is evident that the shooting was the result of a wanton and reckless disregard of consequences. The prosecutor was in the

act of entering his store, when the accused called to him to look out, and immediately fired one time. The prosecutor testified: "I do not think that he would have shot me intentionally. He had nothing against me. I have never in the world had any trouble with Mr. Gaskin. We had served on the jury together the week before, on the same case together. He just seemed to look and seemed to be shooting at anything that he seen. That seemed to be his idea." In his statement the accused said that he had no recollection of having shot at the prosecutor at all, that they were friends, and that he was so drunk at the time as to be utterly oblivious of his conduct.

The presiding judge took the view that the evidence demanded a verdict for the higher offense, and declined to submit the law in reference to the statutory offense of shooting at another. Undoubtedly, if death had resulted, the accused would have been guilty of murder, because the law would have presumed an intention to kill, and would have held the slayer responsible for the consequences of his act. *Chelsey v. State*, 121 Ga. 340, 49 S. E. 253; *Stovall v. State*, 106 Ga. 443, 32 S. E. 586; *Gallery v. State*, 92 Ga. 463, 17 S. E. 863. But the rule is altogether different where death does not ensue. Before one can be convicted of assault with intent to murder, the state must prove a specific intention to kill. In *Coney v. State*, 101 Ga. 582, 28 S. E. 918, the following statement was used in the course of the opinion: "Had death ensued, it would plainly have been a case of murder; and therefore the statutory offense of shooting at another was not involved in the case." This was an inaccurate expression, and is not in harmony with numerous decisions of the Supreme Court, rendered both before and after the decision in that case. The mere fact that one assaults another with a deadly weapon does not demand the inference that he intended to kill the person thus assaulted. There are cases in which it has been held that the evidence demanded a finding that the accused intended to kill. For example, in *Tyre v. State*, 112 Ga. 224, 37 S. E. 374, the accused presented his pistol at the prosecutor, with the statement, "I am going to kill you," and immediately fired. The only defense was that of alibi, and the court held that the law applicable to the statutory offense of shooting at another was not involved in the case. *Kendrick v. State*, 113 Ga. 759, 39 S. E. 286, is similar in its facts to the case just cited, and the same ruling was made.

But the case here presented is altogether different. The evidence did not demand a finding that the accused intended to kill the prosecutor. On the contrary, the testimony of the person at whom the accused shot showed that there was no motive for such an intention, and altogether justified the inference that the accused was acting without

malice. The impression made on our minds from the evidence is that in a drunken frenzy and with a reckless disregard of consequences, the accused was indulging in a promiscuous shooting, without a specific intent to kill anybody. As we have said before, he would clearly be guilty of murder had the prosecutor been killed; but this would have been true, not because a specific intent to kill in fact existed, but because, if death had resulted, the law would conclusively have presumed that such intent existed, and the accused would not have been heard to say that it did not. But here the prosecutor was not killed, or even struck, and under the evidence as a whole the accused might very well have been convicted of the statutory offense of shooting at another, and the law in reference to that offense should have been given in charge. *Fallon v. State*, 5 Ga. App. 659, 63 S. E. 806; *Ripley v. State*, 7 Ga. App. 679, 67 S. E. 834; *Chester v. State*, 3 Ga. App. 332, 59 S. E. 843; *Hunter v. State*, 74 S. E. 553, this day decided.

Judgment reversed.

(11 Ga. App. 13)

GASKIN v. STATE. (No. 3,999.)

(Court of Appeals of Georgia. April 2, 1912.)

(Syllabus by the Court.)

INSTRUCTIONS—SHOOTING AT ANOTHER.

The case is controlled by the decision this day rendered in *Gaskin v. State* (No. 3,998) 74 S. E. 554.

Error from Superior Court, Berrien County; W. E. Thomas, Judge.

R. B. Gaskin was convicted of assault with intent to murder, and brings error. Reversed.

J. P. Knight, W. G. Harrison, and E. K. Wilcox, for plaintiff in error. J. A. Wilkes, Sol. Gen., for the State.

POTTLE, J. In this case the accused was convicted of assault with intent to murder W. D. Bule. The case is very similar to the other case against the accused, this day decided (74 S. E. 554), in which he was charged with having assaulted, with intent to murder, one Albritton. The shooting all occurred about the same time. The evidence shows that the accused shot eight or nine times, and that one of the shots went through a window pane in the law office of Judge Bule, which was located upstairs, and that he also shot two or three times after that in the direction of this office.

It is contended that the evidence demanded a conviction of the higher offense. In this case there was proof that a short time before the shooting, and while the accused was drunk, he stated that if Bule did not retract some assertion he had made there was going to be trouble, and that he would kill Bule. This evidence would unquestion-

ably have authorized the verdict returned by the jury, but it did not demand it. It appears that Judge Bule received information that the accused might attack him. Shortly thereafter, upon hearing a shot fired on the street, Judge Bule went to the window of the office in which he was staying, and saw the accused down on the street with a pistol in his hand. He then went out of his office, and fastened two of the doors on the outside, and while he was in the act of fastening these doors the first bullet was fired. It is inferable from this testimony of the prosecutor that the accused could not have seen him when the shot was fired. Taking the evidence as a whole, the jury would have been warranted in finding in this case, as in the other case, that the accused, in a drunken frenzy, was indulging in promiscuous shooting, with a wanton and reckless disregard of consequences, with no specific intent to kill anybody. The accused shot at the courthouse, at the school commissioner's office, and at Barnett's store. The evidence did not demand a finding that at the time the shot was fired the accused had a specific intent to kill Judge Bule. This being so, the case is controlled by the decision this day rendered in the case in which the accused was charged with having assaulted Albritton with intent to kill him.

Judgment reversed.

(11 Ga. App. 22)

**CARVER v. STATE.** (No. 4,029.)  
(Court of Appeals of Georgia. April 2, 1912.)

(*Syllabus by the Court.*)

**TELEGRAPHS AND TELEPHONES (§ 10\*)—REGULATION—RIGHTS IN HIGHWAYS.**

A telegraph company engaged in interstate commerce under the act of Congress of July 24, 1866 (14 Stat. 221, c. 230 [U. S. Comp. St. 1901, p. 3579]), by virtue of its written acceptance of the provisions, restrictions, and obligations imposed by that act, has a right to operate lines of telegraph through and over the public or post roads of any county in the state and to occupy these roads with its telegraph poles, this right to be enjoyed in subordination to the public use of such roads, and subject to any lawful exercise of the police power of the state or county, so that travel should not be unreasonably obstructed, or the public rights unreasonably interfered with. The state cannot by any specific statute, nor the county by the action of any of its authorities, prevent such a corporation from placing its lines and poles along the post roads or routes, or stop the use of them after they are so placed. The limit of their power and authority is regulation as to the manner in which the right given by Congress shall be exercised by such a corporation.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. § 6; Dec. Dig. § 10;\* *Municipal Corporations*, Cent. Dig. § 1487.]

Error from Superior Court, Cobb County; N. A. Morris, Judge.

J. L. Carver was convicted of obstructing a public road, and brings error. Reversed.

Clay & Morris and Anderson, Felder, Rountree & Wilson, for plaintiff in error. J. P. Brooke, Sol. Gen., for the State.

HILL, C. J. J. L. Carver was convicted of a violation of section 547 of the Penal Code of 1910, which is in the following language: "If any person shall obstruct a road registered as aforesaid by building a fence, or felling a tree, or cutting a ditch in or across any part of it; or shall make or place in or across any such registered road, or part thereof, an obstruction of any kind which renders the use of the road unsafe or inconvenient, or shall dig or plough up the surface of a registered public road, or remove any dirt or rocks from the same; or shall stop up, fill with dirt, or obstruct any side ditch or drain of a public road, he shall be guilty of a misdemeanor." The indictment (omitting formal parts) charged that the accused obstructed a "certain side ditch and drain of the public highway and road between Marietta and Atlanta, known as the Marietta and Atlanta public road, by placing in said side ditch and drain, and by causing to be placed in said side ditch and drain, telephone poles, which thereby obstruct said side ditch and drain." The evidence is not in conflict and makes the following case:

The Marietta and Atlanta road is a registered public road and has been so for 50 years. It is traveled by the public generally and is used by the R. F. D. mail carriers. The county authorities widened the road, and the poles of the Postal Telegraph Cable Company, which for years had been along the edge of the road, were left in or near the middle of the road. It became necessary to remove these poles from the middle of the road, as they interfered with the ordinary traveling thereon. The road commissioners, under the direction of the county authorities, refused to designate on the highway or public road where the poles could be removed and replaced, and directed their removal off the highway. The accused, acting for the Postal Telegraph Cable Company, removed the poles from the middle of the public road, replacing them on the outer edge of the road to near the drain ditch on the side of the road. There were 28 telegraph poles so removed and replaced, with a distance of from 120 to 125 feet between the poles. The location of the poles on the side of the road after they had been removed from the middle of the road was still within the right of way of the public road, and it was claimed by the state that these poles obstructed the drainage from the road, and that each and every pole would collect leaves and such things, which caused a dam that would pond the water, and that the effect of this finally was to cut holes in some places across the road, and the county authorities after each rain were put to the expense and trouble of

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

cleaning away the accumulation of leaves and grass which had been stopped by the obstruction of the poles. These poles had been on the street until it was widened for about 20 years, and when the street was widened the telegraph company was directed by the county authorities to remove the poles from the road, and in compliance with that order the poles were removed from the middle and placed on the edge of the public road, near the ditch on the outside edges, as above stated. The Postal Telegraph Cable Company used the poles in question in its interstate and intrastate business.

The controlling legal question in the case is as to the right of the county authorities to prohibit a telegraph company from placing its poles on the highway or public road, or to require the company to move its poles off the highway or public road. It is conceded by counsel for plaintiff in error that the county authorities can regulate the use of the highway by telegraph companies, and may designate where the poles of the company shall be placed, or where they may be removed. It is insisted, however, that the county authorities cannot deny to the telegraph company the right to occupy the highways or post roads with its poles and lines; in other words, that the power of the county is regulative, and not prohibitive. The telegraph company claims the right to use the highway by placing its poles and lines thereon under the act of Congress approved July 24, 1866. Revised Statutes of the United States, §§ 5263, 5268 (U. S. Comp. St. 1901, pp. 3579, 3581). These sections read as follows:

"Any telegraph company now organized, or which may hereafter be organized, under the laws of any state shall have the right to construct, maintain, and operate lines of telegraph through and over any portion of the public domain of the United States, over and along any of the military or post roads of the United States which have been or may hereafter be declared such by law, and over, under, or across the navigable streams of water of the United States; but such lines of telegraph shall be so constructed and maintained as not to obstruct the navigation of such streams and waters, or interfere with the ordinary travel of such military or post roads."

"Before any telegraph company shall exercise any of the powers or privileges conferred by law, such company shall file their written acceptance with the Postmaster General of the restrictions and obligations required by law."

The accused offered to prove the acceptance by the Postal Telegraph Cable Company of the privileges conferred by the act of Congress aforesaid by introducing a certified copy of the original acceptance on file in the Post Office Department duly certified by the Postmaster General and under the seal of the department. The court excluded

the testimony as irrelevant and immaterial, and to this the defendant excepted. The act of Congress approved March 1, 1884 (23 Stat. 3, c. 9 [U. S. Comp. St. 1901, p. 2708]), declares that "all public roads and highways, while kept up and maintained as such, are hereby declared to be post routes." Under the evidence the Marietta and Atlanta public road, referred to in the indictment, is a post route or road in the contemplation of the act of Congress just quoted. The Postal Telegraph Cable Company was organized under a charter granted by the state of Delaware. Congress has the constitutional power to pass an act giving to telegraph companies organized under state laws the right to construct and use lines of telegraph along any of the military or post roads of the United States. *Pensacola Telegraph Co. v. Western Union Telegraph Co.*, 96 U. S. 1, 24 L. Ed. 708. This is on the theory that telegraph lines extending through different states for the purpose of transmitting interstate messages are instruments of commerce, which are protected by the commerce clause of the federal Constitution (article 1, § 8), and the messages passing over such lines from one state to another constitute a portion of the commerce itself. *Western Union Tel. Co. v. James*, 162 U. S. 650, 16 Sup. Ct. 934, 40 L. Ed. 1105. A telegraph company, therefore, engaged in interstate commerce, which has accepted the provisions, restrictions, and obligations imposed by the act of Congress of July 24, 1866, supra, has the right to occupy the public roads or post routes of the state or county with its telegraph poles used in the construction and maintenance of its business. This right, however, is to be enjoyed in subordination to public use and private rights, and subject to any lawful exercise of the police power belonging to the state or to its municipalities or counties. *Richmond v. Southern Bell Tel. Co.*, 174 U. S. 761, 19 Sup. Ct. 778, 43 L. Ed. 1162.

In the case of *Western Union Tel. Co. v. Massachusetts*, 125 U. S. 530, 8 Sup. Ct. 961, 31 L. Ed. 790, the Supreme Court holds that the state could not interfere by any specific statute to prevent a corporation from placing its lines along the post roads, or stop the use of them after they were placed there; nevertheless, the company receiving the benefit of the laws of the state for the protection of its property is liable to be taxed on its property as any other person would be. It never could have been intended by the Congress of the United States, in conferring upon a corporation of one state the authority to enter the territory of any other state and erect its poles and lines therein, to establish the proposition that such a company owed no obedience to the laws of the state into which it thus entered, and was under no obligation to pay its fair proportion of the taxes necessary to its support. These decisions simply go to the ex-

tent of holding that the act of Congress, in permitting the telegraph company to lay its poles necessary to the transaction of its business on the post roads of the different states, was simply permissive in character. It was not intended to relieve the company either from the ordinary burdens of taxation or from any lawful exercise of the police power of the state, counties, or municipalities of the state. In the case of *Western Union Tel. Co. v. Massachusetts*, supra, Mr. Justice Miller said: "The telegraph company, which is the defendant here, derived its franchise to be a corporation and to exercise the function of telegraphing from the state of New York. It owes its existence, its capacity to contract, its right to sue and be sued, and to exercise the business of telegraphy, to the laws of the state under which it is organized. But the privilege of running the lines of its wires through and over any portion of the public domain of the United States, over and along any of the military or post roads of the United States, is granted it by the act of Congress. \* \* \*

While the state could not interfere in any specific statute to prevent a corporation from placing its lines along these post roads, or stop the use of them after they were placed there, nevertheless the company receiving the benefit of the laws of the state for the protection of its property and its right is liable to be taxed upon its real or personal property, as any other person would be. \* \* \* If the Congress of the United States had authority to say that the company might construct and operate its telegraph over these lines, as we have repeatedly held it had, the state can have no authority to say it shall not be done." In *Western Union Tel. Co. v. Lakin*, 53 Wash. 326, 101 Pac. 1094, 17 Ann. Cas. 718, the court said: "The company possessed under its federal franchise the right to do business upon all the roads and highways in the county of Pierce, whether within or without incorporated cities or towns. This right could not be denied. The power of the city was limited to its right to regulate the use of the privilege granted by Congress. It might provide that poles and wires should be carried over certain streets, that the wires should be carried on poles or buried in the ground, that travel should not be unreasonably obstructed, and that the poles should be of certain height, and other like incidents. Beyond this it had no power to go."

It would seem that these decisions settle the question of law raised by the record. The Postal Telegraph Cable Company, whose employé was indicted and convicted, was a state corporation. It owes its existence as such to a charter granted by the state of Delaware. But it is also an interstate corporation, and as such derived from the act of Congress the privilege or right of running its

lines of wires over any public or post road in any county of any state in the United States; and the county authorities, therefore, had no right to prohibit the use of this public road by the company in placing its poles thereon, and were not authorized to have the poles already placed there removed. According to the decisions of the Supreme Court just quoted, the state itself by specific statute could not prevent the company from placing its line along its post roads, or stop the use of them after they had been placed there. The county was only authorized to regulate the use of the privilege granted by Congress. The county could designate a place on the public road where the poles should be erected or buried in the ground. It could lawfully make such regulations as would prevent any unreasonable obstruction of the public road or interference with public travel.

The learned trial judge in the present case, however, utterly ignored any right of the company under the act of Congress. He refused to admit evidence showing that the company had accepted the privilege of the act of July 24, 1866. In his instructions to the jury he refused in any manner to recognize the act of Congress as at all applicable to the facts of the case. He treated the agent of the telegraph company as an ordinary trespasser upon the public road. In this we think he was in error. The act of the agent of the company in locating the telegraph poles should have been interpreted in the light of the rights of the company under the act of Congress above quoted. Neither the company nor its agents, in pursuance of these rights, were in any sense trespassers. The company was entitled to use the road, subject only to the proper exercise of the police power of the county in making regulations as to the manner in which it should be used. Now, the county, under the evidence in this case, refused to permit the use of the road at all. It ordered the company to take up the poles already on the road, and which had been on the road for 20 years. It refused to designate any point on the road where these poles could be placed. This conduct of the county authorities was not only unauthorized, but arbitrary. It left the agents of the company only one alternative, either to permit the poles to remain where they were, and had been for many years without objection, or to exercise their judgment in removing the poles and in replacing them on such parts of the public highway as would not interfere with ordinary travel thereon; and if the jury believed that the agents of the company had made a reasonable and proper exercise of this discretion, and had replaced the poles on the public road in a position or location where they would be less liable to interfere with public travel, and where in fact they did not seriously or materially obstruct the ditch or drain of the road, then, under these circumstances, the ac-

cused should have been acquitted; and the court should have complied with its written requests, embodying instructions to the jury to this effect. If such instructions had been given to the jury, they could very reasonably have concluded that the accused had not violated the statute under which the indictment was framed.

It is manifest that after the road had been widened and the poles left in the middle of the road, where they necessarily obstructed the road and interfered with public travel, they should have been removed. It is equally manifest that the county should have designated some place on the road where these poles could have been properly replaced, so that they would not materially or substantially interfere with the use of the public road. Failing to do this, and ordering the company to take up the poles from the middle of the road, and not to replace them on any part thereof, it clearly did so without regard to the rights or the privileges of the company granted to it by the provisions of the act of Congress, and if in this exigency, caused by the county through its unlawful and arbitrary conduct, the company, through its agents, removed the poles from the middle of the road and replaced them in a location where they would least interfere with the rights of travelers, or would be less likely to cause an obstruction to the road, we do not think the county has the right to complain. Indeed, it is difficult to imagine how the telegraph company violated the statute on which the indictment was framed, or was lacking in proper respect and consideration for the rights of the county or the public, when all it did was to remove the poles from the middle of the road, where they were obstructions to public travel, and place them on the extreme edge of the road, where they were least likely to interfere with travel, and in the same relative position on the road where, before the road was widened, they had been allowed to remain for nearly a quarter of a century.

The question as to whether the telegraph company could lawfully take and use any part of the public highway, without first paying for the part actually occupied, is not involved. As to this point, see *City of St. Louis v. W. U. Telegraph Co.*, 148 U. S. 92, 13 Sup. Ct. 485, 37 L. Ed. 380.

We note a variance between the allegation of the indictment and the proof as to the character of the poles alleged to constitute the obstructions complained of; the allegation being that they were *telephone poles*, and the proof showing that they were telegraph poles. *Richmond v. Southern Bell Tel. & Tel. Co.*, 174 U. S. 761, 19 Sup. Ct. 778, 43 L. Ed. 1162. No question was made in the record as to the materiality of this variance; but the poles were treated by both sides as being poles of the telegraph company, cov-

ered by the act of Congress. The use of the word "telephone" in the indictment seems to have been regarded merely as a clerical or typographical error.

For the reasons above stated, we think the conviction in this case was unauthorized, and that a new trial should have been granted.

Judgment reversed.

(11 Ga. App. 83)

HORTON v. STATE. (No. 4,048.)

(Court of Appeals of Georgia. April 2, 1912.)

(Syllabus by the Court.)

DISTRICT AND PROSECUTING ATTORNEYS (§ 3\*)  
—SOLICITOR OF CITY COURT—APPOINTMENT.

The presiding judge of a city court in this state is authorized to appoint a solicitor pro tem., in the absence of the solicitor of the court, or in the event of his disqualification, to represent the prosecution in criminal cases pending in the court, and the solicitor pro tem. thus appointed would be authorized to sign accusations filed in the court, and in every respect to represent the state in the prosecution of criminal offenses pending in the court.

[Ed. Note.—For other cases, see District and Prosecuting Attorneys, Cent. Dig. §§ 10-17; Dec. Dig. § 3.\*]

Error from City Court of Cairo; J. R. Singletary, Judge.

W. A. Horton was convicted of misdemeanor, and brings error. Affirmed.

Roscoe Luke, R. C. Bell, and Ira Carlisle, for plaintiff in error. W. J. Willie, Sol., J. Q. Smith, and M. L. Ledford, Sol. pro tem., for the State.

HILL, C. J. This was an accusation in the city court of Cairo, charging the accused with a misdemeanor. A motion was made to quash the accusation, on the grounds that it appears not to have been signed by the solicitor of the city court of Cairo, who was duly elected and qualified as the solicitor of the court, and was the only officer authorized to sign accusations in the city court, but was signed by a solicitor pro tem., and there was no authority for the judge to appoint any one as solicitor pro tem., and the solicitor pro tem. was not authorized by law to sign such accusations as a solicitor pro tem. The court overruled the motion, and this judgment is here for review. We think the motion was properly overruled, for two reasons:

1. The act creating the city court of Cairo (Acts 1906, p. 191) authorizes the judge of that court, where not otherwise expressly provided, to perform any acts necessary to the proper conducting of the business of the court, and that could properly be performed by a judge of the superior court under similar circumstances. Section 4929 of the Civil Code of 1910 provides that the presiding judge, wherever the solicitor general is absent, or is indisposed, or is disqualified, from interest or relationship, to engage in the prosecution, must appoint

a competent attorney of the circuit to act in his place, where the duly constituted solicitor of that court was for any reason disqualified or absent.

2. Besides, the power to appoint a solicitor pro tem. in the absence of the solicitor, would be inherent in the court, where required by the exigencies of the business pending before the court. We cannot possibly see how the accused could have been hurt by the fact that the solicitor pro tem., rather than the solicitor, signed the accusation against him based on the affidavit. The objection to the accusation on this ground was wholly without merit.

Judgment affirmed.

(11 Ga. App. 34)

**HOLT v. STATE.** (No. 3,744.)

(Court of Appeals of Georgia. April 2, 1912.)

(*Syllabus by the Court.*)

**1. RELIEVING SOLICITOR.**

The question of law raised by the special plea is fully controlled by the decision of this court in *Horton v. State*, 74 S. E. 559, this day decided.

**2. EXTORTION (§ 15\*)—EVIDENCE—SUFFICIENCY.**

The verdict is without any evidence to support it as to the existence of the essential element of criminal intent.

[Ed. Note.—For other cases, see *Extortion*, Cent. Dig. § 14; Dec. Dig. § 15.\*]

(*Additional Syllabus by Editorial Staff.*)

**3. EXTORTION (§ 5\*)—ELEMENTS OF OFFENSE—INTENT.**

A deputy sheriff, who, on being directed to arrest persons charged with criminal offenses, in good faith accepted \$10 from each of them as a cash bond, and refused to pay over the money to the mayor of the city, or the clerk or the solicitor of the city court, but deposited it in a bank for the court, and never claimed any interest in it, nor used the money, though he had no authority to take such a cash bond, was not guilty of extortion, under Pen. Code 1910, § 302, providing that extortion shall consist in any public officer's unlawfully taking, by color of his office, any money or thing of value that is not due to him, or is more than due.

[Ed. Note.—For other cases, see *Extortion*, Cent. Dig. § 5; Dec. Dig. § 5.\*]

**4. EXTORTION (§ 1\*)—ELEMENTS OF OFFENSE.**

The technical legal meaning of "extortion" is the taking of money or anything of value by an officer by color of his office, either when none is due him, or more than is due him, or probably where it is not yet due, or the oppressive misuse of official power by the rejection of money (citing 3 Words and Phrases Judicially Defined, 2623).

[Ed. Note.—For other cases, see *Extortion*, Cent. Dig. § 1; Dec. Dig. § 1.\*]

Error from City Court of Fitzgerald; E. Wall, Judge.

T. L. Holt was convicted of extortion, and brings error. Reversed.

Haygood & Cutts and Elkins & Wall, for plaintiff in error. Alex. J. McDonald, Sol., and L. Kennedy, for the State.

**HILL, C. J.** 1. The plaintiff in error was convicted of the offense of extortion, and he excepts to the judgment overruling his motion for a new trial.

[1] Before pleading to the merits, the accused filed a special plea setting up the following facts: An accusation was filed against him, signed by the solicitor of the city court, and based upon the affidavit of the solicitor, charging the offense of extortion. The presiding judge quashed this accusation, and entered an order appointing a solicitor pro tem., apparently entertaining the view that the solicitor of the court was disqualified, because he had made the affidavit upon which an accusation was based. The solicitor pro tem. preferred the accusation, based upon the affidavit of the solicitor. It is insisted that this affidavit was illegal, because the law does not contemplate or authorize the appointment of a solicitor pro tem. upon the disqualification of the regular solicitor, and that no valid accusation can be preferred against the accused in the city court, based upon an affidavit made by the solicitor of the city court, and that the accusation was therefore invalid, and should be quashed. This plea was overruled.

We think the plea was properly overruled. We do not agree to the proposition that the solicitor of a court cannot himself, if he knows the facts upon which the affidavit is based, make such affidavit and subsequently prefer an accusation charging the offense covered by the affidavit. The making of the affidavit does not disqualify the solicitor from subsequently preferring the accusation and prosecuting the case. The action of the presiding judge, however, in relieving the regular solicitor of the prosecution of the case, because he had made the affidavit upon which the accusation was founded, and appointing a solicitor pro tem. to conduct the prosecution, was fully authorized, and was not a matter of which the accused could complain. *Horton v. State*, 74 S. E. 559, this day decided by this court.

[2] 2. Numerous special assignments of error are contained in the amended motion for a new trial; but the view that we entertain of the merits of the case renders unnecessary a decision of the special questions made. The facts make the following case: The accused was the deputy sheriff of the county, and was assigned to duty in the city court. He was directed by the solicitor to arrest three women charged with some criminal offense. He went to the home of these women, and told them that he had come to arrest them. It does not appear that the accused had in his possession any warrant, and the fact is not material. The women objected to being arrested, and asked the officer if there was any way to avoid an arrest. He finally consented to accept from each of the women \$10 as a "cash bond" for their appearance, and in pursuance of this agreement the \$10 was



delivered to him by each of the women. The accused returned to the sheriff's office and reported the fact that he had taken "cash bonds" for the appearance of the women. For some reason the mayor of the city of Fitzgerald and the clerk of the city court and the solicitor of the city court demanded that the deputy sheriff pay over the money to them, and this the deputy sheriff declined to do. The deputy sheriff, in his statement to the jury, admitted receiving the money, and said that he thought that he had a right to receive it as "cash bonds"; that he promptly notified the sheriff that he had received it; that it was deposited in the bank for the court, and that he had never claimed any interest in it as an officer or otherwise; that he had not used the money, and that it was still in the bank, subject to the order of the court; that, when the question was made as to his right to accept the money as "cash bonds," he consulted Mr. Elkin, Judge Kennedy, and Judge Haygood, and asked their advice as to what to do with the money, and they advised him to hold it until the regular term of the city court, and said that they would take an order for the proper disposition of the money. The attorneys referred to by the accused were not introduced by the accused in his behalf, but his statement was not controverted.

[3] There is no evidence to show that the official took the money from the women for his own personal use, or that he demanded the same by virtue of his official position. He seems to have consented to accept the money as "cash bonds," under the impression that he had a right to take "cash bonds." In other words, there seems to be an utter absence of any evidence of criminal intent on the part of the accused. It may be conceded that he had no right to take a "cash bond"; but this fact would not be sufficient of itself to show any criminal intent, especially in view of the well-known practice indulged in by the officers of this state of taking "cash bonds" in criminal cases. Penal Code 1910, § 302, defines the offense of extortion as follows: "Extortion shall consist in any public officer's unlawfully taking, by color of his office, from any person any money or thing of value that is not due to him, or more than is due." The word "extortion" acquired a technical meaning at common law, and was defined to be the corrupt or unlawful taking by an officer of money or anything of value that is not due him, or the corrupt and unlawful taking of money or anything of value more than is due him, or before it is due him; and the offense of extortion, as defined by the Code section, *supra*, seems to embody the same meaning.

[4] The technical legal meaning of the word is the taking of money or anything of value by an officer by color of his office, either when none is due him; or more than is

due him, or probably where it is not yet due. 3 Words and Phrases Judicially Defined, 2623. While in its larger sense it signifies any oppressive taking of money under color of right, in its strict sense it signifies the taking of money as costs by an officer, by color of his office, where none, or only a part, is due. In other words, the offense of extortion consists of the oppressive misuse of official power by the exaction of money. Now, the evidence in this case indisputably shows that the accused, as deputy sheriff, did not demand or extort from the three women the money in question as costs due him in the case. He accepted it from them in lieu of their bond, and as a "cash bond," under the belief that as an officer he had the right to accept a "cash bond." He did not exact the money for his own use. He held it in trust for the women, who on their appearance were entitled to receive it back. The undisputed evidence is that he did not use the money, but deposited it in the bank, where at the time of the trial it was held subject to the order of the court. Under these facts it seems to us that his conviction of the offense of extortion was unauthorized. Even if it be conceded that he had no right to accept from these women a "cash bond" for their appearance, yet his doing so was a mistake of law; and while ignorance of the law is no excuse, yet there can be no offense unless there is a joint union or operation of act and intent, and if the act of the officer in taking the cash bond was not authorized by law, there certainly seems to have been no criminal intent on his part in doing the act.

Judgment reversed.

POTTLE, J., not presiding.

(11 Ga. App. 45)

**BENTLEY v. CITY OF ATLANTA.**  
(No. 3,822.)

(Court of Appeals of Georgia. March 19, 1912.  
Rehearing Denied April 16, 1912.)

(Syllabus by the Court.)

**SUFFICIENCY OF EVIDENCE.**

The evidence authorized the inference of the defendant's guilt, and the judge did not err in dismissing the certiorari.

Error from Superior Court, Fulton County; Geo. L. Bell, Judge.

W. F. Bentley was convicted of violating an ordinance of the City of Atlanta. From an order dismissing a certiorari, he brings error. Affirmed.

John A. Boykin, for plaintiff in error. Jas. L. Mayson and W. D. Ellis, Jr., for defendant in error.

RUSSELL, J. Judgment affirmed.

POTTLE, J., not presiding.

(11 Ga. App. 37)

**FLAGG v. STATE.** (No. 4,054.)

(Court of Appeals of Georgia. April 2, 1912.)

*(Syllabus by the Court.)***1. CRIMINAL LAW (§ 576\*)—TIME FOR TRIAL—EFFECT OF DELAY.**

Where demand for trial in a criminal case for an offense not affecting life is regularly allowed, the failure of the state to place the accused on trial at either the first or the second term after the demand is made operates as an absolute acquittal and discharge, provided qualified juries are impaneled at both terms, unless the accused has done some affirmative act which in law would amount to a waiver of his demand. Mere silence at the second term, and failure to bring the fact of the demand to the court's attention, will not amount to a waiver.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1297-1304; Dec. Dig. § 576.\*]

**2. CRIMINAL LAW (§ 576\*)—TIME FOR TRIAL—EFFECT OF DELAY.**

Voluntary absence from court will operate as a waiver of the demand; but involuntary absence at the second term, caused by confinement in the county chain gang under a misdemeanor sentence imposed at the first term, is not within the exception of the statute.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1297-1304; Dec. Dig. § 576.\*]

**3. CRIMINAL LAW (§ 576\*)—TIME FOR TRIAL—EFFECT OF DELAY.**

Absence of the accused at the third term, after the failure to comply with the demand has entitled the accused to an acquittal, is no reason for refusing to sustain a motion, made at that term by his counsel, to complete the record by granting an order of discharge.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1297-1304; Dec. Dig. § 576.\*]

**4. CONVICTS (§ 2\*)—CONTROL—PRESENCE OF ACCUSED—POWER OF COURT.**

The courts of this state have inherent power to cause the production in court of a convict serving a penal sentence in the state penitentiary or county chain gang, whenever his presence is needed for a lawful purpose.

[Ed. Note.—For other cases, see Convicts, Cent. Dig. §§ 11-16; Dec. Dig. § 2.\*]

**5. CONVICTS (§ 5\*)—CRIMES.**

The rule of the common law that one attainted of a felony could not be tried again for another felony has never been of force in this state.

[Ed. Note.—For other cases, see Convicts, Cent. Dig. § 4; Dec. Dig. § 5.\*]

**6. CONVICTS (§ 5\*)—CRIMES.**

The fact that one is serving a misdemeanor sentence in a county chain gang constitutes no reason why he cannot be brought to trial and sentenced under an indictment or accusation charging another offense.

[Ed. Note.—For other cases, see Convicts, Cent. Dig. § 4; Dec. Dig. § 5.\*]

**7. RIGHT TO DISCHARGE—ORDER.**

The plaintiff in error was entitled to his discharge, and an order to that effect should have been entered.

Error from Superior Court, Baldwin County; J. B. Park, Judge.

Gid Flagg was indicted for assault with intent to murder. To an order refusing to discharge him, on account of failure of the

state to put him on trial at the second term after a demand for trial had been allowed, he brings error. Reversed.

The plaintiff in error was under indictment for assault with intent to murder. The exception is to the refusal to grant an order discharging and acquitting him, on account of the failure of the state to put him on trial at the second term after a demand for trial had been allowed and entered upon the minutes of the court. The demand was made at the January term, 1911. The next July term was not convened, but was adjourned over till November, at which time the plaintiff in error was serving a misdemeanor sentence in the county chain gang; but he was present in court as a witness, having been brought there by the chain gang authorities for that purpose. He was not tried at that term, and at the succeeding January term his counsel, while the accused was still absent at work on the chain gang, moved for an order adjudging that he stand acquitted of the charge made in the indictment upon which the demand for trial had been made.

Erwin Sibley, for plaintiff in error. Jos. E. Pottle, Sol. Gen., for the State.

POTTLE, J. [1] 1, 2. The Constitution of this state guarantees to one accused of crime a speedy trial, and in aid of this guaranty our statute allows him to make demand for trial for an offense "not affecting his life," and requires that, unless a trial be had at the first or second term after demand, the prisoner shall be discharged, provided that at both terms there are juries regularly impaneled and qualified to try him. Penal Code 1910, § 983. Under the statute the only prerequisite to a discharge after the second term is that demand shall be made and allowed, and qualified juries be impaneled; but, upon general principles, our courts have raised another exception, namely, that the failure to try be not due to the voluntary act of the prisoner, as, for instance, voluntary absence from court, or obtaining a postponement to another term, and the like. In all such cases the prisoner will be held to have waived his demand. It has been said many times that, unless the demand be waived by some affirmative act of the prisoner, the only alternative is trial or acquittal by discharge. *Nix v. State*, 5 Ga. App. 835, 63 S. E. 926; *Collins v. Smith*, 7 Ga. App. 653, 67 S. E. 847; *Thornton v. State*, 7 Ga. App. 752, 67 S. E. 1055; *Dublin v. State*, 126 Ga. 581, 55 S. E. 487, and citations; *Walker v. State*, 89 Ga. 482, 15 S. E. 553.

[2] It is not incumbent upon the accused or his counsel to make any further motion or demand at the second term. They may sit mute. The demand having been regularly and lawfully made, the accused may thenceforward rely upon his right to a discharge,

if the state fails to comply by the end of the second term with the demand already made; the only duty imposed upon him being that he be not voluntarily absent from the court, and that he have done no other act which in law would amount to a waiver of his demand. No formal order of discharge is necessary. Acquittal results automatically by operation of law after the adjournment of the second term. *Thornton v. State*, supra.

[3] 3. From this it necessarily results (and it was expressly so decided in the case just cited) that the absence of the accused after the second term, when his counsel moves for a completion of the record by an order of discharge and acquittal, is no reason for refusing to grant the order.

[4] 4-7. The judgment of the trial judge in the present case must be sustained, if at all, either upon the theory that the accused was absent by his own fault, and the state was not bound to procure his presence, or upon the ground that, being in the custody of the county chain gang authorities, serving another sentence, the court was without power to compel his attendance, put him upon trial, and impose sentence in another case, until after the expiration of the first sentence. There may be cogent reasons why there should be a statutory suspension of the demand during imprisonment under sentence in a case previously tried; but the courts cannot imply an exception not warranted by the language of the statute. In no fair sense can it be said that the absence of the accused from court while he was in the chain gang was voluntary. His imprisonment was, of course, the result of his own misconduct; but the confinement was involuntary, and the enforced absence resulting therefrom was not the consequence of any act of the accused over which he had control.

We come, therefore, to the last point, which is the real ground upon which state's counsel seeks to uphold the judgment of the trial court. There is no statute of this state which expressly authorizes the court to take into custody and put on trial a person already serving a sentence under an indictment upon which he has previously been tried. The General Assembly has enacted a statute providing machinery for bringing a convict into court to testify as a witness; but it was expressly declared that the proceeding authorized by the act should be cumulative. Penal Code 1910, §§ 1180-1184. It cannot be doubted that, under the court's inherent power, there is ample authority, irrespective of this statute, to procure the attendance of convicts as witnesses. At common law the writ of habeas corpus was used for this purpose, as well as to remove a prisoner from one jurisdiction to another where his presence was needed. 3 Bl. Com. 130. When a convict is serving a penal sentence, he is in the custody of the state or its authorities. In a sense he is the property of the state. His labor belongs to the state. Having for-

felted his right to freedom, he is completely under the dominion and control of the state, with no rights save those which the law in its humanity may accord him. It would, indeed, be remarkable if the state, which has full power to reach out and bring into court one of its citizens while in the full enjoyment of his liberty, could not find a process by which one of its convicts could be brought into court for any purpose for which his presence could lawfully be required. We have not the slightest doubt of the full and complete power of the courts to adopt appropriate measures to obtain a convict's presence in any proper case.

[5] It seems to have been the rule at common law that where one was attainted of a felony he could not be tried again for the same or any other felony, for the reason that by the attainder the prisoner became dead in law and had forfeited all he had, so that it would have been superfluous "to endeavor to attain him a second time." 4 Bl. Com. 337. But this doctrine is obviously not applicable with us, and has not usually been followed in this country. *Thomas v. People*, 67 N. Y. 218; *Coleman v. State*, 35 Tex. Cr. R. 404, 33 S. W. 1083; *Singleton v. State*, 71 Miss. 782, 16 South. 295, 42 Am. St. Rep. 488; *People v. Flynn*, 7 Utah, 378, 26 Pac. 1114. In Missouri it was held that a statute of that state required the enforcement of the common-law rule. *State v. Buck*, 120 Mo. 479, 25 S. W. 573.

[6, 7] The courts of this state have power to adjudge that one sentence shall begin at the expiration of another previously imposed at the same term. Here the prisoner was serving a misdemeanor sentence. If he had been tried for the felony and convicted, the court would have had power to provide that the sentence in the felony case should begin at the expiration of the misdemeanor sentence. Whether any part of the latter sentence imposed at a previous term could have been extinguished by being merged into the felony sentence we need not inquire; but, at any rate, such a merger would afford the prisoner no ground for complaint.

The plaintiff in error was serving a sentence imposed by the court in which the felony indictment was pending. Both the court and the prosecuting attorney were bound to know of this sentence. The attorney for the accused was under no duty to call the court's attention to the fact of his imprisonment. It was the duty of the court to send for him and put him on trial. In addition to this, it appears from the agreed statement of facts that the convict was in court as a witness during the term. This was sufficient notice to the court and the solicitor that he was confined in the chain gang even if such notice were necessary; and as the state had full power to put the accused on trial, the failure to do so operated absolutely to discharge him from the felony in-

dictment. This conclusion clearly results from previous decisions of the Supreme Court, as well as of this court.

Judgment reversed.

(11 Ga. App. 46)

**BROWNING v. CITY OF WAYCROSS.**  
(No. 3,983.)

(Court of Appeals of Georgia. April 2, 1912.  
Rehearing Denied April 16, 1912.)

(Syllabus by the Court.)

**COMMERCE (§§ 43, 44\*)—SUBJECTS OF REGULATION.**

The interstate commerce clause of the federal Constitution does not prohibit a state or one of its subordinate political subdivisions from imposing a reasonable occupation tax upon the business of "putting up or erecting lightning rods," and a person engaged in such a business is subject to the tax, notwithstanding it appears that the lightning rods were sold by him as agent for a nonresident manufacturer, under a contract which required the seller to install the lightning rods. This is true, without reference to whether the lightning rods are shipped from the foreign state directly to the purchaser, or are shipped as a part of a common mass with other property of the same character to the agent of the seller and distributed by him to the purchaser. Such a tax affects only incidentally, and does not impose an unlawful burden upon, interstate commerce.

[Ed. Note.—For other cases, see *Commerce*, Cent. Dig. §§ 32, 35; Dec. Dig. §§ 43, 44.\*]

Error from Superior Court, Ware County;  
T. A. Parker, Judge.

E. A. Browning was convicted of violating an ordinance of the City of Waycross, and brings error. Affirmed.

J. L. Sweat, for plaintiff in error. C. L. Redding and Wilson, Bennett & Lambdin, for defendant in error.

**POTTLE, J.** The plaintiff in error was convicted of the violation of an ordinance of the city of Waycross, and excepts to the overruling of his certiorari.

The ordinance imposed an occupation tax of \$25 "upon lightning rod agents or dealers engaged in the business of putting up or erecting lightning rods." The plaintiff in error was employed as agent of the St. Louis Lightning Rod Company, a nonresident corporation, to solicit and sell lightning rods. During the year 1911 he, together with another agent of that company, solicited a large number of orders in the city of Waycross. The manner in which the business was carried on was that the purchaser would deliver to the soliciting agent a written order, addressed to the agent, for a certain quantity and quality of lightning rods, and at a certain price. In the written order there was nothing said directly in reference to the installation of the lightning rods bought; but it was understood that this was to be done by the agent taking the order, or some other agent of the seller. It was the practice that the orders, when taken, were forwarded to

the residence of the seller, and when a sufficient quantity to make up a car load had been sold, as shown by these orders, the car would be shipped to Waycross, consigned to the St. Louis Lightning Rod Company. Upon arrival of the car in Waycross, the agent who was to make delivery would take the lightning rods from the car, load them on a wagon, and deliver them in this way from house to house to the purchasers. There was no mark on any particular set of lightning rods to indicate that they were designed for any particular individual. They were received in bulk by the agent, and from the car of rods the various orders would be filled according to the specifications set out in each. It required special skill to put the rods together and install them on the house, but this was done without any extra charge over and above the amount stated in the order. When the rods were installed on the house, the amount of each order would be collected in cash or notes by the agent and transmitted to his employer in St. Louis. The plaintiff in error had not paid the occupation tax required by the ordinance for the year 1911, nor had any one else paid it for him.

The only point presented for our consideration is whether the ordinance of the city of Waycross is void, as being in conflict with the interstate commerce clause of the federal Constitution. In 1899, upon the authority of the decisions of the Supreme Court of the United States, as they were then understood and construed, the Supreme Court of this state held that the commerce clause of the federal Constitution does not prevent a state from imposing for revenue purposes a license tax upon agents of principals residing in other states, who make executory contracts for the sale of goods, and who, when the goods are shipped into this state, receive them in bulk, break the original packages in which they are contained, and distribute them among the customers. *Racine Iron Co. v. McCommons*, 111 Ga. 536, 36 S. E. 866, 51 L. R. A. 134. That decision was based upon the idea that the goods having been shipped into this state in bulk to the agent, who distributed them among the purchasers in compliance with their respective contracts, the state had complete authority to impose a tax upon the business of the agent, since the goods were not actually delivered to the purchaser until after they became a part of the mass of property in this state. After the rendition of that decision, and in 1903, the Supreme Court of the United States had under consideration a case from North Carolina involving practically the identical facts of the *McCommons* Case. *Caldwell v. North Carolina*, 187 U. S. 622, 23 Sup. Ct. 229, 47 L. Ed. 336. In that case it appeared that the agent took orders for portraits to be shipped into North Carolina by a Chicago corporation, that the orders were taken and forwarded to

this corporation, and when a sufficient number had accumulated the corporation would load the portraits into a car and ship them by freight to North Carolina, consigned to the order of the corporation itself, or to its agent. Upon arrival of the car, the agent would take charge of it, put the portraits in the frames to which they belonged, respectively, and deliver them to the purchasers. The Supreme Court of North Carolina held that the ordinance was a valid exercise of the taxing power of the city of Greensboro, for the reason that the portraits were shipped to the order of the seller, and the agent of the seller opened the boxes in which the portraits were shipped, took out the portraits and frames, assorted them and put them together, and delivered them to the purchasers in the city of Greensboro. This was thought by the Supreme Court of North Carolina to be the distinction between the case then being dealt with and the decision in the case of *Brennan v. Titusville*, 153 U. S. 289, 14 Sup. Ct. 829, 38 L. Ed. 719. This distinction, however, was summarily disposed of by the Supreme Court of the United States on review, and it was directly held in a unanimous decision that the ordinance in question operated as an unlawful burden on interstate commerce and was for this reason void. Similar cases again reached the Supreme Court of Georgia after the rendition of the decision in *Caldwell v. North Carolina*. The former ruling of our Supreme Court was overruled, and it was held that "one who, in this state, as the representative of a principal residing in another state, takes orders on such principal for the purchase of goods held in such other state, and who, when the goods are shipped by his principal to him, receives them in this state, breaks the original packages in which they are contained, distributes them among the customers from whom he obtained such orders, and upon delivery receives from them the price of the goods, is engaged in interstate commerce." *Stone v. State*, 117 Ga. 292, 43 S. E. 740. To the same effect, see *Kehrer v. Stewart*, 117 Ga. 969, 44 S. E. 854.

Since the decisions of the Supreme Court of the United States upon questions involving the construction and application of the federal Constitution are the supreme law of this state, it becomes necessary to ascertain whether there is any valid distinction between the case now in hand and the case of *Caldwell v. North Carolina*, supra. If there is no rational distinction, this ordinance must be held to be void. It is argued that a material point of difference lies in the fact that no separate lot of lightning rods was designed for any particular individual, but that they were shipped in car load lots in a common mass, received by the agent of the seller in this state, put together with such mechanical skill as was necessary for the purpose, and delivered from house to house in compli-

ance with the orders previously given, and that no particular purchaser had any claim upon or title to any particular set of lightning rods. It is said this is altogether unlike the case wherein the portraits were sold and delivered, because there, from the very nature of the case, each particular portrait was designed for some particular purchaser. We are inclined to think that this distinction which counsel seeks to draw is somewhat shadowy and unsubstantial. In the portrait case the agent in North Carolina put together the frames, placed in each frame the portrait for which it was designed, and in this condition delivered the portrait and frame to each purchaser.

But, without reference to whether there is any rational distinction between the two cases, so far as this point is concerned, we do believe there is a material point of difference between the cases. It will be observed that in all of the cases which have been passed upon by the Supreme Court of the United States, including the *Caldwell* case, the tax was levied either directly or indirectly on the business, because a "tax on the occupation of doing a business is a tax on the business." It is freely conceded by us, as it must be, that if this ordinance, properly construed, imposes any substantial burden on interstate commerce, whether directly or indirectly, it is absolutely void and of no effect. The ordinance does not purport to levy a tax or license fee either upon the business of selling lightning rods or upon the agency appointed by the seller to consummate this purpose. It undertakes merely to impose a tax "upon lightning rod agents or dealers engaged in the business of putting up or erecting lightning rods." Courts are always inclined, where it can be done without violence to the language employed, to give to a law a construction which prevents it from coming in conflict with the fundamental law of the state or general government. The primary object of this ordinance is to exact a license fee from persons engaged in putting up or installing or erecting lightning rods. The business of installing lightning rods is not so necessary a part of the business of manufacturing and selling lightning rods as that the two cannot be separated for purposes of taxation. The evidence shows, and we may know judicially, that it requires more or less mechanical skill to install a system of lightning rods properly. There is no reason why a purchaser could not buy lightning rods from the St. Louis manufacturer and install them himself, either directly by his own effort, or through the medium of a local agent. For example, if the plaintiff in error had simply taken orders for the sale and delivery of these lightning rods, and had carried along with him another man not employed by the manufacturer, who made separate contracts for the installation and erection of the lightning

rods, it could not be doubted that the city of Waycross would have full power and authority to exact from such a person a reasonable occupation tax.

It is true that in the present case it appears that the agent who made the sale likewise agreed, in behalf of his principal and as a part of the contract of purchase, and without increasing the contract price, to install the lightning rods; but we do not think this makes any substantial difference. Relatively to this matter, the interstate commerce which is protected by the federal Constitution is "the negotiation of sales of goods which are in another state, for the purpose of introducing them into the state in which the negotiation is made." *Caldwell v. North Carolina*, supra. It does not include mere incidents, which are not necessary parts of the contract of sale. There are many laws enacted by the states and their subordinate political divisions which incidentally bear upon and affect interstate commerce; but the rule has been announced, time and time again, by the supreme tribunal of the general government, that such laws, having merely an incidental, unsubstantial, and immaterial effect upon interstate commerce, are not prohibited by the commerce clause of the federal Constitution. The nonresident will be protected fully and completely in carrying on its business with citizens of this state in making and consummating its contract of sale up to and including actual delivery to the purchaser; but we do not believe that it was ever contemplated, by the commerce clause of the Constitution or by the decisions of the United States Supreme Court construing it, that an agent appointed by a nonresident, not only to make a sale, but to perform some other act not a necessary part of the sale, and having no necessary connection with interstate commerce, would be exempt from the reasonable exercise of the taxing power of the state, operating solely upon the act which was not a necessary part of the contract of sale. A case might be conceived of where on account of the peculiar nature of the article, or the secrecy of the process, only the seller or manufacturer could put it in condition to be used, and where the article would be worthless unless delivered in complete state ready for use. In such a case, to take away the right to put it in condition for use would practically destroy the sale; and hence, where the article was the subject of an interstate sale, to tax the right to install it would be an unlawful interference with interstate commerce. For example, if a portable house should be the subject of an interstate sale, and it could only be put together by a process known to the manufacturer, he would be protected from inter-

ference both in making the sale and in erecting the house. But if, on the other hand, the house was simply made of blocks which could be cemented together by any one skilled in general work of that nature, we think the business of putting the house together might be separated for purposes of taxation from the business of selling. And so, if a grain dealer in Chicago should sell to a planter in Georgia a car load of seed wheat, the mere fact that as part of the contract of sale he agreed to sow the wheat would not preclude the state from collecting from him a license fee imposed upon the business of planting grain for hire.

But such is not the case here, or at least the evidence does not admit of such a conclusion. So far as appears, any skilled mechanic can put up lightning rods. While some special aptitude is required, it is not of such a peculiar character as to justify the inference that it would unduly hamper or prevent the sale if the seller should not install the rods on the purchaser's house. Hence to tax merely the business or occupation of installing the rods is not an unlawful interference with interstate commerce. The only case which has been called to our attention involving the exact question now presented is that of *State v. Gorham*, 115 N. C. 721, 20 S. E. 179, 25 L. R. A. 810, 44 Am. St. Rep. 494, wherein the Supreme Court of North Carolina reached the same conclusion that we have arrived at in this case. In principle a recent decision of the Supreme Court of Alabama is also in point. *American Amusement Co. v. East Lake Chutes Co. (Ala.)* 56 South. 961.

The case is unlike that of *Rogers v. City of Sandersville*, 120 Ga. 193, 47 S. E. 557, where it was held that the posting of bills to advertise wares for sale was only incidental to the sale, and could not be separated from it for purposes of taxation. There could be no sale without advertisement of some sort, either by word of mouth, or printed signs, or display of the goods, and the like. Such an act is merely an offer or invitation to buy, and is necessarily part and parcel of the sale. Such is not the case where the business upon which the tax is laid is not necessary to effectuate the sale, though it may in point of fact facilitate it. As was said by Mr. Justice Lamar in the *Rogers Case*, "a man may have more than one business, and be taxed for each." The business of building houses might facilitate the sale of building materials; but one engaged in both enterprises could be taxed for each. We hold that the ordinance involved was a valid exercise of the taxing power of the city of Waycross.

Judgment affirmed.

RUSSELL, J., concurs, dubitante.

(11 Ga. App. 15)

**NALLEY v. STATE.**

(No. 4,018.)

(Court of Appeals of Georgia. April 2, 1912.)

*(Syllabus by the Court.)***1. FORGERY (§ 26\*)—INDICTMENT AND INFORMATION (§ 125\*)—SUFFICIENCY OF INDICTMENT—CHARGING SEPARATE OFFENSES.**

The indictment sufficiently charged an offense under section 245 of the Penal Code of 1910, and was not subject to demurrer, either upon the ground that it charged two separate and distinct offenses in one count, to wit, forgery and uttering a forged paper, or upon the ground that it did not appear from the indictment that the paper might be used to defraud, or, if genuine, would have injured any one.

[Ed. Note.—For other cases, see Forgery, Cent. Dig. § 61; Dec. Dig. § 26;\* Indictment and Information, Cent. Dig. §§ 334-400; Dec. Dig. § 125.\*]

**2. FORGERY (§ 12\*)—DEFENSES.**

Where one is charged with altering an answer which had been filed to a summons of garnishment, the fact that the garnishee lives in a militia district other than the one to which the summons of garnishment was made returnable constitutes no defense.

[Ed. Note.—For other cases, see Forgery, Cent. Dig. §§ 28-47; Dec. Dig. § 12.\*]

**3. CRIMINAL LAW (§ 798½\*)—INSTRUCTIONS—FORM OF VERDICT.**

Where, in a criminal case, the jury are distinctly instructed that if certain theories of the evidence contended for by the accused, are in the opinion of the jury well founded, they should acquit, the inadvertent omission to instruct the jury as to the form of a verdict of acquittal is not cause for a new trial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1801, 1938; Dec. Dig. § 798½.\*]

**4. CRIMINAL LAW (§ 954\*) — ADMISSION OF EVIDENCE—RECORD—REVIEW.**

A ground of a motion for a new trial, complaining of the admission of documentary evidence, will not be considered, when the evidence objected to is not so substantially set forth in the ground as to enable the reviewing court to determine the point without reference to other parts of the record.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2341, 2363-2367; Dec. Dig. § 954.\*]

**5. CRIMINAL LAW (§ 398\*)—EVIDENCE—BEST AND SECONDARY.**

Where a document which would be admissible as evidence for the state in a criminal case is shown to be in the custody of the accused or his counsel, secondary evidence of the contents of the writing is admissible.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 879-886; Dec. Dig. § 398.\*]

**6. WITNESSES (§ 244\*)—EXAMINATION—LEADING QUESTIONS.**

Where counsel states in his place that he has been misled or entrapped by a witness offered by him, who had before the trial made to the counsel statements at variance with the testimony then being given, the court may in its discretion permit the counsel to ask the witness leading questions.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 795, 848; Dec. Dig. § 244.\*]

**7. CRIMINAL LAW (§ 1159\*)—APPEAL—DIRECTING VERDICT.**

The refusal of the court to direct a verdict in a criminal case cannot be made the subject-

matter of an assignment of error in the reviewing court.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3074-3083; Dec. Dig. § 1159.\*]

**8. PERJURY (§ 33\*)—EVIDENCE.**

The evidence authorized the verdict.

[Ed. Note.—For other cases, see Perjury, Cent. Dig. §§ 117-124; Dec. Dig. § 33.\*]

Error from Superior Court, Paulding County; Price Edwards, Judge.

H. W. Nalley was convicted of altering an answer to a summons in garnishment, and brings error. Affirmed.

The accused was indicted for altering and publishing as true an answer to a summons of garnishment. The facts alleged in the indictment were as follows: In a suit pending in a justice's court, summons of garnishment was issued and served, and the garnishee filed an answer in that court, admitting indebtedness in a named sum. While the answer was on file, the accused, who was attorney at law for another creditor of the defendant in the suit above mentioned, had summons of garnishment issued by the magistrate of another district and served upon the garnishee. Thereafter, when the second garnishment case came on to be tried, the accused fraudulently obtained possession of the answer which had been filed in the first proceeding, and with intent to defraud the garnishee did "make, forge, alter, and counterfeit said original and genuine answer," by erasing the name of the original plaintiff and substituting that of the client of the accused, and by changing the dates in the answer, so as to make it appear as an answer to the summons of garnishment served in the second proceeding, and the accused, knowing the answer as thus changed to be false, altered, and counterfeited, uttered and published it as true by filing the answer in the court to which the second summons of garnishment was made returnable. A demurrer to the indictment was overruled. After conviction, the accused filed a motion for a new trial, and complains in this court of the overruling of this motion, and of the refusal to quash the indictment.

J. S. James, for plaintiff in error. J. R. Hutcheson, Sol. Gen., and A. L. Bartlett, for the State.

POTTLE, J. [1] 1. An abstract of the indictment is set forth above. It was framed under the act of 1907 (Acts 1907, p. 57), found in section 245 of the Penal Code of 1910. It charged the offense substantially in the language of that section and was not subject to general demurrer. It has been directly ruled by the Supreme Court several times that forgery and uttering the forged paper may be joined in one count in the same indictment. *Thomas v. State*, 59 Ga. 784; *Lascelles v. State*, 90 Ga. 347 (4), 16 S. E. 945, 35 Am. St. Rep. 216. See, also, *Heath v.*

State, 91 Ga. 126, 16 S. E. 657, and Hale v. State, 120 Ga. 183, 47 S. E. 531. There was no error in overruling the demurrer.

[2] 2. The answer to the garnishment as originally filed was in the case of W. O. Hitchcock v. T. F. V. Cole, alleged to have been pending in the justice's court of the 1,080th district. It was sworn to on the 15th day of April, 1907, and admitted an indebtedness of about \$75, being the balance which the garnishee claimed to be due on certain notes which he had executed to the defendant for borrowed money. In the answer as altered, the case was stated to be that of A. L. Scroggins v. T. F. V. Cole, pending in the justice's court of the 1,080th district. The date was changed so as to make it appear that the answer had been sworn to on December 15, 1907. It is alleged in the indictment that judgment had been obtained by Scroggins in the justice's court of the 951st district against the defendant, T. F. V. Cole, for the sum of \$35, and that the summons of garnishment which had been sued out by the defendant as the attorney of Scroggins was based upon this judgment. The point is made that under section 4754 of the Civil Code of 1910, when the garnishee resides in a different militia district from that in which the judgment was obtained the affidavit and bond for garnishment should be made before an officer of the district in which the garnishee resides, that the summons of garnishment should be made returnable in the district of the garnishee's residence, and that the garnishment proceedings in the Scroggins Case were void, because the summons was made returnable to the justice's court of a district other than that in which the garnishee resided. It is insisted that, the proceeding being void, a forged or counterfeited answer filed in the district to which the summons was returnable could not have defrauded the garnishee, and that for this reason the conviction was unauthorized. There is no merit in this point. If a summons of garnishment should be made returnable to a district other than that in which the garnishee resides, the garnishee could raise the point by appearing and pleading to the jurisdiction of the court; but if he waived jurisdiction, by appearing and filing an answer, he would be bound by any judgment rendered in the garnishment case. For this reason the answer as altered and filed could have been used to defraud the garnishee, and, if it had been a genuine answer, judgment rendered in the garnishment case would have been binding upon him.

[3] 3. The judge's charge was not sent up with the record. By approving the grounds of the amended motion for a new trial unconditionally, he certified that he did not charge the jury in reference to the form of their verdict in the event they found the defendant not guilty. It appears, however, from an extract from the charge set forth

in another ground of the motion for a new trial, that the judge distinctly charged the jury that they must confine themselves to the allegations made in the indictment and to the opinion which they might entertain of the evidence, and "make up a verdict of guilty or not guilty as the evidence justified." The jury returned a verdict of guilty, with recommendation that the accused be punished as for a misdemeanor. Where, in a criminal case, the judge distinctly charges the jury that, if they believe the evidence offered in behalf of the accused they should acquit him, the inadvertent omission to state what should be the form of their verdict in the event of acquittal will not be cause for a new trial. Thompson v. State, 120 Ga. 132 (5), 47 S. E. 566.

[4] 4. In several grounds of the motion for a new trial complaint is made of the admission of documentary evidence; but the evidence is not set out, either literally or so substantially that this court can determine the question sought to be raised, without reference to other parts of the record. For example, in the fifth ground of the motion the alleged error is thus stated: "Because the court erred in admitting before the jury the certified copy offered in evidence by the state, signed J. R. Lawrence, J. P. 1080 Dist. G. M., dated August 10, 1909." In the tenth ground the complaint is made generally that the court erred in admitting in evidence a "certified copy of the proceedings of the garnishment proceedings." In the eleventh ground the complaint is made generally that the court erred in overruling "the objection to the answer of G. F. Cole to the garnishment tendered in evidence by the state." It has been many times ruled that assignments of error such as those above referred to present no questions with which the reviewing court can deal. Shippen Lumber Co. v. Gates, 136 Ga. 37, 70 S. E. 672; Sasser v. Pierce, 9 Ga. App. 27, 70 S. E. 197; Jones v. Pope, 7 Ga. App. 538, 67 S. E. 280; MacGovern v. Carrollton Elec. Co., 5 Ga. App. 393, 63 S. E. 233; Barker v. State, 1 Ga. App. 286, 57 S. E. 989.

[5] 5. One of the documents material to the state's case could not be found. Upon the preliminary investigation before the court, there was testimony from which the court could have found that the paper was in the custody of the accused. The accused objected to secondary evidence of the contents of this paper. Since the court could not compel the accused to produce evidence against himself, the paper was so inaccessible that secondary evidence of its contents was admissible. Farmer v. State, 100 Ga. 41, 28 S. E. 26, and cases cited; Moore v. State, 130 Ga. 322 (4), 60 S. E. 544.

[6] 6. The court permitted state's counsel to propound leading questions to a witness who had been called by the state. Counsel stated that he had been misled by the wit-



ness; that statements had been made to him by the witness totally at variance with the testimony then being given, and, for this reason, counsel desired permission to lead the witness, for the purpose of ascertaining the truth of the matter then under investigation. There was no abuse of discretion in permitting leading questions to be propounded to this witness. Matters of this nature are in the discretion of the trial judge, and it is only in extreme cases that the reviewing court will interfere. In the present instance the judge properly exercised his discretion. *Barker v. State*, 1 Ga. App. 286, 57 S. E. 989.

[7] 7. Where, in a criminal case, there is no evidence upon which a verdict of guilty could properly be based, it is not improper for the trial judge to so state to the jury and advise them to return a verdict of not guilty. It is a needless consumption of time to permit extended arguments in a criminal case, and to give lengthy instructions upon various theories of the law, when there is a total lack of evidence to authorize a verdict of guilty. In such a case the trial judge not only has the right, but it is his duty, if he interprets the law in such a way as that, when applied to the evidence, a verdict of acquittal would necessarily result, to so instruct the jury and end the case. But, while this is true, a refusal of the trial judge at the close of the evidence for the state to direct a verdict of "not guilty" is not a proper subject-matter of an assignment of error in the reviewing court. The only question in reference to the evidence which this court can consider is whether or not, upon an examination of the evidence as a whole, including the statement of the accused, there was any evidence upon which a verdict of guilty could properly be founded.

[8] 8. We have carefully examined the evidence in this case. It appears that the accused had a claim in favor of Scroggins against T. F. V. Cole, and that as attorney at law he caused summons of garnishment to be issued and served upon G. F. Cole; that the garnishee called the attorney over the telephone and stated that he was unable to come to town and make answer to the garnishment, and inquired if he could not make the answer over the telephone. The attorney replied that he could. Whereupon the garnishee instructed the attorney to make for him the same answer which he had previously filed in the case of *Hitchcock v. T. F. V. Cole*, with the exception that the notes which the garnishee had given to T. F. V. Cole had been transferred by Cole to some other person since the filing of the first answer. Counsel for the accused claims that in filing the second answer he acted under instructions from the garnishee, and that, while the transaction was illegal, at the same time the evidence demanded a finding that he could have had no criminal intent in making the al-

teration in the answer to the garnishment. The difficulty about this contention is that the accused did not comply with the instructions given him by the garnishee. In effect, the instructions were to file an answer that the garnishee was not indebted at that time to the defendant, and the answer as filed by the accused showed an existing indebtedness of \$75. There was sufficient evidence from which the jury could find that the accused made the alteration in the answer, as alleged in the indictment. He did not in his statement undertake to explain the transaction, but contented himself with a general statement to the effect that he was not guilty of the crime with which he was charged, and had never been guilty of any similar crime in his life. The circumstances were such as to call for a detailed explanation from him in reference to the transaction, and his failure to give it was proper matter for consideration by the jury upon the question of criminal intent. This question was one peculiarly for their determination, and this court has no power to set aside a verdict in any case where there is any evidence upon which it could be based, unless there has been some material error of law.

No such error having been committed in the present case, it necessarily results that the judgment must be affirmed.

(11 Ga. App. 1)

MOSLEY v. STATE. (No. 3,850.)

(Court of Appeals of Georgia. April 2, 1912.)

(Syllabus by the Court.)

1. CRIMINAL LAW (§ 1093\*)—WRIT OF ERROR—DISMISSAL—GROUNDS.

The writ of error will not be dismissed because the April adjourned term, 1911, of the court is designated in the bill of exceptions, which was certified by the trial judge, as the "July adjourned term, 1911," since it appears from the record that the trial in fact occurred in the month of July, 1911. Where the identity of the trial which it is sought to review by the bill of exceptions with the trial set out and described in the record is unequivocally established by the record itself, the particular designation applied to the term as a matter of nomenclature may be disregarded, as immaterial.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 2828-2833, 2919, 2920; Dec. Dig. § 1093.\*]

2. CHARGE OF COURT—CONSTRUCTION AS A WHOLE.

The excerpts from the judge's charge to the jury upon which error is assigned, if standing alone, might be amenable to criticism; but viewing them in connection with the immediate context, and considering the instructions as a whole, the charge was free from error, and manifestly not prejudicial to the accused.

3. ASSAULT AND BATTERY (§ 92\*)—SHOOTING AT ANOTHER—EVIDENCE.

The evidence authorized the verdict.

[Ed. Note.—For other cases, see *Assault and Battery*, Cent. Dig. §§ 137-139; Dec. Dig. § 92.\*]

#### 4. CRIMINAL LAW (§ 893\*)—TRIAL—VERDICT—CONSTRUCTION.

Verdicts are to be given a reasonable intentment, and not to be rendered ineffectual when the true meaning of the finding can be readily ascertained. In every instance a verdict should be construed in the light of the maxim that that is certain which can be rendered certain.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2089; Dec. Dig. § 893.\*]

*(Additional Syllabus by Editorial Staff.)*

#### 5. CRIMINAL LAW (§ 823\*)—TRIAL—INSTRUCTIONS—CURE BY OTHER INSTRUCTIONS.

In a prosecution for assault with intent to murder, the expression in an instruction: "Now, you determine this question: If the party shot in this case had died, what would be the defense, murder or manslaughter?" though subject to criticism when taken by itself, is not error, where the court had instructed fully the law of justifiable homicide, had told the jury to take the case and the evidence and determine whether any offense was committed, and had recapitulated by charging that if defendant acted in defense of his brother against an assault which amounted to a felony, or what appeared to him to be a felony, he would have the right to defend his brother against it.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1992-1995, 3158; Dec. Dig. § 823.\*]

#### 6. CRIMINAL LAW (§ 823\*)—TRIAL—INSTRUCTIONS—CURE BY OTHER INSTRUCTIONS.

In a prosecution for assault with intent to murder, an instruction that the jury are the judges of all the circumstances, and that it is for the jury to determine whether, in the defense of defendant's brother, that defense stands upon the same footing of reasonable justice and amounts to a justification, is not error, as submitting to the jury the question of law whether defendant would be justified in shooting to defend his brother, where the judge had correctly charged on the doctrine of mutual defense as applicable to brothers.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1992-1995, 3158; Dec. Dig. § 823.\*]

Error from Superior Court, Tattnall County; W. W. Sheppard, Judge.

Enoch Mosley was convicted of shooting at another, and brings error. Affirmed.

H. H. Elders, for plaintiff in error. N. J. Norman, Sol. Gen., for the State.

RUSSELL, J. [1] 1. A motion to dismiss the writ of error is made, upon several grounds. All of them, however, can be treated as being only a presentation in different ways of the question whether the plaintiff in error should not have designated the term of the court at which the accused was tried as the April adjourned term, 1911, of Tattnall superior court, rather than the July adjourned term, 1911, of the same court, as it is designated in the motion for a new trial and in the bill of exceptions. It is insisted that the laws of Georgia do not provide for any July adjourned term of the superior court of Tattnall county, and that no such term was held, as will appear from an inspection of the brief of the evidence and the charge of the court sent up in the record;

also that the motion for a new trial and the bill of exceptions referred to a different term from the one in which the case was tried, and that the state's counsel was not served with the bill of exceptions for the case tried at the April adjourned term, 1911, and brief of the evidence was filed, approved, and sent up in a case purporting to have been tried at the July adjourned term of the superior court of Tattnall county. It appears from the bill of exceptions that a case against Enoch Mosley, the present plaintiff in error, was tried at the July adjourned term, 1911, of the superior court of Tattnall county. It is recited therein that the motion for a new trial was set for a hearing on September 2, 1911, and was finally heard and determined, and the motion overruled, on September 26, 1911, and the judge certifies these recitals in the bill of exceptions to be true. The plaintiff in error specified as material to be sent up to this court the indictment, the verdict, the judgment, the original and amended motion for new trial, the brief of the evidence, the charge of the court, and the order denying a new trial. An inspection of the record discloses that the brief of evidence bears a caption in which the case is said to belong to a term designated as the April adjourned term, 1911, and the charge of the court is preceded by the following caption: "The State vs. Enoch Mosley. In Superior Court of Tattnall County, April Adjourned Term, 1911. Assault with Intent to Murder."

We bear in mind the rule that, when there is conflict between the recitals of a bill of exceptions and the record, the record generally controls. In the present case, however, while there is apparently a difference in the statements certified in the bill of exceptions, and the record, we see no real conflict between them. It is evident that reference is had to the same term of court, the same defendant, and the same trial. The headings of the brief of evidence and of the charge of the court were no doubt made by the official stenographer, and he designated the term of court at which the accused was tried as the April adjourned term, 1911. This designation may or may not be technically correct. The judge certifies that the motion for new trial was set for a hearing September 2, 1911, and was overruled September 26, 1911, and both of these statements are verified by the transcript of the record ordered to be transmitted to this court. In the motion for new trial the term of court is designated as July adjourned term, 1911, of Tattnall superior court. It may be true, technically speaking, that the term was really the April adjourned term of Tattnall superior court, and that this adjourned term was still in session in July, 1911. The term at which the defendant was tried, perhaps, should have been more correctly designated as the April

adjourned term, if this was the fact. But it appears from the record that the defendant was not tried until July 18, 1911. His original motion was made on July 22, 1911, and the solicitor general acknowledged service of the motion on the latter day. From all of these statements in the record it conclusively appears that the trial which it was sought to review was the trial of which the record speaks. There can be no doubt that the verdict in the record is the verdict which it was sought to review, even if the term of the court should have been designated in the bill of exceptions as the April adjourned term, instead of the July adjourned term. A comparison of the bill of exceptions and the record relieves the question of any confusion or doubt. It is a mere misnomer as to a term of court thoroughly identified. It is immaterial, and does not afford sufficient ground for dismissing a writ of error. In ordering the record sent up the judge identified it in the bill of exceptions as the motion for new trial filed upon a verdict and judgment against this defendant for the offense of shooting at another, in which the motion had been set for a hearing on September 2, 1911, and finally heard on September 26, 1911, and this removed any possible doubt as to whether the proceedings in the record appertained to a different case from that actually designated in the bill of exceptions.

The cases of *Mixon v. State*, 85 Ga. 455, 11 S. E. 874, and *Pearce v. State*, 86 Ga. 507, 12 S. E. 926, are not in point. In *Mixon's Case* Judge Blandford, in delivering the opinion of the Supreme Court, says that "the record was not brought up in compliance with the act of November 11, 1889, and for that reason the court was not permitted to look into the record," and yet he expresses the opinion that, if he could look into the record, it would be plain that the verdict was demanded by the evidence, and that the defendant's motive in asking a continuance was solely for the purpose of preventing a trial. The writ of error was not dismissed, but the judgment was affirmed. It is inferable that the defect in the record referred to by Judge Blandford was the failure to make a bona fide effort to brief the testimony. In *Pearce's Case* the bill of exceptions failed to specify the record, and the certificate was defective; in the instant case the record is specified and serves to identify itself as the record of the proceeding referred to in the bill of exceptions, and the certificate is in the statutory form.

[2. 5] 2. Two exceptions are taken to the charge of the court, based upon excerpts quoted. It is insisted that the court erred in charging as follows: "Now, you determine this question: If the party shot in this case had died, what would be the offense, murder or manslaughter?" The error assigned upon this instruction is that it was prejudicial to the defendant, and

left the impression that, if the man who was shot had died, the defendant would have been guilty of murder, and that in any event the jury was obliged to infer that the court thought the defendant was guilty of some offense. Viewing this disjointed fragment of the charge by itself, the criticism appears to possess merit; but upon an inspection of the charge of the court as a whole, and in connection with the sentence to which exception is taken, it is quite apparent that it is not subject to either of these objections. Before telling the jury to determine the grade of offense of which the defendant would be guilty, if guilty at all, the judge had charged very fully the law of justifiable homicide, and had told the jury to "take the case and the evidence, and determine whether or not any offense was committed." He recapitulated by charging the jury again that "if the defendant acted in the defense of his brother against an assault being committed or about to be committed upon him, which amounted to a felony, or what appeared to him to be a felony, he would have the right to defend his brother against it." He then instructed the jury that the defendant would not be justifiable in firing a gun at the prosecutor if he was not acting under the fears of a reasonable man, and that if they found that to be the case then they must turn their attention to determining "what crime, if any crime," was committed.

It must be borne in mind that the defendant admitted the shooting and sought to justify. The judge, having fully charged the jury on the law of justifiable homicide, and especially upon the subject of the mutual right of brother to defend brother against a felonious assault, correctly told the jury that if the accused was not defending his brother's person against an assault which amounted to a felony, or not acting under the fears of a reasonable man, then he would not be justifiable, but would be guilty either of assault with intent to murder, or of shooting at another not in his own defense, as the jury might determine, and it was immediately following these instructions that the sentence to which objection is made was uttered, and following the excerpt of the charge to which exception is taken the trial judge very fully and fairly explained the meaning of the sentence which he had used. The explanation does not, in any sense, withdraw from the jury the theory that the shooting might have been entirely justifiable, nor intimate any opinion on the part of the court as to the truth of the case, or suggest that the jury should find the defendant guilty of some offense in preference to acquitting him.

[6] Exception is taken to the following instruction: "Gentlemen, you are the judges of all these circumstances. It is for you to determine whether or not, in the defense of his brother as claimed by the defendant, it

Is for you to determine whether or not that defense stands upon the same footing of reason and justice, and amounts to a justification." It is insisted that this instruction left it to the jury to determine, as a matter of law, whether the defendant would be justified in shooting to defend his brother. Even if this excerpt, standing alone, might be subject to the construction which it is sought to place upon it, the language of the judge, when considered in connection with the context, could not have misled the jury, or have been subject to the interpretation given to it in the assignment of error. Immediately preceding it, the judge had charged the jury on the doctrine of mutual defense as applicable to brothers, and instructed them that brothers have the right to defend and protect each other against assaults that are being committed upon the person of a brother; and, following the language excepted to, the judge gave this additional charge: "I charge you that the defendant is placed in the same position that his brother would be placed. In other words, he would be allowed to defend his brother in the same manner as his brother would be allowed to defend himself; and if he was in a position to defend himself, and if you find that an assault was being committed upon the brother of the defendant, which amounted to a felony, and the defendant shot to defend his brother from the commission of an assault which amounted to a felony, it would be justifiable, and you would not be authorized to find him guilty of any offense." The judge further charged in the same connection that if the jury had a reasonable doubt that he acted under the fears of a reasonable man, or if the circumstances were such as to excite the fears of a reasonable man at the time the shooting occurred that an assault was being committed upon his brother, which amounted to a felony, it would be the duty of the jury to give him the benefit of the doubt and acquit him. Construing the charge as a whole, it was very fair to the accused, and presented to the jury every phase of defense which could be available to him under the evidence or his statement.

Upon a review of the instructions as a whole, the statement of Chief Justice Blackley in *Brown v. Matthews*, 79 Ga. 1, 4 S. E. 13, seems peculiarly applicable to the present case: "Standing alone, various expressions in it would be amenable to criticism. A charge torn to pieces and scattered in disjointed fragments may seem objectionable, although when put together and considered as a whole it may be perfectly sound. The full charge being in the record, what it lacks when divided is supplied when the parts are all united. United they stand, divided they fall."

[3] 3. The evidence authorized the verdict. It seems that the prosecutor was a stepfather. He had married a widow with several

children. According to the testimony of their mother, he supported these children and cared for them as if he had been their father. He was entitled to correct them in a proper manner in case of misbehavior. It is in the evidence that he had the mother's consent to control them. On the morning of the shooting he started to chastise a younger brother of the defendant. Conceding, for the sake of the argument, that there was not sufficient cause for this stepfather to beat the younger brother; conceding that the stepfather was unnecessarily cruel, and even brutal—the defendant would not have been justified, under the law, in shooting his stepfather with a shotgun unless either really or apparently to the defendant a felony was being committed, or was about to be committed, upon his brother. The jury evidently did not believe that the stepfather intended to commit upon the person of the younger brother either murder or assault with intent to murder. They attributed the shooting of the stepfather by the older brother to passion and resentment, and hence found the defendant guilty of shooting at another. We thus construe the verdict.

Sympathizing with the natural spontaneity of the older brother's impulse to repel an attack upon his younger brother, they recommended that the offense be punished as for a misdemeanor, and the judge acted upon this recommendation. Personally the writer is in the fullest sympathy with the impulse which actuated the older brother in taking the part of his little brother; but, in view of the fact that it is undisputed in the testimony that the stepfather had run for a considerable distance after the first shot was fired, and was still running away when the second shot was fired, the jury evidently gave the defendant the benefit of every possible doubt upon the subject of motive. Even if there had been reason for the brother to apprehend that his younger brother was in danger at the time of the first shot, there was no danger when the second shot was fired. The jury might have attributed the second shot to revenge. The verdict shows they gave the defendant the benefit of the doubt, and ascribed it to passion, but without intent to kill.

[4] 4. It is insisted in the brief that the plaintiff in error was tried in the lower court for the offense of assault with intent to murder, and that the jury found him guilty of unlawfully shooting another. The point is made that there is no such criminal offense as that of shooting another, and that though the defendant could have been convicted of unlawfully shooting at another, yet if one unlawfully shoots and hits another, he would be guilty of assault with intent to murder. We do not concede the last statement to be sound. One may shoot another, and still be guilty of the statutory offense of shooting at another. It is not a

question of marksmanship, but of intent and motive. A bad marksman may be guilty of assault with intent to murder, or of shooting at another, though his adversary was untouched because the bullet missed the mark. A better marksman may be guilty only of shooting at another, though he shoots down his assailant, if he does not shoot with intent to kill, or if the shooting (though not justifiable) is done in passion in protecting himself or a brother against a mere assault and battery. One may be justifiable in shooting his assailant in actual or apparent self-defense, though under different circumstances he would not be justified in shooting, even if he missed him. As remarked by one of the Justices of the Supreme Court, the statute penalizing shooting at another was not intended to put a premium on bad marksmanship.

However, the general assignment that the verdict is contrary to law does not raise the point that the finding of the jury in this case, that the defendant was "guilty of shooting another not in his own defense," did not authorize the court to pronounce judgment upon the verdict. Verdicts are to be given a reasonable intendment, and not to be rendered ineffectual when the true meaning of the finding can be readily ascertained. In every instance a verdict should be construed in the light of the maxim that that is certain which can be rendered certain. "Id certum est quod certum riddi potest." *Southern Ry. Co. v. Oliver & Morrow*, 1 Ga. App. 734, 58 S. E. 244.

Judgment affirmed.

POTTLE, J., not presiding.

(10 Ga. App. 830)

DANIEL v. PERSONS. (No. 3,539.)

(Court of Appeals of Georgia. April 2, 1912.)

(Syllabus by the Court.)

#### REFUSAL OF HABEAS CORPUS.

The controlling question of law raised by the record in this case having been certified by this court to the Supreme Court for instruction, and that court having decided this question adversely to the contention of the plaintiff in error and in accord with the judgment of the lower court, and there remaining in the record no other question for decision by this court, the judgment stands affirmed.

Error from City Court of Monticello; A. S. Thurman, Judge.

Application for a writ of habeas corpus by Ike Daniel against W. F. Persons. From an order denying the writ, Daniel brings error. Questions certified to the Supreme Court (74 S. E. 260). Judgment affirmed.

Doyle Campbell, for plaintiff in error. W. S. Florence, for defendant in error.

HILL, C. J. Judgment affirmed.

POTTLE, J., not presiding.

(11 Ga. App. 45)

SMITH v. WHELCHER. (No. 3,747.)

(Court of Appeals of Georgia. April 2, 1912.  
Rehearing Denied April 16, 1912.)

(Syllabus by the Court.)

#### ANIMALS (§ 61\*)—ESTRAYS—RECOVERY OF POSSESSION.

Where one of the animals designated in section 2032 of the Civil Code of 1910 has been impounded as authorized by section 2033, and has subsequently been disposed of by the taker up as provided by law in cases of estrays, a possessory warrant to recover the animal will not lie in favor of its owner against the taker up; but the owner is relegated to the provisions of section 2034 of the Civil Code for the recovery of his property so impounded, and the determination of the relative rights arising between him and the taker up of the animal, and the adjustment and settlement of any damages claimed by either in connection with the impounding.

[Ed. Note.—For other cases, see *Animals*, Cent. Dig. §§ 194-210, 214; Dec. Dig. § 61.\*]

Error from Superior Court, Hall County; J. B. Jones, Judge.

Action by F. M. Whelcher against J. R. Smith. Judgment for plaintiff, and defendant brings error. Reversed.

Ed Quillian and Luther Roberts, for plaintiff in error. W. B. Sloan and A. C. Wheeler, for defendant in error.

HILL, C. J. Judgment reversed.

(10 Ga. App. 845)

MCDONALD et al. v. BUTLER et al.

(No. 3,898.)

(Court of Appeals of Georgia. April 2, 1912.)

(Syllabus by the Court.)

#### 1. MUNICIPAL CORPORATIONS (§ 745\*)—TORTS—ACTS OF OFFICERS.

A municipal corporation is not liable in damages for a trespass committed by its officers in wrongfully disinterring and removing the remains of a person buried in a cemetery owned and controlled by the city, unless the act was performed in pursuance of and to effectuate some corporate power conferred by the municipal charter.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1566; Dec. Dig. § 745.\*]

#### 2. CEMETERIES (§ 21\*)—DAMAGES (§ 91\*)—DISINTERMENT—CIVIL LIABILITY.

"One who is the owner of the easement of burial in a cemetery lot, or who is rightfully in possession of the same, is entitled to recover damages from any one who wrongfully enters upon such lot and disinters the remains of persons buried therein;" and where the trespass has been wanton and malicious, or is the result of gross negligence or a reckless disregard of the rights of those entitled to sue, equivalent to an intentional violation of them, exemplary damages may be awarded.

[Ed. Note.—For other cases, see *Cemeteries*, Cent. Dig. § 23; Dec. Dig. § 21; \*Damages, Cent. Dig. §§ 193-201; Dec. Dig. § 91.\*]

#### 3. CEMETERIES (§ 21\*)—DISINTERMENT—CIVIL LIABILITY.

The value of an easement of burial may be recovered from one who wrongfully deprives the owner of his right of user. An action to

recover as damages the value of such an easement will lie against one who wrongfully disinters the body of one buried by the owner, and causes to be interred in its place, without the consent of the owner, the remains of a stranger to him.

[Ed. Note.—For other cases, see *Cemeteries*, Cent. Dig. § 23; Dec. Dig. § 21.\*]

#### 4. CEMETERIES (§ 21\*)—DISINTERMENT—CIVIL LIABILITY.

Where a corpse is wrongfully disinterred, one upon whom rests the duty of reinterment may recover from the wrongdoer the expense thereby incurred.

[Ed. Note.—For other cases, see *Cemeteries*, Cent. Dig. § 23; Dec. Dig. § 21.\*]

#### 5. SPECIAL DEMURRERS OVERRULED.

The special demurrers were properly overruled.

*(Additional Syllabus by Editorial Staff.)*

#### 6. ACTION (§ 48\*)—JOINDER—NATURE OF CAUSES.

A petition for damages for the disinterment of a body from a burial lot, claiming the value of the lot, the cost of reintering the remains removed, and damages for disturbing and removing the remains, and alleging the continuance of the injury to plaintiff's feelings up to the filing of the suit, states but one cause of action.

[Ed. Note.—For other cases, see *Action*, Cent. Dig. §§ 490-510; Dec. Dig. § 48.\*]

Error from City Court of Madison; K. S. Anderson, Judge.

Action by J. W. McDonald and others against E. W. Butler and others. Judgment for defendants, and plaintiffs bring error. Affirmed in part, and reversed in part.

The action was against E. W. Butler and the mayor and council of Madison as joint tort-feasors. The petition as amended set forth the following facts: On April 7, 1893, plaintiffs bought from Butler, then mayor of Madison, and the mayor and council, a lot in a cemetery owned by the city of Madison, to be used as a family burying ground, and received a deed thereto. On April 8, 1893, plaintiffs interred the remains of their father on the lot, and shortly thereafter moved away from Madison. Upon their return on a visit in 1910, they found that their cemetery lot "had been sacrilegiously raided, the remains of their father ruthlessly taken without warrant by alien hands, from the home bought and paid for by his own loved ones, and where loved ones had lain him to rest, placed in a rough box, and dumped in a hole in some out of the way place, all of which was done by the said E. W. Butler and his agent, and the mayor and city council of Madison, all without warrant, cause, or authority." The defendants were not only guilty of the acts above recited, but they likewise took possession of the lot and sold it to another, and there now rests thereon the remains of a stranger, not connected in any way with plaintiffs. This conduct of the defendants was "without warrant, cause, or justification." On November 11, 1910, written demand for compensation was serv-

ed upon the mayor and council of Madison; the claim being in the following language: "Madison, Georgia, November 11, 1910. To the Hon. Mayor and City Council of Madison, Georgia—Gentlemen: This is to notify you that J. W. McDonald and C. F. McDonald hold, present, and ask settlement of the following claims and demands jointly due by you and E. W. Butler to said claimants: City of Madison, Madison, Georgia, the Honorable Mayor and City Council of the City of Madison, and E. W. Butler, to J. W. McDonald and C. F. McDonald, Dr. 1909, April. To one cemetery lot, lying in the new cemetery in the said city of Madison, known and distinguished in the said cemetery as lot No. 26, on the Fourth avenue in section first; a plat of new cemetery as here referred to as being of record in Book PP, folio 32, in the office of the superior court of Morgan county, Georgia, of the value of \$100.00. To the expense of another lot, necessary for the purpose of reintering the remains of their father, which were removed from the aforesaid lot and cast out in the rubbish or put in an out of the way place, expense of \$100.00. To cost of coffin, grave, and reintering the remains of their father, which were removed from the aforesaid lot and cast out, expense of \$125.00. March, 1910. To damage for disturbing and removing the remains of applicants' father from the aforesaid cemetery lot, and for desecrating the grave of their said father, and for taking said remains of their said father from the aforesaid cemetery lot and dumping them out elsewhere, the sum of \$4,875.00—a total of \$5,000.00. This notice is given pursuant to the act of the Legislature of Georgia approved on December 20, 1899." This account is made a part of the petition, and judgment prayed against the defendants for each and every item as charged in said account. The injury to plaintiffs' feelings has continued up to the filing of the suit. Punitive and exemplary damages are claimed "by reason of the act and intention, and of the gross, wanton, reckless, cruel conduct, of the defendants," above described. All of the defendants demurred, generally and specially. The demurrers were sustained, and the plaintiffs excepted.

Williford & Lambert, for plaintiffs in error. E. H. George and Saml. H. Sibley, for defendants in error.

POTTLE, J. [1] 1. It needs little argument to show that the city is not liable for exemplary or punitive damages for the alleged conduct of its officers in desecrating the grave and disintering the remains of the plaintiffs' father. Even if authority to remove the bodies of deceased persons from their resting places could be conferred upon a municipal corporation as a legitimate exercise of the police power, the General As-

sembly has not attempted to expressly confer such authority upon the city of Madison, and it will not be implied from the general welfare clause in the city's charter, or from the authority granted in an amendment to the charter to own and regulate cemeteries and interments therein. Acts 1906, p. 837. The alleged conduct of the members of the council was ultra vires and wholly beyond the scope of their official duty. The trespass was not the result of an exercise of corporate powers, and the corporation would not be liable, even though its governing body commanded the performance of the act. In such a case the corporation is not estopped to plead the want of corporate power. The rule is succinctly stated by the Supreme Court as follows: "Where an act is done by the officers and agents of a municipal corporation, which is within the corporate power and might have been lawfully accomplished, had the municipal authorities proceeded according to law, the corporation will be liable for the consequences of an act of such officers or agents proceeding contrary to law or in an irregular manner. Aliter, where the act complained of lies wholly outside of the general or special powers of the corporation." *Langley v. Augusta*, 118 Ga. 590 (4), 45 S. E. 486, 98 Am. St. Rep. 133. See, also, *Roughton v. Atlanta*, 113 Ga. 948, 39 S. E. 316; *City Council v. Mackey*, 113 Ga. 64, 38 S. E. 339; *Gray v. Griffin*, 111 Ga. 361, 36 S. E. 792, 51 L. R. A. 131; Civil Code 1910, §§ 893, 897; 4 Dillon, *Municipal Corporations* (5th Ed.) § 1650 et seq.

It is argued that since the city sold the cemetery lot, and thus gave colorable authority to the grantee to remove the body of the plaintiffs' father, it ought to be liable for the natural consequences of its act in making the deed; but this position is not tenable. We need not discuss the question whether the city had in 1893 power under its charter to lay out and own a cemetery. Certainly the mere grant of an easement of burial in a cemetery lot would not make the corporation liable for exemplary or punitive damages for the act of the grantee or of officers of the city in disinterment and removing from the lot the remains of one previously buried there. No act of its governing body could make it liable for such a trespass. The act of making the second sale of the lot was within the corporate power, but the unlawful trespass was not so connected with, or the consequence of, the lawful act as to render the city liable for the tort. Since all of the items of damage claimed were traceable to and grew out of the trespass in disinterment and removing the body, the general demurrer of the city was rightly sustained.

[2] 2. As to Butler, the petition stated a case. His counsel do not contest the correctness of the principle, decided in *Jacobus v. Children of Israel*, 107 Ga. 518, 33 S. E. 853, 73 Am. St. Rep. 141, that "one who is the owner of the easement of burial in a

cemetery lot, or who is rightfully in possession of the same, is entitled to recover damages from any one who wrongfully enters upon such lot and disinters the remains of persons buried therein." See, also, *Wright v. Hollywood Cemetery Corporation*, 112 Ga. 884, 38 S. E. 94, 52 L. R. A. 621; *L. & N. R. Co. v. Wilson*, 123 Ga. 62, 51 S. E. 24, 3 Ann. Cas. 128; *Medical College v. Rushing*, 1 Ga. App. 468, 57 S. E. 1083. His point is that only special damages are laid, and that, there being no claim for general damages, the petition was rightly dismissed as to Butler, because the allegations are not sufficient to support the claim for exemplary or punitive damages. See *Wright v. Smith*, 128 Ga. 432, 57 S. E. 684. The authorities cited in the *Jacobus Case* show the rule to be that damages may be recovered where the act of disinterment was done either wantonly or negligently. Mere negligence will authorize the recovery of general damages. But in order to authorize the recovery of exemplary damages it must appear that the "injury has been wanton and malicious, or is the result of gross negligence or a reckless disregard of the rights of others, equivalent to an intentional violation of them." *Jacobus v. Children of Israel*, supra. Where there are aggravating circumstances, either in the act or the intention, punitive damages may be awarded. Civil Code 1910, § 4503.

There is no prayer for general damages, but the averments sufficiently state a case entitling plaintiffs to recover exemplary or punitive damages. It is true the petition does not allege in terms that the act was willfully done; but it does allege that Butler himself, as mayor, executed the deed to the plaintiffs; that he and others ruthlessly and without warrant of law desecrated the grave, took the remains therefrom, placed them in a rough box, and "dumped" them into a hole in an out of the way place; that he and the other defendants sold and delivered possession of the lot to another person, who interred therein the body of a stranger to plaintiffs. The law is not over-particular about what a thing is called. From the facts pleaded the law will presume that the act was willful and wanton, and done with a reckless disregard of the rights of the plaintiffs. In addition to this, there is a sufficient averment of aggravating circumstances, both in the act and in the intention, to authorize the imposition of punitive damages. The mere absence of a headstone or monument would not excuse the desecration of the grave. When it was discovered, no matter how, that a human body had been interred on the lot, the grave should have been held sacred, and the body allowed to remain undisturbed in its last resting place. Certainly upon discovery of the grave the most diligent and searching inquiry should have been made to discover ownership of the lot and the identity of the person whose remains lay buried there. Nor would the

mere fact of the apparent abandonment of the lot justify the ruthless invasion of the sacred precincts of the grave. Neglect of a child, though never so gross, to care for the grave of his parent, will not excuse one who wantonly or negligently disinters the corpse and removes it elsewhere. The law recognizes and holds sacred that respect which all natural persons are presumed to have for the memory of the dead; and when the feelings of a child have been wounded in the manner described in the petition, damages will be awarded. We have no means of knowing what the truth is. Of course, if there has been an honest mistake, and no malice, and no gross negligence, and no such reckless disregard of the rights of the plaintiffs as would be equivalent to an intentional violation of them, they would not be entitled to recover exemplary or punitive damages. These are questions to be decided upon the coming in of the evidence. The defendant has not been heard. If the real truth be as stated in the brief of his counsel, a very different case will be presented.

[3] 3. The claim for compensation for the value of the lot taken from plaintiffs was demurred to, upon the ground that, as the plaintiffs still own the lot, they cannot recover its value. Tortious deprivation of land, where the owner has the fee in the soil, will not give rise to an action sounding in tort to recover as damages the value of the land, because ejectment lies to recover the land, and a double recovery of the land and its value would not be allowable. But where an easement or mere right of user has been destroyed, the owner cannot maintain ejectment. *Stewart v. Garrett*, 119 Ga. 386, 46 S. E. 427, 64 L. R. A. 99, 100 Am. St. Rep. 179. *Powell, Actions for Land*, § 50. His only remedy is in tort, where the measure of damages will be the value of the easement. Here the lot remains, but the body of a stranger to plaintiffs reposes there. No one with proper respect for the memory of a deceased loved one would care to lay his remains beside those of an alien in blood. The law will not require plaintiffs, in order to obtain the full enjoyment of their easement of burial, to commit an act similar to

that which the defendants are alleged to have performed. Their easement is lost to them, as they say, by the conduct of the defendants. The plaintiffs bought and paid for the lot, and those who wrongfully deprived them of their right to its full and complete enjoyment ought to pay whatever the easement may be shown to have been worth at its fair market value. Of course, if Butler was in no way concerned with the interment of the body of the stranger to the plaintiffs, this item of damage could not be recovered from him.

[4] 4. The defendants specially demurred to the claim for the cost of reinterment of the body of the plaintiffs' father, upon the ground that it was not alleged that the plaintiffs actually expended the amount sued for. If the plaintiffs did not themselves incur this expense, they cannot recover for these items; but we think the petition sufficiently alleges that they did so. The averment that defendants are indebted to plaintiffs for the "expense of another lot," in the sum of \$100, and for the "cost of coffin, grave, and reintering the remains of their father" at an "expense of \$125," is equivalent to an allegation that plaintiffs incurred the expense claimed.

[5, 6] 5. There was no misjoinder of causes of action. There was but one cause of action alleged, namely, the wrongful disinterment of the dead body; and the several items of damage sought to be recovered relate to different elements growing out of and consequent upon the tort. The allegation in reference to the continuance of the tort was simply an averment that plaintiffs' feelings were still wounded and they continue to suffer mortification and humiliation. If the facts stated in the petition be true, time will never wholly heal the wounded feelings of the children of him whose grave was desecrated in the manner described in the petition. The demurrer, of course, admits these facts.

The judgment will be affirmed, in so far as it dismissed the petition as to the city, but reversed in so far as it sustained the demurrer filed by Butler.

Judgment affirmed in part, and in part reversed.



(159 N. C. 453)

**GAINNEY v. ATLANTIC COAST LINE R. CO.**  
(Supreme Court of North Carolina. April 10, 1912.)

**RAILROADS (§ 347\*)—OPERATION—ACCIDENT AT CROSSING—EVIDENCE.**

In an action to recover for the death of plaintiff's intestate at a crossing, where there was no evidence that the train by which intestate was struck was not equipped with a proper headlight, and that it was not burning, or that signals had not been given, and where it was further admitted that there was an arc light at the crossing, which was burning, a nonsuit was properly granted.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1124–1137; Dec. Dig. § 347.\*]

Appeal from Superior Court, Nash County;  
J. S. Ferguson, Judge.

Action by Nancy J. Gainney, administratrix, against Atlantic Coast Line Railroad Company. From a judgment of nonsuit, plaintiff appeals. Affirmed.

His honor rendered judgment that, upon the pleadings and admissions in open court, the plaintiff's intestate was guilty of contributory negligence, which bars any recovery herein, and ordered a nonsuit.

The judgment of the lower court is as follows:

"This cause coming on for hearing before his honor, G. S. Ferguson, and being heard upon the pleadings and the admissions of the parties, and the further admission that the two tracks of the defendant company run parallel at a distance of 13 feet apart from center to center, and the court being of opinion, upon said pleadings and admissions, that plaintiff's intestate was guilty of contributory negligence, which bars any recovery herein, it is therefore adjudged that plaintiff take nothing by her writ, that the defendant go hence without day, and recover its costs of plaintiff and the surety on her prosecution bond, to be taxed by the clerk."

On certiorari, return was made as follows:

"In obedience to the order of the court made in the case of Nancy J. Gainney, Administratrix of Robert Gainney, v. Atlantic Coast Line Railroad Company, I beg to report that, when the case was called for trial and the pleadings read, it was admitted that the decedent, who was standing at the side of the north-bound track waiting for a long freight train, which was going north, to clear the crossing, immediately and as the last car or caboose reached the crossing walked around the end of the caboose and stepped upon the track of the south-bound train, and was immediately struck and killed. It was further admitted that the distance between the center of the tracks was 13½ feet. The plaintiff admitted that she had no evidence to prove that the passenger train was not equipped with a proper headlight, and that it was not burning, or to prove that the bell was not ringing or that the whistle for the station and crossing had not been blown. It was further admitted that there was an

arc light at the crossing, which was burning. I was of the opinion that there was sufficient room and opportunity for the decedent, after he got within the zone of danger, to have observed the approach of the passenger train before he went upon the track, and that it was negligence for him not to have done so, and to get on the track without looking and listening for the train. And under the ruling of the court in Coleman's Case I stated that upon the pleadings and admissions, if that should be the evidence on the trial I would direct a nonsuit, and in deference to this intimation the plaintiff agreed that I might order a nonsuit, and she take exception thereto, and appeal to the Supreme Court, which was accordingly done."

Henry Grady and T. T. Thorne, for appellant. F. S. Spruill, for appellee.

**PER CURIAM.** When this cause was argued in this court, a writ of certiorari was issued, directing the judge of the superior court to certify up as a part of the record the admissions of the parties made in open court, and which were fully set out in the record. His honor having certified the said admissions in due form, they have been considered by us. We are of opinion, upon the said admissions so certified to us, and upon the pleadings, that the plaintiff's intestate was guilty of contributory negligence upon the plaintiff's own showing, and that the judgment of nonsuit was properly entered.

Judgment affirmed.

(159 N. C. 44)

**HOLMAN v. NORFOLK & W. R. CO.**

(Supreme Court of North Carolina. April 10, 1912.)

**1. APPEAL AND ERROR (§ 927\*) — REVIEW — NONSUIT.**

On appeal from a nonsuit, the evidence must be considered in the aspect most favorable to plaintiff.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2912, 2917, 3748, 4024; Dec. Dig. § 927.\*]

**2. RAILROADS (§ 400\*)—INJURY ON TRACK—JURY QUESTION.**

Evidence in an action for intestate's death on defendant's railroad track held sufficient to take the case to the jury.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1365–1381; Dec. Dig. § 400.\*]

**3. RAILROADS (§ 367\*)—INJURIES ON TRACK—DUTY OF COMPANY.**

Trainmen must keep a careful and continuous lookout along the track for persons thereon, and are negligent if they fail to do so, making the company liable for resulting injuries.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1257, 1258; Dec. Dig. § 367.\*]

Appeal from Superior Court, Durham County; O. H. Allen, Judge.

Action by Luvenia Holman, administratrix, against the Norfolk & Western Railroad

Company. From a judgment of nonsuit, plaintiff appeals. Reversed.

Manning & Everett, for appellant. Guthrie & Guthrie, for appellee.

CLARK, C. J. This was an action for wrongful death. The plaintiff appealed from a judgment of nonsuit. The evidence tended to prove: That plaintiff's intestate was killed shortly after 9 o'clock in the corporate limits of Durham, and his body was found lying on the east side of the defendant's track, partly on the ends of the cross-ties and with his skull fractured. He was unconscious when found, and died soon after. The defendant's passenger train from Lynchburg passed about 9 o'clock at night running about 30 miles an hour, which was greatly in excess of the speed limit (8 miles) permitted by the ordinances of the city. The railroad track was downgrade, and curved to the left going into Durham; but the sharpest part of the curve was some distance beyond where the body of the deceased was found. The skull was fractured just above the left ear. The railroad track had been used for many years by the public generally as a walkway, and especially by the operatives in the mill, going and returning from work. The place was in the city limits and in a populous community. A man lying on the track or sitting on the end of a cross-tie at the point where the plaintiff's body was found could be seen under the headlight of the engine 125 yards, and the defendant's train that night could have been stopped within that distance from the spot, if running at the rate of not over 8 miles per hour, the speed allowed by the ordinance. The evidence for the plaintiff showed that, though there is a street crossing a short distance south of the spot where the body was found, no bell was rung, or whistle sounded; that the place was within the corporate limits, and the train was moving about 30 miles an hour. The defendant's answer, which was offered in evidence, averred that the deceased entered on defendant's track while drunk and in an intoxicated condition, and substantially admits that the deceased was killed by the engine.

[1] The above evidence taken in the most favorable light for the plaintiff, as must be done on a nonsuit (*Cotton v. Railroad*, 149 N. C. 229, 62 S. E. 1093), tended to establish the admission by defendant that plaintiff's intestate was drunk and intoxicated, and was on the track when struck and killed by defendant's train; that he could and ought to have been seen by the engineer or fireman on the train in time to have prevented killing the deceased, especially if the train had been running within the speed permitted by the city ordinance; that the train was running at a speed very much faster than that permitted by the ordinance; that the defend-

ant's track at that place had been used for many years as a walkway by the public, especially Saturday nights and Sundays; that the deceased was killed on Saturday night; that the place of the accident was within the city limits and in a populous community; and that no bell was rung or whistle sounded nearer than half a mile.

[2] Upon the above evidence the case should have been submitted to the jury. *Pickett v. Railroad*, 117 N. C. 637, 23 S. E. 264, 30 L. R. A. 257, 53 Am. St. Rep. 611; *Clark v. Railroad*, 109 N. C. 446, 14 S. E. 43, 14 L. R. A. 749; *Fulp v. Railroad*, 120 N. C. 525, 27 S. E. 74; *Cox v. Railroad*, 123 N. C. 604, 31 S. E. 848; *Powell v. Railroad*, 125 N. C. 370, 34 S. E. 530; *Whitesides v. Railroad*, 128 N. C. 229, 38 S. E. 878.

[3] In *Snipes v. Railroad*, 152 N. C. 42, 67 S. E. 27, the court says: "It is well established that the employees of a railroad company in operating its trains are required to keep a careful and continuous outlook along the track, and the company is responsible for injuries resulting as the proximate consequence of their negligence in the performance of their duty." To same effect are *Arrowood v. Railroad*, 126 N. C. 629, 36 S. E. 151; *Lea v. Railroad*, 129 N. C. 459, 40 S. E. 212; *Bessent v. Railroad*, 132 N. C. 934, 44 S. E. 648; *Stewart v. Railroad*, 136 N. C. 389, 48 S. E. 793; *Sawyer v. Railroad*, 145 N. C. 29, 58 S. E. 598, 22 L. R. A. (N. S.) 200; *Edge v. Railroad*, 153 N. C. 214-217, 69 S. E. 74; *Gulford v. Railroad*, 154 N. C. 607, 70 S. E. 393.

Upon the authorities cited, the judgment of nonsuit must be reversed.

(159 N. C. 459)

#### STATE v. MOSTELLA.

(Supreme Court of North Carolina. April 10, 1912.)

#### 1. CRIMINAL LAW (§ 404\*)—PROSECUTION—ADMISSION OF EVIDENCE.

That the officer who found whisky in a bucket in accused's place of business poured it into a large bottle, because he thought the bucket might be overturned, would not exclude the whisky as evidence in a prosecution for unlawfully keeping liquor for sale, when offered in the bottle to prove that the contents of the bucket was whisky.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 873, 891-893, 1457; Dec. Dig. § 404.\*]

#### 2. INTOXICATING LIQUORS (§ 223\*)—TIME OF OFFENSE—INDICTMENT—PROOF.

When time is not of the essence of offense, as in a prosecution for keeping liquor for illegal sale, the proof need not show a sale on the date laid in the indictment.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. § 273; Dec. Dig. § 223.\*]

#### 3. CRIMINAL LAW (§ 789\*)—INSTRUCTIONS—REASONABLE DOUBT.

An instruction that by "reasonable doubt" was meant "a doubt based upon the evidence and common sense; not a vain, visionary, imaginary doubt; and a reasonable doubt in a

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

jury box is the same reasonable doubt that an honest man meets up with in the ordinary business affairs of life, no more, no less"—could not have misled the jury so as to prejudice accused's rights.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1846-1849, 1904-1922, 1960, 1967; Dec. Dig. § 789.\*]

Appeal from Superior Court, Richmond County; Whedbee, Judge.

Andrew Mostella was convicted of unlawfully keeping intoxicants for sale, and he appeals. Affirmed.

The charge on reasonable doubt was as follows: "By 'reasonable doubt' is meant a doubt you can give a reason for, a doubt based upon the evidence and common sense, not a vain, visionary, imaginary doubt; and a reasonable doubt in a jury box is the same reasonable doubt that an honest man meets up with in the ordinary business affairs of life—no more, no less."

Jno. P. Cameron and Lorenzo Medlin, for appellant. T. W. Bickett, Atty. Gen., and T. H. Calvert, Asst. Atty. Gen., for the State.

HOKE, J. The statute applicable (chapter 21, Laws of Ex. Session 1908) makes it unlawful for persons other than duly licensed druggists to have or keep for sale, barter, or exchange spirituous, vinous, malt, or other intoxicating liquors in the county of Richmond. By section 2 the having on hand more than one quart of the liquors in question by persons other than duly licensed druggists is made prima facie evidence of guilt. There was ample evidence to sustain the verdict, and we find no reversible error which entitles defendant to a new trial of the issue.

[1] There was evidence on the part of the state tending to show that defendant was proprietor of a poolroom, and among various other things found on defendant's premises tending to establish the charge, including four half-pint bottles of whisky in a bed under the cover, castor shucks used to cover bottles, empty bottles, etc., the officer, a short time prior to indictment found a bucket containing 58 ounces of corn whisky under the poolroom table. This the officer poured out into a large bottle, and it was produced at the trial; defendant contending there was error because it had been poured out of the bucket and on that account was no longer admissible as evidence. The officer gave the very natural explanation that he did this because he was afraid it might be overturned. The article was produced because of a claim made by defendant that the contents of the bucket was not whisky. The objection urged goes to the force of the circumstance, but in no way affects the relevancy.

[2] Defendant objected further to a position of his honor's charge as follows: "The law presumes the defendant is innocent, and requires the state to satisfy you beyond a

reasonable doubt that he had intoxicating bitters in his possession for the purpose of sale within the county of Richmond within two years from the date of this bill of indictment. It does not make any difference what whisky, whether this particular whisky or any whisky; if this evidence satisfies you beyond a reasonable doubt that he kept whisky in his possession for the purpose of sale in violation of this act, it would be your duty to return a verdict of guilty." The objection being that the inquiry should have been confined to the precise time laid in the bill. But it is well understood that, when time is not of the essence, the date laid in the bill is ordinarily not considered as restrictive or controlling on the question of proof. State v. Williams, 117 N. C. 753, 23 S. E. 250.

[3] We find nothing in the charge as to reasonable doubt that is calculated to affect defendant's rights adversely, or that was likely in any way to have misled the jury. State v. Whitson, 111 N. C. 695, 16 S. E. 332.

There is no error, and the judgment below will be affirmed.

No error.

(159 N. C. 200)

# GREENSBORO NAT. BANK v. CAROLINA MUT. LIFE INS. CO. et al.

(Supreme Court of North Carolina. April 10, 1912.)

## 1. CONTRACTS (§ 28\*)—SUFFICIENCY OF EVIDENCE—PROMISE TO PAY.

Evidence, in an action on notes executed by an insurance company whose business was purchased by defendant company, held not to show that defendant unconditionally promised to pay the notes upon purchasing the business.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 183-140, 1755, 1782-1784; Dec. Dig. § 28.\*]

## 2. CORPORATIONS (§ 432\*)—ACTS OF OFFICERS—EXISTENCE OF AGENCY—BURDEN OF PROOF.

One claiming that the manager of a corporation assumed, for the corporation, the payment of certain notes, has the burden of showing the officer's authority to so contract.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1717, 1718, 1724, 1726-1737, 1743, 1762; Dec. Dig. § 432.\*]

## 3. PLEADING (§ 249\*)—AMENDMENT—ACTION ON NOTE—ACCOUNTING.

Defendant insurance company purchased the business of another company under a contract to allow the seller 25 per cent. of the gross earnings derived from policy holders as premiums, which should be applied on two notes indorsed by the seller to plaintiff bank, and that such sum should be paid direct to the bank. Held that, though plaintiff did not show that defendant assumed unconditionally the payment of the notes when it purchased the business, it could, in an action thereon, amend so as to require defendant to account for such sums as it had collected under the contract by applying them to the payment of the notes.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 710-729; Dec. Dig. § 249.\*]

Appeal from Superior Court, Guilford County; Cooke, Judge.

Action by the Greensboro National Bank against the Carolina Mutual Life Insurance Company and others. From a judgment for plaintiff against the defendant named, it appeals. Reversed, and new trial ordered.

The action was brought to recover upon two notes of the Mutual Registry Life Insurance Company of the denominations of \$185 and \$65, which notes were indorsed by the codefendants.

G. M. Patton, for appellant.

**BROWN, J.** The plaintiff introduced testimony tending to prove that some time in 1907 the Mutual Registry Life Insurance Company, a corporation, sold its entire business to the defendant the Carolina Insurance Company; that at the time the defendant company took over the business of the Mutual the plaintiff held two notes of the Mutual Registry Life Insurance Company in the sums of \$185 and \$65.

[1] It is contended by the plaintiff that, as a part of the transaction between the two companies, the defendant company assumed the payment of these notes. An inspection of the record discloses that all of the evidence introduced for the plaintiff, as well as the defendant, establishes that the contract between the two companies was wholly in writing and dated the 26th of March, 1908, and was put in evidence by the defendant. It is true that Waddy, a witness for the plaintiff, upon examination in chief said that the defendant company assumed the liabilities of the Mutual and agreed to pay the notes in question. But upon cross-examination the witness materially qualifies his testimony in chief, and admits that the contract between the two companies was in writing, and states that he was not present when any contract between the two companies was made. He states that he did not see the written contract, but understood that there was one. Upon being questioned by the court as to how he knew that the defendant assumed the debts, the witness does not undertake to say, but states that he was not present when the contract was signed. The witness Ellington, president of the plaintiff bank, states that Waddy, Newby, and others representing the defendant company came to the bank and said that the manager of the defendant was there and that he was to take over their assets and liabilities. It also appears from the testimony of Ellington upon cross-examination that they came in the bank with this paper with them, evidently the contract of March 26th, entered into between the two companies, thus fixing Ellington, the president of the plaintiff bank, with notice that the contract between the two companies was in writing. The contract between the two companies does not purport to be unconditional assumption of the debts of the Mutual Company,

but, on the contrary, it provides for only partial payment in these words: "And the said Carolina Mutual agrees to allow said Mutual Registry Life Insurance Company 25 per cent. of the gross earnings derived from policy holders as premium on same, and that the said 25 per cent. to be applied on the two notes made and indorsed by the said Mutual Registry Life Insurance Company, to the Greensboro National Bank of the city of Greensboro, each month, and that said sum be paid direct to said bank, and that a written report, showing such gross earnings be sent to the proper officer of said Mutual Registry Life Insurance Company, and that said Carolina Mutual agrees that such 25 per cent. be continued for a period of twelve (12) months, and it is further agreed that all policy holders of said Mutual Registry Life Insurance Company be fully reinstated from date hereof and such amount arising therefrom as premiums be also applied as is herein stated."

[2] It is further contended that Powell, the manager of the defendant company, stated "that he would assume the liabilities, and that Powell conducted negotiations for the Carolina Mutual Life Insurance Company." It may be that Powell personally undertook to assume these particular liabilities of the Mutual Company, himself; but there is not a shred of evidence that he had any authority to assume them on behalf of his company. The contract between the two companies, as we have already shown, was in writing, and the rights and liabilities of the two insurance companies under it were already well defined, and there is nothing to show that Powell was authorized in any way to change them. If Powell had any such authority, the burden of proof would be upon the plaintiff to show it. 81 Cyc. p. 1644, and cases cited.

[3] While the plaintiff is not entitled to recover upon the notes sued on upon the ground that they have been unconditionally assumed by the defendant, by proper amendment to the pleadings, the plaintiff may call upon the defendant to account for such sums as it has collected under the contract, and have the same applied to the payment of the notes.

New trial.

(159 N. C. 467)

#### STATE v. BROWN.

(Supreme Court of North Carolina. April 10, 1912.)

#### CRIMINAL LAW (§ 84\*)—JURISDICTION—CONSTITUTIONAL PROVISIONS.

Const. art. 4, § 12, empowers the General Assembly to distribute jurisdiction below the Supreme Court among the other courts prescribed in the Constitution, or which may be established by law as the Legislature may deem best, and section 14 authorizes the establishment of special courts for the trial of misdemeanors in cities and towns. Pub. Laws 1909,

c. 651, as amended by Priv. Laws 1911, c. 430, provides for the establishment of a municipal court in Greensboro, giving it jurisdiction, where crime is committed in the city or within one mile of its corporate limits. *Held*, that the constitutional provisions do not inhibit the giving such courts of jurisdiction outside of the municipality, as the Legislature may give jurisdiction concurrent with that of justices of the peace, or with the superior court.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 115-124; Dec. Dig. § 84.\*]

Appeal from Superior Court, Guilford County; Cooke, Judge.

Annie Brown was convicted of crime in the municipal court, and appealed to the superior court, where she was again convicted. From an order arresting the judgment, the State appeals. Error.

Attorney General Bickett, T. H. Calvert, and A. Wayland Cooke, for the State. Sapp & Williams, for appellee.

**WALKER, J.** The defendant was charged in the municipal court of Greensboro with the common-law offense of keeping a disorderly house, and was convicted. She appealed, and was again convicted in the superior court, but the judgment was arrested, upon the ground that the crime was not committed within the corporate limits of Greensboro, although it was committed within one mile of the same. Appeal by the state. The contention is that the Legislature could not confer jurisdiction upon the municipal court of Greensboro to hear and determine criminal cases, where the offenses are committed, not in the city, but within one mile thereof, and that she should have been indicted originally in the superior court. The acts establishing the court expressly give the jurisdiction where the crime is committed in the city or within one mile of its corporate limits. Public Laws 1909, c. 651, as amended by Private Laws of 1911, c. 430. Counsel for the defendant argued that this jurisdiction was not authorized by the Constitution, as it conflicted with the jurisdiction of justices of the peace under that instrument, but we think the question has been decided against this contention in several cases. It is only necessary to reproduce what was said in *State v. Collins*, 151 N. C. 648, 65 S. E. 617, where reference is thus made to the constitutional provision (article 4, § 12) for the establishment of courts inferior to the superior court: "These provisions, so plainly worded and so comprehensive in their scope, would seem to admit of no doubt as to the rightful exercise by the Legislature of its constitutional power in enacting the law by virtue of which the recorder's court of Nash county was created and afterwards organized, and to be a full answer to the contention of the state in the court below. But the question has been heretofore fully considered by this court, and we reached the conclusion that the Legislature had the power,

under the Constitution, to establish a recorder's court, not only for cities and towns (*State v. Lytle*, 188 N. C. 738, 51 S. E. 66; *State v. Baskerville*, 141 N. C. 811, 53 S. E. 742; *State v. Jones*, 145 N. C. 460, 59 S. E. 117), but also for counties (*State v. Shine*, 149 N. C. 480, 62 S. E. 1080). In the case last cited the Legislature created the recorder's court of Monroe, in the county of Union, and further provided in the act by which the court was established, as follows: "Said court shall have exclusive original jurisdiction to hear and determine all other criminal offenses committed within the county of Union below the grade of a felony, as now defined by law, and all other such offenses committed within the county of Union, are hereby declared to be petty misdemeanors." This language is at least substantially identical with that to be found in Laws 1909, c. 633, by which a recorder's court for Nash county was created. If the former act was valid, and we so held, the latter must necessarily be." It will be observed that in *State v. Collins* it appeared that the court was created for the entire county, including the town of Nashville, the capital of the county, and other towns therein. In *State v. Shine* the court was created for the city of Monroe, but its jurisdiction was extended beyond the city and to the county limits. The offense for which the defendant was convicted in that case was committed beyond the city limits. *State v. Baskerville*, supra.

These authorities seem to be decisive of the question now raised by the appellant. It is not necessary to decide whether the provision as to the exclusiveness of the court's jurisdiction is valid, as, if it can only be concurrent with the court of a justice of the peace in certain cases, it has assumed and exercised, in this case, its rightful jurisdiction, and the question as to the extent of the jurisdiction is not presented, nor was it presented, in *State v. Collins*. The only question here is, and so it was in that case as to the recorder's court, whether the statutory court or the superior court had the jurisdiction. *State v. Doster*, 157 N. C. 634, 73 S. E. 111, cited by defendant's counsel, does not sustain the position that, because this is called a municipal court, and has jurisdiction of offenses committed in the city, it can have no jurisdiction beyond the city limits, under article 4, § 14, of the Constitution, which provides for special courts for the trial of misdemeanors in cities and towns, but the intimation is clear that such jurisdiction may be given, though in some cases it may be concurrent. The offense in that case was within the jurisdiction of a justice of the peace, and committed outside of the city of Monroe. The defendant had been tried before a justice and convicted. On appeal he moved to quash, and the question was whether the recorder's

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

court of Monroe had exclusive jurisdiction. The court held that it did not, but it did not decide that the jurisdiction was not concurrent, or that the Legislature could not confer jurisdiction outside the city upon the recorder's court. In this case the offense is not within the final jurisdiction of a justice of the peace. We do not see why the Legislature under article 4, § 12, of the Constitution, is not invested with ample power to establish this court and assign to it the jurisdiction conferred by the statute. The court is given jurisdiction over offenses committed within the city of Greensboro, but the power of the Legislature was not thereby exhausted.

It follows, therefore, that there was error in the judgment of the court.

Error.

(158 N. C. 685)

#### STATE v. RICE.

(Supreme Court of North Carolina. April 10, 1912.)

#### 1. MUNICIPAL CORPORATIONS (§ 64\*)—LEGISLATIVE CONTROL—NATURE AND SCOPE.

The Legislature has authority to confer upon municipalities jurisdiction for sanitary or police purposes of territory beyond the city limits, and so Priv. Laws 1911, c. 2, § 27, providing that all ordinances of the city of Greensboro enacted in the exercise of police power given to it for sanitary purposes, or for the protection of the property of the city shall apply to territory outside of the city limits within one mile of the city, is valid.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 156-157; Dec. Dig. § 64.\*]

#### 2. MUNICIPAL CORPORATIONS (§ 64\*)—LEGISLATIVE CONTROL—NATURE AND SCOPE.

The form of municipal government cannot affect the validity of legislative delegations of authority to control land outside the city limits for purposes of sanitary and police protection.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 156, 157; Dec. Dig. § 64.\*]

#### 3. MUNICIPAL CORPORATIONS (§ 604\*)—POLICE POWERS—ORDINANCES—VALIDITY.

An ordinance of the city of Greensboro prohibiting the keeping of hogs or pigs within the corporate limits of the city, or within one-fourth of a mile thereof, is a valid exercise of police power under Priv. Laws 1911, c. 2, § 17, providing that municipal authorities may make such rules and regulations not inconsistent with the Constitution and laws of the state for the preservation of the health of the inhabitants of the city, as to them may seem right.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1335-1337; Dec. Dig. § 604.\*]

#### 4. MUNICIPAL CORPORATIONS (§ 63\*)—POWERS—JUDICIAL SUPERVISION.

The ordinance, whether a wise exercise of police power or not, cannot be interfered with by the courts.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 155, 1378, 1379; Dec. Dig. § 63.\*]

Walker and Allen, JJ., dissenting.

Appeal from Superior Court, Guilford County; Cooke, Judge.

R. F. Rice was convicted in the municipal court of a violation of a municipal ordinance, and, on appeal to the superior court, the warrant was quashed, and the State appeals. Reversed.

The Attorney General and A. Wayland Cooke, for the State. Sapp & Williams, for appellee.

CLARK, C. J. The defendant, who lives outside the corporate limits of Greensboro, was indicted in municipal court of the city of Greensboro for unlawfully and willfully "keeping and running hogs in a lot within one-fourth of a mile of the corporate limits of the city of Greensboro," in violation of the city ordinance, which is set out, and which provides: "It shall be unlawful for any person, firm or corporation to keep any hogs or pigs within the corporate limits of the city of Greensboro or within one-fourth of a mile of said limits." On appeal from the municipal court the warrant was quashed and the state appealed.

[1] The General Assembly provides in the charter of Greensboro (Private Laws 1911, c. 2, § 27) that all ordinances of the city of Greensboro enacted "in the exercise of police powers given to it for sanitary purposes or for the protection of the property of the city, shall apply to the territory outside of said city limits within one mile of same in all directions." The Legislature has unquestioned authority to confer upon the town authorities jurisdiction for sanitary or police purposes of territory beyond the city limits. 28 Cyc. 704; 20 A. & E. Enc. 1148, and cases there cited. This is sometimes conferred for police protection, but oftener for the preservation of public health. Power is often granted to the town authorities to police the watershed beyond corporate limits, so that the city may have pure water; also to insure cleanliness, to protect the sewerage, and for many like purposes to protect the health of those living within the city. Among the most notable cases are *Van Hook v. Selma*, 70 Ala. 361, 45 Am. Rep. 85; *Chicago Packing Co. v. Chicago*, 88 Ill. 221, 30 Am. Rep. 545; *Emerich v. Indianapolis*, 18 Ind. 279, 20 N. E. 795; *Albia v. O'Harra*, 64 Iowa, 297, 20 N. W. 444; *State v. Franklin*, 40 Kan. 410, 19 Pac. 801; *Jordan v. Evansville*, 163 Ind. 512, 72 N. E. 544, 67 L. R. A. 613, 2 Ann. Cas. 96. There are many other cases to like effect, and none to the contrary. Among the late cases are *Gower v. Agee*, 128 Mo. App. 427, 107 S. W. 999; *Ex parte Glass*, 49 Tex. Cr. R. 87, 90 S. W. 1108. In this last case the court sustained an ordinance forbidding the keeping of hogs within one mile of the courthouse. The court held that this was a matter within the discretion of the town commissioners, though it

permitted hogs to be kept at places within town limits beyond that distance from the courthouse. In 2 Abbott, Mun. Corp. § 562, it is said: "It is, of course, within the power of the state Legislature to authorize a town to pass ordinances which shall have a restricted effect beyond their limits." In *Chicago Packing Co. v. Chicago*, supra, the court said: "Persons desiring to engage in particular avocations in or near cities must submit to have their pursuits limited and controlled at least so far as the preservation of health and to a reasonable extent the comfort of the people may require."

\* \* \* The lives, the health, and comfort of the people are the highest claim and demand the first and greatest protection.

\* \* \* They have the right to be protected against all kinds of business that endanger life and health, and from intolerant nuisances that destroy their comfort. To accomplish this purpose, the power was conferred upon cities and villages to regulate these establishments for the distance of one mile beyond their corporate limits, even if that shall lap over and embrace a portion of territory included in the boundaries of another municipality. Each, to that extent, has the right to protect its inhabitants, and such establishments, located in such territory, are subject to the police power of both corporate bodies. The ordinance there sustained was for the regulation of the great packing houses located outside of Chicago, and which had been licensed by a neighboring town.

[2] The argument that the town of Greensboro is governed under the commission form of government with initiative, referendum, and recall, and therefore that its municipal authorities should have no control outside the city limits is wanting in application. The question is not how the city authorities are chosen, but what power the Legislature has conferred upon them over adjacent districts beyond the city limits in which may be set up establishments, businesses, or other things which would be injurious to the health of its people. There is nothing in our Constitution which restricts the Legislature in the exercise of its police power from conferring upon the municipal authorities of Greensboro such power. Indeed, the municipal court of Greensboro is given jurisdiction outside the city limits, and such jurisdiction has been affirmed at this term in *State v. Brown*, 74 S. E. 580; citing *State v. Shine*, 149 N. C. 480, 62 S. E. 1080; *State v. Baskerville*, 141 N. C. 811, 53 S. E. 742, and divers other cases.

[3] The city therefore had the same power to pass this ordinance and make it applicable to a district within a quarter of a mile outside the city limits as it had to prohibit "keeping any hogs or pigs within the corporate limits." The question, therefore, is whether it could pass such ordinance applicable within the city limits. In *State v. Hord*, 122 N. C. 1093, 29 S. E. 952, 65 Am.

St. Rep. 743, the court held that the town authorities could forbid keeping a hogpen within the city limits. In that case the prohibition was against keeping a hogpen within 100 yards of the residence of another, which was, of course, practically an entire prohibition. In 2 Dillon, Mun. Corp., it is said that "the keeping of hogs and swine is a generally recognized subject of regulation of municipal ordinance." In *Darlington v. Ward*, 48 S. C. 570, 26 S. E. 906, 38 L. R. A. 326, it is said: "An ordinance cannot be held invalid because it is unreasonable when the power to pass the ordinances on the subject is conferred by a constitutional statute." It is further held: "An ordinance making it unlawful to keep any hogs within the corporate limits of the town cannot be held void." In *Skaggs v. Martinsville*, 140 Ind. 476, 39 N. E. 241, 33 L. R. A. 781, 49 Am. St. Rep. 209, the court held that it would not "inquire as to the reasonableness, of an ordinance when the power exists to pass it." The same was held in the late case of *Brunson v. Youmans*, 76 S. C. 128, 56 S. E. 651, in which the court held valid a town ordinance which made it unlawful to keep any hogs within the town—citing *Darlington v. Ward*, supra. Ordinances to prohibit hogs within a town have also been sustained in *Quincy v. Kennard*, 151 Mass. 563, 24 N. E. 860; *Smith v. Collier*, 118 Ga. 306, 45 S. E. 417; *Ex parte Glass*, 49 Tex. Cr. R. 87, 90 S. W. 1108.

[4] Even if this court were of opinion that the ordinance is not sound public policy and might work hardship, we could not declare it invalid. The Legislature has conferred jurisdiction upon the town commissioners "to make such rules and regulations, not inconsistent with the Constitution and laws of the state, for the preservation of the health of the inhabitants of the city as to them may seem right." Pr. Laws 1911, c. 2, § 17. An appeal in such case must be to the law-making power. *Red "C" Oil Co. v. Board of Agriculture*, U. S. Supreme Court, 9 Jan. 1912, 222 U. S. 380, 32 Sup. Ct. 152, 56 L. Ed. —. But, as a matter of fact, there are some 20,000 people within the limits of the town of Greensboro, and they have a right to be protected against such matters as their local legislature may deem unsanitary. If that body is wrong, it will be influenced by their constituents to repeal or modify the ordinance. But the authority to make the ordinance and to extend its limits, not to exceed one mile, beyond the city boundaries, has been conferred by the Legislature. Of their own volition the city authorities made the ordinance applicable only to the extent of one quarter of a mile beyond the city boundaries. The language of the ordinance forbids "keeping any hogs or pigs within the corporate limits of the city of Greensboro or within one-fourth of a mile of said limits." The warrant charges that the defendant "did unlawfully and

willfully keep and run hogs in a lot within one-fourth of a mile of the corporate limits of the city of Greensboro." It therefore comes within the terms of the ordinance. It does not appear what size the lot was, nor is it material. The ordinance prohibits "keeping hogs" within the limits named. In *Darlington v. Ward*, 48 S. C. 570, 26 S. E. 906, there was a single hog kept within a two-acre lot. The court held that the question was not whether the keeping of that particular hog was injurious to the health of the town, but whether the town had authority to prohibit the "keeping of hogs" within the limits prescribed, and whether the defendant had violated that ordinance. The court said that the nature and condition of the premises was immaterial, and that "the power of the town council to preserve the public health cannot be measured by the size of Ward's lot" nor by the cleanly condition in which he kept his premises. The court further said: "Courts cannot run a race of opinion upon points of right, reason, and expediency against the lawmaking power. No act of Legislature can be declared void or unconstitutional unless it conflicts with some provision of the Constitution. Nor can any ordinance of any municipal corporation within the power conferred by the Legislature, and not in conflict with the laws and Constitution of the state, be impeached in a court for unreasonableness. A critical examination of cases holding police regulations void, because unreasonable, will disclose that the attempted police regulations violated some constitutional guaranty. The right asserted by some courts to declare municipal ordinances invalid because unreasonable is limited to ordinances passed under the implied or incidental powers of the municipality." The greatest advance of the age probably is towards the preservation of the public health, and in measures for the prevention of disease. The Legislature conferred power upon the municipal authorities of Greensboro to adopt sanitary regulations. In passing this ordinance, they acted within this authority, and doubtless upon the advice of the sanitary board. The necessity and the benefit of sanitation cannot be better shown than by a statement which recently appeared in a government publication that in Cuba, a tropical country, under the impetus given by United States supervision, there is an expenditure now of 46 cents per capita for better sanitation and an annual mortality of 15 per 1,000 of the population, while in North Carolina, in naturally a healthy climate, there is an expenditure of only 1 cent per 1,000 and a mortality of 18.3 per thousand or 22 per cent. greater. In view of such fact the courts will be slow to interfere with sanitary regulations which have been adopted by city authorities presumably in accordance with the wishes of

the most intelligent and advanced portion of its population, even if we possessed the power to interfere. It is not our province to review the action of boards of sanitation, within the limits of their powers.

Reversed.

WALKER and ALLEN, JJ., dissenting.

(158 N. C. 555)

**FULGHUM et ux. v. ATLANTIC COAST  
LINE R. CO.**

(Supreme Court of North Carolina. April 10, 1912.)

**1. CARRIERS (§ 286\*)—DUTIES TO PASSENGERS  
—PROVIDING SAFE ACCESS.**

The duty of a common carrier to provide for its passengers a safe means of access to and from its stations did not make it negligence for a carrier to place and leave, in broad daylight, a few cross-ties at intervals along the track near a flag station.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 1142-1152; Dec. Dig. § 286.\*]

**2. TRIAL (§ 159\*) — CONTRIBUTORY NEGLIGENCE—NONSUIT.**

Where the plaintiff's own evidence shows such contributory negligence as bars recovery, a motion to nonsuit should be sustained.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 341, 359-367; Dec. Dig. § 159.\*]

**3. CARRIERS (§ 333\*)—INJURY TO PASSENGERS  
—CONTRIBUTORY NEGLIGENCE.**

Where a passenger, while going in broad daylight to a nearby crossing, from a train from which she had just alighted, saw a muddy cross-tie before her in an inclined position with one end in a ditch, and stepped upon it and fell, instead of passing around it as she could easily have done, she was guilty of contributory negligence.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 1385-1397; Dec. Dig. § 333.\*]

**4. CARRIERS (§ 338\*)—INJURY TO PASSENGERS  
—EMERGENCY.**

A passenger placed suddenly in a position of danger by the carrier's negligence is not required to exercise infallible judgment, but only ordinary care.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. § 1352; Dec. Dig. § 338.\*]

Clark, C. J., and Hoke, J., dissenting.

Appeal from Superior Court, Johnson County; Peebles, Judge.

Action by J. L. Fulghum and wife against the Atlantic Coast Line Railroad Company for personal injuries to wife. From a judgment of nonsuit, plaintiffs appeal. Affirmed.

F. H. Brooks and Aycock & Winston, for appellants. Abell & Ward, for appellee.

BROWN, J. The defendant offered no evidence, and the following is an accurate statement of that offered by plaintiff:

Plaintiff was a passenger on defendant's train on the morning of January 29, 1909, and left the train at Bagley, N. C., a flag station at which there was no regular depot, station house, or platform. Passengers alighted generally in the vicinity of the pub-



the crossing. The conductor helped the plaintiff off the car, and placed her safely on the ground about 60 feet north of the crossing on the right side of the track going north, from which point she started towards the crossing. There were several cross-ties distributed along the right of way for use in repairing the road between the point where she alighted and the crossing. The plaintiff stepped on one of the cross-ties, her foot slipped on the tie, and threw her ankle out of joint. Plaintiff testifies she knew that the tie she stepped upon was "wet, muddy, and slippery, and one end in the ditch and the other end towards the railroad, and the end towards the railroad was higher." Plaintiff says she stepped on the tie because she thought it safer to step on it than over it. Plaintiff admits she could easily have stepped over it, and further admits that she could have walked around this cross-tie without stepping on or over it. The other testimony is that of two witnesses introduced by the plaintiff, which tends to prove that the nearest end of the cross-tie was five or six feet from the car, and that there was ample room for the plaintiff to pass around it. The defendant offered no evidence, and moved to nonsuit, which motion was granted.

Upon a review of these undisputed facts, we conclude that his honor properly sustained the motion to nonsuit, first, because there is no evidence of negligence; second, because the plaintiff's own negligence was the immediate cause of her injury.

[1] 1. Bagley is a flag station, having no depot nor station platform of any kind. Passengers are taken on the train in the vicinity of the crossing. The defendant for purposes of repairing its track had placed a few cross-ties at intervals along its right of way. The exact number does not appear. Plaintiff says several; while one of her witnesses says there was only one tie between where she alighted and the crossing. All the evidence shows there was a space, or passway, five or six feet wide between the end of the ties nearest the railroad track and the cars. There is nothing in the evidence to indicate that plaintiff could not have walked around the ties with perfect safety. This occurrence did not happen in a town or city where a regular station is kept, but at a flag station, where there was no depot or platform required by law. We recognize fully the duty of a common carrier to provide safe means of access to and from its stations for the use of passengers (1 Hutchinson on Carriers, § 51), but what may be considered a reasonably safe exit under conditions existing at Bagley would not be so regarded in populous towns and cities. We are not prepared to hold that it was negligence upon the part of the defendant to lay a few cross-ties under such conditions at intervals along its right of way for the purpose of repairing its track, where they were in plain view of the passengers in

broad daylight, and not in the least dangerous to a person exercising ordinary care.

[2, 3] 2. It is well settled in this state that, where the plaintiff's own evidence discloses such contributory negligence as bars recovery, a motion to nonsuit should be sustained. We think that is the case here. The plaintiff was assisted from the car by the conductor and landed in a place of safety only 60 feet from the public crossing. It was broad light. She started towards the crossing. She admits that she saw the cross-tie before her. It was in an inclined position, one end elevated some, and the other in a ditch. She admits that she saw that it was muddy and slippery on top. She further states that she could have easily walked around it, or have stepped over it. In fact, a 10 year old child could have stepped over it. Instead of taking the obviously safe course that the most ordinary prudence would have dictated, and either stepping over, or walking around, it, the plaintiff with full knowledge of its condition stepped upon the inclined tie, muddy and slippery as she knew it to be, and sprained or dislocated her ankle. As much as we may sympathize with the plaintiff in her misfortune, a bare statement of the facts is in our opinion sufficient to demonstrate that it was caused by her thoughtlessness. Suppose she had been on a station platform, and had discovered a hole in front of her in time to avoid it, and had stepped in it, instead of walking around it, or suppose she had seen a grease splotch ahead of her on the platform, and had deliberately walked through it, instead of stepping across or walking around it, could she have recovered damages for consequent injury? It will scarcely be contended that she could.

[4] This is not a case like *Hinshaw v. Raleigh & A. A. L. R. Co.*, 118 N. C. 1052, 24 S. E. 426 (cited by plaintiff), where a passenger is placed suddenly in a position of danger by the carrier's negligence, and required to decide at once what course to pursue. He is not expected to exercise infallible judgment, but only ordinary care, and, if he does so, he is not held to the consequences of his act if he makes a mistake. But the plaintiff was not confronted with a sudden danger. She was in a place of absolute safety. The whole situation was open before her. She saw the tie, that it was slanting, muddy, and slippery. She admits she could have stepped over it, or walked around it. She did neither, but deliberately stepped on it. She must bear the unfortunate consequences of her carelessness. The case is very much like that of *Johns v. Railway Company*, 133 Ga. 525, 66 S. E. 269, where a woman with full knowledge that a strip of pavement along the car track had been torn up decided to step across the excavation, and in doing so stepped on a paving stone, and slipped and fell. The court says: "The conductor, who was inside the car, had nothing to do with

this decision, or the effort to carry it out. When she attempted to step from the car across the opening in the pavement, she placed her foot on a paving stone, or dirt, which gave way, and she was hurt. She took the chance of being able to make the long step successfully, and she failed to do so in safety. Even if the defendant was not altogether faultless, nevertheless she cannot recover for the results of her own conduct, with full knowledge and in full view of the situation. Her injury was unfortunate, but she has no right to recover from the defendant. This case is not like those involving concealed danger, or dangerous places known to the company, and not to the passengers, or where a passenger was ordered or forced to leave a car, or where there was a defect in street or sidewalk, which may have been previously known to a passenger, but of the proximity or danger of which by reason of darkness, or other cause, at the time of the injury, he was not aware." We do not deem it necessary or useful to discuss the cases cited in the brief of the learned counsel for plaintiff. None of them bear much resemblance to the case at bar, which is peculiar and unusual in the facts presented.

The judgment of the superior court is affirmed.

CLARK, C. J. (dissenting). When the train stopped at Bagley, the feme plaintiff started to the rear door of the coach which was at or near the crossing to get out. Had she been permitted to do so, she would not have been injured. The conductor called her to come to the front door, which was the length of the car some 60 feet further from the crossing. When she got upon the ground, there were several cross-ties lying along the roadbed between her and the railroad crossing. It had been raining, and the walkway around the end of the cross-ties was muddy and slippery, and the 60 feet that she was unnecessarily required to walk to reach the crossing was in a shallow cut. It was negligence in the defendant company to require her to get out at this spot, instead of the other end of the coach, where she would have stepped down upon the crossing. The defendant owed to her a decent and safe landing place, all the more so where, this not being a regular station, there was no platform.

The burden was upon the defendant under the statute to prove contributory negligence. It offered no evidence whatever to that effect, and the only evidence on the point was by the plaintiff herself, who said that it seemed to her safer to step on the cross-ties than on the muddy sloping earth in getting back to the crossing. It is patent to any one that this must have been so. If the cross-ties were slanting a little, so was necessarily the ground upon which they lay, and the ground, being soft and muddy, was much more slippery than the cross-ties could have been. If

she had fallen by slipping in the mud as she doubtless would have done, she must have fallen upon the cross-ties, and been worse hurt. At any rate, the plaintiff had a right both under the Constitution and the statute to have a jury, and not the judge, to pass on the facts. It was the duty of the defendant to have given the plaintiff a safe place to dismount. It did not do so, and would not permit her to get off at the other end of the coach, where she would have been safe. The burden was upon the defendant to prove contributory negligence. It did not do so, and the only evidence is that of the plaintiff that she pursued the safest course in stepping upon the cross-ties, instead of upon the slippery mud. The plaintiff was still a passenger when she fell. Being a woman, she was entitled to the attention that the law requires to be paid to women and children, who are less able to take care of themselves than men. *Morarity v. Traction Co.*, 154 N. C. 586, 70 S. E. 938. The conduct of the defendant company in preventing the feme plaintiff from getting out in a safe place, and causing her, to walk 60 feet through mud and slush, was of itself actionable. Certainly the judge had no right to say as a matter of law and in violation of the statute that the plaintiff was guilty of contributory negligence because she chose what seemed to her and what the jury doubtless would have found (if she had been allowed her constitutional right to a jury trial) was the safer method of traversing the 60 feet of the sloping cut.

In *Roberts v. Railroad*, 155 N. C. 84, 70 S. E. 1080, this court quotes with approval as it had previously done in *Smith v. Railroad*, 147 N. C. 450, 61 S. E. 266, 17 L. R. A. (N. S.) 179, from *Hutchinson on Carriers*, § 128, as follows: "It is the duty of railway companies as carriers of passengers to provide platforms, waiting rooms, and other reasonable accommodations for such passengers at the stations and at such places at which they are in the habit of taking on and putting off passengers. Their public profession as such carriers is an invitation to the public to enter and alight from their cars at their stations, and it has been held that they must not only provide safe platforms and approaches thereto, but that they are bound to make safe for all persons who may come to such stations in order to become their passengers, or who may be put off there by them, all portions of their station grounds reasonably near to such platforms and to which such persons may be likely to go; and for not having provided such station accommodations and safeguards railway companies have frequently been held liable for injuries to such persons." And in *Mangum's Case*, 145 N. C. 153, 58 S. E. 913, 13 L. R. A. (N. S.) 589, 122 Am. St. Rep. 437, Associate Justice Brown, in delivering the opinion, said: "It seems now to be almost elementary that one of the recognized duties of a railway company that undertakes to carry pas-

sengers is to keep its station premises in a reasonably safe condition, so that those who patronize it may pass safely to and from the cars. *Pineus v. Railroad*, 140 N. C. 450, 53 S. E. 297, 111 Am. St. Rep. 856; *Wood on Railways*, 310, 1341, 1349. This duty extends not only to the condition of the platform itself, whereon passengers walk to and from the trains, but also to the manner in which that platform is allowed by the common carrier to be used. *Weston v. Railroad*, 73 N. Y. 595; *Wood, supra*. The defendant owed a duty to plaintiff, and to all other passengers, to keep its depot platforms used by them as a means of ingress and egress free from obstructions and dangerous instrumentalities, especially at a time when its passengers are hurrying to and from its cars"—citing *Pineus v. Railroad and Railroad v. Johns*, 36 Kan. 769, 14 Pac. 237, 59 Am. Rep. 609.

The plaintiff, not having left the carrier's premises, was still a passenger. *Hansley v. Railroad*, 115 N. C. 602, 20 S. E. 528, 32 L. R. A. 543, 44 Am. St. Rep. 474. Being still a passenger, she was entitled to a safe exit. 2 *White, Personal Injuries*, § 557. If the railroad offers an egress that is unsafe, it is negligence. 2 *White, Personal Injuries*, 619. "The railroad should so arrange its station grounds that a passenger who gets off a train at the station, or at places provided to alight, may leave the cars without danger, and a reasonably safe passageway or a bridge should be provided leading to and from the station." *Hulbert v. Railroad*, 40 N. Y. 152. There a passenger who fell in a cattle guard, going from the car to the station, was injured and recovered damages. "Every spot likely to be visited by passengers departing from depots should be made safe and kept so, and passengers injured may have compensation." 1 *Bishop, Noncontract Law*, § 1086, quoted with approval *Railroad v. Lucas*, 119 Ind. 583, 21 N. E. 968, 6 L. R. A. 193; s. c., 120 Ind. 206, 21 N. E. 972, 16 Am. St. Rep. 323; *Gaynor v. Railroad*, 100 Mass. 215, 97 Am. Dec. 98. The passageway to and from a depot must be kept safe, and passengers are entitled to a suitable place of egress. 1 *Fetter, Carriers*, 112; 2 *Hutchinson, Carriers*, 1060, 1063. The defendant, having required the female passenger to get out, not at the crossing, owed it to her to give her a safe, dry path back to the crossing, and, if hurt by any defect in getting to the crossing, the defendant is liable. *Autry v. Railroad*, 156 N. C. 293, 72 S. E. 380. The defendant was more negligent, not less so, in making the plaintiff get out at an unsafe place, when she could have gotten out at a safe place at the other end of the coach, as she wished to do, because this was a flag station. She has been deprived of a right guaranteed her by the statute and the Constitution in being arbitrarily refused by the judge the opportunity to have 12 men pass upon the question

whether the railroad was guilty of negligence in causing her to get out of the train not at the crossing place. His honor was further in error in depriving her of the benefit of the statute which placed upon the defendant the burden of proof to show that the plaintiff was guilty of contributory negligence, and in finding himself, not only without any evidence whatever, but in contradiction of the only evidence before him, that she was guilty of contributory negligence. She testified that she took the safest course. The presumption under the statute is that she did. *Revisal*, § 483. This presumption should be reversed only by a jury as the statute requires.

The conduct of the defendant and the action of the court below are without any precedent to sustain them. All passengers, and especially ladies, are entitled to better treatment than this plaintiff has received. Her ankle was broken because the defendant put her off at an unsuitable place, when she could have gotten off at a safe place, and that, too, when it was apparent that for her to get back to the proper point, the road, she would have to traverse a muddy, slippery, sloping bank incumbered with cross-ties. If necessary for her to get out at the front end of the coach, the train should have been run back till she could have landed at a safe spot. The plaintiff testified that the usual place for putting off passengers at Bagley was at the crossing. That the egress they gave her was not a safe exit is conclusively shown by the fact that in attempting to get back to the crossing her ankle was dislocated, by reason of which she suffered greatly, and was laid up two months. Her testimony that she chose the safest plan must be taken as true on a noli suit. *Spruill v. Insurance Co.*, 120 N. C. 147, 27 S. E. 39; *Powell v. Railroad*, 125 N. C. 372, 34 S. E. 530, and cases there cited. In *Wright v. Railroad*, 127 N. C. 228; 37 S. E. 221, this court said: "The court has heretofore had occasion to condemn the growing tendency to take cases from the jury, and limit their sphere in damage cases. The right of trial by jury is guaranteed by the Constitution, and on all disputed issues of fact the courts cannot be too careful to refrain from invading the province of the constitutional triers of fact."

HOKE, J., concurs in dissenting opinion.

(158 N. C. 641)

#### STATE v. PRICE et al.

(Supreme Court of North Carolina. April 10, 1912.)

#### 1. HOMICIDE (§ 264\*)—EVIDENCE OF THREATS OF DECEDENT—ADMISSIBILITY.

Where an eyewitness testified to the killing and accused had not introduced evidence of self-defense, the exclusion of evidence of threats by decedent, not communicated to ac-

cused, was properly excluded, and accused, on subsequently proving self-defense, must again tender the evidence of threats before he can complain of the ruling.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 558; Dec. Dig. § 264.\*]

## 2. WITNESSES (§ 240\*)—EXAMINATION—LEADING QUESTIONS.

A question asked defendant on direct examination if he went to the house of codefendant to make peace between codefendant and decedent was properly excluded as leading.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 795, 837-839, 841-845; Dec. Dig. § 240.\*]

## 3. WITNESSES (§ 379\*)—IMPEACHMENT—RELEVANCY.

Where a witness for accused testified to a prior difficulty between accused and decedent and to decedent's threats during the difficulty, the state was properly permitted to contradict the witness by proving that he had given conflicting versions of the difficulty.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1209, 1220-1222, 1247-1256; Dec. Dig. § 379.\*]

## 4. HOMICIDE (§ 30\*) — EVIDENCE — SUFFICIENCY.

A person who actually engaged in an assault on decedent, or who was present aiding and abetting his brother in his unlawful acts, resulting in decedent's death, was properly convicted of murder, though his original motive in going to his brother's house where the killing occurred might have been a good one.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 48-51; Dec. Dig. § 30.\*]

## 5. CRIMINAL LAW (§ 834\*)—TRIAL—INSTRUCTIONS—GRANTING REQUESTS.

The court need not charge in the very language of requests, but it is sufficient to charge substantially as requested, provided the force of the instruction is not weakened, or its meaning materially altered by any change in the language.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2013, 2014; Dec. Dig. § 834.\*]

## 6. HOMICIDE (§ 300\*)—INSTRUCTIONS—REFUSAL TO GIVE INSTRUCTIONS COVERED BY CHARGE GIVEN.

Where the court charged that accused, who relied on self-defense, must show that he killed decedent in his necessary self-defense, and explained that, if accused had a reasonable apprehension under the circumstances that he was about to suffer death or serious bodily harm, his act in killing decedent was excusable, the refusal to charge that in considering self-defense the jury must be guided by the facts as they appeared to accused at the time of the killing, and that, if a man of ordinary firmness would reasonably have apprehended that he was about to suffer death or serious bodily harm, accused should be acquitted, was not erroneous.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 614-632; Dec. Dig. § 300.\*]

## 7. CRIMINAL LAW (§ 822\*)—INSTRUCTIONS—CONSTRUCTION.

The charge must be read and construed as a whole.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1990, 1991, 1994, 1995, 3158; Dec. Dig. § 822.\*]

## 8. HOMICIDE (§ 309\*)—ISSUES—MANSLAUGHTER—EVIDENCE.

Where the state showed that decedent was shot in the back while he was walking away from defendants, unconscious of their presence and when they were in no danger, real or ap-

parent, and defendants showed that the shot was fired in self-defense, the issue of manslaughter was not raised, and the refusal to charge thereon was proper.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 649-656; Dec. Dig. § 309.\*]

## 9. HOMICIDE (§ 116\*)—THREATS—EFFECT.

Threats of decedent and fear on the part of accused induced thereby do not of themselves justify a killing, but there must be some act of violence or other circumstance to rebut the malice implied by law and excuse or mitigate the offense.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 158-163; Dec. Dig. § 116.\*]

Appeal from Superior Court, Anson County; Ferguson, Judge.

Jesse A. Price and another were convicted of murder, and they appeal. Affirmed.

The defendants, Jesse A. Price and Robert E. Price, were indicted in the court below for the murder of Lester Rushing. The evidence is voluminous, and there are many exceptions.

Thomas Rushing, a witness for the state, testified: That he and his brother Lester went to Lester's house about dark for the purpose of getting feed for Lester's mule. Lester Rushing kept his mule in Jesse Price's barn. The barn was east of Jesse's house about 20 yards, and was situated about north of Lester's house. While he and the deceased were in the latter's house, some one shot five times at Jesse's house. Sounded like pistol shots. They stayed in Lester's house about five minutes, and walked up to Jesse's barn with the mule and feed. After feeding the mule, they left, going towards Lester's house, when Jesse shot both of them in the back, and one shot struck the deceased in the right side of his head. He saw the defendant Jesse shoot. Jesse and Robert, the defendants, went to shooting pistols. Jesse Price shot a gun. He (the witness) was not armed, but his brother had a pistol on his person. Lester did not shoot and did not pull out his pistol. When he was shot, Lester ran a few steps and fell. He was shortly carried to his house, and died three or four hours afterwards. He went to Lester's house and saw a pistol lying on the table. He then went about 60 yards to where Jesse and Robert were and shot at Jesse one time. He went back and got a gun and started again. When he heard Lester groaning in the field, he laid the gun down in Lester's door. Lester Rushing was keeping a bachelor's house; the witness lived with his mother, some distance from Lester's house; he knew that Lester and Jesse Price had had a little trouble before this; that the feeling of his brother Lester towards Jesse Price had existed about three weeks. His brother Lester went to Monroe Saturday evening, and returned Monday evening with his Winchester rifle. He loaned Lester his buggy to go to Monroe; Lester did not have a Winchester rifle before he went,

but he had one when he got back. He went over to his brother Willie's to get Lester's shotgun. Lester had a double-barrel shotgun there that night, and two pistols and a Winchester rifle. Both pistols were Lester's. Witness testified that he did not know whether Lester had any firearms before he went to Monroe or not. When witness met the Timmon boys and Richardson, immediately after the shooting, he had the shotgun in his hand. When Jesse Price fired, the shot killed Lester and also hit him. He supposed that Jesse was using a breach-loader with a No. 1 shot. He and his brother were hit in the back, and one shot struck his brother in the right side of his head. Some of the shots are in the witness yet—three or four shots in his back now. He exhibited his coat and showed where the shot holes were in the coat and in his brother's suspenders. He also exhibited his brother's shirt, and showed where the shot had entered, stating that they were shot in the back, and there were holes in the back of the shirt. He also stated that they were walking down the path when they were shot, his brother being on his side, and that he did not see either of the defendants before the gun was fired. There were 13 shot holes in his brother's coat. Both Jesse and Robert were shooting pistols, and they shot three times after he did. Jesse and Robert were standing together at the corner of the wagon and they both fired from that place; that is, standing behind the wagon, or at the corner of the wagon. Robert did not tell him not to come and raise any fuss.

Dr. J. B. Eubanks testified: That he examined the body of the deceased; he found 13 bruised spots which appeared to be shot holes on the right side of the backbone, and one in the right side of the head. The range of the shots was at an angle. Two shots were taken out from under the skin; they went straight towards the backbone. The range of the shot in the temple was inward and outward. Found only one shot in the temple. The shot in the back seemed to be rather a glancing shot; the shot that entered the temple was the one that caused death. It was a small shot. He undertook to probe the shot holes, and found that they were only bruises. Only two shots penetrated the skin. They went in about one-eighth of an inch, and he pushed them out; they were very small shot, and would have to hit some vital part in order to hurt. In order to satisfy himself that the shot did not penetrate the skin, he cut out pieces of the bruised skin and washed it, and found no holes in the skin at all.

J. W. Terrell, Jr., testified: He was at Jesse Price's house in August; Jesse told him he had to get his brother Zeke's Winchester rifle to practice shooting, as he expected trouble with Lester Rushing that fall; he told his father about this when he came home.

J. W. Terrell, Sr., testified: That the young man came home one evening and talked a little while, and said: "Pa, let me see you a little bit." He then went out in the yard and the son said: "Pa, I expect Jesse Price and Lester Rushing will have trouble." That Jesse had told him he and Lester would have trouble, and he was going to get his brother Zeke's rifle and practice up.

Cletes Martin testified: That Robert Price came to his house on the 12th of October and said that Zeke Price said to let him have his rifle; that Jesse had some 32-caliber cartridges, but that the rifle carried No. 38 cartridges.

James Martin testified: That Jesse Price sent a box of No. 32 cartridges by him to Marshville to be exchanged for No. 38 cartridges, but that he could not secure the 38 cartridges, and returned the 32 cartridges to the merchant and carried Jesse Price 85 cents.

This closed the state's testimony in chief.

Jesse A. Price testified in his own behalf, as follows: That the deceased was living and farming with him during the year 1910; deceased traded on halves and then got dissatisfied and said that he wanted a mule of his own. He went to Marshville and got one, and the witness rented him his land. He never had any trouble with the deceased until three weeks before the homicide; they were entirely friendly up to that time. At this time they had a dispute over a sack of flour and some molasses; the deceased wanted to sell him his crop, but witness could not give him what he asked for it; he told him that he was not able to buy it. The deceased said: "I want you to come down at 12 o'clock, and we will count everything I owe you." He was afraid, from the way deceased had been talking, that he would fuss with him, and he sent his brother Buck down to go over the account, and told Buck not to have any dispute with him. He asked Lester Rushing the following day if he thought he would charge the sack of flour to him wrongfully. The deceased did not answer "Yes" or "No." The defendant tried to explain to him where he got the flour and molasses. Deceased then remembered the molasses, but denied the flour. Defendant insisted that he got the flour, when deceased drew a pair of knucks and followed the defendant to his house, cursing him and calling him a son of a bitch. He followed him to his door with his knucks, when defendant went into his house and got his gun. Deceased then left, threatening to kill defendant. Defendant tried to make friends with him, and told deceased he would drop everything and never mention the sack of flour again. The deceased, after the dispute at the defendant's door, went over to his mother's and returned with a pistol. On Monday night previous to the homicide, deceased tried to burn the home of the defendant. The witness was lying in his room. He

heard a match strike under this room; the light blazed up and could be seen through the cracks of his log house. Defendant ran out and saw Lester Rushing. The witness shot twice, and Lester ran down to his house and through his door. The deceased had set fire to some cotton and fodder under the room in which the cotton was stored. On the day of the homicide, he had been moving Willie Simpson. He left home early that morning, and returned home about dusk that evening; found no one at home but his wife and children. He had had no dinner; he put up his mule and went in and asked for supper at once. He was eating supper and heard some one shooting outdoors. He called his wife and asked who was shooting out about Lester's house. She never answered. He got up and went to see what was the matter and what had become of his wife. He saw his wife and children going down the hill, and Tom and Lester coming up towards the barn. He picked up his gun before he stepped out of the door. When Tom and Lester reached the place where the road forks, one end going to the barn and the other end to Jesse's house, they turned up the path into Jesse's yard. They had a gun with them. Defendant told them not to come up there raising any fuss. Robert Price came up about that time and said: "Boys, this won't do." Lester and Tom did not say anything; Lester pulled out his pistol and fired at me. Tom was carrying a gun. Defendant was standing at the corner of his porch. When Lester fired, defendant shot up over them. Deceased and Tom kept coming towards the defendant, continuing to shoot. Defendant thought they were going to kill him, and ran around the house. Defendant fired as he ran. He ran around the house and through his kitchen door on the back side. The door was latched, and he broke the door open to get in. After he went in the house, he thought he heard Tom Rushing and the deceased in the yard. His mother ran over there and came to the front door. He whispered and told her that the deceased and Tom were trying to kill him. When she left, he ran out of the dining room door into the edge of the woods and ran over to his mother's house. His mother came very soon and told him that he had shot Lester. He told her that he was sorry that he had shot him, but it looked like he was forced to do it; that they ran on him. Defendant then went immediately to Mr. Morgan, a justice of the peace, and surrendered. This defendant further testified that, before the day of the homicide, he had been told by several persons, whose names he gave, that Lester Rushing had threatened to kill him, and, when he returned to his house on the evening of the homicide, his wife told him that Lester had a Winchester rifle and was drunk; that she was alarmed and asked his brother Robert to come to their home and

stay with them. There was evidence implicating Robert Price, and also evidence tending to show that he took no part in the affray, but had merely gone to his brother's house to prevent a difficulty, and as a peacemaker, and that he ran when the first shot was fired and did not return.

We have stated substantially so much of the evidence as is necessary to an understanding of the exceptions, following as nearly as possible the version of the defendants' counsel as found in their brief. There was much testimony introduced by the state and the prisoners, tending to sustain their respective contentions. The defendants were convicted of murder in the second degree, and appealed from the judgment which was rendered upon the verdict.

Adams, Armfield & Adams, McNeely & Brooks, Lockhart & Dunlap, and Robinson & Caudle, for appellants. Attorney General Bickett and T. H. Calvert, for the State.

WALKER, J. We will consider the exceptions in the order of their statement in the record.

[1] The defendants proposed to ask the witness, Thomas Rushing, how many times the deceased had threatened to take the life of Jesse Price in his presence. The rule in regard to the admissibility of previous threats is stated in *State v. Turpin*, 77 N. C. 473, 24 Am. Rep. 455, and more recently in *State v. Exum*, 138 N. C. 600, 50 S. E. 283, and *State v. Baldwin*, 155 N. C. 494, 71 S. E. 212. The general rule is that proof of the character and habits of the deceased, and of his disposition towards the prisoner, is not relevant to the issue in trials for homicide, but there are certain well-settled and well-defined exceptions to this rule of exclusion which are fully stated in the cases we have cited. At the time the question was asked in this case, nothing had developed to bring the proposed evidence within any one of the exceptions, and, we may add, it did not appear that the threats had been communicated to the prisoner. The question was therefore properly excluded under *State v. Exum*, supra, as the proof was not again tendered by the prisoner after the facts and nature of the case had been sufficiently shown to have made it competent.

[2] The prisoner Robert Price was asked by his counsel if he went to his brother's house to make peace. Assuming that the question was otherwise competent, under *State v. Hall*, 132 N. C. 1095, 44 S. E. 553, and *State v. White*, 138 N. C. 704, 51 S. E. 44, it was leading and properly excluded for that reason, but the witness had already testified that he went to the house as a peacemaker to prevent any difficulty between his brother and Lester Rushing.

[3] Buck Price, brother of the prisoners, had testified as to a prior meeting between Lester Rushing and Jesse Price when they

quarreled about their settlement, and Lester Rushing cursed his brother and threatened to kill him. The state introduced a witness, John Smith, to contradict him, and was allowed to do so over the prisoner's objection. We do not see why this ruling was not a proper one. If it was material to know what had occurred at their meeting a few days before the homicide was committed, it was certainly relevant to show that the witness, Buck Price, had given two conflicting versions of the matter. This exception does not seem to be relied on by the prisoner's counsel in their brief (*State v. Register*, 133 N. C. 747, 46 S. E. 21), but we have considered it nevertheless.

[4] The prisoner Robert Price requested the court to charge the jury to return a verdict of acquittal as to him, there being no evidence of his guilt, but we are unable, after a careful examination of the case, to say that there is no evidence of his participation in the affray which led to the death of Lester Rushing. The witness, Thomas Rushing, testified: "I did not see either of the defendants before we were shot. I did not hear them say anything at the time we were shot. I heard them shoot at Jesse's house before we went. I saw the defendant Jesse shoot. I do not know how many shots he made. They shot so fast I could not count them. I didn't hear but one shot with the gun. Both went to shooting pistols—Robert and Jesse Price. I saw them both. They were standing right by the side of the wagon, between me and Lester. The wagon was sitting a little to the right of the house, between the barn and house. When they shot at us, I turned my head to see who it was. I came right down the road where Lester was. I left my brother in the cotton patch. He died at his house about three hours after he was shot. (Points out Jesse's and Robert's shots.) I could not tell how many times they shot at us. I have an idea that some 8 or 10 shots were fired. I did not pronounce but one to be a gunshot; the other pistol shots. Robert and Jesse Price both were shooting pistols, standing behind the wagon. Jesse shot the gun. I only shot one time after defendants shot at us. They were standing at the same place in front of the wagon when I shot. They shot three times after I did. After I went to Lester's house, they fled."

It was not necessary to his conviction that the prisoner Robert Price should have had any previous understanding with his brother that they should together attack the Rushings, or that Robert Price should take part in the affray. If he actually engaged in the assault upon them, or was present aiding and abetting his brother in his unlawful acts, it would be sufficient to sustain a verdict against him, although his original motive in going to Jesse's house may have been a good one. He must be judged by what he did, and not merely by what he intended to do. There was at least some evidence of his guilt.

It was for the jury to weigh it and find therefrom the fact of guilt or innocence. The facts in this case are not like those in *State v. Tachanatah*, 64 N. C. 614, and *State v. Howard*, 112 N. C. 859, 17 S. E. 166. If it be true that the deceased and his brother were walking away from the prisoners, and the latter fired at them, and the shot struck them in the back, we do not see why this is not some proof of a joint participation in the felonious assault, especially when considered in connection with the other evidence in the case. The court charged fully and correctly on this phase of the case.

[5, 6] The prisoners requested the court to submit certain special instructions to the jury, and the charge of the court will show that they were substantially given, and, in some instances, most favorably to them. The jury were fully cautioned as to how they should examine and weigh testimony of interested witnesses, and no objection to the charge, in this respect, is well founded.

The prisoners requested the court to charge the jury that, in considering the plea of self-defense, they should be guided by the facts and circumstances as they appeared to them at the time of the homicide, and if a man of ordinary firmness would reasonably have apprehended, under such circumstances, that he was about to suffer death or serious bodily harm, they should acquit the prisoner. A careful review of the charge satisfies us that the court fully responded to this request, and instructed the jury substantially in accordance with its terms. It is not required that the very language of a prayer should be used in giving the instructions asked for, but it is sufficient for the court to instruct the jury substantially as requested, in its own words, provided, if the party is entitled to the instruction, its force is not weakened or its meaning materially altered by any change in the language. It is true the court told the jury that the prisoners must have killed in their necessary self-defense, but he explained to the jury what was meant by this expression in other parts of the charge, and substantially instructed the jury, in language that could not well have been misunderstood, that if they had a reasonable apprehension, under the circumstances surrounding them, that they were about to suffer death or serious bodily harm, their act in slaying the deceased was excusable in law, and they should acquit the prisoners.

[7] The charge must be read and construed as a whole. *State v. Exum*, supra; *Kornegay v. Railroad*, 154 N. C. 389, 70 S. E. 731; *State v. Lewis*, 154 N. C. 632, 70 S. E. 619. When thus considered, it was a full and clear exposition of the law, as applicable to the facts. This case bears no resemblance to *State v. Barrett*, 132 N. C. 1005, 43 S. E. 832, and *State v. Clark*, 134 N. C. 699, 47 S. E. 36.

[8] The prisoners further excepted to the

charge because the court failed to charge fully and explicitly upon manslaughter. The prisoners requested no instruction as to manslaughter, and we do not think the evidence warranted the submission of this question to the jury. If the prisoner's version of the facts was the correct one, they were not guilty, as they manifestly acted in self-defense, and the jury were so instructed, but if the state's contention was accepted by the jury, and it must have been, then they were guilty, at least of murder in the second degree. The solicitor did not ask for a conviction of murder in the first degree, so that murder in the second degree was the highest grade of homicide for which they were being tried. As we have said, there is no suggestion of manslaughter in any of the prayers tendered in behalf of the prisoners, but without exception they conclude with the request for an instruction to the jury directing them to return a verdict of not guilty. The case was tried upon the theory of self-defense, and all the evidence tended to show that the prisoners were either guilty of murder, or that the homicide was excusable. The court instructed the jury that, if they found the facts as the prisoners claimed them to be, they should acquit the defendants. If the jury found the prisoners guilty, they should not return a verdict for manslaughter, without evidence to support it, merely because of an aversion to convict of the higher felony. Verdicts must be based upon the evidence, and not inspired solely by merciful considerations or feelings of sympathy. Jurors are not to be moved by motives of clemency, however commendable they may be, but should decide always according to the facts and the law. There was no view of the facts which called for an instruction as to manslaughter, and, in this respect, the case is not unlike *State v. White*, 138 N. C. 704, 51 S. E. 44.

If the state's evidence is true, the deceased was shot in the back while he was walking away from the prisoners, unconscious of their presence, and when they were in no danger, real or apparent, while if the prisoner's evidence be true, Robert Price fled immediately, and Jesse Price also retreated and fired the fatal shot while doing so. There is no element of manslaughter in these facts. The jury convicted the prisoners of murder in the second degree, we presume, because of the physical facts or natural evidence in the case—the testimony of Thomas Rushing and the clothes which were exhibited showing that the Rushings had been shot in the back by some one in their rear—for doing which not even the violent threats of Lester Rushing excused them.

[8] Threats of the deceased and fear on the part of Jesse Price induced thereby did not, of themselves, justify the killing. There must have been some act of violence, or some

other circumstance, to rebut the implied malice of the law and excuse or mitigate the offense.

Our consideration of the case has led us to the conclusion that no error was committed at the trial.

No error.

(159 N. C. 60)

PEELE et al. v. NORTH & SOUTH CAROLINA RY. CO. et al.

(Supreme Court of North Carolina. April 17, 1912.)

1. ARBITRATION AND AWARD (§ 84\*)—SUMMARY JUDGMENT—POWER OF COURT.

The court, in the absence of statute conferring the power, may not enter summary judgment on an arbitration and award arising by agreement in pais, and not as incident to a pending suit.

[Ed. Note.—For other cases, see Arbitration and Award, Cent. Dig. §§ 466-483; Dec. Dig. § 84.\*]

2. ARBITRATION AND AWARD (§ 84\*)—SUMMARY JUDGMENT—POWER OF COURT.

Where the parties to a pending suit, after issue joined, agree to arbitrate and stipulate that the award shall be made a rule of court, the award may be enforced by judgment entered in the cause.

[Ed. Note.—For other cases, see Arbitration and Award, Cent. Dig. §§ 466-483; Dec. Dig. § 84.\*]

3. ARBITRATION AND AWARD (§ 84\*)—SUMMARY JUDGMENT—POWER OF COURT.

Where parties to a pending suit agree, after issue joined, to arbitrate and stipulate that the award shall be entered as judgment in the cause, the award, if otherwise valid, may be so entered and enforced by final process; but the parties must be given opportunity to object to the award and have its validity determined by a jury, if demanded.

[Ed. Note.—For other cases, see Arbitration and Award, Cent. Dig. §§ 466-483; Dec. Dig. § 84.\*]

Appeal from Supreme Court, Scotland County; Cooke, Judge.

Action by R. A. Peele and another against the North & South Carolina Railway Company and another. From a judgment for plaintiffs, defendant named appeals. Affirmed.

The plaintiffs alleged that the defendant was a corporation, doing and carrying on the business of a railroad and the common carrier, and that on the 26th day of October, 1906, it ran its locomotives on its railroad, and negligently permitted sparks of fire to be emitted from its locomotives, and that the said sparks of fire ignited the property of the plaintiffs, which was situated contiguous to or near the railroad, and set fire to and damaged the plaintiffs' property in the sum of \$360. The defendant, answering the complaint, denied that it was guilty of any negligence, as alleged in the complaint, and denied that the plaintiffs were entitled to any recovery against this appellant. After the cause was at issue and out of term, the parties entered into a written agreement, duly



signed, to arbitrate the question at issue and on the amount of damages. The agreement recited and referred to the suits pending, provided for arbitration by arbitrators selected and sworn, etc., and concluded with the stipulation that defendant "shall promptly pay all awards made by said arbitrators, and the same shall be entered as judgment in the cause, so as to become fully binding on all parties hereto." The arbitrators having been selected and sworn as per agreement, and notice having been duly served, met and made award that the amount of damages due from defendant to plaintiffs was the sum of \$360. When the cause was called for trial in October, 1911, these facts were made to appear by affidavit, and plaintiffs moved for judgment according to the award, and defendant filed counter affidavits, tending to impeach the award for fraud and partiality on part of umpires, etc., and thereupon, over defendant's objection, issues were submitted to the jury, and the following verdict was rendered:

"(1) Was there an arbitrament and award as to the amount of damages in which plaintiffs are entitled to recover in this action? Answer: Yes.

"(2) Were the arbitrators thereof wrongfully and corruptly biased and prejudiced in favor of the plaintiffs? Answer: No."

Defendant duly excepted. There was judgment on the issues and the award for the amount of verdict, and defendant further excepted and appealed.

W. H. Neal, for appellant. Cox & Dunn, for appellees.

HOKE, J. (after stating the facts as above). [1, 2] Except by statutory provision, a court has no power to enter summary judgment on an arbitration and award arising by agreement in pais, and not as incident to a pending suit. Where suit is pending between the parties, and more especially after issue joined, and there is an agreement to arbitrate, the award to be made a rule of court, in such case the award may be enforced by judgment entered in the cause.

[3] There is also ample authority for the position that, on action pending and issue joined, though the agreement to arbitrate be made out of court, if the agreement contains the stipulation, as in this case, "that the award shall be entered as judgment in the cause," the award, if otherwise valid, may be so entered and enforced by final process. *McCall v. McCall*, 36 S. C. 80-85, 15 S. E. 348; *Farrington v. Hamblin*, 12 Wend. (N. Y.) 212; *Corrigan v. Rockefeller*, 67 Ohio St. 354, 66 N. E. 95; *Rodgers' Heirs v. Nall*, 6 Humph. (Tenn.) 29; *Wear v. Ragan*, 30 Miss. 88; 11 Enc. Pl. & Pr. p. 1049. It would seem that the decisions of this state have been against this position, though in much the larger number of them, as in *Jack-*

*son v. McLean*, 96 N. C. 474, 1 S. E. 785, *Metcalfe v. Guthrie*, 94 N. C. 449, *Moore v. Austin*, 85 N. C. 179, cited and relied on by defendant, the question was not really presented, as the agreement in those cases did not contain the stipulation that the award should be made the judgment of the court in the pending cause; and in *Long v. Fitzgerald*, 97 N. C. 39, 1 S. E. 844, where this provision did appear, there judgment upholding the award was affirmed.

The only case we find with us which directly sustains the view that an award, pursuant to agreement made by the parties out of court, may not be entered as judgment in the cause, though containing stipulation that this might be done, is *Simpson v. McBee*, 14 N. C. 531. The learned judge in that case recognizes that a different practice may have then prevailed in England, under a statute, from the time of 9 and 10 William III, c. 15, and we think that the contrary view, presented and sustained by the authorities heretofore cited, should prevail in such cases; and, if the award is otherwise valid, that judgment thereon should be entered in the pending cause. This ruling requires and is predicated on the position that the parties are to be afforded opportunity to object to the award and its validity by exceptions, and the issues so arising to be determined by the jury, if that mode of trial is insisted upon. This was the course pursued in the present case, and we find no reason for disturbing the result of the trial. The judgment, therefore, will be affirmed.

No error.

(158 N. C. 521)

KEARNEY v. SEABOARD AIR LINE RY.  
(Supreme Court of North Carolina. April 10, 1912.)

1. TRIAL (§ 165\*) — MOTION FOR NONSUIT—CONSIDERATION.

In considering a motion for a nonsuit, plaintiffs' evidence must be accepted as true.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 373, 374; Dec. Dig. § 165.\*]

2. CARRIERS (§ 280\*) — PASSENGERS—MIXED TRAINS.

A passenger on a mixed train assumes the usual risks incident to traveling on such trains when managed by prudent men in a careful manner, but he is entitled to the highest degree of care to which such trains are susceptible.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1085-1092, 1098-1106, 1109, 1117; Dec. Dig. § 280.\*]

3. CARRIERS (§ 303\*)—INVITATION TO ALIGHT—EVIDENCE.

Arrival of a train at the terminus of the line, and at the usual place for passengers to alight, shows an invitation to alight.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1216, 1218, 1224-1243; Dec. Dig. § 303.\*]

4. CARRIERS (§ 303\*) — DUTY TO ALIGHTING PASSENGER.

A railroad company is bound to use the highest degree of care practicable toward pas-

sengers alighting at their destination, and to give them sufficient time and opportunity to leave the train; the sudden starting of a train while a passenger is alighting constituting negligence.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1216, 1218, 1224-1243; Dec. Dig. § 303.\*]

**5. CARRIERS (§ 303\*) — DUTY TO ALIGHTING PASSENGER.**

If alighting passengers can leave a train on either side and one side is more dangerous than the other, the carrier must have some employé present to advise the passengers.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1216, 1218, 1224-1243; Dec. Dig. § 303.\*]

**6. CARRIERS (§ 333\*)—ALIGHTING PASSENGERS—CASE REQUIRED.**

An alighting passenger must leave the train with reasonable promptness, and use ordinary care for his own safety.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1385-1397; Dec. Dig. § 333.\*]

**7. CARRIERS (§ 318\*)—INJURY TO ALIGHTING PASSENGER—NEGLIGENCE—EVIDENCE—SUFFICIENCY.**

In an action against a railroad company for injury to a passenger, caused by the train moving while he was alighting, evidence held to warrant a finding that the carrier was negligent.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1270, 1307-1314; Dec. Dig. § 318.\*]

**8. CARRIERS (§ 347\*)—INJURY TO ALIGHTING PASSENGER—CONTRIBUTORY NEGLIGENCE—JURY QUESTION.**

In an action against a railroad company for injury to a passenger caused by the train moving while he was alighting, evidence that a passenger 69 years old let himself from the steps of the car gradually and slowly, it being night, is insufficient to show contributory negligence as a matter of law.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1346-1397, 1402; Dec. Dig. § 347.\*]

**9. CARRIERS (§ 339\*)—INJURY TO PASSENGER—CONTRIBUTORY NEGLIGENCE—REQUISITES.**

Negligence of a passenger in alighting from a train does not prevent his recovery for injury received while so alighting unless the negligence was contributory, and it could not be contributory, unless the proximate cause of the injury.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1353; Dec. Dig. § 339.\*]

**10. CARRIERS (§ 333\*)—ALIGHTING PASSENGERS—INJURY—CONTRIBUTORY NEGLIGENCE.**

Revisal 1905, § 2628, which precludes recovery by a railway passenger for injury while on the platform of a car in violation of the company's regulations, does not affect the passenger's right to recover for injury received while alighting at his destination.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1385-1397; Dec. Dig. § 333.\*]

**11. TRIAL (§ 296\*)—ALIGHTING PASSENGERS—INJURY—INSTRUCTIONS.**

In an action for injury to a passenger while alighting, an instruction that, if the jury found certain facts, "he would be entitled to recover," was not erroneous, where the instructions gave specific directions as to how the issues should be answered according to their findings on the different contentions.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 705-713, 715, 716, 718; Dec. Dig. § 296.\* Carriers, Cent. Dig. § 1406.]

**12. TRIAL (§ 260\*)—ALIGHTING PASSENGERS—INJURY—INSTRUCTIONS.**

In an action for injury to a railway passenger, it was not error to refuse to direct a finding for the carrier on a finding that plaintiff was injured while attempting to jump from a moving train, where the court instructed that plaintiff could not recover unless he was injured while getting off the train after it stopped, and presented defendant's contention that the train was moving at the time of the accident.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 651-659; Dec. Dig. § 260.\* Carriers, Cent. Dig. § 1407.]

**13. CARRIERS (§ 339\*)—ALIGHTING PASSENGERS—INJURY—INSTRUCTIONS.**

In an action for injury to a railway passenger while alighting, it was not error to instruct that if the train slowed down on approaching plaintiff's destination at the usual place of slowing down and stopped before plaintiff attempted to alight, and as he was alighting, but before he had had reasonable time to do so, the engineer suddenly, without notice, moved the train causing plaintiff to fall and plaintiff was injured thereby, he could recover, though he was alighting on the opposite side of the train from the station, and on the side where passengers were not accustomed to alight.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1353; Dec. Dig. § 339.\*]

Brown, J., dissenting.

Appeal from Superior Court, Franklin County; Ferguson, Judge.

Action by H. C. Kearney against the Seaboard Air Line Railway. Judgment for plaintiff, and defendant appeals. Affirmed.

This is an action to recover damages for personal injuries, caused by a car on which plaintiff had been riding as a passenger passing over his foot, making amputation necessary. The plaintiff, a man 69 years old, was a passenger on defendant's train on the night of October 26, 1910, from Louisburg, N. C., to Franklinton, N. C. The train consisted of six box cars and two passenger coaches. The defendant operates a branch line between Louisburg and Franklinton, and in getting into the station at the latter point the trains pass through a switch north of the passenger depot. On the night of this accident the engine stopped at this switch to have it changed, in order to permit the train to pass onto a side track and up to the passenger depot. When the engine stopped at this point, which was 386 feet from the depot, the passenger coach on which plaintiff was riding was seven car lengths further from the depot, making a total distance of more than 700 feet. At this point the plaintiff went on the platform of the car. In describing the circumstances under which he went out on the platform, the plaintiff says: "At any rate, just before Mr. White had gotten on, or about the time he got on the steps, had stepped down there, was when I came out of the coach, and the train had kind of slowed a little, and there was a slack between the cars—lost motion—by the connection being a foot probably, on the box cars especially. There is a foot difference probably—a

foot play between two box cars. There is not so much difference between the coaches; that is, the box cars in front. Those box cars were in front of me. It being dark there, and I couldn't see, there was a jerk, and I caught hold of the iron rod and sat down, like this, with my feet down here, and, when I sat there, I looked to see, and the only thing was Prof. White right across on the steps. \* \* \* I sat down on the platform of the coach with my feet on the first step. I think there are about four steps, counting the top one, down to the bottom one of the steps to get off. When that jerk came, I had hold of this iron, and sat right down on the end of the coach, not on the seat." The plaintiff remained in this position, sitting on the platform and steps of the car, until the train reached the usual place for slowing down the train for the purpose of permitting passengers to alight when the train reached a point opposite the passenger station, and, according to his evidence, it then stopped.

The passenger station is on the southeast side of the track at Franklinton, and a light is kept burning in front of the station. Plaintiff says there was a light at the station where it stops regularly on the east side, and the evidence of all the witnesses familiar with the depot is to the same effect. It is agreed that plaintiff was attempting to alight on the side of the train opposite the passenger station. There was evidence on the part of the plaintiff that passengers were in the habit of alighting on the side opposite the passenger station, without objection by the defendant, and that two passengers got off on that side to one on the other, and that it was equally safe, except it was a few inches lower, and there was no light on that side. There was also evidence on the part of the plaintiff that the train stopped at the usual stopping place for passengers to alight, and that he was then sitting on the top step of the platform; that after the train stopped, holding to the iron rail with one hand, he slid off until his feet were on the ground, and, as he was straightening up, there was a sudden jerk of the train, that he was stricken in the back, knocked down, and dragged eight or ten feet, when the train stopped again. Other passengers were on the platform with the plaintiff, and got off about the same time, and on the same side. The defendant offered evidence tending to prove that the usual and proper place for passengers to alight was on the side next to the passenger depot, that the plaintiff was injured on the platform, or while trying to alight while the train was in motion. The plaintiff also offered evidence that the step on which passengers alighted was left on the platform, and that no employé of the defendant was present to assist or notify passengers. There was a verdict in favor of the plaintiff, and from a judgment rendered thereon the defendant appealed.

Murray Allen and F. S. Sprulli, for appellant. Bickett, White & Malone, for appellee.

ALLEN, J. [1] At the conclusion of the evidence, the defendant moved for judgment of nonsuit, upon three grounds: (1) That there was no evidence of negligence on the part of the defendant, causing injury to the plaintiff. (2) That the plaintiff was guilty of contributory negligence on his own evidence. (3) That the plaintiff was injured while riding on the platform of the train, in violation of section 2623 of the Revisal.

In the determination of this motion, we must accept the evidence of the plaintiff as true, and, guided by the rule of the "prudent man," which is the standard, must consider, not only the evidence of the witnesses, but also the situation of the parties and the circumstances surrounding them.

[2] The plaintiff was a passenger on a train, carrying passengers and freight, and as such assumed the usual risks incident to traveling on such trains, when managed by prudent and careful men in a careful manner (*Marable v. Railroad*, 142 N. C. 563, 55 S. E. 355; *Usury v. Watkins*, 152 N. C. 760, 67 S. E. 926), but he was entitled to the highest degree of care of which such trains are susceptible, and had the right to assume that the employés of the defendant would perform their duties and that the train would be operated with care. *Suttle v. Railroad*, 150 N. C. 673, 64 S. E. 778.

[3] The train had reached Franklinton, which was a terminus of the line, and had stopped at the usual place for passengers to leave the train. This was evidence of an invitation to alight. *Nance v. Railroad*, 94 N. C. 619; *Denny v. Railroad*, 132 N. C. 340, 43 S. E. 847; *Railroad v. Cousler*, 97 Ala. 235, 12 South. 439; *Raub v. Railroad*, 103 Cal. 473, 37 Pac. 374; *Fetter on Carriers*, § 58.

[4] When the train reached its destination, it was the duty of the defendant to exercise the highest degree of care practicable, and to give the plaintiff sufficient time and opportunity to leave the train, and if it failed to do so, and there was a sudden start of the train as he was alighting, this would be negligence. *Hutchinson on Carriers*, § 1118; *Smith v. Railroad*, 147 N. C. 450, 61 S. E. 266, 17 L. R. A. (N. S.) 179.

[5] If passengers could leave the train on either side, and one side was more dangerous than the other, it was the duty of the defendant to have some employé present to advise the passengers. *Ruffin v. Railroad*, 142 N. C. 128, 55 S. E. 86.

[6] It was also the duty of the plaintiff to leave the train with reasonable promptness, and to exercise the care of a person of ordinary prudence in doing so, and, if he failed in this duty, he was negligent.

[7, 8] These are the duties imposed by law upon the plaintiff and defendant, respectively, and when considered in connection

with the evidence of the plaintiff, viewed in the light most favorable to him, as it is our duty to do in passing on a motion to nonsuit, we are of opinion that there was evidence of negligence on the part of the defendant, and that the plaintiff could not be declared guilty of contributory negligence as matter of law. According to the evidence of the plaintiff, the train had reached its destination, and had stopped at the usual place for passengers to alight. No step for passengers was placed on either side of the train, and no employé of the defendant was present to advise or assist, and, while he was getting off the train with reasonable promptness, there was a sudden movement of the train, which injured him. This is undoubtedly evidence of negligence. *Moore on Carriers*, p. 674; *Hutchinson on Carriers*, § 1118; *Nance v. Railroad*, 94 N. C. 619; *Tillett v. Railroad*, 118 N. C. 1031, 24 S. E. 111; *Smith v. Railroad*, 147 N. C. 450, 61 S. E. 266, 17 L. R. A. (N. S.) 179.

When the train stopped, the plaintiff was sitting on the platform, and he immediately attempted to get off on the side opposite the passenger station. He had been a frequent passenger on the train, and usually got off on this side, as did a majority of the passengers, and without any objection from the defendant. He did not rise to his feet, but held on to the iron railing and slid off, and after his feet reached the ground, and he was getting in an erect position, or, as he says, straightening up, the sudden movement of the train injured him. We are not prepared to hold as matter of law that it is negligence for a passenger, 69 years of age, when alighting from a train in the night, to let himself to the ground gradually and slowly, and particularly so in view of the fact that he had the right to assume that the defendant would not be negligent, and that the train would not move before he was given a reasonable time to get off, nor can we say it was negligent to get off on the side he did, when it was in evidence that he had done so repeatedly, without objection by the defendant, and that passengers usually got off on that side. His honor gave to the defendant all it was entitled to on the question of contributory negligence, when he instructed the jury, in substance, that the plaintiff was negligent if he failed to exercise the care of one of ordinary prudence similarly situated.

[8] If, however, it should be held that there is evidence of negligence on the part of the plaintiff, this would not prevent a recovery unless it was contributory, and it could not be contributory unless a real proximate cause of the injury, and according to the evidence of the plaintiff, if believed, the real cause was the negligent act of the defendant in moving its train while the plaintiff was alighting. The principle is applied by Justice Brown in *Darden v. Railroad*, 144 N. C. 1, 56 S. E. 512, to one at-

tempting to alight from a train in motion, which was stronger evidence of contributory negligence than is shown by the plaintiff's evidence, and he there says: "It is useless to discuss the alleged negligence of the plaintiff in attempting to alight from a moving train, for, if his evidence is to be believed, the proximate cause of his injury in being thrown to the ground was the premature signalling to the engineer by the brakeman to 'Go ahead.' Had it not been for the brakeman's negligence, the plaintiff would doubtless have stepped safely to the ground." The situation of the plaintiff at the time of his injury, if his evidence is believed, was not a cause, but a mere condition, and the distinction between the two is well recognized. In *Black v. Railroad*, 193 Mass. 450, 79 N. E. 798, 7 L. R. A. (N. S.) 148, 9 Ann. Cas. 485, the court, speaking of this distinction, says: "Negligence of a plaintiff at the time of an injury caused by the negligence of another is no bar to his recovery from the other, unless it was a direct, contributing cause to the injury, as distinguished from a mere condition, in the absence of which the injury would not have occurred. \* \* \* The application of this rule sometimes gives rise to difficult questions. But in this connection the doctrine has been established that when the plaintiff's negligence or wrongdoing has placed his person or property in a dangerous situation which is beyond his immediate control, and the defendant, having full knowledge of the dangerous situation, and full opportunity, by the exercise of reasonable care, to avoid any injury, nevertheless causes an injury, he is liable for the injury. This is because the plaintiff's former negligence is only remotely connected with the accident, while the defendant's conduct is the sole, direct, and proximate cause of it."

[10] Nor do we think the fact that the plaintiff was on the platform immediately before his injury bars a recovery under section 2628 of the Revisal, which reads as follows: "In case any passenger on any railroad shall be injured while on the platform of a car, or on any baggage, wood or freight car, in violation of the printed regulations of the company posted up at the time in a conspicuous place inside the passenger cars then in the train, such company shall not be liable for the injury: Provided, said company at the time furnish room inside its passenger cars sufficient for the proper accommodation of its passengers." The case does not come within the letter or spirit of the statute, because the plaintiff was not injured "while on the platform," nor was he at the time of his injury violating the printed regulations of the defendant, which prohibit passengers from going on the platform only when the car is in motion. The statute was intended for the protection of passengers and railroads, and should be reasonably construed, and there is as much reason for saying that a passenger, who remains in his seat until

the train stops, and is injured as he is stepping from the train, is injured "while on the platform," as there is for that construction to be placed on the plaintiff's version of his conduct. As was said in *Shaw v. Railroad*, 143 N. C. 315, 55 S. E. 713, and affirmed in *Smith v. Railroad*, 147 N. C. 451, 61 S. E. 266, 17 L. R. A. (N. S.) 179: "The statute in plain terms relieves the company from liability in the case of a passenger injured while on the platform of a moving train, when the company, as in this case, has complied with its terms." And, as the train was not in motion at the time of his injury, the statute has no application under the circumstances in this case.

Nor did the fact that the plaintiff had been on the platform have anything to do with his injury. If he had lost his rights as a passenger because violating the statute, the train, according to his evidence, had stopped, and he then had the right to get off, and, if in doing so he was injured by the negligence of the defendant, his being on the platform prior to that time was not even a contributing cause. The language used by the court in *Wood v. Railroad*, 49 Mich. 372, 13 N. W. 779, is in point: "It is claimed that it was negligence on the part of the plaintiff in going onto and standing upon the car platform and steps while the car was in motion. This may be true, and might have prevented a recovery, had the plaintiff been injured while standing there before the train stopped. Such, however, was not the fact, and his standing there neither caused nor contributed to the injury, other than by enabling the plaintiff to step off the train immediately upon its coming to a stop. Upon the stopping of the train he had then a right to get off, whatever his position up to that time may have been, and the danger of his position up to then cannot be charged against him, if he then, in the usual and customary manner and place, attempted to get off."

[11] His honor charged the jury on this phase of the case as follows: "My attention has been called to a statute passed by the Legislature, which I will read to you: 'In case any passenger on any railroad shall be injured while on the platform of a car, or any baggage, wood or freight car, in violation of printed regulations of the company, posted at the time in a conspicuous place inside its passenger cars, then in the train, such company shall not be liable for the injury: Provided, said company at the time furnished room inside its passenger cars sufficient for the proper accommodation of its passengers.' It is admitted, gentlemen, that the notices which have been introduced, one placed on the outside of the passenger coach, which reads, 'Passengers not allowed to stand on the platform,' and notices posted inside the coach, 'Passengers are prohibited from going on platforms or between cars while the train is in motion, and are warned not

to allow their heads or limbs to project from car windows.' The defendant company cannot make a contract which would excuse it from responsibility for its own negligence. Neither could it make rules or regulations for the movement and control of its trains which would excuse it from its own negligence; but the Legislature has seen proper to pass a law which prohibits a passenger from recovering if he stands on the platform, if he is injured while on the platform, contrary to notices which are posted. So that, if you should find from the evidence that the plaintiff went out and stood upon the platform, or sat down on the platform with his feet on the steps, while the train was in motion; and while it was in motion, he having placed himself there, in violation of a notice, he is prohibited by the statute from recovering, if he received injury while on the platform. And that means, not simply if he might get his hand mashed by the cars coming together, but, if he placed himself there so that he was thrown from that place to the ground by the ordinary movement of the cars, he would be prohibited from recovering by reason of the notice, and it would be your duty to answer the second issue, 'Yes,' whatever you might find as to the first; for, although the defendant might have been negligent in not moving its train with proper skill and proper care, still, under the law and the posted notices, its engineer could not anticipate that a passenger could be standing on the platform, and if he were standing or sitting there and the train in motion, and were thrown out, he could not recover. But although you might find that he went out and sat down on the platform while the train was in motion, and he remained there without injury until the train stopped, if you find it did stop, and when it stopped at the usual place of stopping the train for passengers to alight from the train while it was stationary, and before he had reasonable time to alight, the train moved forward, and by its motion in going forward struck him and knocked him down and ran over his foot and injured him, he would be entitled to recover." The latter part of this instruction is the subject of exception by the defendant, because it concludes with the words, "would be entitled to recover," and this exception finds support in what is said in *Miller v. Railroad*, 143 N. C. 115, 55 S. E. 439, but this language does not stand alone, and must be considered with reference to the other parts of the charge, and, when so considered, it will be found that his honor gave specific directions as to how the issues should be answered by the jury, according to their findings on the different contentions of the parties. It was not intended to be decided in the *Miller Case*, nor do we think it has been so decided in any other, that counsel may not ask the judge presiding to instruct the jury upon general principles, applicable and

necessary to an understanding of the case, nor that the judge cannot do so of his own motion.

[12] The defendant also excepts because, as it contends, his honor refused to instruct the jury to answer the first issue, "No," if they found the plaintiff was injured while attempting to jump from a moving train. As was said in *Cox v. Railroad*, 149 N. C. 87, 62 S. E. 762, 16 Ann. Cas. 474: "The verdict, like the charge, must be construed with reference to the trial." His honor instructed the jury that they could not answer the first issue, "Yes," unless they found that the plaintiff was injured while getting off the train after it stopped, and then presented the defendant's contention that the train was in motion at the time of the injury. He said: "If you find from the evidence that the train was being properly conducted and in motion, and shall further find that while it was in motion the plaintiff placed himself on the steps of the platform, and while the train was in motion the plaintiff, from his position in which he had placed himself, either fell from his position or attempted to alight from the train while it was in motion, and fell or was knocked down by the cars, the defendant would not be guilty of negligence, and it would be your duty to answer the first issue, 'No.' One who rides on a mixed train—that is, a train made up partly of freight cars with coaches attached—must take notice of the mode of moving such trains, and give a due regard thereto; and, if you shall find from the evidence that the engineer slowed down his train and did not stop his engine, and thereby stop the movement of the passenger coaches, but moved slowly, and when he stopped his engine the passenger coach on which the plaintiff moved stopped at the time he stopped his engine, and afterwards, and while plaintiff was attempting to alight, the passenger coach moved forward on account of the freight cars in front and between the passenger coach and the engine, taking up slack, it would not be negligence of the defendant, and you would answer the first issue, 'No.' Contributory negligence is where the negligence is a contributing cause to the negligence already in motion, or put in motion during the existence of the contributing act of negligence, and if by the joint negligence of the two the injury is caused, each in part being the cause of the injury. To illustrate: If the defendant was negligent and the defendant's negligence was the proximate cause of the injury to the plaintiff, and the plaintiff was negligent and his negligence contributed to the injury, it would be a case of negligence on the part of the defendant and contributory negligence on the part of the plaintiff. If you shall find from the evidence, by its greater weight, that the plaintiff attempted to alight from a moving train, it would be a case of negligence on his part, because it

was the duty of the defendant to stop its train at the station. And a reasonably prudent man, careful of himself to avoid injury, would observe that the motion of the train, stepping from that to the ground, which was stationary, was calculated to throw him, cause him to fall and get hurt, and, should you so find from the evidence, it would be your duty to say that he was contributing to the act of the defendant, if you find the defendant was negligent." We do not think the jury could fail to understand from this charge that the issues should be answered against the plaintiff if he was injured in attempting to jump from the train or while it was in motion. Indeed, his honor, we think inadvertently, went too far in behalf of the defendant, when he substantially told the jury to answer the second issue, "Yes," if they found the plaintiff was careless.

[13] The defendant further excepted to the following charge: "I charge you that if you shall find from the evidence, by its greater weight, that the train was slowed down on approaching the depot at Franklinton, at the usual place of slowing down the train, and shall further find from the evidence that the train came to a stop before the plaintiff attempted to alight from the train, and that just as the plaintiff was in the act of alighting and before he had a reasonable time to alight, and before the passengers who were to alight at the station had a reasonable time to alight, the defendant's engineer suddenly, without notice, moved the train forward, which motion of the train caused the plaintiff to fall, or struck him and knocked him down, and the train ran over his foot and injured him, it is your duty to answer the first issue, 'Yes,' although the plaintiff was getting off on the opposite side of the train from the station, and on the side that passengers were not accustomed to alight." This instruction presents the question of proximate cause, and is equivalent to charging the jury that although the plaintiff was negligent in getting off on the wrong side of the train, and in the manner adopted by him, if the train had stopped at the usual place, and he was attempting to alight and was injured by a sudden movement of the train, a reasonable time not being given to leave the train, the sudden movement of the train was the proximate cause of the injury, which is in accordance with authority. *Darden v. Railroad*, 144 N. C. 3, 56 S. E. 512; *Smith v. Railroad*, 147 N. C. 451, 61 S. E. 266, 17 L. R. A. (N. S.) 179. The following excerpt from *Moore on Carriers*, § 38, is quoted and approved in *Smith v. Railroad*, supra: "The duty resting upon a carrier involves the obligation to deliver its passenger safely at his desired destination, and that involves the duty of observing whether he has actually alighted before the car is started again. If the conductor fails to attend to this duty

and does not give the passenger time enough to get off before the car starts, it is necessarily this neglect of duty which is the primary and proximate cause of the accident, if injury be occasioned thereby to the passenger. It is not a duty due a person solely because he is in danger of being hurt, but it is a duty owed to a person whom the carrier had undertaken to deliver, and who was entitled to be delivered safely by being allowed to alight without danger."

We have discussed the principal questions raised by the exceptions and those mainly relied on on the oral argument and in the briefs, and have also considered the other exceptions not referred to, and upon the whole record find no error which entitles the defendant to a reversal of the judgment.

There are 13 exceptions to evidence, which are not discussed in the brief, because counsel were doubtless of opinion, as we are, that they were without merit.

No error.

HOKE, J. (concurring). I concur in the decision affirming the judgment. The court charged the jury, in effect, that plaintiff was not entitled to their verdict on the issues if he was injured in the effort to get off a moving train or by reason of going on the platform while the train was in motion, or if he was injured by reason of the slack. The verdict then has been rendered on the theory necessarily accepted by the jury that plaintiff received his hurt by reason of defendant's negligence in giving the train a sudden, violent movement forward, eight or ten feet, while plaintiff was in the act of alighting from the train on which he was a passenger; that at the time of the occurrence the train had come to a full stop at the regular place at the station, and plaintiff, at the proper time, was endeavoring to alight from the train on the side where passengers or good numbers of them were accustomed to alight, and where it was ordinarily safe to do so, and was taking the precaution to slide down, holding onto the usual supports, in order to avoid a possible injury by making too long a step. In this condition, when plaintiff had no reason to expect it, the train as stated, was jerked violently forward, throwing plaintiff down, and running over his foot. There was evidence to support the view. The jury have accepted it, and on this theory the question of contributory negligence and of proximate cause involved in it are removed as a matter of law, and, on the record, the recovery should be upheld both on law and fact. *Thorp v. Traction Co.*, 74 S. E. 644 (present term); *Darden v. Railroad*, 144 N. C. 1, 56 S. E. 512; *Clark v. Traction Co.*, 138 N. C. 77, 50 S. E. 518, 107 Am. St. Rep. 526; *Hodges v. Railroad*, 120 N. C. 555, 27 S. E. 128.

BROWN, J. (dissenting). The plaintiff, a man 69 years old, who had been sheriff of

Franklin county more than 30 years, was a passenger on defendant's train on the night of October 26, 1910, from Louisburg, N. C., to Franklin, N. C., consisting of six box cars and two passenger coaches. The defendant operates a branch line between Louisburg and Franklinton, and in getting into the station at the latter point the trains passed through a switch north of the passenger depot. On the night of this accident the engine stopped at this switch to have it changed, in order to permit the train to pass onto a side track and up to the passenger depot. When the engine stopped at this point, which was 386 feet from the depot, the passenger coach on which the plaintiff was riding was seven car lengths further from the depot, making a total distance of more than 700 feet. At this point the plaintiff went on the platform of the car. In describing the circumstances under which he went out on the platform the plaintiff says: "At any rate, just before Mr. White had gotten on, or about the time he got on the steps, had stepped down there, was when I came out of the coach, and the train had kind of slowed a little, and there was a slack between the cars—lost motion—by the connection, being probably a foot probably, on the box cars especially. There is a foot difference, probably—a foot play between two box cars. There is not so much difference between the coaches; that is, the box cars in front. Those box cars were in front of me. It being dark there, and I couldn't see, there was a jerk, and I caught hold of the iron rod, and sat down, like this, with my feet down here, and, when I sat there, I looked to see, and the only thing was Prof. White right across on the steps. Q. You sat down on what? A. On the platform of the coach with my feet on the first step. I think there is about four steps, counting the top one, down to the bottom one of the steps to get off. When that jerk came, I had hold of this iron, and sat right down on the end of the coach, not on the seat." The plaintiff remained in this position, sitting on the platform and steps of the car, until the train reached a point which, according to his testimony, was the usual place for slowing down the train for the purpose of permitting passengers to alight when the train reached a point opposite the passenger station.

The passenger station is on the southeast side of the track at Franklinton, and a light is kept burning in front of the station to enable passengers to alight in safety. Plaintiff says there was a light at the station where it stops regularly, on the east side, and the evidence of all the witnesses familiar with the depot is to the same effect. It is agreed that plaintiff was attempting to alight on the side of the train opposite the passenger station. The proper place for passengers to alight at Franklinton, and the place provided by the defend-

ant for that purpose, is on the side of the train on which the passenger station is located. There is a light on that side, and the conductor goes on that side of the train to permit passengers to alight, and puts his box down there for that purpose. On the night of this accident the conductor had gone to the telegraph office for orders in connection with his train, and was in the act of passing around the rear of his train to get to the passenger depot to put down his box on the east side, when his attention was called to Sheriff Kearney, who had fallen on the west side of the train. "It was dark," Sheriff Kearney says, and "couldn't see to get off, because I had fallen twice there by reason of the distance being greater. They usually put down a step for passengers to get off the cars. There was no step put there that night." With these conditions existing on the west side of the train, the plaintiff described the manner in which he was hurt as follows: "The car had stopped. \* \* \* The coach had stopped—the coach that I was on—and the one in the rear. I don't know about the box cars, or whether the engine had just stopped, or how that was. \* \* \* I didn't raise up on the platform. With my feet on that first step there, and sitting here, I just kind of slid down; did it because it was dark there, except right between the coaches, but the distance was more than a step. The distance from the bottom step of the coach down to the ground I can't tell exactly, but I suppose it must be some 15 inches, though. At any rate, it is a little more probably on that side than it is on the other—not more than that (indicating a distance with his hands)—but the step when it is put down makes it about equal between the ground and the first step of the car. And, when my foot got on the ground, I had hold of the rod with one hand—which one I won't be positive. I can't remember for my life. I know I had my grip in my hand, and I raised up, and, when I raised up, I did not quite straighten, and I know then I turned my left hand, with my face to the left, to catch hold of the iron to get up straight. I lacked a little bit of getting up straight, and couldn't recover it. If I could have gotten hold of the iron, I might have done it. I saw that I would sit back, and just at that time the coach in front of me moved, and the one in the rear, I think. Now, I won't be positive about it—which part of the coach that struck me right under the shoulder blade."

The following testimony of Sheriff Kearney is also descriptive of the manner in which he alighted: "Q. This was at night? A. Yes, sir. Q. And a dark night? A. It was, that night. Q. There was a light burning on the passenger side of that train? A. I reckon there was. I didn't see it. I said they usually had that light, but I didn't notice it. Q. You didn't look for the light—you stepped off on the opposite side of the

train? A. I stepped off on the right-hand side. Q. You stepped off on the opposite side from the passenger depot? A. Yes, sir. Q. And it was dark where you stepped off? A. No; it was not dark right in front of me because I could see the ground, and so stated. I said when the train stopped I could see the light underneath it. Q. But you sat down on the platform and slid down to your feet on the side opposite from the passenger depot? A. Yes, sir; that is right. Q. Did you get off, looking back towards Louisburg? A. No; I turned and then slid off, when I heard that the train had stopped. Q. Slid off, right down the steps? A. No; I don't think I did; don't think I raised up at all. That is my recollection of it." The plaintiff says that this was a mixed train, and he was using all the caution he could, because he could not see well at night. Q. You know how box cars, with slack, how they come together that way? A. Yes, sir; I have seen it many times." And the plaintiff further explains that his knowledge of the jerking of a mixed train is what caused him to sit down when the train first stopped at the lower switch.

As further explaining the manner in which he fell, plaintiff was asked: "Q. Now, you say the car came to a stop after you sat down, and you slid down. Did you catch on your feet? A. Yes, sir; my feet went on the ground. Q. You don't remember which hand you had your bag in? A. I think I had hold of the railing with my left hand. Q. Tell me which direction the jerk was? A. As I got down and my feet went on the ground, I necessarily had to turn the way I was going, and when my feet got down and I raised up this way to get up, having hold of this iron, I did not take leverage enough to carry my body straight up, and caught a new hold there with my left hand, or with the other hand. That is the time the jerk came and I dragged. Q. Was that the impact of the cars as they came together that way? A. Yes, sir; I think that is what struck me. It was two weeks after it was done before I knew the bruise was on my back. Q. The slack in the train caused that car behind you—the railing or the end of the bumper, or something—to hit you in the back? A. Yes, sir. Q. Now, you were sitting on the top of the platform, with your feet on the first step, and then below there are two steps more? A. I think so. Q. And you straightened your feet and slid down? A. My feet got to the ground. Q. You were still in a sitting posture? A. Yes, sir; I let my feet get on the ground until they struck the ground, and brought a swing to get up straight, and lacked a little bit of getting up and down, and saw I was going back on the car, and that was the time the bump came. Q. You were still sitting on one of the steps? A. I can't say I was sitting. Q. So, when you went to swing up and down, you didn't get the impetus to go forward—your weight



was on the step, and you didn't get the impetus to pull up? A. That is right, and, before I could recover, this jerk came."

It is not denied that defendant's train was being handled by a competent engineer and conductor. Sheriff Kearney says Engineer Sine and Conductor Finlator are competent men; nor is it disputed that the cars were properly equipped with air brakes.

There was sufficient room in the car for plaintiff to sit down, and he admits that he knew it was against the defendant's rules to ride on the platform. It is also admitted by the plaintiff that the defendant had posted in its car the following notices: "Passengers are prohibited from going on the platforms or between cars while the train is in motion, and are warned not to allow their heads or limbs to project from car windows." And it is admitted that there were plates on the doors which read: "Passengers not allowed to stand on the platform." The defendant offered the evidence of its train crew and other witnesses to show that the train was moving when plaintiff fell from the car and was injured, and an eyewitness testified that he was within eight feet of the train, and saw the plaintiff fall while the train was moving.

1. I think the motion of nonsuit should have been granted upon the ground, first, that there is no evidence of negligence on the part of the defendant causing injury to the plaintiff. There can be no dispute as to the law as laid down in our decisions that a passenger on a mixed train assumes the usual risks incident to traveling on such trains when managed by prudent and careful men and in a careful manner. *Marable v. Railroad*, 142 N. C. 563, 55 S. E. 355; *Usury v. Watkins*, 152 N. C. 760, 67 S. E. 926. This rule does not change the burden of proof. The burden is upon the plaintiff to satisfy the jury by a preponderance of the evidence that the injury did not result from one of the usual risks incident to traveling on such trains. The plaintiff must show negligence. It would not be presumed from the mere fact that a mixed train moved after having momentarily stopped at a station. The plaintiff must show by a preponderance of the evidence that the movement of the train was due to the failure of the defendant to exercise care in the operation of the train. There is not only an absence of evidence in the record that the movement of the train was such as is not ordinarily incident to the movement of a mixed train, but the plaintiff's positive testimony is to the effect that the movement of the car which knocked him down was the result of the box cars in the train taking up slack. The plaintiff testified that he was familiar with the manner in which box cars take up slack when a train stops. He said there is probably "a foot play between two box cars." The following evidence shows the cause of the movement of the cars: "Q. Was that the impact of the

cars as they came together that way? A. Yes, sir; I think that is what struck me. Q. The slack in the train caused that car behind you—the railing or the end of the bumper or something to hit you in the back? A. Yes, sir."

2. I think the motion of nonsuit should have been granted upon the further ground that upon plaintiff's own evidence he was guilty of contributory negligence which was the proximate cause of his injury. The law requires a passenger in alighting from a train to exercise reasonable care for his safety in taking hold of railings and in stepping off in the proper direction and manner, and, if his injury results from his failure to exercise such care, he is charged with contributory negligence. The evidence of the plaintiff in itself and without argument seems to me to establish conclusively that he failed to exercise the care of a prudent man in alighting from this mixed train. He knew the place was dangerous. He says he had fallen twice there by reason of the distance being greater on that side. He did not step from the train as is customary and prudent, but slid down the steps. It does not meet this to say that he slid off the steps because of the darkness. He selected the dark side knowing the conditions. It is no answer to say that the defendant should have notified him to get off on the depot side. He required no notice. As long as the railroad had been running, Sheriff Kearney had been riding on this train, and he knew the place to alight was on the depot side. The court lays stress upon the fact that the box used for passengers to alight was not put down, and no one was present to notify passengers. While there was evidence for the plaintiff that this box or step was left on the platform, and no employé of the defendant was present to assist or notify passengers, there was also evidence from the plaintiff and his witnesses, which is not disputed, that this step would not have been placed on the side on which plaintiff attempted to alight. There was no duty on the defendant to notify the plaintiff as to the proper place to alight. He admits that he knew all about the locality; that he knew the location of the depot and the light; that he knew the difference in the distance from the bottom step to the ground on the two sides of the train. Was the defendant required to notify a passenger that the proper place to alight was on the side of the train next to the depot where the light is kept burning for the purpose of enabling passengers to alight in safety? Was the defendant required to notify a passenger of the danger of alighting on the dark side of the train when the passenger admits frankly that "it was dark, and I couldn't see to get off, because I had fallen twice there before by reason of the distance being greater." This admission is in itself sufficient to eliminate all question of the defendant's duty to

notify plaintiff of the conditions existing at the Franklinton station. Experience had given him a lasting notice.

It is said in the opinion of the court that the fact that plaintiff was riding on the platform in violation of the rules of the defendant and the notices posted in the cars had nothing to do with his injury. The case relied upon is *Wood v. Railroad*, 49 Mich. 372, 13 N. W. 779. In my opinion this case is so far different from the facts in our case as to make it inapplicable as an authority. I think the present case falls within the exception noted in *Wood v. Railroad* in the following language: "Had the plaintiff been in an improper position when the cars stopped, and because thereof attempted or been obliged to resort to unusual methods to alight, and been injured while so doing, the case would be different, as the second wrongful act would contribute directly to the injury." The decision in that case turned entirely upon the fact that the plaintiff was alighting in the usual and customary manner and place. Sheriff Kearney's violation of the posted notices and the rules of the company was a cause in the absence of which the accident would not have occurred, and he is denied the right to recover by section 2628 of the Revisal. *Wagner v. Railroad*, 147 N. C. 315, 61 S. E. 171, 19 L. R. A. (N. S.) 1028.

3. If this case was properly submitted to the jury, as is held by the majority of the court, I am convinced that the defendant was seriously prejudiced in the trial by the charge of the court, and by the refusal to give the defendant's requests for special instructions. One of the principal exceptions to the charge is contained in the following instruction: "But although you might find that he went out and sat down on the platform while the train was in motion, and he remained there, without any injury, until the train stopped, if you find it did stop, and when it stopped at the usual place of stopping the train for passengers to alight, he then, being in the position on the platform, attempted to alight from the train while it was stationary, and before he had reasonable time to alight, the train moved forward, and by its motion in going forward struck him and knocked him down and ran over his foot and injured him, he would be entitled to recover." While the defendant objects to the form of this instruction, and its form has been repeatedly held to be erroneous (*Ruffin v. Railroad*, 142 N. C. 120, 55 S. E. 86; *Witsell v. Railroad*, 120 N. C. 557, 27 S. E. 125; *Bottoms v. Railroad*, 109 N. C. 72, 13 S. E. 738), the defendant also attacks the instruction for error in its substance, and I think the point is well taken, and finds direct support in the opinion of Mr. Justice Walker in *Miller v. Railroad*, 143 N. C. 123, 55 S. E. 439. In the *Miller* Case it was held to be error to instruct the jury:

"If you find as a fact from the evidence that at the time he got on the caboose it was not hitched on and connected, coupled with the engine, he was on the car wrongfully, and he cannot recover in this action." In discussing the reason for holding this instruction to be erroneous, Mr. Justice Walker says: "The liability of the defendant did not exclusively depend upon whether the caboose, when the plaintiff got on it, was coupled to the engine. It it was not, there were other facts and other questions to be considered, both in regard to defendant's negligence and plaintiff's contributory negligence." The objection to the form of the question given in the present case is noted in the court's opinion, but no reference is made to the objection to the substance, which was the objection insisted upon by the defendant. I am of opinion, as argued by the defendant, that the instruction had the effect of telling the jury that, if they believed certain parts of the plaintiff's testimony, he would be entitled to recover, without regard to the other evidence. The instruction contains a statement of the law governing this case that is in conflict with every decision of this court on the subject of a carrier's liability for injury to passengers traveling on a mixed train. It contains the statement that the plaintiff would be entitled to recover if the train moved forward. No reference is made to the requirement that the movement must have been negligent, and that it would not be negligent if it was due to the cars "taking up slack," as testified to by the plaintiff, and which is one of the usual incidents to the operation of a mixed train. This instruction eliminates the plaintiff's conduct in alighting from the train on the side opposite the station, in the dark, at a point at which he had fallen twice before, and when he knew the probability that the cars would take up slack, and it eliminates his conduct in alighting from the train at a place where the distance to the ground was six inches greater than on the side towards the depot and by sitting on the platform in violation of the rules of the company, which he knew, and the notices posted in the cars in compliance with the statute, and by sliding down the steps in a sitting posture holding to an iron rail with his left hand. The instruction eliminates the fact, as shown by the defendant, that passengers invariably get off on the east side of the train because provision is made for them on that side, and it deprives the jury of the right to consider whether the plaintiff would have been knocked down by the movement of the train if he had been alighting from the train at the proper place and in the proper manner, and, in violation of the very fundamental principle of all actionable negligence, it omits all reference to proximate cause. The baneful effect of this charge could not be cured by general instructions in the issues, and I

think the defendant is entitled to a new trial.

The charge does not contain a definition of proximate cause, and his honor repeatedly charged the jury and omitted all reference to that material element of actionable negligence. Because of this omission, the following instruction is in my opinion erroneous: "I charge you that if you shall find from the evidence, by its greater weight, that the train was slowed down on approaching the depot at Franklinton at the usual place of slowing down the train, and shall further find from the evidence that the train came to a stop before the plaintiff attempted to alight from the train, and that just as the plaintiff was in the act of alighting, and before he had a reasonable time to alight, and before the passengers who were to alight at the station had a reasonable time to alight the defendant's engineer suddenly, without notice, moved the train forward, which motion of the train caused the plaintiff to fall, or struck him and knocked him down, and the train ran over his foot and injured him, it is your duty to answer the first issue 'Yes,' although the plaintiff was getting off on the opposite side of the train from the station, and on the side that passengers were not accustomed to alight." In sustaining this charge the majority of the court find it necessary to hold that proximate cause upon the facts of this case is a question of law. This can only be done by holding that there is no evidence of contributory negligence on the part of the plaintiff. In considering this instruction, the defendant is entitled to the strongest evidence in the record tending to show contributory negligence, whether offered by the plaintiff or the defendant, because the jury was at liberty to accept the defendant's evidence as true. There was evidence to the effect that it was very dark on the side of the train on which plaintiff alighted; that it was not the proper place to alight and that passengers invariably alighted on the opposite side; that the plaintiff knew of danger in alighting; that the difference in the distance to the ground on the two sides is six inches by actual measurement; that the plaintiff knew there was a foot slack between the box cars, and that this would cause the train to move forward after the engine had stopped; that immediately upon the train stopping, and without waiting to see if the stop was final, the plaintiff attempted to alight; that he was sitting upon the platform in violation of the rules of the company and printed notices, and without arising he slid in a sitting posture down the steps holding to the iron rod only with his left hand, and that on account of his failure to have sufficient power, on account of his position, to get up straight, and when he was about to sit back on the steps and in an unbalanced condition due to the manner in which he was alighting, he was knocked down by the movement of the train, and there is no evidence that the movement of

the train would have knocked him down if he had been alighting in a proper manner on the side of the train provided for that purpose. Can it be that that recital of the evidence in this case contains no evidence of a failure on the part of the plaintiff to exercise the care of a prudent man? If it is conceded to contain such evidence, under the decisions of this court, the question of proximate cause was a matter for the jury, and it was necessary that they should find that defendant's negligence was the proximate cause of the injury before they could answer the first issue, "Yes." The court refuses to sustain the exception to this instruction, because, as is said in the opinion, "according to the evidence of the plaintiff, if believed, the real cause was the negligent act of the defendant in moving its train while the plaintiff was alighting." Is there no evidence from which the jury could find that the plaintiff's conduct was the cause of his injury? Is proximate cause to be tested by plaintiff's evidence alone? I cannot agree with the conclusion of the majority of the court. I have failed to find in plaintiff's evidence the statement that the defendant moved the train, but, on the other hand, I find the plaintiff's positive statement that the train was caused to move by the slack in the cars being taken up. I find upon examining the cases that, whenever the question has been presented to this court, it has always been held that proximate cause is a question for the jury whenever the facts would admit of two conclusions. It has been held invariably that it is improper to charge that certain facts, if found to be true, would constitute contributory negligence and bar a recovery without adding the essential element of proximate cause.

A striking illustration will be found in *Roberts v. Railroad*, 155 N. C. 89, 70 S. E. 1080, in which the defendant's request for an instruction that, if certain facts were found to be true, the plaintiff would be guilty of contributory negligence, was modified by adding the element of proximate cause. The court in an opinion by Mr. Justice Hoke holds that this modification was proper, and that the court could not have made the conduct of the plaintiff "determinative and controlling, and as a matter of law the proximate cause of the injury." In the recent case of *Boney v. Railroad*, 155 N. C. 106, 71 S. E. 87, will be found three special instructions requested by the defendant, each containing the recital of certain facts which the defendant regarded as constituting contributory negligence, and upon the basis of the finding of such facts by the jury the defendant requested the court to charge the jury to answer the issue of contributory negligence, "Yes." These instructions were given, except that the element of proximate cause was added to each; which this court said was proper. The very theory upon which the Boney Case was sub-

mitted to the jury was that proximate cause is a question for the jury, and that principle was invoked in denying the defendant a new trial for refusal to give certain instructions requested. In an elaborate discussion of proximate cause by Mr. Justice Allen it is held that: "When it appears that plaintiff's intestate, an engineer, was killed by a collision of his passenger train with another train at a station which it was entering, the rules of the company, known to him, prescribing that under the conditions a speed over six miles an hour was prohibited, and he was running thirty miles an hour, an instruction that the jury should find the intestate guilty of contributory negligence which would bar his recovery, leaves out the essential point that it must approximately cause the injury, and is an improper one." That proximate cause is a question for the jury when more than one inference can be drawn from the evidence is nowhere more vigorously maintained than by the Chief Justice and Mr. Justice Hoke in their dissenting opinions in *Kearns v. Railroad*, 139 N. C. 470, 52 S. E. 181, and they cite the differing views of the members of this court as proof positive that more than one inference could be drawn from the evidence in that case. The Chief Justice speaks of proximate cause as "a matter of fact eminently for a jury to decide." It was held in *Ramsbottom v. Railroad*, 188 N. C. 38, 50 S. E. 448, that: "Where two different conclusions could be fairly drawn as to whether there was a negligent breach of duty in not stopping a train and whether the injury was one that any man of ordinary prudence might have expected from the facts as they existed, an instruction that withdrew the decision of both of these elements of actionable negligence from the jury, and submitted to them only the question whether the failure to stop the train caused the injury, was erroneous."

It has been frequently held by this court that an instruction which makes the liability of the defendant depend upon its negligence, without regard to whether such negligence was the proximate cause of the injury, is erroneous. *Butts v. Railroad*, 133 N. C. 82, 45 S. E. 472. And cases are almost as numerous as the leaves that fall sustaining the principle that proximate cause is for the jury when more than one conclusion can be drawn from the evidence. *Stout v. Turnpike Co.*, 153 N. C. 513, 69 S. E. 508, 31 L. R. A. (N. S.) 804; *Muse v. Railroad*, 149 N. C. 451, 63 S. E. 102, 19 L. R. A. (N. S.) 453; *Wagner v. Railroad*, 147 N. C. 325, 61 S. E. 171, 19 L. R. A. (N. S.) 1028; *Boney v. Railroad*, 145 N. C. 248, 58 S. E. 1082; *Whisenant v. Railroad*, 137 N. C. 349, 49 S. E. 559; *Lassiter v. Railroad*, 133 N. C. 244, 45 S. E. 570; *Dunn v. Railroad*, 126 N. C. 343, 35 S. E. 606. It is said in the opinion of the court that, if it should be held that there is evidence of negligence on the part of the plaintiff, this would not prevent a recovery, unless it was con-

tributory, and that it could not be contributory unless the real proximate cause of the injury. This is, I think, an incorrect idea of contributory negligence. It is not essential that the plaintiff's negligence should be the real proximate cause of the injury. It is sufficient if it is, as the words imply, a contributing cause. If the plaintiff's negligence is the real proximate cause of the injury in the sense of sole proximate cause, the act of the defendant would not be the real proximate cause, and therefore would not be actionable. The injury would, then, be the result of plaintiff's own negligence, and not his contributory negligence. It cannot be said as a matter of law that the movement of the train was the real proximate cause when it does not appear that plaintiff would have been injured if he had been alighting in a proper manner. Plaintiff's own testimony shows that he was in an unbalanced position due to his own conduct. Could not the jury say that such position contributed to cause the fall, and that he would not have fallen if he had exercised the care of a prudent man? The true rule, as laid down by Beach on Contributory Negligence, §§ 34-35, is that, if the negligence of the plaintiff contributed in any degree to cause or occasion the accident, there can be no recovery. Mr. Beach says: "However it may have been expressed, the principle underlying all these decisions seems to be, and verily it is the only sound basis upon which they can rest, that whenever the plaintiff's case shows any want of ordinary care under the circumstances, even the slightest, contributing in any degree, even the smallest, as a proximate cause of the injury for which he brings his action, his right to recover is thereby destroyed. \* \* \* There can be no middle ground. Either the truth of these elementary propositions must be conceded or the whole theory of our modern law of contributory negligence must be abandoned." I think the evidence shows conclusively that the plaintiff's conduct was the proximate cause of his injury. Other members of the court draw the conclusion that the movement of the train was the proximate cause as a matter of law. Would it not be as little as the defendant is entitled to submit that question to the jury under proper instructions from the court?

There is no similarity in the case of *Darden v. Railroad*, 144 N. C. 1, 56 S. E. 512, referred to as sustaining the position of the court that the conduct of the defendant in this case was as a matter of law the proximate cause of plaintiff's injury. In that case the plaintiff was alighting at a proper place, and was stepping from the train in a proper manner. There was no evidence that his manner of alighting was in any way the cause of his injury. On the other hand, it appeared that when the train had almost come to a complete stop and some one had called out, "All off for Springhill!" plaintiff

went out on the platform, and just as he was in the act of alighting, "one foot on the bottom step and the other on the ground," the brakeman threw his lantern, and holloed, "All off for Springhill!" and the engineer opened his throttle, and the train jerked off. It appeared that the brakeman was in position to see the plaintiff as he was alighting, and it was his duty to see that passengers had descended from the steps to the ground before signaling the engineer. It is doubtful if there was any evidence of negligence on the part of the plaintiff in that case. The negligence complained of was his attempting to alight from a moving train, and there was no evidence in the case that the speed of the train was such that it would have thrown him if the train had not been suddenly jerked while he was in the act of alighting. There was no evidence that the plaintiff's manner of alighting in any way contributed to cause his injury, and, under such circumstances, it was said that the proximate cause of the injury was the premature signaling to the engineer by the brakeman to "go ahead." I do not think such facts are similar to the facts in this case, and I cannot agree with the court in saying that that case presented "stronger evidence of contributory negligence than is shown by the plaintiff's evidence in this case." Darden was, in the most unfavorable light of the evidence, attempting to alight from a moving train after his station had been called and the usual place of alighting reached. The brakeman nearby signaled the engineer ahead while he was alighting. The engineer in obedience to such signal suddenly jerked the train. The brakeman knew that Darden was going to alight at that point. In this case Sheriff Kearney, without the knowledge of any of defendant's employes, immediately upon the stopping of a mixed train, attempted to alight by sliding down the steps. He lost his balance as the result of the manner and place in which he alighted, and saw he was going to sit back on the steps, and while in that uncertain position the train moved forward, and he was injured. There is nowhere in the record a single word of evidence that supports the view that Sheriff Kearney would have been hurt if he had been in the act of alighting from the train in a proper manner. The facts alone would seem to distinguish this case from Darden's Case.

I have examined *Smith v. Railroad*, 147 N. C. 451, 61 S. E. 286, 17 L. R. A. (N. S.) 179, and I am unable to find anything in the facts or the law of that case to sustain the position that the movement of the train was as a matter of law the proximate cause of the injury to this plaintiff. There the plaintiff was a passenger on the defendant's train bound for Mebane, N. C., and, when the train reached that point, it stopped at a place about 50 yards east of the usual stopping place. The plaintiff thereupon went up-

on the platform for the purpose of alighting, and discovered that a train of box cars was on the side track on the north side and a train with engine attached was on the south side of the car on which she arrived. The side tracks were close to the track on which was the car she was on. No one of the train crew was there to assist her to alight, as she was well acquainted with the ground. Passengers are usually received and discharged on the south side of the track where the depot is situated. When plaintiff reached the platform, the local train began to move east along where she stood on the platform. She hesitated to attempt to alight there, and while she was standing there, not over half a minute, the train on which she was began to move slowly towards the station, and she supposed it was going to pull up to the place to alight, and instead it increased its speed, and by jerking threw plaintiff off and injured her. Upon these facts the plaintiff was nonsuited. In an opinion by Mr. Justice Hoke this court holds that the evidence of negligence was sufficient to be submitted to the jury, and there was no testimony in the record to justify the ruling that as a matter of law the plaintiff was guilty of contributory negligence. The question of proximate cause was not presented, and is not discussed in the opinion.

The quotation from *Moore on Carriers*, § 38, in the opinion of the court, should be read in connection with the opening sentence of that section: "It is the duty of the servants of a carrier of passengers, especially when in charge of a railroad train, to stop it a reasonable time to allow passengers to board or alight with safety; and, in the absence of contributory negligence on the part of the passenger, the carrier is liable for injuries resulting from a failure to perform this duty." In stating that the movement of the train is in such cases the proximate cause of the injury, the author had reference to cases in which the passenger was alighting in a proper manner and at a proper place, and in which the passenger's conduct did not tend to establish contributory negligence on his part.

The defendant requested the court to answer the issue of negligence, "No," if they should find that plaintiff attempted to jump from the train as it was moving into Franklinton, or if they should find from the evidence that at the time of his injury plaintiff was attempting to alight from a moving train. These instructions contain correct statements of law, and are supported by defendant's evidence. They were refused, and such refusal is conceded to be error, unless the requested instructions were substantially given in the charge. The charge quoted by the court as covering the requested instructions opens with this language: "If you find from the evidence that the train was being properly conducted and in motion," etc. I think it clear that the defendant was en-

titled to the instructions as requested without modification. If the train was in motion when plaintiff fell, he would not be entitled to recover, and it would make no difference how the train was being operated by the defendant. That part of the charge quoted in the opinion of the court, as well as other parts of the charge, show that the court below treated the question of plaintiff's alighting from a moving train as one of contributory negligence. It is not a question of contributory negligence. Whether the plaintiff exercised the care of a prudent man or not, if he was injured while the train was moving into the station at Franklinton, the jury would be required to answer the first issue, "No." His honor repeats the view that the defendant would not be relieved if plaintiff attempted to alight from a moving train, unless the train was being properly conducted, when he charges the jury: "The defendant would not be guilty of negligence if it was moving its train in the ordinary way and without any negligence on its part in the management of its train." In place of this confusing and erroneous charge on the question of defendant's liability if the train was moving when plaintiff was hurt, the defendant requested the simple, correct instruction: "If you find from the evidence that at the time of his injury the plaintiff was attempting to alight from a moving train, you will answer the first issue, 'No,' which was refused. In this I think there was error prejudicial to the defendant for which a new trial should be granted.

I will notice two other instructions requested by defendant, which are sustained by authority, and which the defendant was entitled to have submitted to the jury:

"If you find by the greater weight of the evidence, the burden being upon the plaintiff, that the plaintiff was caused to fall by a jerk of the train, the court charges you that in taking passage upon a mixed freight and passenger train a passenger assumes the usual risks incident to traveling upon such trains, when managed by prudent and competent men in a careful and prudent manner; and unless you find by the greater weight of the evidence, the burden being upon the plaintiff, that this train was not managed by prudent and competent men in a careful and prudent manner, you will answer the first issue, 'No.'"

"A passenger on a mixed freight and passenger train takes the risk of jars not caused by the negligence of the railroad company, but which are usual and consequent on such mode of transportation, and the burden is upon the plaintiff to satisfy the jury by a preponderance of evidence that the jerk of which he complains was not such as is usual and consequent upon the operation of a

mixed train; and, if he has failed to so satisfy you, you will answer the first issue, 'No.'"

These instructions are in strict accordance with the principles announced by this court in *Marable v. Railroad*, 142 N. C. 563, 55 S. E. 355, *Suttle v. Railroad*, 150 N. C. 668, 64 S. E. 778, and *Usury v. Watkins*, 152 N. C. 760, 67 S. E. 926. They were refused, and in this I think there was error. It was of the greatest importance to a correct presentation of the case from the defendant's standpoint to have the burden placed upon the plaintiff of showing by a preponderance of the evidence that this mixed train was not managed by prudent and careful men in a careful manner, and that the injury of which he complained was not such as is ordinarily incident to the operation of a mixed train. I have written at length in this case because I am convinced that the defendant was seriously prejudiced in the trial, and that the errors complained of are of such nature as to entitle the defendant to a new trial. Specific instructions were requested on all of the most important phases of the case, all of which were refused. His honor attempted to cover some of the requests by general statements in his charge. The defendant's request on contributory negligence was particularly full and directed the jury to plaintiff's evidence. In the court's opinion it is said that his honor gave the defendant all it was entitled to on the question of contributory negligence when he instructed the jury, in substance, that the plaintiff was negligent if he failed to exercise the care of one of ordinary prudence similarly situated. It would be impossible to conceive of a more general instruction on the subject of contributory negligence or a more abstract statement of the law. This court has repeatedly held that "it is the duty of a trial judge to give a requested prayer for special instruction, which is correct in itself, material to the case, and based upon certain facts reasonably assumed from the evidence; and a general and abstract charge of the law applicable to the case is not sufficient." *Baker v. Railroad*, 144 N. C. 36, 56 S. E. 553; *Horne v. Power Co.*, 141 N. C. 58, 53 S. E. 658; *State v. Dunlop*, 65 N. C. 288; *George v. Smith*, 51 N. C. 273.

This case was closely contested, and it was important to the parties to have the benefit of their special requests for instruction, and that the charge of the court should be free from error. I am of opinion that neither requirement has been observed, and, if the action is a proper one to be submitted to the jury, a new trial should be ordered in order that the defendant may have its cause presented in a manner free from harmful error.

(158 N. C. 504)

GORHAM et al. v. SOUTHERN RY. CO.

(Supreme Court of North Carolina. April 10, 1912.)

**1. PRIVATE ROADS (§ 2\*) — ESTABLISHMENT—EVIDENCE.**

In proceedings for the establishment of a cartway across defendant's railroad to petitioners' land, evidence that petitioners intended to erect a dwelling on the land, that the timber they would cut was on part of the land across the railroad, the distance between the timber and the dwelling by the crossing then in use and by the proposed new cartway, was admissible.

[Ed. Note.—For other cases, see Private Roads, Cent. Dig. §§ 3-21; Dec. Dig. § 2.\*]

**2. APPEAL AND ERROR (§ 1050\*)—HARMLESS ERROR—ADMISSION OF EVIDENCE.**

Error in the admission of evidence is not prejudicial, where it appears that the party's own witness had without objection given the same evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4153-4160, 4166; Dec. Dig. § 1050.\*]

**3. PRIVATE ROADS (§ 2\*) — ESTABLISHMENT—EVIDENCE—ORDER OF SUPERVISORS.**

On appeal from an order of township supervisors establishing a cartway over a railroad right of way, the petition was admissible to show where the proposed cartway was to be located, and also in corroboration of the testimony of the supervisors.

[Ed. Note.—For other cases, see Private Roads, Cent. Dig. §§ 3-21; Dec. Dig. § 2.\*]

**4. PRIVATE ROADS (§ 2\*) — ESTABLISHMENT—EVIDENCE—PREVIOUS REQUEST.**

On appeal from an order of township supervisors establishing a proposed cartway over a railroad right of way on petition of private owners, evidence that petitioners had previously requested that another way be located was inadmissible.

[Ed. Note.—For other cases, see Private Roads, Cent. Dig. §§ 3-21; Dec. Dig. § 2.\*]

**5. PRIVATE ROADS (§ 2\*) — ESTABLISHMENT—PREVIOUS REQUEST.**

A proceeding on petition of private owners for the establishment of a cartway over a railroad right of way is not barred by a previous request of petitioners that another way be located.

[Ed. Note.—For other cases, see Private Roads, Cent. Dig. §§ 3-21; Dec. Dig. § 2.\*]

**6. PRIVATE ROADS (§ 2\*)—ESTABLISHMENT—NECESSITY OF ROADS.**

Revisal 1905, § 2686, which provides that persons living upon land to which there is no public road leading, and where the establishment of a public road is not necessary, may petition for a cartway leading to some public road, is to be liberally construed, and petitioners, who show that there is no public road leading to their lands, and that the proposed cartway is necessary and reasonable, are entitled to such a way, notwithstanding the existence of a private way, the use of which is permissive.

[Ed. Note.—For other cases, see Private Roads, Cent. Dig. §§ 3-21; Dec. Dig. § 2.\*]

**7. PRIVATE ROADS (§ 2\*) — ESTABLISHMENT—DANGER OF CROSSING.**

Where the establishment of a cartway running across a railroad right of way is sought by petition of private owners, the danger of the crossing is to be considered in de-

termining whether the way was necessary and reasonable.

[Ed. Note.—For other cases, see Private Roads, Cent. Dig. §§ 3-21; Dec. Dig. § 2.\*]

Appeal from Superior Court, Granville County; Allen, Judge.

Petition by W. C. Gorham and another against the Southern Railway Company for the establishment of a cartway. From a verdict and judgment establishing the cartway, defendant appeals. No error.

The petitioners filed their petition in November, 1910, before the board of supervisors of Salem township, Granville county, asking that a cartway be established from the land on which they lived across the track and right of way of the defendant to a public road. Notice was issued to the defendant, and on November 28, 1910, said supervisors made the following order: "This cause coming on to be heard before the undersigned road supervisors of Salem township, Granville county, upon the petition of W. R. Taylor and W. C. Gorham, after due notice to the Southern Railway Company and Mrs. Wright, both parties being represented by counsel, after hearing the statements and contentions of both petitioners and the Southern Railway Company, we went upon the lands desired as cartway and made personal inspection of the same, and we find that it would be necessary, reasonable, and just that the petitioners be allowed a cartway from the dwelling house of said W. C. Gorham and W. R. Taylor over the lands of said W. R. Taylor, Mrs. E. L. Wright, and the Southern Railway right of way and railroad track to the public road leading from Oxford to Stovall, and that said cartway be laid off and kept open as laid off by said Gorham, except that it should cross the railroad on the south side of the second telegraph pole from the crossing described in the plat hereto attached. Said Gorham is to cut two feet off face side of cut in railroad up to level between the telegraph pole at crossing asked for and the one hereby established if the railroad agrees to it. And it is ordered that said cartway be laid off and kept open across said lands of the parties in accordance with the laws of North Carolina. And for want of a constable in said township, the sheriff of Granville county is hereby ordered to summon a jury of five freeholders to view the premises and lay off the cartway hereinbefore granted to width of fourteen feet, and assess any damages the owner of said land may sustain thereby, and the cartway herein allowed shall be marked and staked out in accordance with the findings above set out. And said cartway shall be kept open according to law."

The defendant from the order appealed to the board of commissioners of Granville county, which affirmed the order of the super-

visors, and the defendant then appealed to the superior court, where the following verdict was returned by the jury:

"(1) Are the plaintiffs settled upon the land to which no public road is leading? Answer: Yes.

"(2) Is the proposed cartway necessary, reasonable, and just? Answer: Yes."

On the trial it appeared that the plaintiffs were the owners of about 800 acres of land in Salem township, and that the track and right of way of the defendant ran through this tract of land, leaving about 280 acres, on which the home of the plaintiffs was situated, on the east side, and about 20 acres on the west side. It also appeared that there was a public road on the land on the west of the railroad, running parallel with it, and the cartway proposed was to run from the land on the east side of the railroad to said public road. It further appeared that at the time of filing the petition, a grade crossing was maintained across said railroad and right of way over which the plaintiffs could pass on their own land, except possibly a short distance on the Booth land, to said public road; but that this was permissive and not of right.

One of the petitioners testified as follows: That Lewis station was not more than one mile from the dwelling of the plaintiff (witness); but in order to reach it he had to go over 800 yards toward Oxford, and then 840 yards back along the public road until he reached a point opposite his house, on the railroad, which was 345 yards from his dwelling where he asked that the cartway cross the railroad. That he wished to haul his heavy freight, such as fertilizers, farm machinery, lumber, and other things, from Lewis station. That the crossing at that place was necessary to enable him to reach the cultivated land west of the railroad more conveniently. That he was preparing to build a dwelling near the tenant house in which he was living. That a sawmill had been established just east of that place, and a very considerable portion of the timber he expected to use was on the west side of the railroad and the public road, which he would have to haul across the proposed crossing. That there was a grade crossing 800 yards southwest of his present dwelling, which was in use when he went to live there. That between said crossing and the public road there was a narrow point of the Booth land, and plaintiff's land comes up to the crossing on the east side, and the roadway thereto on the east is on plaintiff's land. Witness was asked where he proposed to erect the new dwelling of which he had spoken. (Defendant objected. Objection overruled.) Witness then testified that he intended to erect the dwelling between present house and the railroad. Witness was asked where the timber was on the west side of which he had spoken, which he intended to cut and haul for his new dwelling. (Defendant objected.

Overruled. Exception.) Witness stated that it was on the northwest part of the land, and it would be much shorter to haul it by the proposed crossing than to go 840 yards to the present crossing and then more than 800 yards to the new mill. (Defendant objected. Overruled. Exception.) Witness testified that there were signs of an old road along the proposed cartway and crossing of the railroad. On cross-examination witness testified that his present house fronted south toward the present crossing, 800 yards distant, in sight of the house; that said crossing was a grade crossing used by him and others who lived east of his house without objection from the defendant; that his house was on about the highest part of the farm. Defendant then asked witness if a grade crossing could not be obtained at almost any point along said railroad for a distance of nearly 400 yards north of the present crossing. Witness replied that a grade crossing could be obtained at several places, but that it would require him to go a much further distance to reach his dwelling on account of a very great depression, or ravine, between the east side of the railroad, which drained out toward the north (but being easily crossed at a bridge on the proposed cartway). Witness was asked if there was not another way to reach Lewis station, by going out northeast back of his dwelling. Witness replied there was an old road on his land and that of another person by which he could reach Lewis station, but it was very rough and somewhat longer than the proposed cartway.

The order of the supervisors was introduced, and the defendant excepted. Each of the supervisors was examined as a witness, and testified that he went on the land and examined it. He described the conditions existing, and stated his reasons for making the order. The cartway was not established by the supervisors at the place requested by the petitioners, but the defendant offered evidence that the proposed location was dangerous.

One of the witnesses for the defendant was asked if the petitioners had asked for a crossing at any other place than the one mentioned in the petition, and if any objection had been made on the part of the defendant to granting a crossing at any point south of the said cut. (Objection by petitioners. Objection sustained. Defendant excepted.)

The defendant requested that the jury be instructed as follows:

"(1) If you find that plaintiffs own the land on both sides of defendant company's roadbed and have been using a crossing from east to west to and from a public road which runs through the land on the western side of the defendant company's right of way, and that plaintiffs still have the right to use the said crossing on their land over said roadbed of defendant, then I charge you that the



plaintiffs would not be entitled to the cartway asked for.

"(2) If the petitioners own the land on both sides of the railroad and now have an unobstructed way to get from the east side to the road on the west side over their own lands, or the lands of another, then they would not be entitled to the cartway asked for.

"(3) If you find that petitioners have a way to the station and public road at Lewis, other than the one on the east side, then they would not be entitled to the cartway asked for.

"(4) If the crossing asked for is at such a place as to make it dangerous for passengers or to the passers over said track, the same would not be reasonable, necessary, and just.

"(5) If petitioners can have a grade crossing at another place along said track at a place where it would be safe for passengers and travelers wishing to cross the same, the same would not be reasonable, necessary, and just."

Judgment was rendered in accordance with the verdict, and the defendant appealed.

Hicks & Stem, for appellant. Graham & Devin, for appellees.

ALLEN, J. [1] The exceptions from 2 to 6, inclusive, present the same question, and are directed to evidence introduced by the petitioners to prove that they intended to erect a dwelling on the land east of the railroad, where it was to be located; that the timber they would cut for the dwelling was on the west side of the railroad, and its location; and the distance between the timber and the dwelling, by the crossing in use at the time of filing the petition, and by the proposed new cartway. In our opinion, this evidence was competent, for the purpose of showing the jurors the exact situation of the plaintiffs, and giving them a true concept of the land, and the uses of which it was susceptible; and these were circumstances proper to be considered in the determination of the issue as to whether the proposed cartway was necessary, reasonable, and just.

[2] If this is not true, the defendant has not been prejudiced by the evidence, because it appears that the witness had, without objection, testified to the same facts, in substance.

[3] The order of the board of supervisors was properly admitted in evidence. It was necessary for the jury to understand where the proposed cartway was to be located, and as each of the supervisors testified as a witness, it was also competent in corroboration. Besides this, the statement in the order that the cartway is necessary, reasonable, and just, to which objection is principally urged, would be implied from the making of the order, and the jury already knew that the order had been made.

[4, 5] We do not see the relevancy of the question asked a witness for the defendant

for the purpose of showing that the petitioners had requested that another crossing be located, and that the defendant made no objection, as the answer to the question, if in the affirmative, would not aid the jury in determining the issue submitted, and it cannot be claimed that such a request would be a bar to this proceeding; and, further, it does not appear from the record what would have been the answer of the witness. *Stout v. Turnpike Co.*, 159 N. C. —, 72 S. E. 993.

[6] The first, second, and third requests for special instructions present the question whether the existence of a private way, the use of which is permissive, will prevent the location of a cartway by petition, under the provisions of the Revisal, and the defendant relies on *Lea v. Johnston*, 31 N. C. 19, which has been followed in several cases. The case of *Lea v. Johnston* was decided in 1848, when the Revised Statutes of 1837 was in force, which provided, in section 33, c. 104: "If any person shall be settled upon or cultivating any land, to which there is no public road leading, and no way to get to and from the same, other than by crossing other person's lands, and it shall not be necessary to establish a public road, it shall be lawful for such person to file his petition in the county court, praying for a cartway or wagonway, to be kept open across another person's land, leading to some public road, ferry, bridge or public landing." And by reference to the Revisal of 1905, § 2686, it will be observed that the important and material words in the Revised Statutes, "and no way to get to and from the same," are omitted in the statutes now in force.

Justice Hoke adverted to the tendency of the early decisions to construe the statute strictly in *Ford v. Manning*, 152 N. C. 151, 67 S. E. 325, and said: "And while many of the decisions are to the effect that these statutes, being in derogation of common right, should be strictly construed, and the petitioner required to bring himself clearly within the meaning of their terms, there is doubt if some of the cases have not gone too far in applying this principle of construction, and if it is not a more wholesome rule to construe the statute in a way to promote its principal and beneficent purpose."

Following this view, we are of opinion that the petitioners have brought themselves within the language and spirit of the statute by showing that there is no public road leading to their lands, and by offering evidence that the proposed cartway is necessary, reasonable, and just, and that the existence of the permissive way is not fatal to their demand.

[7] Nor do we think the defendant was entitled to have the fourth and fifth prayers for instruction given.

It has been said frequently that a railroad track is notice of danger, and the traveler is required to look and listen before crossing it, because it is understood that there is danger, and if we were to hold that a cartway

could not be granted across the right of way and track of a railroad because dangerous, we would, in effect, forbid it in any case. His honor properly charged the jury that they must consider the existence of the permissive way, and the danger of the crossing as it was proposed to locate it, in determining whether it was necessary, reasonable, and just, which we think was fair to the defendant.

Upon a review of the whole record, we find no error.

No error.

(159 N. C. 18)

**WEAVER et al. v. WEAVER.**

(Supreme Court of North Carolina. April 17, 1912.)

**DEEDS (§ 61\*)—DELIVERY—SUFFICIENCY.**

If decedent absolutely parted with a deed conveying land to his son when he delivered the deed to a third person for delivery to the son at decedent's death without retaining any control over it, there was a good delivery entitling the son to the land at his father's death; but otherwise if decedent retained control over the deed and the right to destroy it if he desired to do so during his lifetime.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 375-401, 403-412, 416-454; Dec. Dig. § 61.\*]

Appeal from Superior Court, Rowan County; M. H. Justice, Judge.

Action by John W. Weaver and others against P. C. Weaver. Judgment for plaintiffs, and defendant appeals. Affirmed.

P. S. Carlton and R. Lee Wright, for appellant. T. F. Kluttz and Whitehead Kluttz, for appellees.

**CLARK, C. J.** This is an action to set aside a deed from Henry Weaver to the defendant, Peter C. Weaver. The only question before the court is whether there was in law a delivery of the deed, actually, conditionally, or as an escrow for the benefit of the defendant P. C. Weaver.

The evidence briefly stated, is as follows:

Deaton, witness for the state, testified that Henry Weaver told him he wanted to make a deed to Peter Weaver, but wanted it fixed so that he (Henry Weaver) could have it during his lifetime. Squire Linn had told him that he could have the deed so fixed that he could hold the land during his lifetime. The deed was drawn with this reservation of a life interest. Nothing was said to him by Henry Weaver, then or at any other time, about giving the deed to Peter Weaver. That he never delivered it to him or any one else. That it remained in witness' safe, until Henry Weaver died. That he did not turn it over to Squire Linn, and only knew that it was out of his safe after Henry's death and had been turned over to Peter by his telling him so. There was no consideration expressed in the deed.

Linn, witness for defendant, testified: That Henry Weaver told him he wanted a lifetime right reserved and to leave the papers with him. He said, in case anything should happen and his son should not treat him with the respect he ought to have, that he would take his deed up. He did not say he would tear it up, but that was about what he meant. That he told him to put the deed in Deaton's safe. That after Henry Weaver's death, the witness got the deed out of Deaton's safe and sent it for registration at the request of Peter. That he did this because Henry Weaver had left it in his possession. That if Henry had called for it, he would have given it up to him. That Henry told him that, if Peter did not treat him right, he would come and take it up. That he wanted to keep his thumb on it and did not want to give his right away. That the land was to go to Peter, if Peter treated him right. Peter was to come in possession after Henry's death if the contract was carried out; in other words, if he did not call for it during his lifetime, the land was to be Peter's at his death. "Henry said I should give it to Peter." This deed conveyed all the land Henry Weaver had. Peter was living with his father at the time of his death. All other children had married and moved off.

M. C. Leazer, witness for defendant, testified: That Henry Weaver in December, 1909, said he was going to make a deed to Peter. That Peter was to take care of him. He said he got Mr. Linn and Mr. Deaton to help fix deed up. That he left deed in Hardware safe until called for. That Peter was to have the land at his death. That Peter was to have the deed for taking care of him. Peter was good to him and took care of him and was living with him at his death.

Peter Weaver, the defendant, testified that he lived with his father, Henry Weaver, all his life; that last year he demanded and got from the administrator one-half of the crops, but before that he got one-third.

The court instructed the jury that "if the deed was left with Squire Linn, and the testator retained control over it, and instructed Linn to hold it for him, unless he called for it, and that he retained the right to call for it and destroy it if he desired, then the testator still retained control of it until his death, and if such was the state of facts, there was no delivery in law." He further charged the jury that "if they found that Henry Weaver absolutely parted with the deed, when he delivered it to Deaton and Squire Linn, and did not retain any control over it, and it was to be delivered to Peter at his death, that would be a good delivery," and they would so answer the issue. The court also charged: "If a deed has been simply found in the possession of other parties duly executed, the law would presume the delivery; but when the facts shown are that

the grantor retained control and power to recall the deed, that would not be a delivery, and the deed being found in the hands of a third party under such circumstances would create no presumption of delivery. That a deed is not considered executed when the maker has not gone so far with the execution that he cannot recall or control it, and if the jury should find from the greater weight of the evidence that Henry would control and recall said deed, there was no delivery, that a deed is only operative from the time of actual delivery, and if the jury should find the said deed was never delivered to said Peter C. Weaver, by Henry Weaver, or any one under his direction, then the deed is void, of no effect, and passed no title to said Peter." The court also instructed the jury that: "If they found that the paper writing was delivered to Linn and Deaton with the right on the part of Henry Weaver to recall it, and that he retained control of it, but with instructions that, if he did not recall it, it was to be delivered to Peter at his death, and it was so delivered, still that would not make the delivery by Henry Weaver complete."

The above was duly excepted to, but we find no error.

In *Tarlton v. Griggs*, 131 N. C. 221, 42 S. E. 593, it is held: "There must be an intention of the grantor to pass the deed from his possession and beyond his control, and he must actually do so, with the intent that it shall be taken by grantee or some one for him. Both the intent and the act are necessary to the valid delivery. Whether such existed is a question of fact to be found by the jury. But if the grantor did not intend to pass the deed beyond his possession and control, so that he would have no right to recall it, and did not do so, then there would be no delivery in law. \* \* \* Our conclusion is that there is no delivery of a deed when the maker has not gone so far with its execution that he cannot recall or control it."

To the same effect is *Bond v. Wilson*, 129 N. C. 325, 40 S. E. 179; *Robbins v. Rascoe*, 120 N. C. 80, 26 S. E. 807, 38 L. R. A. 238, 58 Am. St. Rep. 774. In the recent case of *Gaylord v. Gaylord*, 150 N. C. 234 et seq., 63 S. E. 1033, this court, in an elaborate opinion, reviewing the authorities in this and other states, cites with approval from *Porter v. Woodhouse*, 59 Conn. 569, 22 Atl. 299, 13 L. R. A. 64, 21 Am. St. Rep. 131. "The delivery of a deed implies the parting with the possession and a surrender of authority over it by the grantor at the time, either absolutely or conditionally. But it is essential, characteristic, and an indispensable feature of its delivery, whether absolutely or conditionally, that there must be a parting with the possession of the deed, and with all power and control over it, by the grantor for the benefit of the grantee, at the time of deliv-

ery." This case also cites with approval *Tarlton v. Griggs* and other earlier cases. To same effect 9 A. & E. (2d Ed.) 155-157, and cases cited. There are numerous decisions in other states to same effect, but it is useless to add to what is so clearly stated in our own authorities.

The court left the defendant nothing to complain of when he told the jury as follows, which is a clear statement of the law: "If you find that Henry Weaver retained the control of it (the deed), and retained the right to go there and get it and destroy it, if he desired to do so during his lifetime, that would not be delivery of it, and you will answer the third issue, 'No.' If you find that Henry Weaver absolutely parted with the deed when he delivered it to Mr. Deaton or Squire Linn, and did not retain any control over it, and it was to be delivered to Peter at his death, that would be a good delivery, and you will answer the third issue, 'Yes.'"

Indeed, the question is fully discussed and settled in *Fortune v. Hunt*, 149 N. C. 358, 63 S. E. 82, where the court held: "The execution and delivery of a deed by the maker to a third person must be accompanied by an unqualified instruction to deliver, to make such delivery effectual; and when the testimony of the subscribing and only witness tends but to show that the maker signed the deed, and gave it to a third person with instruction to deliver it to the proper person if he never delivered to the grantee in the lifetime of the maker, the presumption of delivery from the unexplained possession of the grantee and its registration is rebutted. When the maker of a deed gives it to a third person to deliver, but qualifies his instructions so as to retain control over it, and dies while this condition exists, in law his death revokes the authority thus given; otherwise, when the delivery is complete in grantor's lifetime, for then it relates back to the time of its delivery to the third person."

No error.

(158 N. C. 512)

# CITY OF WINSTON v. WACHOVIA BANK & TRUST CO.

(Supreme Court of North Carolina. April 10, 1912.)

## 1. MUNICIPAL CORPORATIONS (§ 918\*)—BOND ISSUES—ELECTIONS—SINGLENES OF MATTERS VOTED ON.

Where a popular vote is required to authorize or validate a municipal indebtedness, and the question presented embodies two or more distinct and unrelated propositions, and the voter is only afforded opportunity to express his preference or decision on a single ballot and on the question as an entirety, the election, upon proper objection, may be set aside.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1919-1923; Dec. Dig. § 918.\*]

**2. CONSTITUTIONAL LAW (§ 70\*)—LEGISLATIVE POWER—JUDICIAL ENCRoACHMENT—BOND ISSUES.**

Const. art. 7, § 7, provides that no county, city, town, or other municipal corporation shall contract any debt, etc., unless by vote of the majority of the qualified voters therein. Article 8, § 4, provides that the Legislature shall provide for the organization of cities, towns, and unincorporated villages, and restrict their power of taxation, assessment, borrowing money, etc., so as to prevent abuses. *Held* that, as the Constitution deals with the matter of municipal elections for fiscal purposes in general terms only, the method thereof is within the legislative discretion, and not within the control of the courts, for its unwisdom or dangerous effect.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 129-132, 137; Dec. Dig. § 70.\*]

**3. MUNICIPAL CORPORATIONS (§ 867\*)—BOND ISSUES—ELECTIONS—METHOD OF VOTING—CONSTRUCTIONS OF LEGISLATIVE PROVISIONS.**

Winston City Charter (Laws 1909, c. 72) § 46, provided that the power to create a public debt and issue bonds for municipal purposes should depend upon the passage of an ordinance by the board of aldermen specifying the purposes of the debt, the amount, etc., and the approval of such ordinance by a majority of the qualified registered voters. An election was held under the charter to determine whether a specified indebtedness should be created for permanent improvements for street and sidewalks, another sum for increased sewer facilities, another for the extension of water mains and improvements in the water system, with other sums for the erection and equipment of school buildings, hospital facilities, etc.; the ballots provided submitting the question of such indebtedness as a whole. *Held* that, as the charter did not expressly require that the separate items of municipal indebtedness should be placed on one ballot, it will not be construed as authorizing an election in contravention of the principle that each voter should be afforded an opportunity to vote for a single proposition, and the election was invalid.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1841; Dec. Dig. § 867.\*]

**4. MUNICIPAL CORPORATIONS (§ 867\*)—BOND ISSUES—ELECTION METHOD.**

Nor was such election rendered valid by a provision of the charter which declares that the election shall be held with such restrictions and rules governing the voting as the board of aldermen may prescribe; such provision referring only to the time and place of voting and other merely formal regulations.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1841; Dec. Dig. § 867.\*]

Appeal from Superior Court, Forsyth County; F. A. Daniels, Judge.

Action by the City of Winston against the Wachovia Bank & Trust Company. From a judgment overruling a demurrer to the complaint, defendant appeals. Reversed.

The action was to collect the purchase price, which defendant had agreed to pay for certain municipal bonds of the city of Winston, to the amount of \$160,000, which defendants had contracted to take at par and interest. The bonds having been tendered and all the facts relevant to their validity and issuance having been fully stated in the complaint, defendant demurred, as-

signing for cause that the bonds tendered were not binding on the city, for the reason that in submitting the question to the popular vote several distinct and unrelated propositions were combined and voted for on a single ballot. There was judgment overruling the demurrer, and defendant excepted and appealed.

Watson, Buxton & Watson, for appellant.  
Manly, Hendren & Womble, for appellee.

HOKE, J. (after stating the facts as above). The charter of the city of Winston (chapter 72, § 46), by Laws 1909, conferred upon its government, on approval of the popular vote, the power to incur indebtedness and to issue bonds therefor, in terms as follows: "That for the purpose of improving streets and sidewalks, purchasing, establishing, equipping, extending or maintaining water-works, sewerage, gas plant, electric light or power plant, public schools, or for any public improvement, or to fund or pay any bonded debt now existing, on or before the date when same shall fall due, the board of aldermen is hereby authorized and empowered to create a public debt and issue bonds therefor, under the following provisions: That an ordinance specifying the purpose of the debt, the amount thereof, the time when same shall fall due, and such other provisions as the board may adopt, shall be passed by a three-fourths vote of the entire board at two separate regular meetings, submitting the question of creating a debt to the vote of the people, with such regulations and rules governing such voting as the board of aldermen may prescribe, and the said debt shall become a valid obligation, and bonds may be issued in accordance with the ordinance if the same is approved by the vote of a majority of the qualified registered voters having voted in favor thereof; that the board may order a new registration whenever such question is submitted to the voters. \* \* \* By an amendment in 1911 the words, "Hospital or Hospitals," were added, as one of the purposes to be inserted in the original act, just after the words "Public Schools."

Undertaking to exercise the power thus conferred, the board of aldermen, by the required majority and at two separate regular meetings, passed an ordinance providing: "That an election be held in the three wards of the city of Winston, on Tuesday, the 8th day of August, 1911, at which said election the qualified registered voters of the said city of Winston shall be allowed to vote upon the question of creating an indebtedness of three hundred and fifty thousand (\$350,000) dollars; of which sum the amount of seventy-five thousand (\$75,000) dollars shall be for permanent improvements to streets and sidewalks; the amount of eighty-five thousand (\$85,000) dollars shall be for increasing the sewerage facilities; the amount of forty

thousand (\$40,000) dollars shall be for the extension of water mains and improvements in the waterworks system; and the amount of sixty thousand (\$60,000) dollars shall be for the erection and equipment of additional public school buildings; and the amount of ninety thousand (\$90,000) dollars for improved and larger hospital facilities in the city of Winston and the acquisition, by purchase or otherwise, of a site and the erection and equipment of a hospital;" and "it is further ordained: That the mayor and board of aldermen be authorized to prepare, issue and sell bonds to the amount of three hundred and fifty thousand (\$350,000) dollars as aforesaid; the proceeds to be used for the purposes and in the amounts herein named. \* \* \* The said bonds shall be sold and delivered as the necessities of the work and improvements and payments authorized may require." The ordinance then made certain regulations as to the time, place, and methods of conducting the election, the giving of proper notice, etc., and concluded as follows: "The secretary and treasurer of the city shall provide and furnish the necessary ballots for each ward and these ballots shall be of the uniform size and color, to be selected by the secretary and treasurer, and those who vote at the election, if in favor of the issuance of said bonds and the creating of the indebtedness, shall vote a ticket with the word 'approved' written or printed thereon; and those opposed to the proposition shall vote a ticket with the words 'not approved' written or printed thereon." Pursuant to the ordinance and its requirements, an election was held, and the proposition to incur the indebtedness for the different purposes specified was approved by the voters with practical unanimity; there being only 10 votes cast against the measure. The ballot used was single with the words "approved" or "not approved" printed thereon, and was taken on the proposition as an entirety, as directed by the ordinance. Under authority vested in them by these different proceedings, the board of aldermen, by resolution duly passed at a meeting in September, 1911, determined on issuing bonds to the amount of \$160,000, the proceeds to be used for "the following purposes and none other, to wit: \$60,000.00 for the erection and equipment of additional school buildings; \$20,000.00 for the extension of water mains and improvements in the waterworks system; \$42,500.00 for increasing the sewerage facilities; \$37,500.00 for permanent improvements to streets and sidewalks; all making a total of \$160,000.00 par value of bonds." And, having bargained said bonds at par to defendants and tendered the same, payment was refused; defendant contending that the bonds are invalid. On these, the controlling facts relevant to the inquiry, the court is of opinion that the position of defendant is well taken, and that the proposed bond issue is without warrant of law.

[1] It has come to be well understood, certainly it is sustained by the great weight of authority, that, when a popular vote is required to authorize or validate a municipal indebtedness, the proposition should be single and when the question presented embodies two or more distinct and unrelated propositions, and the voter is only afforded opportunity to express his preference or decision on a single ballot and on the question as an entirety, the election as a rule is invalid, and, on objection made in apt time, and in a proper way, may be disregarded and set aside. This was recognized by this court in *Goforth v. Construction Company*, 96 N. C. 538, 2 S. E. 361, a suit to set aside an election and prevent a bond issue pursuant to same, and in which Merrimon, Judge, delivering the opinion, said: "We do not deem it necessary at this time to decide what effect the taking of the vote upon the propositions to subscribe for stock of two distinct companies as a single proposition may have on the election, except to say that it was certainly irregular and improper to do so." And there are numerous decisions in the courts of other states in which such an election is directly held to be invalid. *Ross v. Lipscomb*, 83 S. C. 136, 65 S. E. 451, 137 Am. St. Rep. 794; *Johnson v. Roddey*, 83 S. C. 462, 65 S. E. 626; *Rea v. City of La Fayette*, 130 Ga. 771, 61 S. E. 707; *City of Bethany v. Allen*, 186 Mo. 673, 85 S. W. 531; *Gas & Water Co. v. City of Elvria*, 57 Ohio St. 374, 49 N. E. 335; *Williams v. People*, 132 Ill. 585, 24 N. E. 647; *Supervisors v. Railroad*, 21 Ill. 338-373; *Lewis v. Commissioners*, 12 Kan. 186; *Leavenworth v. Wilson*, 69 Kan. 74, 76 Pac. 400, 2 Ann. Cas. 367; *McMillan et al. v. Lee County*, 3 Iowa, 311; *Stern v. City of Fargo*, 18 N. D. 289, 122 N. W. 403, 26 L. R. A. (N. S.) 665; *City of Denver v. Hayes*, 28 Colo. 110, 63 Pac. 311; *Farmers' Loan & Trust Co. v. Sioux Falls (C. C.)* 131 Fed. 891; *McBryde v. Montessano*, 7 Wash. 69, 34 Pac. 559; and many others could be cited. The ruling and the reasons upon which it is generally made to rest are very well presented by *Stockton, Judge*, delivering the opinion in *McMillan v. Lee County*, 3 Iowa, *supra*, as follows: "The law in our opinion has provided no such mode of submitting these questions to the vote of the people. The evils which might be permitted to grow up under such a system are so obvious and apparent that any extended discussion of the question by us would be superfluous. It may be sufficient to suggest that, if it were allowed, measures in themselves odious and oppressive might by means of it become fastened upon a county, which in no other way could have obtained the number of votes requisite to insure their adoption but by being connected with some other proposition, which commended itself to the favor and suffrages of the people, by its inherent merits and popularity. They must be

adopted or rejected together. After the same manner, a measure desirable and necessary to a people of a county may, when offered for their adoption, be rejected by their votes and fail to become a law by reason of its connection with some other measure or measures unpopular and uncalled for. In either case there is an evil. An unpopular measure may be forced upon an unwilling people, or a necessary and desirable one may be denied them, in spite of their wishes. It is sufficient for us to say that the law in our opinion intended to provide for no such system of contradictions. A measure wise and salutary in itself needs no adventitious assistance to recommend it to the suffrages of the people, or to insure its adoption by them. It may demand that its enactment into a law shall be made to depend upon its sanction alone. A pernicious measure is not entitled to such assistance, and should be permitted to stand or fall by its own inherent merits or defects. And by Brewer, Judge, in *Lewis v. Commissioners*, supra: "It may be conceded that two or more questions may be submitted at a single election, provided each question may be voted on separately, so that each may stand or fall upon its own merits. But that is a very different matter from tacking two questions together, to stand or fall upon a single vote. It needs no argument to show the rank injustice of such a mode of submission. By it several interests may be combined, and the real will of the people overslaughed. By this combination an unpopular measure may be tacked on to one that is popular, and carried through on the strength of the latter. A necessary matter may be made to carry with it some private speculation for the benefit of a few. Things odious and wrong in themselves may receive the popular approval because linked with propositions whose immediate consummation is deemed essential. It is against the very spirit of popular elections, that aims to secure freedom of choice, not merely between parties, but also in respect to every office to be filled, and every measure to be determined. A voter at a state election would be shocked to be told that, because he voted for a person named for Governor on one ticket, he must vote for all other persons named thereon, or that, voting for one person, he was to be understood as voting for all. He would feel that his freedom of choice was infringed upon. None the less is it so by such a submission as this." And, continuing further, he said: "A mode of submission which is so obviously unjust, so contrary to the spirit of election, and has received such condemnation from the courts will not be imputed to the intention of the Legislature, unless necessarily demanded by the language used." Citations made with approval in the learned opinion of Chief Justice Fish in *Rea v. City of La Fayette*, supra. A perusal of the authorities will disclose that in much

the larger number of them the rule as stated is made dependent on the proper interpretation of the legislative statutes applicable to and controlling the question, and is not referred by them to any constitutional principle. True, the Georgia case, above cited, declares that "such an election contravenes the spirit of their Constitution, as embodied in the requirement that 'No law or ordinance shall pass which refers to more than one subject-matter,' but, so far as examined, no decision rests the position on any express constitutional provision except the case from Colorado." *Denver v. Hayes*, supra. In that case their Constitution specified "that no city or town shall contract any debt by loan in any form except by means of an ordinance, \* \* \* specifying the purposes to which the funds to be raised shall be applied. \* \* \* But no such debt shall be created unless the question of incurring the same, at a regular election, \* \* \* shall be sanctioned by a majority of those voting on the question, by ballot deposited in a separate ballot box, \* \* \* shall vote in favor of creating the debt," etc. And the court, construing the section and a statute which authorized the creation of a municipal debt for certain specified purposes, held that the correct interpretation of the Constitution and the statute was one and the same, and both required that, in order to a valid election, the voter should not be required to vote for dual propositions on a single ballot.

[2] But the Constitution of North Carolina, while it clearly requires the approval of a popular vote to sanction an indebtedness for any purpose other than for necessary expenses (article 7, § 7), and contains direct admonition that the General Assembly shall safeguard municipalities so as to prevent abuses in the matter of taxation, assessment, and the incurring of debts (article 8, § 4), deals with the subject otherwise in very general terms; the exact language of the constitutional provisions referred to being as follows:

Article 7, § 7: "No debt or loan except a majority of voters. No county, city, town or other municipal corporation shall contract any debt, pledge its faith or loan its credit, nor shall any tax be levied or collected by any officers of the same except for the necessary expenses thereof, unless by a vote of the majority of the qualified voters therein."

Article 8, § 4: "Legislature to provide for organizing cities, towns, etc. It shall be the duty of the Legislature to provide for the organization of cities, towns, and incorporated villages, and to restrict their power of taxation, assessment, borrowing money, contracting debts and loaning their credit, so as to prevent abuses in assessments and in contracting debts by such municipal corporations."

In view of the very general terms in which these provisions are expressed and the un-

doubted position that, except where regulated by the Constitution, this question of election methods is, to a large extent, legislative in its character, we conclude that an election of the kind we are discussing does not with us offend against any constitutional principle, and, as to the methods of ascertaining the popular vote and the restrictions to be imposed upon municipalities in respect to taxation, assessment, and the contracting of debts, the subject is left in a large measure to legislative discretion. This view finds support in a concurring opinion of Chief Justice Jones, in one of the South Carolina cases cited (*Johnson v. Roddy*), and in which he says: "I concur in the judgment. When the statute confers upon the municipality the power to contract for waterworks and sewerage in an aggregate sum, and to submit the question of bond issue therefor as a single proposition, I do not think the courts have a right to interfere because, in their view, such submission is unwise and dangerous. If the municipal action is within statutory power granted and no constitutional inhibition appears, courts cannot annul." And the latter portion of the citation from Judge Brewer's opinion, *supra*, "A mode of submission which is so obviously unjust, so contrary to the spirit of election, and has received such condemnation from the courts will not be imputed to the intention of the Legislature, unless necessarily demanded by the language used," gives clear indication that the distinguished jurist regarded and was dealing with the subject as being within legislative control. Two decisions of this court are in general approval of this position (*Lumberton v. Nuveen Co.*, 144 N. C. 303, 56 S. E. 940, and *Smith v. Belhaven*, 150 N. C. 156, 63 S. E. 610), and, while the question of voting in separate ballot boxes was chiefly urged upon our attention, an examination of the record and decision of the last case will disclose that the question of voting for dual propositions on a single ballot was also presented, and such an election was upheld because the statute clearly provided that the vote should be taken in that way.

From these considerations and the authorities cited, we take it as established in this state:

(1) That in reference to the question we are discussing the method of voting on a proposition of municipal indebtedness under all ordinary conditions is for the Legislature.

[3] (2) In view of the position so generally recognized that, where a popular vote is required, the voter should be afforded opportunity to cast his ballot for a single proposition, an act of the Legislature will not be construed as authorizing an election in contravention of this principle unless such purpose is expressed in clear and unmistakable terms.

Applying these principles to the cause in

hand, we are of opinion, as stated, that this election must be declared invalid. While some of the decisions have perhaps gone too far in holding that several propositions shall be considered distinct and unrelated, here is an aggregate indebtedness of \$350,000, embracing various propositions, some of them undoubtedly distinct and voted on by the single ballot, containing the words "approved" or "not approved," as the case may be, and there is nothing in section 46 of the charter, as we construe it, which requires or permits that these differing questions should be voted for on a single ballot.

[4] While the various purposes are enumerated in the section, the law provides that "an ordinance specifying the purpose of the debt and the amount thereof" shall be first passed. Almost the very language made the basis of the decisions cited, in which elections of the kind have been declared invalid, and the result is not changed or in any way affected by the general provision: "With such regulations and rules governing such voting as the board of aldermen may prescribe." This, in our opinion, refers, and was only intended to refer, to the time and place of voting and other merely formal regulations concerning the elections, and may not be construed as authorizing the board of aldermen to provide for and hold an election in direct contravention of the wise and wholesome principle that a voter should not be required to vote on single ballot for two or more distinct and entirely unrelated propositions. We are of opinion, and so hold, that the demurrer of defendant must be sustained, and this will be certified that judgment to that effect be entered.

Reversed.

(91 S. C. 294)

# NEWBERRY SAVINGS BANK v. BANK OF COLUMBIA.

(Supreme Court of South Carolina. April 11, 1912.)

## BANKS AND BANKING (§ 149\*)—PAYMENT OF FORGED CHECKS—RECOVERY BACK.

A bank took a check payable to itself drawn on another bank from a person representing himself to be a depositor in the drawee bank, without requiring any identification. The check was paid by the drawee, but it subsequently discovered that the signature was a forgery. *Held*, that the negligence of the drawee in not discovering the forgery before payment was not available to the payee in an action to recover back the amount paid; the rule that a bank should know the signatures of its depositors not being available to a party representing to the bank that a check presented by it is the check of a depositor, where it has taken no precaution to ascertain whether such is the fact.

[Ed. Note.—For other cases, see *Banks and Banking*, Cent. Dig. §§ 453, 454; Dec. Dig. § 149.\*]

Appeal from Common Pleas Circuit Court of Richland County; Robt. Aldrich, Judge.

"To be officially reported."

Action by the Newberry Savings Bank against the Bank of Columbia. From a judgment on a directed verdict for plaintiff, defendant appeals. Affirmed.

D. W. Robinson, for appellant. Barron, Moore, Barron & McKay, for respondent.

WOODS, J. In this case the circuit judge directed a verdict in favor of the plaintiff. As the main question involved in the appeal is whether there was any view of the evidence which would have warranted a verdict for the defendant, we state the evidence from the defendant's standpoint.

On March 21, 1907, a man, who represented himself to be R. L. Crooks, and who had in his possession a depositor's passbook issued to R. L. Crooks by Newberry Savings Bank, went into Bank of Columbia and asked to have cashed a check purporting to be signed by Crooks for \$100 in favor of Bank of Columbia on Newberry Savings Bank. Mr. Gibbs, cashier of Bank of Columbia, asked Mr. Norwood, cashier of Newberry Savings Bank, by telephone, if the check of R. L. Crooks on his bank for \$100 would be good, and, on receiving an affirmative answer, cashed the check. The Bank of Columbia then indorsed the check: "Pay any bank for account of the Bank of Columbia. T. H. Gibbs, Cashier"—and sent it forward through its correspondent bank. The Newberry Savings Bank paid the check on its presentation by the Exchange Bank of Newberry. A second check for \$150, dated April 1, 1907, was cashed by Bank of Columbia and paid by Newberry Savings Bank under like circumstances. In May, 1908, more than a year after these transactions, Crooks having occasion to go to the Newberry Savings Bank, the officers of that bank discovered that the man to whom the Bank of Columbia had paid the money was not Crooks, and that his name had been forged. Very soon after demand was made by Dr. McIntosh, president of Newberry Savings Bank, on the Bank of Columbia for the repayment of the money, and the demand was refused.

Mr. Gibbs, cashier of the defendant bank, died before the trial; but other officers of the bank who were present and participated in the transactions testified that the drawer of the checks was a stranger, and they were unable to show that any identification was required of him. Notwithstanding this evidence of negligence on its part, the defendant bank contended that the cause should have been submitted to the jury because of the negligence of the plaintiff bank: "(1) In not discovering the forgery more promptly. (2) In not notifying the defendant bank after the first forgery, in order that said bank might not have cashed the second or third forgery, and might have apprehended the forger and protected itself. (3) In not having or keeping the genuine signature of its customers, and in not comparing the signature

of its customer with such genuine signature. (4) In paying a check which contained a restricted indorsement only for collection without any effort to establish the genuineness of the signature. (5) And that defendant has been misled and has changed its situation for the worse in reliance upon the conduct of the plaintiff."

In fixing the relations and obligations of the parties, we first consider the effect of the indorsement "pay to any bank for account of Bank of Columbia, S. C." The undisputed proof was that this meant that the Bank of Columbia had not parted with the title to the check, but had only appointed the bank presenting the check its agent to collect. In this respect the case stands, therefore, precisely as if an officer of the Bank of Columbia had gone to Newberry and presented the check as that of R. L. Crooks and demanded and received payment therefor. The case then comes to this: Does the person who has himself taken the check in his own favor, and who himself presents it and demands payment of the bank on which it is drawn, represent to the bank that the signature is genuine, and is he responsible if it turns out that the signature is not genuine and that he took no precautions to identify the person who signed it?

The person or bank to whom the money is paid, in such circumstances, receives the money of another on the faith of an untrue representative that he has dealt with and received the check from the person whose name is signed to it. The rule that a bank should know the signature of its customers is not available to one who represents to the bank that he holds in his hand the check of the customer without having taken precautions to ascertain the identity of the person with whom he was dealing. The law is thus stated in *Ford v. People's Bank*, 74 S. C. 180, 54 S. E. 204, 10 L. R. A. (N. S.) 63, 114 Am. St. Rep. 986, 7 Ann. Cas. 744, quoting from *National Bank v. Bangs*, 106 Mass. 441, 8 Am. Rep. 349: "To entitle the holder to retain money obtained by a forgery, he should be able to maintain that the whole responsibility of determining the validity of the signature was placed upon the drawee, and that the negligence of the drawee was not lessened, and that he was not lulled into a false security, by any disregard of duty on his (the holder's) own part, or by the failure of any precaution from which his implied assertion in presenting the check as a sufficient voucher the drawee had a right to believe he had taken." This case is much stronger in favor of the drawee bank than the *Ford Case*, for there the bank which received the money did not take the draft from the person who signed it, but from an indorsee in the usual course of business.

All of the authorities cited by the appellant relate to the obligation of the payee bank to know the signature of its customers



as against a bank not dealing with the drawer but taking the check by indorsement from others. None of them, and none that we have been able to find, exempt a bank from liability to refund money which it has received on a forged check taken by it directly from the forger. On the contrary, in *Bank of St. Albans v. Farmers' Bank*, 10 Vt. 141, 33 Am. Dec. 188, the court said: "It seems now well settled that a person giving a security in payment or procuring it to be discounted vouches for its genuineness." The same principle is laid down in *Nat. Bank of America v. Bangs*, 106 Mass. 141, 8 Am. Rep. 349. The courts with practical unanimity go at least to the extent of holding that a bank which takes a forged check without taking due care to ascertain its genuineness must refund the money paid to it by the drawee bank. See note to *First Nat. Bank v. Bank of Wyndmere*, 10 L. R. A. (N. S.) 58.

On the same reasoning the defendant cannot avail itself of the position that the plaintiff should have ascertained and given notice long before it did that the checks were genuine. The defendant had been negligent in failing to have the drawer of the checks identified, and had lulled the plaintiff into confidence and repose by presenting the check as genuine. The plaintiff had nothing to arouse its suspicions or suggest examination afterwards until it actually discovered the forgeries, and it then immediately notified the defendant.

It thus appears that, disregarding all the evidence to which defendant objected, and considering only the facts proved or not disputed by the defendant, the plaintiff is entitled to recover. This conclusion makes unnecessary the consideration of the exceptions alleging error in the admission of testimony.

It is the judgment of this court that the judgment of the circuit court be affirmed.

GARY, C. J., and HYDRICK, WATTS, and FRASER, JJ., concur.

(91 S. C. 281)

# GUY v. OSBORNE et al.

(Supreme Court of South Carolina. April 11, 1912.)

## 1. WILLS (§ 614\*)—LIFE ESTATES—LIMITATION TO ISSUE.

A devise to a person during his natural life and after his death to his "surviving issue" gives the first devisee only a life estate, and not a conditional fee.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1393-1416; Dec. Dig. § 614.\*]

## 2. WILLS (§ 498\*)—DESIGNATION OF DEVISEES—"SURVIVING ISSUE."

A testator devised land to his nephew during his natural life, and at his death to his surviving issue. He also provided that, if his nephew died without surviving issue, "the land herein bequeathed to his children" should be disposed of as directed. Held that, although "surviving issue" without qualification ordinarily means heirs of the body, the subsequent

provision of the will showed that the testator meant surviving children, and hence that the issue of a child of the nephew who died before the nephew would take no interest in the land.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1087-1089; Dec. Dig. § 498.\*]

For other definitions, see Words and Phrases, vol. 8, pp. 6825-6832.]

Appeal from Common Pleas Circuit Court of York County; R. C. Watts, Judge.

"To be officially reported."

Action by Martha C. Guy against Martha E. Osborne and another. From the judgment, the parties bring cross-appeals. Reversed.

Hart & Hart, for Martha C. Guy. A. G. Brice, for Martha E. Osborne. Witherspoon & Spencers and J. S. Brice, for Mary A. Rainey.

WOODS, J. John Blair died in 1848, leaving a will which contained the following devise: "To my nephew Samuel Blair, during his natural life, I give and bequeath in trust, and at his decease, I give and bequeath to his surviving issue, \* \* \* my tract of land (describing the lands). But should my said nephew die without any surviving issue of his body, \* \* \* the said lands \* \* \* herein bequeathed to his children, I allow to descend the one half to my nephew John B. Lowrey or to his children; and the other half to the children of my half cousin James Blair, senr." Samuel Blair, the devisee, married in January, 1848, and his first child was born in July, 1849, after the death of the testator. Two children of Samuel Blair, Martha C. Guy and John C. Blair, survived their father, who died in October, 1907. Another child, Mary Agnes Patrick, predeceased her father, leaving children.

The questions submitted to the circuit court and brought by appeal to this court are: Did Samuel Blair take a fee conditional? If not, did the expression, "surviving issue," refer to issue generally, so that, after the death of Samuel Blair, the land passed to his surviving children, and the children of his predeceased daughter, or did testator so limit the meaning of the expression as to exclude all issue of Samuel except his children living at the time of his death? The circuit court held that at the death of Samuel his two surviving children took one-third of the land, and the children of the deceased child, Mary Agnes Patrick, the remaining third.

[1] The testator by limiting the devise in remainder to the surviving issue of Samuel Blair, instead of to his issue in indefinite succession, gave Samuel a life estate, and not a fee conditional. *McCorkle v. Black*, 7 Rich. Eq. 407; *Gadsden v. Desportes*, 39 S. C. 181, 17 S. E. 706; *Davenport v. Askew*, 69 S. C. 292, 48 S. E. 223, 104 Am. St. Rep. 798.

[2] The court has recently held that the word "issue" used without qualification will be generally construed to have the same import as the words "heirs of the body." *Rembert v. Catoe*, 89 S. C. 198, 71 S. E. 959. Therefore, if the words "surviving issue" stood without further qualification, all who were heirs of the body of Samuel Blair would take at his death in the proportion fixed by the statute of distribution. But the words "issue or heirs of the body" are often construed to mean children, when the testator has clearly expressed his intention to use the words in that sense. *Duckett v. Butler*, 67 S. C. 130, 45 S. E. 137; *Rembert v. Catoe*, supra; *Reeves v. Cook*, 71 S. C. 275, 51 S. E. 93. In saying immediately after the direct devise to Samuel for life and after his death to "his surviving issue," "the said lands \* \* \* herein bequeathed to his children, I allow to descend," etc., the testator clearly indicated that he meant to use the words "his surviving issue" in the sense of his surviving children. It follows that the remainder was to the surviving children of Samuel Blair to the exclusion of the children of a child who did not survive him.

It is the judgment of this court that the judgment of the circuit court be reversed.

GARY, C. J., and HYDRICK and FRASER, JJ., concur. WATTS, J., disqualified.

(91 S. C. 284)

HURSEY v. SURLS et al.

(Supreme Court of South Carolina. April 10, 1912.)

1. VENDOR AND PURCHASER (§ 342\*)—CONTRACTS—BREACH—REMEDY OF PURCHASER.

On the vendor's breach of the contract, the purchaser may sue for specific performance, or he may elect to regard the contract at an end, and sue for damages.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. §§ 1018, 1019; Dec. Dig. § 342.\*]

2. VENDOR AND PURCHASER (§ 350\*)—CONTRACTS—BREACH—REMEDY OF PURCHASER.

Where a purchaser sues for the vendor's breach of contract, the contract is admissible to show the obligation of the vendor, and the measure of benefit the purchaser would have derived from its performance.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. §§ 1043-1048; Dec. Dig. § 350.\*]

3. WILLS (§ 68\*)—CONTRACTS TO DEVISE OR BEQUEATH—RIGHTS AND REMEDIES ON BREACH.

Where a person who has agreed for a valuable consideration to make a devise or bequest breaches the contract, the other party may elect to regard the contract as at an end and sue for damages.

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. §§ 178-182; Dec. Dig. § 68.\*]

4. EXECUTORS AND ADMINISTRATORS (§ 449\*)—CONTRACTS TO DEVISE—ACTIONS—ISSUES, PROOF, AND VARIANCE.

A complaint in an action against executors for services rendered testator in his life-

time, which alleges that testator promised generally that he would compensate plaintiff for his services, is supported by evidence of a promise by testator to devise a specific tract of land for such services, but the compensation is limited to the value of the land.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 1850-1854; Dec. Dig. § 449.\*]

5. WILLS (§ 68\*)—CONTRACTS TO DEVISE—ACTIONS—QUESTION FOR JURY.

Where, in an action against executors for compensation for services rendered testator in his lifetime, pursuant to a contract to devise a specific tract, the issue was whether the contract was made, the jury in determining the question of fact must consider all the evidence, the relations of the parties, their business habits, and the circumstances shown by the evidence.

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. §§ 178-182; Dec. Dig. § 68.\*]

6. TRIAL (§ 194\*)—INSTRUCTIONS—INVADING PROVINCE OF JURY.

Where, in an action for services rendered a decedent in his lifetime, the evidence was not so clear as to warrant the judge in saying that there was a presumption either way whether the services were intended to be gratuitous but there was evidence on both sides of the question, a charge that, if plaintiff rendered the services and decedent accepted them, the law implied a contract on his part to pay for them, was objectionable as a charge on the facts.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 413, 439-441, 446-454, 456-466; Dec. Dig. § 194.\*]

7. EXECUTORS AND ADMINISTRATORS (§ 267\*)—DEMANDS DRAWING INTEREST.

A demand for services rendered a decedent in his lifetime pursuant to his contract to pay therefor is not an interest-bearing demand, and in an action for the services, brought against decedent's executors, a charge allowing interest from the date of decedent's death is erroneous.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 1032-1043; Dec. Dig. § 267.\*]

Appeal from Common Pleas Circuit Court of Dillon County; J. W. De Vore, Judge.

"To be officially reported."

Action by John A. Hursey against Allen Surlis and another, executors of Archibald B. Surlis. From a judgment for plaintiff, defendants appeal. Reversed and remanded.

James W. Johnson and Livingston & Gibson, for appellants. Sellers & Moore, for respondent.

WOODS, J. In this action of John A. Hursey against the executors of Archibald Surlis to recover compensation for alleged services rendered to Surlis in his lifetime, the plaintiff recovered judgment for \$1,866.25. The more important questions made by the appeal depend on the court's view of the scope of the issues made by the following material allegations of the pleadings. The complaint alleges: "That at the time of the death of the said Archibald B. Surlis, the testator of the defendants, he was indebted to the plaintiff upon an account for services rendered by the plaintiff to and for the tes-

tator in his lifetime, extending over a period of a little over 11 years and 6½ months immediately preceding his death. That said services were of a business nature performed by the plaintiff at the instance and at the request of the defendants' testator in the conduct and management of his extensive business and property interests in and around the town of Dillon, in said county and state. That said services consisted generally in making and drawing up contracts with his tenants in said town, leasing his houses and lands therein, collecting and enforcing the collection of his rents therein, looking after the repairs on his houses and about the premises thereof, conducting his private correspondence, looking after the insurance of his buildings, collecting his rents on a part of his farm outside of said town, and doing and performing any and all acts and services in connection with his extensive interests in the town of Dillon outside and apart from his mercantile business in said town, whenever called upon to do so by the said testator at all times, and under all and varying circumstances, under a contract made by the plaintiff with the said testator that he would amply compensate the plaintiff therefor. That said services so rendered as aforesaid by the plaintiff for and on behalf of said testator for the time aforesaid were and are reasonably worth the sum of \$6,935, no part of which has been paid, although the plaintiff has demanded of the executors payment of the same." The defendants meet this allegation by saying in their answer: "They deny emphatically all the other allegations of said complaint, and they allege that the said Archibald B. Surles was a man of rare business qualifications; that he gave his business his own personal attention; that he looked after all the details of his business; that he paid his debts promptly, and by judicious and close attention to business massed quite a fortune during his lifetime; that so far from the plaintiff rendering him assistance the said Surles set the plaintiff up in business, and contributed largely to his support for many years prior to his death, and made him a handsome devise in his will; that, so far from the said Surles being indebted to said plaintiff at the time of his death, these defendants allege that if an accounting were gone into between plaintiff and said A. B. Surles that said plaintiff would be largely in debt to the said Surles without taking into consideration the devise in question. They allege, further, that said A. B. Surles paid the plaintiff all demands he may have had against him during his, the said A. B. Surles', lifetime."

The plaintiff had first married the daughter of Surles, and, upon her death, had married a second time. There were two children of the first marriage who were living at the time of the death of their grandfather, the testator. The plaintiff and the testator lived

on terms of intimacy in their social and business relations until the end of the testator's life. The plaintiff managed Surles' mercantile business in the town of Dillon, and for him collected rents, and from time to time attended to the repair of buildings. The lot on which plaintiff resided was devised to him by Surles on the condition, expressed in the will, that he should properly manage and keep up the stock of goods for the benefit of his children to whom it had been bequeathed.

In support of the specific allegations of the complaint, evidence was introduced by the plaintiff tending to show that he performed the services set out in the complaint as the representative of Surles. As evidence that these services were not regarded by the parties as gratuitous, the wife of the plaintiff testified with respect to an interview between Surles and the plaintiff: "Q. Well, now, tell in your own words how that conversation arose, who brought it about, and all about it? A. Well, Mr. Surles asked Mr. Hursey himself to look up the store, and come to dinner with him. He wanted to have a private conversation with us, and he brought up this subject himself. He told us he had decided to marry, and this marriage would cause him to have to make some changes in the business, and referred to the contract he had with Mr. Hursey about tending to his business on the outside. He says, 'You know I have given you a three-horse farm, and, when I marry, I will want to change that, and give that to my wife,' and asked Mr. Hursey if he was willing for him to give him 18 acres near town in place of that three-horse farm. He says, 'You know the house and lot you live in is for your work on the inside. Now I ask your permission to change this for 18 acres near town.' Q. What was that for? A. For the work of collecting rents, etc., on the outside of the store. Q. Did you, state, I believe you said, that the contract that existed between them was referred to? A. Oh, yes, sir; he said he wanted to change the contract he had with him ever since Mr. Hursey commenced collecting rents and taking charge of his business." The position taken by defendants' counsel in support of the motion for nonsuit was that the evidence was conclusive of a fatal variance between the allegations of the complaint and the proof, in that the averment of the complaint was that the testator had promised generally "that he would amply compensate the plaintiff" for his services, whereas the only evidence as to compensation tended to show a promise to devise a specific tract of land. Such proof it was contended might sustain an action for the specific property which the testator had agreed to devise on the authority of *McKeegan v. O'Neill*, 22 S. C. 454, and *Fogle v. St. Michael's Church*, 48 S. C. 90, 26 S. E. 99, but could not support an action of quantum meruit for

the value of the services, resting on an alleged general promise of compensation.

[1] Upon a contract for the sale of land or other property, the purchaser may sue for the specific performance of the contract, or he may elect to regard the contract at an end and sue for damages for its breach.

[2] In such case, if the suit is for the breach, the agreement is introduced, not for the purpose of requiring specific performance of it, but as evidence of the obligation assumed by the seller, and of the measure of benefit the purchaser would have derived from its performance.

[3] We see no reason why a contract to make a devise or a bequest should in this respect stand on a different footing from other contracts. When the person who has agreed for valuable consideration to make the devise or bequest has breached the contract, the other party may elect to regard the contract at an end and sue for the loss or damage resulting from failure to make the devise. So, if the plaintiff had alleged in this case that he had performed valuable services for Surles, and that Surles had agreed to compensate him therefor by devising to him a certain tract of land, and that he had breached his contract, a case would be stated for the recovery of damages for the breach. If that had been the allegation, and the plaintiff had proved the services and their value, and the promise of compensation, but not the alleged specific promise to devise the land, this would not have been such a failure of proof as to be fatal to the action. The plaintiff could still recover for his services, but the recovery could not exceed the value of the land which he had alleged was to be devised.

[4] The actual case before us is the converse of that just supposed. The plaintiff alleges services and a promise of ample compensation but without specifying the manner of compensation. The evidence offered in support of the latter allegation tends to prove that the promise of compensation was the promise to devise a tract of land. This evidence does not defeat his action; but, if accepted by the jury, it limits his recovery to the value of the land. The testimony of the promise to make the devise is available to the plaintiff only as evidence that the services were to be paid for; but it is available to the defendant as evidence that the compensation was not to go beyond the value of the land. This principle was laid down and applied even under the strict common-law rules of pleading in the case of *Barnes v. Gorman*, 9 Rich. 297. There the plaintiff declared on a written instrument as a promissory note, and also, in a separate account, in *indebitatus assumpsit* for the hire of a slave. It was held that although the plaintiff had failed altogether on his first count, as the instrument sued on was not a promissory note, yet he

might recover on the second count, using the written instrument as evidence of the hiring of the slave and the promise to pay the hire.

The case now under consideration does not fall under the rule often laid down that there cannot be a recovery on a quantum meruit on a complaint setting up an express contract. *Fitzsimons v. Guanahani Co.*, 16 S. C. 192; *Birlant v. Cleckley*, 48 S. C. 298, 28 S. E. 600; *King v. Western U. Tel. Co.*, 84 S. C. 73, 65 S. E. 944. On the contrary, here the allegation is for a contract to compensate for services rendered, and the evidence tends to prove a contract to compensate for the services, the evidence not being at variance with the allegation, but merely going beyond it, in that it tends to prove a contract to compensate in a particular manner; that is, by devising a tract of land. The motion for nonsuit was properly refused.

[5] The question whether Surles made a contract to compensate the plaintiff was a question for the jury, in the consideration of which they had to consider, not only the direct evidence of plaintiff's wife, but the relations of the parties, their business habits, and perhaps a number of circumstances shown by the evidence.

[6] The circuit judge in the following instruction on this subject charged the jury, in effect, that, even if the express contract was not proved, yet, if the services alleged were rendered, the verdict must be for the plaintiff, because the law would imply a contract to pay for the services. "So, if you conclude from the evidence in this case that the plaintiff rendered the service that it is alleged here in the complaint that he rendered, but you must conclude that based on the evidence, you cannot conclude that simply because it is alleged in the complaint he must prove it. If you conclude that he rendered the service, and this evidence satisfies you of the fact that he rendered them, and the party to whom he rendered those services accepted them and received them, why the law would imply a contract on his part to pay for them." This was clearly a charge on the facts, in that it indicated to the jury that the relations of the parties gave no indication that the services were rendered gratuitously. The evidence was not so clear as to warrant the judge in saying there was a presumption either that the services were intended to be gratuitous or that they were not; on the contrary, there was evidence on both sides of the question whether the relationship of the plaintiff with Surles was so close as to indicate that the services were rendered and accepted on a business basis as a favor in the ordinary give and take of persons connected by social and family ties. This issue was erroneously taken from the jury in the sentence of the charge just quoted. *Dash v. Inabinet*, 53 S. C. 382, 31 S. E. 297.

[7] The account for services rendered was not an interest-bearing demand, and the circuit judge erred in charging that interest was recoverable from the date of the death of Surles. *Schermerhorn v. Perman*, 2 Bailey, 173; *Edwards v. Dargan*, 30 S. C. 177, 8 S. E. 858.

The other exceptions are relatively unimportant, and relate to points not likely to arise on a second trial.

It is the judgment of this court that the judgment of the circuit court be reversed, and the cause remanded for a new trial.

GARY, C. J., and HYDRICK and WATTS, JJ., concur. FRASER, J., concurs in the result.

(137 Ga. 775)

### CARGILE v. STATE.

(Supreme Court of Georgia. March 12, 1912.)

(Syllabus by the Court.)

#### 1. CRIMINAL LAW (§ 823\*)—TRIAL—INSTRUCTIONS—DUTIES OF JURORS.

An instruction that the jury will try the case by the evidence as applied to the law given in charge is not erroneous, as excluding a consideration of the prisoner's statement, where the court also fully instructs the jury on the effect to be given the prisoner's statement. *Tolbirt v. State*, 124 Ga. 767, 53 S. E. 327.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1992-1995, 3158; Dec. Dig. § 823.\*]

#### 2. CRIMINAL LAW (§ 922\*)—TRIAL—INSTRUCTIONS—CROSS-EXAMINATION OF ACCUSED.

While it is true that a defendant in a criminal case, electing to make a statement, is not subject to cross-examination without his consent, yet, as this provision of the statute is but a rule of trial procedure, it is the better practice to omit any reference to it in the general charge. Nevertheless, the statement of this rule of procedure in the general charge will not ordinarily be ground for a new trial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2210-2218; Dec. Dig. § 922.\*]

#### 3. CHARGE OF COURT—MALICE—NO ERROR.

The excerpts from the charge defining malice, when taken in connection with their context, are not erroneous.

#### 4. HOMICIDE (§ 309\*)—TRIAL—INSTRUCTIONS.

The presiding judge, in charging on the subject of voluntary manslaughter, should not mingle with it a charge on the subject of justifiable homicide under the doctrine of reasonable fears; but in view of the facts disclosed by the evidence in this case, and the entire charge, that part of the charge complained of, though not altogether accurate, will not require a reversal.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 649-656; Dec. Dig. § 309.\*]

#### 5. CRIMINAL LAW (§ 922\*)—TRIAL—INSTRUCTIONS.

An instruction that: "The law recognizes the fact that there is in the breast of every human being a passion that can be aroused and to such an extent as to become uncontrollable. During that time, if a person, acting under such passion as that, kill another, he is not held to that strict accountability that he would be under different circumstances; yet

the law recognizes the fact that there is in every breast also a conscience, which speaks to man and seeks to restore him back to reason and to his duty to humanity"—is not ground for a new trial, notwithstanding its somewhat metaphysical savor.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2210-2219; Dec. Dig. § 922.\*]

#### 6. HOMICIDE (§ 19\*)—MURDER—MALICE.

"Although there may be mutual intention and agreement to fight, yet if one of the disputants kill the other with malice, it is murder." *Freeman v. State*, 70 Ga. 736.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 32; Dec. Dig. § 19.\*]

#### 7. CHARGE OF COURT—INSUFFICIENCY OF EVIDENCE—DISCRETION OF COURT—REFUSAL OF NEW TRIAL.

The charge was very favorable to the defendant. The evidence supports the verdict, and the discretion of the trial court in refusing a new trial should not be disturbed.

Error from Superior Court, Fayette County; Robt. T. Daniel, Judge.

Henry Cargile was convicted of homicide, and brings error. Affirmed.

J. W. Culpepper, J. W. Shell, and J. F. Gollightly, for plaintiff in error. J. W. Wise, Sol. Gen., A. O. Blalock, T. S. Felder, Atty. Gen., and L. C. Dickson, for the State.

EVANS, P. J. Judgment affirmed. All the Justices concur.

(11 Ga. App. 43)

### ABBOTT v. STATE. (No. 3,957.)

(Court of Appeals of Georgia. March 19, 1912. Rehearing Denied April 8, 1912.)

(Syllabus by the Court.)

#### 1. INTOXICATING LIQUORS (§§ 184, 236\*) — EVIDENCE—SALE OF "NEAR BEER."

The expression "near beer" does not import an intoxicating liquor, and evidence of the sale of such a beverage, without proof that, if drunk to excess, it will produce intoxication, will not support a conviction of violation of the prohibitory law contained in section 426 of the Penal Code of 1910. *Stoner v. State*, 5 Ga. App. 716, 63 S. E. 602; *Campbell v. Thomasville*, 6 Ga. App. 212, 64 S. E. 815.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. §§ 142-144, 300-322; Dec. Dig. §§ 184, 236.\*]

#### 2. INTOXICATING LIQUORS (§ 236\*)—ILLEGAL SALE—EVIDENCE.

The indictment having been returned January 23, 1911, and the trial had at the May term, 1911, testimony that the accused sold intoxicating liquor "within the last two years" does not show with sufficient certainty that the sale took place before the indictment was found. *White v. State*, 93 Ga. 47 (4), 19 S. E. 49.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. §§ 300-322; Dec. Dig. § 236.\*]

#### 3. INTOXICATING LIQUORS (§ 176\*)—ILLEGAL SALE—EVIDENCE.

In a trial under an indictment charging a violation of the prohibitory law contained in section 426 of the Penal Code of 1910, evidence that at the time the offense is alleged to have been committed the accused had a license

to sell "near beer" from the state, county, and municipal corporation in which the law is alleged to have been violated is irrelevant.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Dec. Dig. § 176.\*]

**4. CRIMINAL LAW (§ 629\*) — FURNISHING NAMES OF WITNESSES.**

It is not error to permit the state to introduce a witness whose name had not previously been furnished the accused or his counsel, even though the accused had not waived the furnishing of a list of the witnesses.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 1420-1429, 1432-1436; Dec. Dig. § 629.\*]

**5. CRIMINAL LAW (§§ 686, 1153\*) — TRIAL — INTRODUCTION OF EVIDENCE.**

It is within the discretion of the court to allow a case reopened at any stage for the introduction of additional evidence, and the reviewing court will interfere only when there has been a gross abuse of this discretion. None such appears in the present case.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 1619, 1620, 1625, 1626, 3061-3066; Dec. Dig. §§ 686, 1153.\*]

Error from City Court of Brunswick; D. W. Krauss, Judge.

Joe Abbott was convicted of an illegal sale of liquor, and brings error. Reversed.

Max Isaac, for plaintiff in error. Ernest Dart, Sol., for the State.

POTTLE, J. [1] The headnotes sufficiently indicate our view of the questions with which we deem it necessary to deal. The indictment charged the accused with selling, keeping on hand at his place of business, and giving away to induce trade, "alcoholic, malt, spirituous, and intoxicating liquors, and intoxicating bitters and drinks, which, if drunk to excess, will produce intoxication." All of the witnesses who had any knowledge as to the kind of drink the accused had been selling testified that it was "near beer," and nonintoxicating. One of the state's witnesses said he drank 32 bottles one day, and went home at night entirely sober. The general prohibitory law comprehends only such beverages as, "if drunk to excess, will produce intoxication."

The court judicially knows that many kinds of drinks are intoxicating. But the term "near beer" does not import such a drink. The General Assembly having expressly sanctioned the sale of "near beer," if anything, the presumption would be that a particular beverage having this name was non-intoxicating. Indeed, this court has defined "near beer" as a malt liquor containing such a small percentage of alcohol that it will not produce intoxication, if drunk to excess. *Campbell v. Thomasville*, 6 Ga. App. 212, 64 S. E. 815.

[5] The case was closed with proof simply of sales of "near beer," and, when argument almost concluded, the state was allowed to reopen the case and introduce a witness, who testified that on one occasion he bought a pint of whisky from the accused and paid him 45 cents for it. The only evidence as to the date of the sale was the following testimony of this witness: "That was in this county and within the last two years." While the state may, of course, show that the offense was committed on any day within the limitation period, it seems to be taking rather an unfair advantage to rest the case upon evidence that the crime was committed "within two years, or four years," as the case might be. An honest witness ought certainly to be able to state the date with sufficient exactness to indicate the month, or at least the season of the year. But as to this, see *Chapman v. State*, 18 Ga. 736.

[2] However, it must affirmatively appear that the offense was committed before the finding of the indictment, and this is not shown by evidence that the criminal act was done some time within two years before the trial; the indictment having been returned some months prior thereto. The court should have granted a new trial upon the ground that there was not sufficient evidence to convict.

[3, 4] The special assignments of error were without merit.

Judgment reversed.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

(70 W. Va. 529)

**FIRST NAT. BANK OF GRAFTON v. DANSER et al.**(Supreme Court of Appeals of West Virginia.  
March 19, 1912.)*(Syllabus by the Court.)***1. APPEAL AND ERROR (§ 781\*)—DISMISSAL—MOOT QUESTION.**

An appeal from a decree setting aside conveyances as having been made with intent to hinder, delay, and defraud creditors cannot be dismissed on the motion of the appellee, over the objection of the parties to the deeds, as involving only moot questions, on proof of payment of the debt by the grantee and release of the decree by the creditor, subsequent to the date of the decree.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 8122; Dec. Dig. § 781.\*]

**2. BILLS AND NOTES (§ 320\*)—NEGOTIABLE NOTE.**

The defense of set-off is not applicable to a negotiable note, transferred for an adequate consideration before maturity, even though the transferee purchased the note with notice of the claim of set-off.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 760, 761; Dec. Dig. § 320.\*]

**3. FRAUDULENT CONVEYANCES (§ 277\*)—ADEQUATE CONSIDERATION—BURDEN OF PROOF.**

A grantee in a deed, charged with having obtained it in fraud of the rights of a creditor, must clearly prove payment of a fair and adequate consideration for the property after the prior indebtedness to the attacking creditor has been shown; else the charge of fraud will be sustained.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 799, 809-814; Dec. Dig. § 277.\*]

**4. FRAUDULENT CONVEYANCES (§ 101\*)—SETTING ASIDE—CONFIDENTIAL RELATIONS.**

A deed made when no unsecured indebtedness is shown to have existed, and long before the debt of the assignor of the attacking creditor was contracted, will not be set aside as fraudulent, merely because the parties thereto were closely related, and the deed was withheld from record until after such debt was contracted.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. § 329; Dec. Dig. § 101.\*]

Appeal from Circuit Court, Taylor County.

Bill by the First National Bank of Grafton against Elijah T. Danser and others. Decree for plaintiff, and defendants appeal. Affirmed in part, and reversed in part.

W. P. Samples, for appellants. Warder & Robinson, for appellee.

**POFFENBARGER, J.** The decree under review on this appeal set aside three deeds as having been made in fraud of the rights of creditors, of whom the plaintiff was one, holding a negotiable promissory note for the sum of \$480 as indorsee of Estella Mallonee, executed by the defendant E. T. Danser, representing the unpaid part of a larger note given for purchase money of certain personal property, payment whereof was secured by a deed of trust on such property. As the

deed of trust did not provide for renewal of the original note in whole or in part, it is said the new one for a portion of the amount is not secured by it.

[1] Two of the deeds were executed by E. T. Danser, maker of the note, to William J. Danser, his brother, and the other to Geo. A. Danser, another brother. After the decree, appealed from, William J. Danser borrowed money on some or all of the property so conveyed to him, and satisfied the decree and the debt involved herein. This done, the plaintiff below, appellee here, moved to dismiss the appeal. Though his motion had been overruled prior to the submission of the cause in this court, it was renewed on the submission thereof. By the arrangement made after the decree, William J. Danser was placed in a position to assert a claim against his grantor for breach of the warranty in the deed, of which the decree would be evidence. Hence E. T. Danser, who was not a party to the subsequent transaction, and denies procurement and ratification thereof, or either, is still affected by the decree, and has done no act operative against him as an estoppel. Again, the adjudication of fraud against William J. Danser in favor of the bank, in a suit to which he was a party, may preclude his right of subrogation against E. T. Danser. Clearly, therefore, the payment of the debt and release of the decree do not settle all rights involved in the appeal, and so reduce it to one presenting only moot questions. *Kaufman v. Mastin*, 66 W. Va. 99, 66 S. E. 92, 25 L. R. A. (N. S.) 855. All three of the Dansers have appealed; and an appeal cannot be dismissed at the instance of some of the parties over the protest or objection of others, whose interests have not been extinguished. *Ferguson v. Millender*, 32 W. Va. 30, 9 S. E. 33.

The new note was dated December 20, 1908, and made payable 180 days after date. On the 25th day of February, 1909, W. P. Samples assigned to the maker an account, partly against Mrs. Mallonee individually and partly against her and others, for legal services, amounting to \$556.20. On the 9th day of March, 1909, Danser wrote her a letter, purporting to inclose a release of the deed of trust, requesting her to execute and return it, and notifying her of an assignment of an account against her for an amount larger than the sum evidenced by the note. Thereupon she indorsed and delivered the note to the plaintiff herein, the First National Bank of Grafton, in payment, it is claimed, of two notes, executed by her and her husband for \$200 and \$250, respectively, then held by the bank.

[2] The claim assigned by Samples is relied upon as a full and complete bar, by way of set-off, to the debt evidenced by the note. As to whether the bank had notice of the claim before it acquired the note, there is

great conflict in the evidence; but that is an immaterial question, since the note was transferred before maturity. If it had been overdue, the Samples claim, or a portion of it, would have been a proper set-off, according to some authorities, assuming a transfer after notice of the set-off on the part of the transferee; but no set-off can be allowed the maker of a negotiable instrument against a purchaser thereof for value before maturity, even though he had notice of the claim. Daniel, Neg. Instr. §§ 1435, 1437; Davis v. Noll, 38 W. Va. 66, 17 S. E. 791, 45 Am. St. Rep. 841; Davis v. Miller, 14 Grat. (Va.) 1; Vann v. Marbury, 23 L. R. A. 325, note.

[3] Tested by the rules applicable upon inquiries as to fraud in conveyances, working prejudice to creditors, the two deeds to William J. Danser were fraudulent in the sense of intent to hinder and delay the collection of the Mallonee note, and, perhaps, to defeat it altogether. One of them recites \$1 and the assumption of lien debt on the property as consideration for the conveyance, and the other \$300 in money for the grantor's undivided half interest in the property, which it conveys. The parties were brothers, who seem to have been closely related in their vocations and small financial transactions, as well as by blood. No actual money was paid, except the recited \$1. The recited \$300 was not actual money. It was an account for labor, the exact amount of which neither of the parties can state, and no itemization of which has been made. No book account or memorandum of it has been produced nor shown to exist. Under well-settled principles, this is an insufficient response to a

charge of fraudulent intent. Colston v. Miller, 55 W. Va. 491, 47 S. E. 288. The purchaser must clearly prove payment in some way of a fair and adequate consideration. Butler v. Thompson, 45 W. Va. 660, 31 S. E. 960, 72 Am. St. Rep. 838; Cohn v. Ward, 32 W. Va. 34, 9 S. E. 41; Rogers v. Verlander, 30 W. Va. 619, 5 S. E. 847. Supplementing this evidence, we have the surrounding circumstances. E. T. Danser was endeavoring to offset the note with an assigned account, for which no actual consideration is shown to have been paid, all of which was well known to William J. Danser; and the two conveyances to him were closely related in time to this transaction, and directly in the line of the purpose to force a settlement upon a certain basis, in which the grantee appears to have participated by giving notice of the claim of set-off.

[4] The court erred, however, in setting aside the deed to Geo. A. Danser, made two years before the debt here involved was contracted, and recorded at a time at which that debt was secured by a deed of trust, and at which no unsecured indebtedness to any one is shown to have existed. Though it was withheld from record for more than two years, this unaided circumstance is wholly insufficient to overcome the inference of good faith arising from the conditions existing at the date of the execution of the deed.

Our conclusion is to reverse the decree, in so far as it set aside the deed from E. T. Danser and wife to Geo. A. Danser, dated June 28, 1906, and holds it subject to the indebtedness mentioned and described in the bill, and imposes costs upon the said Geo. A. Danser, and in all other respects to affirm it.



(159 N. C. 472)

## STATE v. CASEY et al.

(Supreme Court of North Carolina. April 17, 1912.)

## HOMICIDE (§ 340\*)—APPEAL—HARMLESS ERROR.

Although the evidence showed the accused to have been guilty of murder in the first degree, if guilty at all, he cannot complain of a charge instructing that there could be no conviction of a higher offense than murder in the second degree.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 715-720; Dec. Dig. § 340.\*]

Appeal from Superior Court, Craven County; Carter, Judge.

Burrill and Leona Casey were convicted of murder in the second degree, and Burrill Casey appeals. Affirmed.

Carl Daniels and W. D. McIver, for appellant. Attorney General Bickett, Assistant Attorney General Calvert, and D. L. Ward, for the State.

BROWN, J. The evidence in this case tends to prove that the feme prisoner was the wife of Joseph Whitty, the deceased, and that she was married to her coprisoner, Burrill Casey, about a month after the death of Whitty. There is most abundant evidence in the record that the deceased came to his death by means of poisoning. It would serve no good purpose to review the evidence in this case, which tends strongly to prove, not only that the deceased came to his death by means of poison, but that the poison was administered by these unfortunate prisoners. We have examined carefully the exceptions to the evidence, and the exceptions to the charge of the jury, and we find all of them without merit. The charge of the court was comprehensive and clear, and gave the prisoners the benefit of every instruction that they were entitled to.

It is contended that the solicitor had no right to place the prisoners upon trial for murder in the second degree only, and that it was their privilege to be tried for the capital felony, and the prisoners excepted to so much of his honor's charge as instructed the jury that they could not convict the prisoners, or either of them, of any higher offense than murder in the second degree. We fail to see that the prisoners have any reasonable ground for complaint, because their lives were not put in jeopardy, and instead they were tried for an offense punishable only by imprisonment in the penitentiary. It is the settled law in this state that the prisoner cannot complain of an instruction which could not possibly be prejudicial to him, but was in his favor.

It is true, as contended by the prisoner, that the administration of poison with felonious intent, resulting in death, constitutes murder in the first degree; but the fact that the state saw fit to ask for a verdict of

murder in the second degree is a degree of mercy extended to the prisoners, of which no reasonable person can complain. This question has been discussed and settled by this court in *State v. Matthews*, 142 N. C. 621, 55 S. E. 342, *State v. Quick*, 150 N. C. 820, 64 S. E. 168, and *State v. Freeman*, 122 N. C. 1012, 29 S. E. 94.

Upon a review of the entire record, we find no error.

(159 N. C. 474)

## STATE v. CASEY et al.

(Supreme Court of North Carolina. April 17, 1912.)

## HOMICIDE (§ 340\*)—APPEAL—HARMLESS ERROR.

Although the evidence showed the accused to have been guilty of murder in the first degree, if guilty at all, he cannot complain of a charge instructing that there could be no conviction of a higher offense than murder in the second degree, for the error is harmless, being beneficial to accused.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 715-720; Dec. Dig. § 340.\*]

Appeal from Superior Court, Craven County; Carter, Judge.

Leona and Burrill Casey were convicted of murder in the second degree, and Leona Casey appeals. Affirmed.

Carl Daniels and W. D. McIver, for appellant. Attorney General Bickett, Assistant Attorney General Calvert, and D. L. Ward, for the State.

BROWN, J. The evidence against Leona Casey amply justified her conviction, as is shown by the following extract from the brief of her counsel: "However, the crime she is charged with is the most heinous known to man. She is charged with poisoning one husband in order that she might be free to marry another. If the evidence introduced in the case tends to prove anything against her, it must prove the charge." This unfortunate prisoner does not ask for a new trial, but states through her counsel that she "would prefer to take her ten-year sentence in the penitentiary than to put her young life in jeopardy again."

The only assignment of error discussed in the brief is stated as follows: "At the conclusion of the evidence the state declined to ask the jury to convict her of murder in the first degree, and there was no evidence of murder in any other degree," and upon this decision of the solicitor she asked for her discharge. We have already held repeatedly that, if the solicitor erred, it is an error in favor of the prisoner, of which she cannot justly complain. *State v. Quick*, 150 N. C. 820, 64 S. E. 168; *State v. Matthews*, 142 N. C. 621, 55 S. E. 342.

Upon a review of the entire record, we find no error.

(159 N. C. 491)

**STATE v. DUNLAP.**

(Supreme Court of North Carolina. April 10, 1912.)

**1. CRIMINAL LAW (§ 93\*) — JURISDICTION — RECORDER'S COURT.**

Under Pub. Laws 1907, c. 860, creating the recorder's court of the city of Monroe, as amended by Pub. Laws 1909, c. 683, providing that, on larceny of sum not to exceed \$20, punishment for the first offense should not exceed imprisonment in the county jail for more than a year, declaring such offenses petty misdemeanors, and giving the recorder's court jurisdiction, such court had jurisdiction under warrant charging larceny of corn of less value than \$20; the presumption being that it was a first offense.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 129, 137-166; Dec. Dig. § 93.\*]

**2. JURY (§ 31\*)—DENIAL OF CONSTITUTIONAL RIGHT—MISDEMEANOR.**

Pub. Laws 1907, c. 860, as amended by Pub. Laws 1909, c. 683, giving the recorder's court jurisdiction of petty misdemeanors, including larceny of property of value less than \$20, was not contrary to the constitutional provision, granting trial by jury.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 204-219; Dec. Dig. § 31.\*]

Appeal from Superior Court, Union County; Whedbee, Judge.

Mack Dunlap, Jr., was convicted of petit larceny in the recorder's court, and from a conviction on appeal to the superior court he appeals. Affirmed.

J. J. Parker, for appellant. Attorney General Bickett and Assistant Attorney General Calvert, for the State.

**BROWN, J.** [1] 1. It is contended by the defendant that the recorder's court had no jurisdiction of the offense charged in the warrant. The recorder's court of the city of Monroe was created by chapter 860, Public Laws of 1907. By section 4 (5), the court was given "exclusive, original jurisdiction to hear and determine all other criminal offenses committed within the county of Union below the grade of felony as now defined by law, and all such offenses committed in the county of Union are hereby declared to be petty misdemeanors."

The statute was amended by chapter 683 of the Laws of 1909; the first section thereof providing: "That in all cases of larceny and receiving stolen property hereafter committed in the county of Union, where the value of the property alleged to have been stolen or received does not exceed the sum of \$20, the punishment for the first offense shall not exceed imprisonment in the county jail or on the public roads a longer period than one year, and all such offenses hereafter committed in said county are hereby declared petty misdemeanors, and the recorder's court shall have original jurisdiction thereof: Provided, the right of appeal shall not be impaired."

It is manifest that the offense charged in

the warrant was within the jurisdiction of the recorder's court, because the punishment was not in the penitentiary; and, while the offense of larceny is generally a felony, yet the General Assembly has made the larceny of sums not exceeding the value of \$20 a petty misdemeanor for the first offense.

It is true that the warrant does not charge that this was the first offense, but that is presumed by law; for, when the state desires to punish as for second conviction, the first conviction should be charged in the warrant or bill of indictment. *State v. Davidson*, 124 N. C. 839, 32 S. E. 957.

A similar act, relating to the recorder's court of Winston, was enacted in 1907, c. 573. By that act, larceny of goods less than \$10 in value was made a petty misdemeanor. The constitutionality of the act was sustained in *State v. Jones*, 145 N. C. 460, 59 S. E. 117; and it was held that upon appeal to the superior court from the judgment of the recorder's court an indictment by the grand jury of the superior court is dispensed with, and that the charge may be tried by the petit jury upon the warrant of the recorder.

[2] 2. It is contended that the defendant is denied his right of trial by a jury by this act. This contention has been decided adversely to the defendant in a number of cases. It is well settled by these decisions that the Legislature has the constitutional power to create recorders' courts, and to give them original jurisdiction over all criminal offenses below that of felony, and declare them to be petty misdemeanors. *State v. Collins*, 151 N. C. 648, 65 S. E. 617; *State v. Shine*, 149 N. C. 480, 62 S. E. 1080; *State v. Baskerville*, 141 N. C. 811, 53 S. E. 742; *State v. Lytle*, 138 N. C. 738, 51 S. E. 66.

In nearly all of these cases, it is said that an indictment by a grand jury on appeal to the superior court is unnecessary. The questions raised upon this appeal have been so fully and thoroughly discussed in the cases cited that it is unnecessary now to repeat what is there so well said.

The judgment of the superior court is affirmed.

**WALKER, J.** (concurring in result). I must concur in the opinion of the court, because so many cases have been decided to the same effect; but it must not be understood that I assent to the doctrine that the Legislature, under the article of our Constitution providing for the trial of petty misdemeanors, without a jury, but with the right of appeal, has the arbitrary right to declare what offenses shall be petty misdemeanors, so as to confer jurisdiction to try and condemn to infamous punishment, without a presentment or indictment by a grand jury and a trial by a petit jury. What difference does it make that we call it a petty misdemeanor, when the crime is punished, upon conviction, with hard labor and with

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

stripes; in other words infamously and as a felony? It seems to me that it is calling a thing by the wrong name, and is violative, not only of the letter and spirit of the Constitution, but of the sacred rights of the citizen, as guaranteed by that instrument, and which guaranty existed long before it was adopted. By the use of the term "petty misdemeanor" was meant such offenses as were known, in the law, by that name at the time the Constitution was ratified, or offenses of a similar grade. I am not attempting to overthrow the decisions of this court by argument or precedent, for, if that was my purpose, I would proceed in a different way, but merely to enter my earnest dissent to the principle, so often announced, as subversive of the rights and liberty of the citizen, and especially of the consecrated right of trial by jury. If you can, by legislative enactment, make larceny a petty misdemeanor, why not manslaughter, perjury, and other offenses of a higher grade of criminality? But we have often decided that this can be done; that is, that certain offenses which are punished infamously, by hard labor and involuntary servitude, and in a way far more degrading than corporal punishment, can be declared petty misdemeanors. The misdemeanor is sent to the roads, and by the same kind of reasoning he may be sent to the penitentiary, because, at last, it all depends upon the legislative will as to what offenses shall be felonies and what misdemeanors. I think we should retrace our steps, and decide the question according to the plain meaning of the Constitution; but until this is done I must abide by the precedents.

ALLEN, J., concurs in this opinion.

(159 N. C. 56)

#### HAMILTON v. NANCE.

(Supreme Court of North Carolina. April 17, 1912.)

#### 1. LIBEL AND SLANDER (§ 100\*)—VARIANCE—MATERIALITY.

Where, in an action for slander, plaintiff claimed that defendant said that the "news" was that plaintiff's husband "had" a venereal disease, and "has given it to his wife" (plaintiff), and defendant admitted that he said the "report" was to that effect, plaintiff was entitled to recover on the theory that defendant falsely accused her of being presently afflicted.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 246-272; Dec. Dig. § 100.\*]

#### 2. LIBEL AND SLANDER (§ 100\*)—ACTION—PLEADING—VARIANCE.

One suing for slander need not prove utterance of the exact words set out in the complaint, but must prove their substance.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 246-272; Dec. Dig. § 100.\*]

#### 3. LIBEL AND SLANDER (§ 101\*)—MALICE—BURDEN OF PROOF.

One who states that another is afflicted with venereal disease is presumed to be actuated

by malice; the burden being on him to prove the truth of the charge under plea of justification.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 273-280; Dec. Dig. § 101.\*]

#### 4. LIBEL AND SLANDER (§ 100\*)—ACTION—ISSUES.

In an action for slander per se, where justification or privilege is not pleaded, the issues are whether defendant spoke of plaintiff the words in substance relied on by plaintiff, and, if so, what damage plaintiff sustained; and if justification is pleaded there is an additional issue whether the words were true.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 246-272; Dec. Dig. § 100.\*]

Appeal from Superior Court, Union County; Cooke, Judge.

Action by Lillie A. Hamilton against Eli S. Nance. Judgment for defendant, and plaintiff appeals. New trial ordered.

Adams, Armfield & Adams and Stack & Parker, for appellant. Redwine & Sikes, McNeely & Brooks, and Robinson & Caudle, for appellee.

ALLEN, J. [1,2] The complaint alleges that the defendant charged that the "news" was that the husband of the plaintiff "had" a venereal disease, naming it, and "has given it to his wife." The answer admits that he said the "report" was that the husband of the plaintiff "has had" the disease named in the complaint, and "has given it to his wife."

The plaintiff tendered the following issue, which the court refused to submit, and the plaintiff excepted: "(1) Did the defendant wrongfully and falsely speak of and concerning the plaintiff language imputing that the plaintiff was afflicted with a venereal disease, as alleged in the complaint?"

His honor submitted the issue, "Did the defendant wrongfully and falsely speak of and concerning the plaintiff" (and then follows the words set out in the complaint), and charged the jury that if the plaintiff had not satisfied them by the greater weight of the evidence that the plaintiff spoke those words to answer the first issue, "No," and the plaintiff excepted.

In our opinion, the ruling was erroneous, and entitles the plaintiff to a new trial. In an action to recover damages for slander, the plaintiff is not required to prove the utterance of the exact words set out in the complaint, but must prove the words in substance; and his honor should have so instructed the jury. The issue submitted could not have been answered in favor of the plaintiff, under the instructions of the court, if the jury found that the defendant used all the language set out in the complaint, except that he used the word "report," instead of the word "news," which would be contrary to the practice under our system of pleading. Revisal, §§ 515 and 516.

Issues are approved in *McCurry v. McCurry*, 82 N. C. 296, *Wozelka v. Hettrick*, 98 N. C. 10, and in *Rice v. McAdams*, 149 N. C. 29, 62 S. E. 774, submitting the inquiry to the jury as to whether the defendant spoke the words set out in the complaint, "or words of the same substance"; and it is generally held that proof of the words in substance is sufficient. 18 A. & E. Encl. L. 1078; 13 Ency. Pl. & Pr. 63; 25 Cyc. 484; *Pegram v. Stoltz*, 67 N. C. 148.

The authorities seem to agree that charging that another *has* a loathsome disease, such as that described in the complaint, is actionable (*Kaucher v. Blinn*, 29 Ohio St. 62, 23 Am. Rep. 729; *Joannes v. Burt*, 6 Allen [Mass.] 236, 83 Am. Dec. 625; *Watson v. McCarthy*, 2 Ga. 57, 46 Am. Dec. 380; *Williams v. Holdredge*, 22 Barb. [N. Y.] 398; *McDonald v. Nugent*, 122 Iowa, 652, 98 N. W. 506; *Bloodworth v. Gray*, 49 E. C. L. 334; *Irons v. Field*, 9 R. I. 217; *Nichols v. Guy*, 2 Ind. 82), but that no action can be maintained if the charge is that he *had* the disease in time past (*Cooley, Torts*, p. 387; *Hale, Torts*, p. 301; *Jaggard, Torts*, p. 509; *Newell, S. & L.* p. 198; *Odgers, S. & L.* 62; *Pike v. Van Wormer*, 5 How. Prac. [N. Y.] 176; *Carlslake v. Maplebarum, Durf. & East R.* 474; *Golderman v. Stearns*, 73 Mass. 182; *Bruce v. Soule*, 69 Me. 566; *Williams v. Holdredge*, 22 Barb. [N. Y.] 398; *Irons v. Field*, 9 R. I. 217; *Nichols v. Guy*, 2 Ind. 82), to which last proposition we do not commit ourselves without qualification; but, if the first is true, it would seem that the answer substantially admits the allegations of the complaint, as the defendant therein says the husband had the disease, and "has given it to his wife," which at least admits of the construction that it referred, at the time of the utterance, to the present.

[3] If the defendant made the charge that the plaintiff had the disease at the time he was speaking, the law would presume malice, and the burden would be on the defendant to prove the truth of the charge under the plea of justification (*Ramsey v. Cheek*, 109 N. C. 273, 18 S. E. 775); and, as no such plea is relied on, the only issue, in that event, remaining for the jury to consider would be the one as to damages, and under this issue the defendant could offer evidence in mitigation. The fact that the charge is made in the form of a "report" or "news," instead of a direct charge, does not relieve the defendant. *Hampton v. Wilson*, 15 N. C. 468; *Johnston v. Lance*, 29 N. C. 459.

[4] The correct issues in actions to recover damages for slander, where the words alleged are actionable per se, and in which justification is not pleaded and privilege is not claimed, are: (1) Did the defendant speak of and concerning the plaintiff the words, in substance, alleged in the complaint? (2) If so, what damage is the plaintiff entitled to recover? If the first issue is

answered, "No," the case is at an end. If answered, "Yes," the law, in the absence of justification, says that the charge is false and malicious, and it is then the duty of the jury to award compensatory damages; and they may, in addition, award punitive damages, if there is actual malice, which may be inferred by the jury in some cases from the circumstances. *Stanford v. Grocery Co.*, 143 N. C. 419, 55 S. E. 815.

If justification is pleaded the issues are: (1) Did the defendant speak of and concerning the plaintiff the words, in substance, as alleged in the complaint? (2) If so, were they true? (3) What damages, if any, is plaintiff entitled to recover? If the first issue is answered, "No," or the second, "Yes," there can be no recovery; and if the first is answered, "Yes," and the second, "No," the jury may award damages. This is true, because the utterance of words actionable per se implies malice; and, in the absence of a plea of justification, or when the plea is entered and the issue is answered against the defendant, the law says the words are false.

There are many exceptions to evidence, which it might be well to consider; but we cannot do so without referring to the evidence, and it is so revolting that it ought not to be in our reports, except from absolute necessity. A new trial is ordered.

New trial.

(159 N. C. 39)

P. J. HUNYCUTT & CO. v. THOMPSON.  
(Supreme Court of North Carolina. April 7, 1912.)

1. PARENT AND CHILD (§ 5\*)—EMANCIPATION—EFFECT.

A father who refuses to support an infant son, and who drives him from his home, is not entitled to the earnings of the son during infancy.

[Ed. Note.—For other cases, see Parent and Child, Cent. Dig. §§ 70-76; Dec. Dig. § 5.\*]

2. PARENT AND CHILD (§ 3½,\* New, vol. 11, Key No. Series)—BURIAL OF MINOR—LIABILITY FOR EXPENSES.

A father who wrongfully drove from his home his infant son, who remained away until his death during infancy, is liable for the son's burial expenses.

Appeal from Superior Court, Stanley County; Daniels, Judge.

Action by P. J. Hunycutt & Co. against Wm. Thompson. From a judgment for plaintiff, defendant appeals. Affirmed.

This action is to recover \$40, alleged to be due the plaintiff for the burial expenses of the son of the defendant. The son was a minor, and was living apart from the defendant at the time of his death, and was in the enjoyment of his own earnings; but the plaintiff offered evidence tending to prove that the defendant wrongfully drove him from home. It was in the evidence that the son owned personal property of the val-

ue of \$60 or \$70, which was disposed of by his relations; and there was no evidence that the defendant expressly authorized the expense incurred. At the conclusion of the evidence, the defendant moved for judgment of nonsuit, which was denied, and the defendant excepted. Exceptions were also taken to the charge of his honor; but they are all involved in the motion for judgment of nonsuit.

The following verdict was returned by the jury:

"(1) Had the deceased, William Thompson, Jr., been emancipated by his father, and was he still emancipated at the time of his death? Answer: No.

"(2) In what amount, if any, is the defendant indebted to the plaintiff? Answer: Thirty-five dollars."

Judgment was entered on the verdict in favor of the plaintiff, and the defendant appealed.

I. R. Burleson and R. L. Smith, for appellant. A. C. Huneycutt, for appellee.

ALLEN, J. (after stating the facts as above). It is conceded, on the one hand, that the defendant would have been liable for the burial expenses of his son, a minor, incurred without his express authority, if the son had been living with the defendant at the time of his death, and, on the other, that there is no liability if the son left the home of the father voluntarily, and without fault on the part of the father. The point in debate, therefore, is whether the defendant can avoid liability, when he has wrongfully driven his child from home.

[1] The position taken by the defendant's counsel is sound, that "if a father neglects and refuses to support or maintain his son during his minority, and denies him a home, so that he is forced to labor abroad and procure a living for himself, he is not entitled to the earnings of such son, as, under such circumstances, the law will imply that the father has emancipated his son from his service, and conceded to him the right to enjoy the fruits of his own labor;" but it does not necessarily follow that the father is relieved from all responsibility, because he has lost the right to control the earnings of his son.

[2] The objection to such a conclusion is that it would permit the father to take advantage of his own wrongful act, and to relieve himself from responsibility by conduct which the law condemns; and, in our opinion, the charge of his honor was a clear and accurate statement of the law. He said: "The mere fact that a child is living away from home, with the consent of the parent, does not relieve the parent from liability for necessities furnished to the child, and the parent is liable, where his misconduct or abuse has driven the child to leave him; but ordinarily, where there is no fault upon the part of the parent, a child who voluntarily

abandons the parent's home, for the purpose of seeking its fortune in the world, or to avoid parental discipline and restraint, forfeits the claim to support, and the parent is under no obligation to pay therefor. A boy may be emancipated for some purposes, and may not be emancipated for others. There may be a total emancipation or a partial emancipation. If the plaintiff's contention is true in this case, the father ran the boy off and permitted him to go to work, and to earn wages and to collect his money. That would be an emancipation for certain purposes. That would authorize the boy to make contracts, collect the money, and spend the money. The father couldn't then come and collect his money. That would be an emancipation for that purpose. But if the father was in fault, if he ran the boy off from home, then there could be no emancipation which would relieve the father from the duty of providing necessities for the son, in the event he was down sick and died. I charge you that if the plaintiff has satisfied you by the greater weight of the evidence that the defendant drove his young son, William Thompson, away from his home, you will answer the first issue, 'No.' The first issue is: 'Had the deceased, William Thompson, Jr., been emancipated by his father, and was he still emancipated at the time of his death?' So, then, if you find from this evidence, and by the greater weight of it, that his father drove him away from home, and he remained away, according to the evidence, 12 months or 16 months, or whatever you may find to be the time, and was taken sick and died, your answer to the first issue will be, 'No,' because that didn't emancipate, didn't relieve the father from his duty to look after and protect and care for his son, because he was in fault, if you find that he ran him away from home. But if you find that the boy left of his own volition, because he wanted to go, because he was tired of home and wished to escape parental control and correction and seek his fortune in life for himself, and was earning money, and had on hand at the time of his death this buggy, which sold for \$37.50, according to the testimony, and the watch, which sold for \$5, and this balance in the hands of Mr. Ebird of \$16.20, then you would find, gentlemen, the answer to this first issue to be 'Yes.'"

The authorities are not uniform on this question; but they fully sustain the charge. 2 Kent, Com. 193; Tyler on Infancy, 114; 29 Cyc. 1609; Owen v. White, 5 Port. (Ala.) 435, 30 Am. Dec. 573; Weeks v. Merrow, 40 Me. 151; Bennett v. Gillette, 74 Am. Dec., note on page 782.

In 2 Kent, supra, the author says: "If a father suffers the children to remain abroad with their mother, or if he forces them from home by severe usage, he is liable for their necessities."

In Tyler on Infancy, supra: "If the par-

ent turn away his child from home, or so cruelly treat him that he cannot remain under the parental roof, or abandon him without adequate provision, the rule is well settled that such parent may be made to pay for necessities furnished such infant child."

In *Cyc.* supra: "The mere fact that a child is living away from home, with the consent of the parent, does not relieve the latter from liability for necessities furnished the child; and the parent is liable, where his misconduct or abuse has driven the child to leave him."

In *Owen v. White*, supra, the court says: "If a child leave his father's house to seek his fortune in the world, or to avoid domestic discipline and restraint, or escape from justice, the authority of the father to purchase necessities is not implied. But if a father abandon his duty to his infant child, so that he is forced to leave home, he is liable for a suitable maintenance. And the principle of the distinction is that in one case the father is blameless, and in the other blamable." And in *Weeks v. Merrow*, supra: "If a minor is forced out into the world by the cruelty or improper conduct of the parent, and is in want of necessities, such necessities may be supplied, and the value thereof collected of the parent, on an implied contract."

It follows, therefore, as there was evidence that the defendant had driven his minor son from home, that there was no error in denying the motion for judgment of nonsuit; and, the charge being in accordance with law and justice, the judgment is affirmed.

No error.

(159 N. C. 437)

#### OVERMAN v. LANIER et al.

(Supreme Court of North Carolina. April 17, 1912.)

#### EXECUTORS AND ADMINISTRATORS (§ 104\*)—ACCOUNTING—INTEREST.

In August, 1904, an administrator filed his final report, showing the balance due the distributees, but did not pay this balance into the clerk's office to stop the running of interest, as required by Revisal 1905, § 145. In a proceeding to have his report approved, it was adjudged that a much greater amount than that shown in the report was due the distributees. *Held*, that the administrator should be charged with interest on the whole amount found due from the date of filing the report.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 423-432; Dec. Dig. § 104.\*]

Appeal from Superior Court, Rowan County; Ferguson, Judge.

Proceeding by Lee S. Overman, as administrator, to have his final report approved and judgment of final discharge entered. From the judgment, Mattie Lanier and others appeal. Reversed and remanded.

Manley, Hendren & Womble, Walser & Walser, Burwell & Cansler, and Geo. W. Garland, for appellants. T. J. Jerome, B. J. Justice, E. C. Gregory, L. H. Clement, C. W. Tillett, and T. F. Kluttz, for appellee.

**PER CURIAM.** This case was decided at last term. 157 N. C. 544, 73 S. E. 192. The present appeal is upon the construction placed by the court below on the following language in our opinion: "The account should also be reformed to charge the administrator with interest from the date of filing the report on so much of the amount which is now adjudged to be due by him at that date on which interest is not calculated in the judgment below."

Administration was taken out in December, 1894. In August, 1904, the plaintiff administrator filed his final report, showing a balance of \$685.34 due by him at that date to the distributees. This proceeding was instituted by him in September, 1904, to have his final report approved and judgment of final discharge entered. Rev. § 150. The next of kin answered, alleging that said amount admitted to be due by the final report of the administrator was incorrect, and that sundry large sums were due them. The matter was submitted to a referee, and his report, which was filed in January, 1911, adjudged that the balance due by the administrator was \$5,346.33, with interest thereon. This court adjudged that a further amount was due by the administrator; i. e. \$1,000. It did not appear from the record whether interest was calculated by the referee from the date of the filing of the final report of the administrator in August, 1904, down to the judgment in May, 1911, or not, or, if it was, upon what sums. It seems clear that no interest was allowed upon the balance due by the administrator from filing the referee's report in January, 1911, to the judgment in May, 1911, and certainly none was allowed upon the additional amount of \$1,000 added by the judgment of this court.

This court, being of opinion that the true amount adjudged to be true by the administrator at the time of filing his report in August, 1904, should bear interest from that date, decreed that the account should be reformed as above stated; i. e., "that the account should be reformed to charge the administrator with interest from the date of filing the report" (by which we meant from filing his report in August, 1904) "on so much of the amount which is now adjudged to have been due by him at that date, on which interest is not calculated in the judgment below." The context of the opinion indicated this, as we thought, plainly. It would have been better, it seems, as there were two reports, one by the administrator in August, 1904, and the other by the referee in January, 1911, that we should have spe-

cifically stated which was meant; but we were discussing then the balance due by the administrator, and not any alleged errors of the referee, all of which had been passed on.

The report of the referee will be reformed, so as to ascertain, under the opinion of this court, the true amount due by the administrator in August, 1904, instead of the \$685.34 which his final report then admitted to be due, and interest will be calculated upon such balance from that date. *Bushee v. Surles*, 79 N. C. 53. The administrator should have filed a final report showing the true amount due by him at that date, and should have paid over the same to the defendants, or, if declined, he should have paid it into the clerk's office to stop the running of interest. Rev. § 145. On the contrary, he claimed and used as his own all above \$685.34, and did not even pay that into the office.

The case will be remanded, so that the court below may proceed in accordance with this opinion.

Reversed.

(159 N. C. 53)

CAUDLE et al. v. CAUDLE et al.

(Supreme Court of North Carolina. April 17, 1912.)

1. WILLS (§ 627\*)—ESTATE CREATED—TENANCY IN COMMON.

A testator devised to his daughter S. "60 acres of land"; to his daughter E. "40 acres"; to his son S. J. "125 acres"; to his son R. E. "82 acres," the latter to include "the old home place where I now live." The testator died seised and possessed of 347 acres of land, and the residuary clause showed an intention to dispose of all his realty. *Held*, that the will makes the devisees the sole tenants in common of the 347 acres, with the right to make partition at their pleasure, subject only to the one restriction, that one of the devisees should have the home place on the share set apart to him.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1452-1459; Dec. Dig. § 627.\*]

2. WILLS (§ 487\*)—CONSTRUCTION—PAROL EVIDENCE TO AID.

Parol evidence of surrounding circumstances is competent to assist a court in interpreting a will to ascertain the real intention of the parties.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1023, 1026-1032; Dec. Dig. § 487.\*]

Appeal from Superior Court, Stanly County; Justice, Judge.

Action by Hattie Caudle and others against Sarah Caudle and others. From a judgment for defendants, plaintiffs appeal. Affirmed.

Jerome & Price and R. E. Austin, for appellants. R. L. Smith, for appellees.

CLARK, C. J. The testator devised to his daughter Sarah "sixty acres of land"; to his daughter Ellza "forty acres"; to his daughter Henrietta "forty acres"; to his son S. J. "one hundred and twenty five acres"; to his son R. E. "eighty two acres,"

the latter to include "the old home place where I now live." It was admitted in the trial below that the testator died seised and possessed of 347 acres of land.

The plaintiffs are the other heirs of the testator, who have brought this proceeding against the devisees above named, alleging that the testator left 347 acres of land, and asking for a partition of the same among themselves and the defendants in equal shares. The clerk adjudged that the defendants were sole tenants in common of said 347 acres under the will. On appeal this judgment was affirmed by his honor, and the plaintiffs appealed.

[1] The court was correct in holding that the devisees were tenants in common of the 347 acres. If the testator had devised one-fifth of his land to each of said devisees, it could not be questioned that they were entitled to take as tenants in common and could make partition between themselves, or apply to the courts to order partition, and that one-fifth be set off and allotted to each devisee. It being admitted here that the testator left 347 acres of land, it follows that, instead of giving one-fifth thereof to each of said devisees, the testator devised  $\frac{40}{347}$  to one;  $\frac{40}{347}$  to another;  $\frac{60}{347}$  to another;  $\frac{125}{347}$  to another; and  $\frac{82}{347}$  to the other. The testator left it to the said devisees to use their own pleasure as to making partition among themselves in that proportion with no restriction save that one of the devisees named should have the home place on his 82 acres.

It may be that these devisees may prefer to continue as tenants in common, or they may set apart and allot in severalty to each the specified number of acres, if they can agree. If they cannot do so, then they may apply to the court to appoint commissioners to make and allot to each his share in severalty. The plaintiffs are the other heirs of the testator for whom other provision is made in the will. They have no interest in said 347 acres of land, and their petition for partition thereof was properly denied. In *Harvey v. Harvey*, 72 N. C. 570, the testator devised to one son 250 acres of land and to another 250 acres of land, and then provided that the remainder should be sold. The court held that it was competent to appoint commissioners to allot to each son 250 acres of land so as to make that certain which before was uncertain. The present is a much stronger case in favor of the devisees as the testator had only 347 acres and the acreage devised to the 5 devisees named foots up exactly 347. It thus appears that the title to the entire tract went to the 5 devisees as tenants in common, and that it is for them, should they wish to make partition. *Harvey v. Harvey*, supra, was cited with approval in *Jones v. Robinson*, 78 N. C. 400, and *Wright v. Harris*, 116 N. C. 465, 21 S. E. 914.

In the latter case the testator devised 50 acres of land to a family servant, and it was held that he was entitled to have 50 acres of land allotted to him by metes and bounds out of the 1,200 acres left by the testator. This decision was reaffirmed in *Harris v. Wright*, 118 N. C. 423, 24 S. E. 751.

[2] Parol evidence of surrounding circumstances is competent in the interpretation of a deed or will to enable the court to ascertain the intention of the parties. *Ward v. Gay*, 137 N. C. 397, 49 S. E. 884; *Boddie v. Bond*, 154 N. C. 359, 70 S. E. 824. But in this case it is not even necessary to do this. It is admitted that the testator owned 347 acres only, and the will shows on its face that he devised that number of acres in proportions stated to 5 of his children. The will specifies that one of the devisees is to have that part of the tract on which the "home place stood," and the residuary clause shows that the testator understood that he had disposed of all his realty.

The judgment of the court below is affirmed.

(159 N. C. 22)

**HARMON v. FERGUSON CONTRACTING CO. et al.**

(Supreme Court of North Carolina. April 17, 1912.)

**1. MASTER AND SERVANT (§ 315\*)—INDEPENDENT CONTRACTOR—LIABILITY.**

A person employing an independent contractor is not liable for his negligence, unless the work he is employed to do is so inherently dangerous that it cannot be let to another without incurring responsibility for the negligence.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 1241, 1244-1253, 1255, 1256; Dec. Dig. § 315.\*]

**2. MASTER AND SERVANT (§ 318\*)—LIABILITY FOR INJURIES—INDEPENDENT CONTRACTOR.**

In a contract between a railroad company and a construction company for the construction of a railroad, the railroad company reserved the power, through its engineer, to discharge any foreman or employé who was unskillful or remiss in the performance of his duties, and it was provided that a certain part of the work, if ordered by the railroad company's engineer, should be done under and according to his direction. The general scope and purpose of the contract indicated an understanding that the railroad company did not part with its authority and supervision over the work. *Held*, that the construction company was the servant of the railroad company, and not an independent contractor, so that the railroad company was liable to another servant for the negligence of the construction company or its employés; *Revisal* 1905, § 2647, and note, expressly permitting a recovery by a servant of a railroad company for the negligence of a co-servant.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 1257, 1258; Dec. Dig. § 318.\*]

**3. MASTER AND SERVANT (§ 316\*)—"INDEPENDENT CONTRACTOR."**

An "independent contractor" is one who in the exercise of an independent employment contracts to do a piece of work according to his own methods without being subject to his

employer's control, except as to the results of the work.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 1242, 1243; Dec. Dig. § 316.\*]

For other definitions, see *Words and Phrases*, vol. 4, pp. 3542-3543; vol. 8, p. 7686.]

**4. MASTER AND SERVANT (§§ 103, 101, 102\*)—LIABILITY FOR INJURIES—DUTIES OF MASTER.**

A master is charged with the duty of exercising ordinary care in supplying his servants with reasonably safe tools and implements, and a reasonably safe place in which to work, and cannot escape responsibility for the proper discharge of this duty by selecting some one else to perform it.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 175, 135, 171, 172, 180-184, 192; Dec. Dig. §§ 103, 101, 102.\*]

**5. MASTER AND SERVANT (§ 124\*)—LIABILITY FOR INJURIES—DUTY OF INSPECTION.**

A master is bound to make such reasonable inspection of the tools and implements furnished his servants and the place in which they are to perform their work as a man of ordinary prudence would make under similar conditions and circumstances.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 235-242; Dec. Dig. § 124.\*]

**6. MASTER AND SERVANT (§ 278\*)—ACTIONS FOR INJURIES—EVIDENCE.**

In a servant's action for injuries caused by a breaking rope, where there was some evidence that the defect in the rope was not latent, a verdict for plaintiff was supported by the evidence.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 954-972, 977; Dec. Dig. § 278.\*]

**7. TRIAL (§ 253\*)—INSTRUCTIONS—IGNORING ISSUES.**

In a servant's action for injuries from the breaking of a rope used on a pile driver, where there was evidence of defects in the rope, and also of negligence of the person operating the pile driver, instructions to find for defendants if the jury should find as specified as to the condition of the rope were properly refused, even if otherwise correct, because they ignored the issue of negligence on the part of the operator of the pile driver.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 613-623; Dec. Dig. § 253.\*]

Appeal from Superior Court, Davidson County; Daniels, Judge.

Action by C. P. Harmon against the Ferguson Contracting Company and another. From a judgment for plaintiff, defendants appeal. Affirmed.

This action was brought to recover damages for injuries to the plaintiff, alleged to have been caused by the negligence of the defendants while he was in their employ at Whitney, N. C. Plaintiff complained as follows:

"(1) The plaintiff at the time of the injuries hereinafter set out and at the time of the institution of this action was a resident of the state of North Carolina, and the defendant the Ferguson Contracting Company was a corporation and was doing business at the time near the town of Whitney, N. C., and the defendant the Winston-Salem South-



bound Railway Company is a corporation organized and doing business under the laws of this state, being engaged at the time of the injury to plaintiff hereinafter described through its codefendant, the Ferguson Contracting Company, in the construction of its roadbed near the said town of Whitney.

"(2) That on or about the 6th day of June, 1910, while in the employment of the Ferguson Contracting Company near the town of Whitney, the plaintiff was injured under the following circumstances: Plaintiff, with a force of hands, was excavating on the south side of a hollow, for the purpose of putting in pedestals, preparatory to the erection of trestles for a bridge at Harper's Mill trestle in Stanley county, and that one Dobbin was, with a force of hands, in charge of a pile driver, and at work for the same company on the other side of the hollow, about 300 feet away. That the pile driver was operated by means of two ropes, one a manilla rope and the other a wire rope. That about the hour of 9 a. m. one of the ropes broke while the pile driver was being lifted by the engine, and flew with great force, and wrapped itself around the plaintiff's neck, jerking him into a pit some 15 feet deep, and severely injuring his back, right shoulder, and left hip, and permanently disabling him. At the time of the injury, the plaintiff was standing some 5 or 10 feet from the line of the rope, on a mixing board, at work.

"(3) That the plaintiff's injuries were caused by the carelessness and negligence of the said Dobbin, manager of the pile driver of the defendant Ferguson Contracting Company, in that the rope or cable which broke was defective, some of the strands being worn or broken, and further by his carelessness and negligence in that the pulley, over which the said rope runs, was not high enough to raise the pile driver, and said pile driver and frame over which the rope ran and on which the pulley was located, being too near on a level, producing too great a strain on the rope and causing it to break.

"(4) That the said injuries of the plaintiff were brought about by the carelessness and negligence of the defendant the Winston-Salem Southbound Railway Company, in that it failed to keep supervision of the dangerous work being done by Dobbin, and in employing incompetent and unskillful servants and agents to operate the pile driver, and in allowing the said servants and agents to use defective and dangerous machinery and apparatus in pursuit of their work, which brought about injuries to the plaintiff, as above set out, and for which both the defendants are liable as joint tort-feasors. That prior to his injuries plaintiff was a skillful and experienced workman, commanding high wages, and earned a salary of from \$100 to \$200 dollars per month, but since said injuries the plaintiff has been unable and unfit for active work, and suffers great

mental and bodily pain at all times, to his permanent damage in the sum of twenty-five thousand (\$25,000) dollars."

The defendants filed separate answers, denying the alleged negligence, and averring that the pile driver and two ropes were in good condition, and had been properly inspected. They pleaded specially that plaintiff had been duly warned by Dobbin that they were about to pull on the ropes for the purpose of lifting the pile driver and to move out of the way of danger as the ropes might break under the heavy strain put upon them, which plaintiff failed to do in his own wrong, and was injured. There was evidence to support the allegations of the respective parties.

There was a verdict for the plaintiff, and the defendants appealed.

F. C. Robbins, Phillips & Bower, and Watson, Buxton & Watson, for appellant Ry. Co. Morrison & McLain, for appellant Ferguson Contracting Co. E. E. Raper and McCrary & McCrary, for appellee.

WALKER, J. It seems to us that the charge explained the law and the evidence to the jury as clearly as it could be done. One of the main issues between the parties related to the character in which the Construction Company was doing the work for the Railway Company, the other to the question of negligence.

[1] If the Construction Company was an independent contractor, the other company was not liable for its negligence, unless the work was so inherently dangerous that it could not be let out to another without incurring responsibility for his negligence.

[2] We need not discuss this aspect of the case, as we do not think the Construction Company was an independent contractor, but a servant of its codefendant, the Railway Company, and therefore the latter is liable for its negligence or that of its employees. The rule as to fellow servants does not apply. Pell's Revisal, § 2647, and note. If the injury to the plaintiff was caused by the negligence of the servant, Dobbin, or by reason of defective machinery or appliances, which defect the exercise of ordinary care would have removed, the defendants are liable—the Railway Company, because the other company was its servant, and the Construction Company, because it had undertaken to do the work and employed Dobbin, as its servant, to assist in doing it. In several respects the contract between the Railway Company and the Construction Company plainly reserves control and direction over the work, through its engineer, with the power of discharging any foreman or employé "who is unskillful or remiss in the performance of his work," and it is provided that a certain part of the work, when ordered to be done by the engineer in charge and representing the Railway Company, shall

be performed and the material therefor furnished "under and according to his direction." The general scope and purpose of the contract indicates an intention and understanding that the Railway Company should not be considered as having parted with its authority and supervision over the work. The court in this case submitted the question to the jury, and required them to find, under the evidence, whether or not the Construction Company was an independent contractor, giving the jury correct instructions as to what was necessary to constitute one an independent contractor. This matter was fully considered in *Denny v. Burlington*, 155 N. C. 33, 70 S. E. 1085, *Thomas v. Lumber Co.*, 153 N. C. 351, 69 S. E. 275, 32 L. R. A. (N. S.) 584, and *Johnson v. Railroad*, 157 N. C. 382, 72 S. E. 1057, where the cases are collected.

[3] Generally stated, an independent contractor is one who in the exercise of an independent employment contracts to do a piece of work according to his own methods, without being subject to his employer's control, except as to the results of the work, and this we understand to have been substantially the definition given by the court to the jury. Another very terse definition we find in *Smith v. Simmons*, 103 Pa. 32, 49 Am. Rep. 113: "Where one who contracts to perform a lawful service for another is independent of his employer in all that pertains to the execution of the work, and is subordinate only in effecting a result in accordance with the employer's design, he is an independent contractor, and in such case the contractor alone, and not the employer, is liable for damages caused by the contractor's negligence in the execution of the work." And in 28 Cyc. 970, will be found the following statement of the rule: "One who contracts to do a specific piece of work, furnishing his own assistants, and executing the work either entirely in accordance with his own ideas, or in accordance with a plan previously given to him by the person for whom the work is done, without being subject to the orders of the latter in respect to the details of the work, is an independent contractor, and not a servant." In *Beal v. Fibre Co.*, 154 N. C. 147, 69 S. E. 834, Justice Hoke said: "If the proprietor retains for himself or for his agent (e. g., architect and superintendent) a general control over the work, not only with reference to results, but also with reference to methods of procedure, then the contractor is deemed the mere agent or servant of the proprietor, and the rule of respondeat superior operates to make the proprietor liable for his wrongful acts or those of his servants, whether the proprietor directly interfered with the work and authorized and commanded the doing of such acts or not. It is not necessary, in such a case, that the employer should actually guide and control the contractor. It is

enough that the contract vests him with the right of guidance and control." Read and construed in the light of the authorities, the contract in this case does not establish that independence of service in the Construction Company which is required to exonerate the Railway Company from liability for its negligence, and the rule of respondeat superior applies.

[4-7] Upon the question of negligence, there was evidence to show that the rope was defective and insufficient. It is a primary duty of the master to exercise ordinary care in supplying his servant with reasonably safe tools and implements and a reasonably safe place in which to perform his work, and he cannot escape responsibility for the proper discharge of this duty by selecting some one else to perform it. He must see that his duty is performed, and, it not being delegable, he cannot shift the obligation to another. *Reid v. Rees*, 155 N. C. 230, 71 S. E. 315; 28 Cyc. 1097. And there is also the duty of the master to make such reasonable inspection as a man of ordinary prudence would make under similar conditions and circumstances. *Womble v. Grocery Co.*, 135 N. C. 474, 47 S. E. 493; *Cotton v. Railroad*, 149 N. C. 227, 62 S. E. 1093. There was also evidence tending to show that the pile driver had not been properly handled by Dobbin. These questions were fairly submitted to the jury with proper instructions as to the law. If the plaintiff was injured by reason of a defect in the rope, which was discoverable by ordinary inspection and was not latent, or by the negligence of Dobbin, he was entitled to recover damages. It does not appear that the defect in the rope was latent; or, to state it a little differently, there is evidence tending to show that it was not, which the jury had the right to consider. It seems to have been suspected of being unsafe or unreliable, as the defendant alleges contributory negligence on the part of the plaintiff, upon the ground that he had been warned of the danger, if the rope should break, and failed to take care of himself. Besides, the prayers for instruction of both defendants as to the defectiveness of the rope are confined to that single act of negligence, and leave out of consideration the other charge of negligence on the part of Dobbin, and therefore the court could not have instructed the jury to answer the first issue, as to negligence, in the negative, without omitting an important phase of negligence from the instruction. The prayers did not take in all the facts going to prove negligence. A careful perusal of the prayers and the charge lead us to the conclusion that the judge substantially responded to all proper prayers and instructed the jury fully and correctly upon the different matters involved in the case, including the question of contributory negligence. We can only correct errors in law, and not any miscarriage by

the jury in finding the facts. This must be left to the supervision of the trial judge, who has the power to set aside the verdict, if against the weight of the evidence.

No error.

(159 N. C. 439)

**THOMPSON v. SMITH et al.**

(Supreme Court of North Carolina. April 17, 1912.)

**EXECUTORS AND ADMINISTRATORS (§ 456\*)—CHARGES AND CREDITS—COSTS.**

Under Revisal 1905, § 1277, which provides that costs assessed against executors and administrators, suing or being sued in their representative capacity, are chargeable only on the estate represented, unless, for mismanagement or bad faith, the court directs the payment to be made by the representative personally, where, on appeal from a judgment in favor of defendants, who were sued as administrators, there was nothing which would warrant making one of them personally liable for the costs on appeal, the costs must be paid by the administrators, and allowance made therefor in the administration account.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 1941-1967; Dec. Dig. § 456.\*]

Action by Fannie H. Thompson against Marcellus Smith and another, executors. From a judgment for defendants, plaintiff appeals. Motion by plaintiff to tax Marcellus Smith personally with costs of appeal on a reversal. Motion denied.

J. H. Fleming, for appellant. B. M. Gatling, for appellees.

**PER CURIAM.** This is a motion by plaintiff to tax the defendant, Marcellus Smith, personally with the costs of this court. Defendants were successful in the court below in the case, and plaintiff appealed. The judgment was reversed here, and the cause remanded to be further proceeded with in accordance with law. We do not see any reason at present for giving a personal judgment against Smith. He was brought here by the plaintiff's appeal, and his conduct has not been frivolous, and he has done nothing to make himself personally liable. The defendants should pay the costs of this court as administrators, and they will be allowed a credit for the same in their administration account, unless the plaintiff can show sufficient reason to the lower court why it should not be allowed. Provision as to the recovery of costs against executors and administrators is made in Revisal, § 1277, where such costs are declared to be "chargeable only upon or collected out of the estate, fund or party represented, unless for mismanagement or bad faith in prosecuting or defending the action, the court shall direct the same to be paid personally by the representative," but no such case is presented here.

The motion is denied, with costs to be taxed.

Motion denied.

(159 N. C. 209)

**BURWELL v. CHAPMAN et al.**

(Supreme Court of North Carolina. April 17, 1912.)

**1. LOGS AND LOGGING (§ 3\*)—CONVEYANCES OF TIMBER—REGISTRATION—NECESSITY.**

A purchaser's actual notice of the prior conveyance of the title to standing timber bought by him cannot supply the notice by registration required under the statute relating to the transfers of land.

[Ed. Note.—For other cases, see *Logs and Logging*, Cent. Dig. §§ 6-12; Dec. Dig. § 3.\*]

**2. LOGS AND LOGGING (§ 3\*)—CONVEYANCE OF STANDING TIMBER—CONSIDERATION—SUFFICIENCY.**

A release of damages caused by cutting timber in violation of the restrictions of a deed to standing timber was a sufficient consideration for a reconveyance of the timber rights to render those to whom the reconveyance was made purchasers for value.

[Ed. Note.—For other cases, see *Logs and Logging*, Cent. Dig. §§ 6-12; Dec. Dig. § 3.\*]

**3. LOGS AND LOGGING (§ 3\*)—CONVEYANCES OF STANDING TIMBER—CONSTRUCTION.**

A deed reconveying all the standing timber rights of all kinds which the grantees had previously conveyed to the grantor on certain land particularly described by metes and bounds, the prior deed being on record, conveyed all the standing timber rights received under the first deed, and not merely such as the grantor had not previously parted with.

[Ed. Note.—For other cases, see *Logs and Logging*, Cent. Dig. §§ 6-12; Dec. Dig. § 3.\*]

Appeal from Superior Court, Granville County; O. H. Allen, Judge.

Action by D. A. Burwell against A. A. Chapman and others. From a judgment of nonsuit, plaintiff appeals. Affirmed.

D. G. Brummitt and T. T. Hicks, for appellant. T. Lanier and Graham & Devin, for appellees.

**BROWN, J.** Civil action brought to restrain the defendants from interfering with the plaintiff in cutting and removing timber from certain lands, and to declare the plaintiff to be the owner of the timber rights on said lands. The defendants denied the title of the plaintiff to the timber in question. The plaintiff presented several contentions upon which he based his right to cut the timber in question, but, in the view we take of the case, it is necessary to consider only one. The timber lands in controversy belonged to the defendants, who conveyed all of the timber of whatever kind and description growing and standing on the said lands, subject to certain restrictions, to H. C. Wolfe of Pennsylvania. The said conveyance is dated the 28th of June, 1906, and was duly registered on the 29th of September, 1906, and fully describes the land upon which the said timber was growing. It is claimed that Wolfe purchased the timber for himself and others, and that he and his associates contracted to form a corporation to whom this timber was to be conveyed, and by which it was to be manufactured. It appears that the company was incorporated and stock

taken as agreed by the incorporators. Wolfe was elected manager of the corporation. He continued to be such until July, 1909, when he resigned. During that time a large part of the timber was taken from the land and sold. On January 16, 1909, this company, by its manager, Wolfe, conveyed certain of the timber to the plaintiff, which the plaintiff proceeded to cut and remove under his contract, which conveyance was not registered until the 1st day of May, 1911. On the 25th day of January, 1911, the said Wolfe reconveyed to these defendants all of the standing timber and timber rights on the said land, specifically describing the land as being fully described in a deed from the defendants to H. C. Wolfe, recorded in Book 60, p. 384, in the office of registrar of deeds of Granville county. This deed was registered on the 26th of January, 1911.

[1] 1. The conveyance or timber contract, whatever it may be called, under which the plaintiff claims the timber in controversy, was not registered until May, 1911, at which time the deed from Wolfe, reconveying all of the property he had purchased from them, had been duly executed and recorded, to wit, on January 26, 1911. The plaintiff contends that the defendants had notice of the existence of the said timber contract made with the plaintiff, and that, when they took the reconveyance from Wolfe, they took subject to the plaintiff's rights. It is not necessary to discuss the fact as to whether there is any evidence as to actual notice to the defendant, for no notice of the character claimed by the plaintiff, however full, can supply the notice by registration required by the statute. This court has held in several cases that standing trees are a part of the realty, and conveyances of title thereto must be sufficient in form to convey realty, and that such conveyances are governed by all the laws relating to the transfer of title to land itself. *Hawkins v. Lumber Company*, 139 N. C. 161, 51 S. E. 852. Applying this principle, it has been held that purchasers for value under a deed sufficient in form and properly registered are not affected with notice by possession under a prior deed, either invalid or not registered at the time of the other conveyance. *Tremaine v. Williams*, 144 N. C. 114, 56 S. E. 694; *Collins v. Davis*, 132 N. C. 106, 43 S. E. 579; *Bialock v. Strain*, 122 N. C. 283, 29 S. E. 408; *Patterson v. Mills*, 121 N. C. 267, 28 S. E. 368.

[2] 2. But it is contended by the plaintiffs that these defendants taking under the deed from Wolfe dated January 25, 1911, are not purchasers for value, and take subject to the equities of the plaintiff. We find no evidence to support this theory. On the contrary, the recited consideration of the deed from Wolfe to the defendants is the sum of \$1, "and in consideration of the parties of the second part releasing the party of the first part (Wolfe) and the Stovall Lumber

Company from all claims for damage on account of waste." It was contended by the defendants that Wolfe had caused the said timber lands to be denuded of timber in violation of the terms and restrictions contained in the deed of June 28, 1906, executed by the defendants to Wolfe. This release upon the part of the defendants was undoubtedly a release of a valuable right, and formed a valuable consideration as a basis for the reconveyance by Wolfe to them.

[3] 3. It is further contended that the reconveyance from Wolfe to the defendants conveyed only such standing timber rights in the land as he, Wolfe, then had, and that, having parted with them to the plaintiff, he had nothing to convey to the defendants. As we read the reconveyance, Wolfe reconveyed to the defendants all of the standing timber rights of all kinds which the defendants had previously conveyed to Wolfe on 2,070 acres of land, particularly described by metes and bounds in the deed from Wolfe to the defendants.

Upon a review of the record, the judgment of the superior court is affirmed.

HOKE and ALLEN, JJ., took no part in the decision of this case.

(150 N. C. 9)

CLINTON-DUNN TELEPHONE CO. v. CAROLINA TELEPHONE & TELEGRAPH CO.

(Supreme Court of North Carolina. April 17, 1912.)

1. TELEGRAPHS AND TELEPHONES (§ 34\*)—REGULATIONS—CHARGES.

A telephone company is a public service corporation, and, as such, is subject to regulation and control, and is required to afford its service at uniform and reasonable rates to all who will pay its charges, and abide by its reasonable regulations, without discrimination.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. § 21; Dec. Dig. § 34.\*]

2. TELEGRAPHS AND TELEPHONES (§ 12\*)—DUTY TO PERFORM SERVICES—CONNECTION WITH OTHER LINES.

In the absence of constitutional or statutory requirement, the obligation of a telephone company, as a public service corporation, to furnish service without discrimination, does not as a rule extend to making physical connection with the company's lines, but where such connection has been voluntarily made under a fair and workable arrangement, and the continuous line has come to be patronized and established as a public convenience, such connection may not be severed by one of the parties in breach of the agreement, but must be continued; and such duty extends to the assignee of a contract running to successors and assignees, who has full knowledge of its existence or facts which would have put it on inquiry leading to knowledge thereof.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Dec. Dig. § 12.\*]

3. TELEGRAPHS AND TELEPHONES (§ 34\*)—REGULATION AND OPERATION—CHARGES—BETWEEN PARTIES.

Where a telephone company, acting under a quasi public franchise, took an assignment

of a contract under which a physical connection with its own lines had been made, and the users thereof had become entitled to a continuation of such connection and service, the original contract providing rates for such service, if discriminating between the company's patrons receiving like service under like conditions, or if so unreasonable and burdensome as to render the company unable to properly perform the duties imposed by its charter, must be annulled to that extent, and the parties, except the parties to the assignment, allowed to continue the service under such reasonable rates as may be agreed upon or which may be approved by public authorities.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. § 21; Dec. Dig. § 34.\*]

**4. MANDAMUS (§ 133\*)—PUBLIC SERVICE CORPORATIONS—TELEPHONE CHARGES.**

Mandamus will lie to enforce the performance of the duties of a telephone company existing for the benefit of the public.

[Ed. Note.—For other cases, see *Mandamus*, Cent. Dig. § 268; Dec. Dig. § 133.\*]

**5. INJUNCTION (§ 5\*)—MANDATORY INJUNCTION—TELEPHONE CHARGES.**

Mandatory injunction will lie to enforce the performance of obligations of a telephone company which solely concerned individuals.

[Ed. Note.—For other cases, see *Injunction*, Cent. Dig. § 4; Dec. Dig. § 5.\*]

Appeal from Superior Court, Sampson County; Peebles, Judge.

Action by the Clinton-Dunn Telephone Company against the Carolina Telephone & Telegraph Company. Judgment for plaintiff, and defendant appeals. Modified and affirmed.

Civil action to compel defendant company to restore telephone connection of plaintiff company with the local exchange of defendant company in Dunn, N. C., and supply service in that town for plaintiff and subscribers, pursuant to a contract set forth and described in the complaint. The cause was heard on a rule to show cause, obtained in term and returnable before his Honor, R. B. Peebles, Judge, holding the courts of the Sixth district, at Wilmington, N. C., on June 3, 1911, and, on affidavits and proofs offered, it was adjudged that on plaintiff's entering into a justified bond in the sum of one thousand dollars conditioned to pay all costs and damages arising by reason of the order, in case same should be set aside, the connection be restored as prayed for and the services rendered free of charge to plaintiff and its subscribers, according to the terms of the contract referred to. Both parties having consented that the hearing could be continued and issue determined outside of Wilmington, the judgment was signed and entered at Beaufort, N. C., on July 5, 1911, and defendant, having duly excepted, appealed to Supreme Court.

J. C. Clifford and G. M. T. Fountain & Son, for appellant. Falson & Wright, for appellee.

HOKE, J. (after stating the facts as above). On the hearing it was made to ap-

pear: That in 1901 E. F. Young and wife owned and operated for charge a local telephone system in the town of Dunn, N. C., and plaintiff, a corporation acting under a quasi public franchise, owned and operated a like system in the town of Clinton, N. C., and was extending its line towards Dunn. That on February 15th of that year the said Young and wife entered into a contract with plaintiff in consideration of \$10, and that plaintiff company would pay for two-thirds of the poles from the corporate line of Dunn to the local exchange in the town and of mutual stipulations in the agreement, whereby the said plaintiff company could physically connect its system with the local exchange in Dunn, and the patrons of the Dunn system, for a single charge of 25 cents, could send messages to Clinton and have service for local delivery in that town without further charge, and plaintiff and its subscribers should have like privilege and service in reference to local delivery in Dunn. The agreement stipulated, further, "that the parties shall quietly enjoy the same and that this contract shall remain in full force and effect from and after the signing and sealing of the same and the successors and assigns of each shall forever quietly enjoy the privileges granted by the contract; that the toll fees of each shall be 25 cts. from exchange to exchange and that local messages shall be settled and established by each so that the fees charged shall not exceed 25 cts.; \* \* \* that this contract shall not be revoked or changed without the consent and the same mutually agreed to by each, their successors and assigns. In testimony whereof, etc." That the physical connection was then made, the parties entered into the enjoyment and exercise of the privileges conferred by the contract, and continued therein until October, 1901, when Young and wife sold and conveyed their system and all rights, etc., held by them to defendant company, a corporation acting also under a quasi public franchise and owning and operating an extended system of telephone lines in the eastern part of the state. That the purchaser entered into the exercise of the rights conferred by the contract with plaintiff and physical connection being continued, and stipulated service afforded by each until February, 1910, when defendant, having, as stated, acquired the plants of various companies in the eastern part of the state and claiming to have spent large sums of money in improving these lines, giving them better equipment and affording a higher order of service, wrote plaintiff company, saying that the contract was not considered as binding on defendant. That it had not been made by the company. That it was unfair in its obligations and burdens, and discriminative in its terms and operation. The letter stated, further: That the rights conferred had been abused on the part of plaintiff company, by extending

the privileges granted to other lines and systems not included in the agreement, and contained formal notice that, unless within 30 days plaintiff entered into a contract agreeing to pay \$72 per annum for service in Dunn to plaintiff and its subscribers and \$72 additional per annum for each additional system, exercising the privileges of the contract, and by plaintiff's permit or procurement, the connection with plaintiff company would be discontinued. That, this demand not having been complied with, defendant severed the connection with plaintiff's system, depriving plaintiff and its subscribers and patrons of all service and telephone connection with Dunn and its inhabitants or any possibility of procuring the same except on defendant's terms. On these, the facts chiefly relevant to the inquiry, we think the court below correctly ruled that plaintiff was entitled to have the connection restored and service afforded, but that the order should be modified or so interpreted that the rate at which this service shall be rendered must be made to depend upon further findings of fact, to be had and made in the cause.

[1] It is very generally recognized that a telephone company, acting under a quasi public franchise, is properly classified among the public service corporations, and as such is subject to public regulation and reasonable control, and is required to afford its service at uniform and reasonable rates and without discrimination among its subscribers and patrons for like service under the same or substantially similar conditions. *Godwin v. Telephone Co.*, 136 N. C. 258, 48 S. E. 636, 67 L. R. A. 251, 103 Am. St. Rep. 941, 1 Ann. Cas. 203; *Leavell v. Western Union*, 116 N. C. 211, 21 S. E. 391, 27 L. R. A. 843, 47 Am. St. Rep. 798; *Horner v. Electric Co.*, 153 N. C. 535, 69 S. E. 607, 138 Am. St. Rep. 681; *Griffin v. Water Co.*, 122 N. C. 206, 30 S. E. 319, 41 L. R. A. 240; *Commercial Union Telegraph Co. v. Telephone & Telegraph Co.*, 61 Vt. 241, 17 Atl. 1071, 5 L. R. A. 161, 15 Am. St. Rep. 593; *Telephone Co. v. Telegraph Co.*, 66 Md. 399, 7 Atl. 809, 59 Am. Rep. 167; *Yancey v. Telephone Co.*, 81 Ark. 486, 99 S. W. 679, 11 Ann. Cas. 135; *Telephone & Telegraph Co. v. Kelly*, 160 Fed. 316, 87 C. C. A. 268, 15 Ann. Cas. 1210.

[2] In the absence of constitutional or statutory requirement, this obligation to afford service at reasonable rates and without discrimination to all who will "pay the charges and abide by the reasonable regulations of the company" does not as a rule extend to making physical connection with the company's lines, but there is high authority for the position that, when such physical connection has been voluntarily made, under a fair and workable arrangement and guaranteed by contract and the continuous line has come to be patronized and established as a great public convenience, such connection shall not in breach of the agreement be severed by one of the parties. In that case the

public is held to have such an interest in the arrangement that its rights must receive due consideration. This position finds approval in *State ex rel. v. Cadwallader*, 172 Ind. 619-636, 87 N. E. 650, and is stated in the elaborate and learned opinion of Chief Justice Myers as follows: "Such physical connection cannot be required as of right, but if such connection is voluntarily made by contract, as is here alleged to be the case, so that the public acquires an interest in its continuance, the act of the parties in making such connection is equivalent to a declaration of a purpose to waive the primary right of independence, and it imposes upon the property such a public status that it may not be disregarded"—citing *Mahan v. Mich. Tel. Co.*, 132 Mich. 242, 93 N. W. 629, and the reasons upon which it is in part made to rest are referred to in the same opinion, as follows: "Where private property is by the consent of the owner invested with a public interest or privilege for the benefit of the public, the owner can no longer deal with it as private property only, but must hold it subject to the rights of the public in the exercise of that public interest or privilege conferred for their benefit." *Allnut v. Inglis* (1810) 12 East, 527. The doctrine of this early case is the acknowledged law. It is stated somewhat differently in *Munn v. Illinois* (1876) 94 U. S. 113, 24 L. Ed. 77, where it is said: "Property does become clothed with a public interest when used in a manner to make it of public consequence, and affects the community at large. When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created. He may withdraw his grant by discontinuing the use; but, so long as he maintains the use, he must submit to the control." See, also, *Telephone Co. v. Telephone Co.*, 118 Ky. 277, 80 S. W. 1114, 84 S. W. 518; 37 Cyc. pp. 1621-1658. While we hold, therefore, that the physical connection of these lines should be continued, it does not necessarily follow that the service shall be rendered at the rate originally fixed upon. So far as these parties are individually concerned, these original rates should bind. It is true that defendant company was not one of the original contracting parties, but the contract provides that it shall extend to the successors and assigns of each and defendant company with full knowledge of its existence or of facts that should have put it upon inquiry leading to knowledge, took over the property, entered on the enjoyment of the rights and privileges conferred, and may not be allowed as individuals to repudiate its obligations and its burdens. *Mahan v. Mich. Telephone Co.*, 132 Mich. 242, 93 N. W. 629. But here, too, the rights of the public must on authority and principle be allowed to affect the ques-

tion. As heretofore stated, these public service corporations are required to render their service at uniform and reasonable rates and without discrimination, and they are not allowed to enter on or continue in the performance of a contract which discriminates among their patrons or which renders them unable to afford the same or perform the duties imposed upon them by reason of their charter. *Griffin v. Water Co.*, supra; *Gibbs v. Gas Co.*, 130 U. S. 396, 9 Sup. Ct. 553, 32 L. Ed. 979; *Western Union v. American Union*, 65 Ga. 160, 38 Am. Rep. 781; *Thompson on Corporations*, § 2792, and authorities cited. In the case of *Gibbs v. Gas Co.* the position is stated as follows: "Courts decline to enforce contracts which impose a restraint, though only partial, upon business of such character, that restraint to any extent will be prejudicial to the public interest. But, where the public welfare is not involved and the restraint upon one party is not greater than protection to the other party requires, a contract in restraint of trade may be sustained. A corporation cannot disable itself by contract from the performance of public duties which it has undertaken, and thereby make public accommodation or convenience subservient to its private interests."

[3] And, applying the principle, if, under conditions developed in the reasonable and orderly exercise and performance of defendant's duties, under its charter, the rates agreed upon between these contracting parties are of a character that discriminates among defendant's patrons receiving like service under like conditions, or it is so unreasonable and burdensome as to render defendant company unable to perform properly the duties incumbent under its charter, the agreement, to that extent, must be annulled and the parties allowed to continue the service under such reasonable rates as they may further agree upon, or which may be sanctioned and approved by the supervising agencies established by law for the purpose. *Revisal 1905*, § 1086 et seq.

[4, 5] In regard to the form of remedy available, where, as in this state, the same court is vested with both legal and equitable jurisdiction, there is very little difference in its practical results between proceedings in mandamus and by mandatory injunction; the former being permissible when the action is to enforce performance of duties existent for the benefit of the public and the latter being confined usually to causes of an equitable nature and in the enforcement of rights which solely concern individuals. *High on Injunctions* (4th Ed.) § 2. Owing to the public interests involved in controversies of this character, it is generally held that mandamus may be properly resorted to. *Godwin v. Telephone Co.*, supra; *Commercial Union v. Tel. Co.*, supra; *Mahan v. Telephone Co.*, 132 Mich. 242, 93 N. W. 629; *Yancey v. Telephone Co.*, 81 Ark. 486, 99 S. W.

679, 11 Ann. Cas. 135. We are not inadvertent to the case of *Soloman v. Sewerage Co.*, 142 N. C. 439, 55 S. E. 300, 6 L. R. A. (N. S.) 391. That was a case in which the rights of individual litigants were alone involved and where in a well-considered opinion by Associate Justice Connor specific performance of the contract, at a specified rate, was refused, on the ground that the contract in question was indefinite as to time and in that respect also was unilateral in its obligation. The rights growing out of the contract as affected by the public interests were referred to, but not considered or determined. The order, directing that physical connection with defendant's exchange be restored and service continued, is affirmed, and the cause is remanded for further findings of facts and determination thereon by the court; whether the contract, at the stipulated rate, is discriminative among patrons receiving like service under like conditions, or whether it is so unfair and burdensome as to render defendant company unable to perform properly the duties incumbent under its charter to afford the general public telephone service at uniform and reasonable rates, an issue to be decided on conditions affecting the public interests, for, if these interests may be properly conserved, the fact that, as between the individuals concerned, the contract rate may operate unequally, would not justify or permit that the contract in that respect be avoided. It will be also ascertained and determined whether plaintiff has extended the privileges, conferred by the contract, to persons or telephone systems not embraced within the agreement.

The judgment will be modified, in accordance with this opinion, and is otherwise affirmed.

Modified and affirmed.

BROWN, J., did not sit.

(159 N. C. 46)

### COOK v. COOK.

(Supreme Court of North Carolina. April 17, 1912.)

#### 1. ABATEMENT AND REVIVAL (§ 85\*) — HOW PLEADED.

Under *Revisal 1905*, § 474, subd. 3, providing that a defendant may demur when it appears on the face of the complaint that there is another action pending, and section 477, providing that an objection may be taken by answer where it does not appear on the face of the complaint, a plea in abatement, on the ground of another suit pending, may be incorporated with an answer to the merits.

[Ed. Note.—For other cases, see *Abatement and Revival*, Cent. Dig. §§ 156, 508-510; Dec. Dig. § 85; \* *Pleading*, Cent. Dig. § 186.]

#### 2. DIVORCE (§ 9\*)—PROCEEDING—CROSS-ACTION.

A spouse sued for divorce may, upon cross-action or petition, accompanied by the proper jurisdictional affidavit, ask for and obtain a divorce; such proceeding being in the general nature of a counterclaim.

[Ed. Note.—For other cases, see *Divorce*, Cent. Dig. § 11; Dec. Dig. § 9.\*]

### 3. JUDGMENT (§ 622\*)—BAR OF CAUSES OF ACTION—COUNTERCLAIM.

A defendant need not set up a counterclaim existing in his behalf, but may assert it in a different or subsequent action.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1136, 1137; Dec. Dig. § 622.\*]

### 4. DIVORCE (§ 82\*)—PENDENCY OF ANOTHER ACTION.

A husband instituted an action in one county against his wife for absolute divorce, and later, and in another county, she instituted an action for divorce *mensa et thoro*; the husband setting up the pendency of the former action as matter of abatement. *Held*, that the plea in abatement was properly denied.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. § 268; Dec. Dig. § 82.\*]

Clark, C. J., and Walker, J., dissenting.

Appeal from Superior Court, Wake County; Peebles, Judge.

Action by Irene J. Cook against John M. Cook. From a judgment for plaintiff, defendant appeals. Affirmed.

The present action was instituted August 26, 1911, and summons therein was personally served on defendant September 1, 1911. Plaintiff filed her complaint to September term, 1911, for divorce from bed and board on account of abandonment "unlawfully and without just cause," the complaint being accompanied by the formal affidavit required by the statute. Defendant thereupon answered, denying the alleged abandonment, and answered, further, in bar of plaintiff's right to maintain her action that the defendant had theretofore commenced an action for divorce a vinculo for cause specified in subsection 5, Rev. 1908, § 1561; that is, because the parties had lived separate and apart for ten successive years, had resided in the state for that period, and there were no children born of the marriage, etc. It appeared that defendant's action returnable to superior court of Alamance county had been commenced September 24, 1910. Summons personally served on plaintiff October 1, 1910, complaint filed November term, 1910, and defendant therein—that is, the present plaintiff—had appeared in that suit, and made formal denial of complaint, and as a part of such denial had averred a wrongful abandonment by her husband in August, 1900, and prayed judgment that plaintiff's suit be denied him. This answer was verified in ordinary form of answers in civil actions, but not in the form required in actions for divorce. When the present case was called for trial in Wake superior court, it was admitted by plaintiff that the action by defendant in Alamance was still pending, and, before the jury was impaneled, defendant moved to "abate the action and dismiss the same" by reason of the pending of the Alamance case, and the court held that on the facts the pendency of the action in Alamance county was not necessarily a bar to this, and that the answer to the merits de-

stroyed the plea in abatement, and offered defendant opportunity to withdraw his plea in bar and file a plea in abatement which was declined and defendant excepted. The jury was then impaneled, and the following verdict was rendered:

"(1) Were the plaintiff and the defendant married on March 22, 1907?" Answer: "Yes."

"(2) Did the defendant abandon the plaintiff, as alleged in the complaint?" Answer: "Yes."

"(3) Has the plaintiff been a resident of the state of North Carolina for two years next preceding the filing of the complaint?" Answer: "Yes."

"(4) Is the defendant a resident of the state of North Carolina?" Answer: "Yes."

"(5) Was the plaintiff a resident of Wake county, N. C., at the time this action was commenced?" Answer: "Yes."

Judgment on the verdict and defendant excepted and appealed.

Parker & Parker, Long & Long, Dameron & Long, and Holding & Snow, for appellant. R. N. Simms and H. E. Norris, for appellee.

HOKE, J. (after stating the facts as above). [1] Under our present procedure, a defendant is allowed to demur when it appears on the face of the complaint that there is another action pending between the same parties for the same cause (Rev. 1905, § 474, subsec. 8), and, where this does not appear from the complaint, the objection may be taken by answer (Rev. § 477), and it has been held with us that an objection of this character may be joined with plea in bar or an answer on the merits. *Blackwell v. Dibrell*, 103 N. C. 270, 9 S. E. 192, citing on this position *Pomeroy's Remedies*, § 721. The judge below, therefore, had no right to require defendant to withdraw his answer on the merits as a condition for having his plea in abatement considered and passed upon.

[2-4] We hold, however, that the verdict and judgment should not be disturbed on this account, being of opinion that the pendency of defendant's suit in Alamance county in which the husband is seeking to obtain a divorce a vinculo is not necessarily a good plea against the present prosecution of plaintiff's suit for divorce from bed and board. As a general rule, this right to plead the pendency of another action between the same parties before judgment had is regarded to a large extent as a rule of convenience, resting on the principle embodied in the maxim, "*Nemo debet bis vexare*," etc. The defect is one that can be waived, and it may also be cured by dismissing the prior action at any time before the hearing (1 Cyc. p. 25; *Grubbs v. Ferguson*, 136 N. C. 60, 48 S. E. 551), and the plea presenting it

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes



is usually confined to suits in which the same litigant is plaintiff or is at least an actor seeking the same relief (*Long v. Coal & Iron Co.*, 233 Mo. 714, 136 S. W. 673; *Rodney v. Gibbs*, 184 Mo. 1-10, 82 S. W. 187; *State ex rel. Craig v. Dougherty*, 45 Mo. 294; *Mattel v. Conant*, 156 Mass. 418, 31 N. E. 487; *Washburn & Co. v. Scutt Co.* [C. C.] 22 Fed. 711; *Walsworth v. Johnston*, 41 Cal. 61; *New England Screw Co. v. Blevin*, 3 Blatchf. 240, Fed. Cas. No. 10,156). In the case before us, the present plaintiff is not the plaintiff in the action pending in Alamance county, nor is she an actor in that suit seeking affirmative relief. She asks for no judgment there, and has not filed the affidavit required by our law in divorce proceedings, and which we have often held is jurisdictional in its nature. *Johnson v. Johnson*, 142 N. C. 462, 55 S. E. 841; *Hopkins v. Hopkins*, 182 N. C. 22, 43 S. E. 508. In divorce proceedings a defendant sued is allowed with us to ask for and obtain a divorce on his own account, but he can only do so by cross-action or petition, accompanied by this jurisdictional affidavit, and coming within the definition of the general term counterclaim, as it is understood and used in the Code. *Smith v. French*, 141 N. C. 17, 53 S. E. 435, citing *Green on Code Pleadings and Practice*, § 815. It is well recognized here that a party sued is not required as a rule to set up a counterclaim existent in his favor, but is allowed to assert the same in a different or a subsequent action. *Shakespeare v. Land Co.*, 144 N. C. 521, 57 S. E. 218; *Mauney v. Hamilton*, 132 N. C. 303, 43 S. E. 908; *Tobacco Co. v. McElwee*, 94 N. C. 425.

It is urged that, while this rule may hold in ordinary actions, it should not obtain in divorce proceedings because the status of the parties is then necessarily involved. It would seem, however, to be especially insistent in such proceedings where a party may not desire to presently seek affirmative relief in the hope that a different course would more likely lead to a reconciliation, and assuredly we think the reluctance or failure to take such course from such a motive should not be held to defeat or prejudice the right of a defendant to bring his cause before the court at another time. This plea, upon which defendant now relies to defeat plaintiff's recovery, is referred to in 1 Pl. & Pr. p. 750, as available when there is a former suit pending in the same jurisdiction between the same parties for the same cause of action and for the same relief. Not only is present plaintiff not an actor in the suit in Alamance county, but the relief sought by her is not the same as that involved in the other issue, nor is it dependent altogether on the same state of facts. And authority seems to favor the position that the pendency of an action seeking one kind of divorce does not necessarily forbid the maintenance of a suit to secure a divorce of a different kind. *Simpson v. Simpson* (Cal.

Sept. 1895) 41 Pac. 804<sup>1</sup>; *Stevens v. Stevens*, 42 Mass. 279; *Monroy v. Monroy*, 1 Edw. Ch. (N. Y.) 382; *Thornton v. Thornton*, 11 Pro. Div. 1886, p. 176; 2 *Bishop on Marriage and Divorce*, § 565; 1 *Cyc.* p. 31; 9 *Amer. & Eng. Ency.* (2d Ed.) p. 840. In this last citation the author says: "It is not a bar to a suit for separation that another suit is pending for an absolute divorce, and the courts will under some circumstances refuse to stay the former proceedings until the latter is determined." Pursuing this statement, if it should be made to appear that a prior suit was pending between the same parties which embraced the same issue and involved to a large extent the same state of facts, a court would and should, if right and justice would be thereby best promoted, stay the proceedings until the results of the former suit could be attained, but, as we have endeavored to show there is nothing in this case that requires such a course as a matter of law and nothing appears of record to justify, it is a matter of discretion.

After a full and fair trial, in which defendant, having answered, was present in court, the plaintiff has established that she was abandoned by defendant wrongfully and without just cause, and we find nothing in the law or the facts of the case to justify the court in depriving the plaintiff of her verdict and the rights which flow from it under the law.

The judgment in plaintiff's favor is therefore affirmed. No error.

CLARK, C. J. (dissenting). The defendant brought an action against his wife, the plaintiff herein, for an absolute divorce in Alamance county, which was the place of his residence, in September, 1910. The present plaintiff, the defendant in that action, appeared and filed an answer. Subsequently she instituted this action in Wake in August, 1911. The defendant herein moved to abate this action by reason of the pendency of his prior action which had been brought in Alamance. This motion should have been granted. In *Smith v. Morehead*, 59 N. C. 360, the court held that the domicile of the husband was the domicile of the wife, and that proceedings in divorce instituted by the wife against the husband must be brought in the county where the husband resided. But, independently of that, an action for divorce is *sui generis*, and is to determine the status of the parties. Hence there can be nothing in the nature of a counterclaim. In *Bidwell v. Bidwell*, 139 N. C. 409, 52 S. E. 57, 2 L. R. A. (N. S.) 324, 111 Am. St. Rep. 797, Hoke, J., says: "Actions for divorce deal with the status of the parties"—and held that, there having been a decree of divorce between the parties, a subsequent action would be barred, though it might set

<sup>1</sup> Reported in full in the *Pacific Reporter*; reported as a memorandum decision without opinion in 109 Cal. xvi.

up matters which would have affected the former decree, if pleaded in time.

In the present case, even if this action had been properly brought by the wife in Wake, the judgment decreeing her a divorce from bed and board was a determination that such was the legal status of the parties at the date of that judgment. Hence in the further prosecution of plaintiff's suit in Alamance which he had a right to bring in that county, and which he did bring therein nearly a year prior to the institution of the present suit by his wife in Wake, he will be estopped by the judgment in this case from further prosecuting his action. He can only bring a new action, and only as to causes arising subsequent to the date of the judgment in this. He is estopped by the judgment in this case. As the husband instituted his action in Alamance prior to the beginning of this action, he had a right to prosecute it to judgment, and the action in this case in Wake should have been dismissed, for the wife could have had her full remedy by a defense to the action in Alamance which was already pending for the purpose of determining the status of the parties.

In *De Haley v. Haley*, 74 Cal. 489, 16 Pac. 248, 5 Am. St. Rep. 460, the point is expressly decided, the court holding that while an action for a divorce is pending one of the parties thereto cannot maintain a subsequent action for divorce against the other, but that all matters affecting the status of the parties should be determined in the action first brought, and not by a new action setting up matters in recrimination or defense. In 2 Nelson, Separation and Divorce, § 745, it is said: "The term 'counterclaim' is not applicable to a cause for divorce, which is neither a tort nor a breach of contract, but is a cause of action unlike all other causes." The husband having brought his prior action in Alamance, the wife should have tried out her grounds of defense or her claim for relief in that action. The test of a counterclaim is that its decision is not necessarily involved in the pending action, and the claimant can bring his counteraction on it even after judgment. If the plaintiff in the Alamance case, which was first brought, had obtained judgment of absolute divorce, the defendant in that case could not have brought her action for divorce from bed and board. *Bidwell v. Bidwell*, 139 N. C. 409, 52 S. E. 55, 2 L. R. A. (N. S.) 324, 111 Am. St. Rep. 797. It follows that she could not bring such suit pending the Alamance action. Her demand is not a counterclaim, but a recrimination, and would be barred by a decision granting the demand in the plaintiff's action against her, for it is a matter necessarily involved in the decree in the action against her which would determine her status. *Tyler v. Capeheart*, 125 N. C. 64, 34 S. E. 108.

WALKER, J., concurs in this dissent.

(159 N. C. 38)

# PAGE v. McDONALD.

(Supreme Court of North Carolina. April 17, 1912.)

## 1. ATTACHMENT (§ 154\*) — WARRANT — SUMMONS — AMENDMENTS.

Where a warrant of attachment was returnable to the court in term, and the date of the beginning of the term was given, and the summons was made returnable to term giving the corresponding date, the informality in the process could be cured by amendment authorized by Revisal 1905, §§ 507, 509, authorizing amendments in proceedings to prevent a failure of justice.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. §§ 432-443; Dec. Dig. § 154.\*]

## 2. ATTACHMENT (§ 232\*) — STATUTORY REQUIREMENTS — SUBSTANTIAL COMPLIANCE.

Where, in a proceeding by attachment, the whole record shows that the statute has been substantially complied with, the action will not be dismissed, nor the attachment dissolved.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. §§ 796, 797; Dec. Dig. § 232.\*]

## 3. PROCESS (§ 163\*) — AMENDMENTS.

Where process is erroneously made returnable before the clerk, instead of to the term of court, the court at term having acquired jurisdiction may make necessary amendments of the process and proceedings to give effectual jurisdiction, provided intervening vested rights are not injuriously affected thereby, and the process, when amended, justifies the original service or any official action previously taken under it.

[Ed. Note.—For other cases, see Process, Cent. Dig. §§ 224-238; Dec. Dig. § 163.\*]

## 4. ATTACHMENT (§ 92\*) — AFFIDAVIT — REQUISITES.

An affidavit which shows that defendant is a nonresident and has property in the state, that plaintiff has a cause of action against him arising out of contract by which he expressly promised to pay a specified sum for professional services rendered at his request, etc., sufficiently complies with Revisal 1905, § 759, and note, defining the requisites of an affidavit for a warrant of attachment.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. §§ 238, 239; Dec. Dig. § 92.\*]

## 5. PROCESS (§ 96\*) — SERVICE — PUBLICATION — AFFIDAVIT — REQUISITES.

An affidavit which shows that defendant cannot after due search be found in the state, that he is a nonresident and has property in the state, that the court has jurisdiction of the action, etc., states facts sufficient under Revisal 1905, § 442, for service of process by publication.

[Ed. Note.—For other cases, see Process, Cent. Dig. §§ 108-120; Dec. Dig. § 96.\*]

## 6. JUDGMENT (§ 142\*) — DEFAULT — VACATION — STATUTORY RIGHTS.

The right given by Revisal 1905, § 449, giving a nonresident defendant on good cause shown the right to defend after judgment on service of process by publication if application therefor is made within one year after notice of the judgment, does not rest in the discretion of the trial court, but the court must set aside the judgment and permit a defense where good cause is shown, and what is sufficient cause is a question of law, and the court must grant an application by a nonresident defendant, supported by an affidavit averring that he has a meritorious defense, and that he had no actual notice of the pendency of the

action until after the rendition of the judgment.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 253; Dec. Dig. § 142.\*]

#### 7. ATTACHMENT (§ 278\*)—JUDGMENT—VACATION.

Where a judgment for plaintiff in attachment is vacated on the motion of defendant, a nonresident served by publication, the property attached will remain in the custody of the court awaiting the determination of the action, subject to the right of defendant to release his property from the attachment by complying with Revisal 1905, §§ 774, 775.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. §§ 980-982; Dec. Dig. § 278.\*]

Appeal from Superior Court, Montgomery County; Justice, Judge.

Action by Ralph W. Page against William V. McDonald. From a judgment for plaintiff, defendant appeals. Reversed.

J. A. Spence, for appellant. Jerome & Price, for appellees.

**WALKER, J.** This is an action by the plaintiff to recover \$500 for professional services as an attorney at law, rendered to the defendant, at his request, and for which he promised to pay the said sum. The defendant is not a resident of this state. The action was commenced by issuing a summons returnable to September term, 1909, of the superior court of Montgomery county, upon which the sheriff returned that the defendant could not be found in his county. Upon affidavit filed, a warrant of attachment was issued and levied by the sheriff upon property of the defendant in said county. The action was commenced too late to publish the summons before September term of the court, but, upon affidavit filed after the term, publication of the summons and warrant of attachment was made for the defendant, returnable to the next term. It is objected by the defendant that there are irregularities in the proceedings, which are sufficient to vitiate the attachment, and therefore he is not properly before the court, and the judgment rendered for the debt is void. He entered a special appearance for the purpose of moving to set aside the judgment and the attachment, and dismissing the action because of said defects.

[1] We think it sufficiently appears that the warrant of attachment was returnable to the court in term, as the date of the beginning of the term is given, and the summons is expressly made returnable to term, the corresponding date being also given. This being so, the process can be amended, if necessary, so as to cure the informality. Revisal, §§ 507, 509. Besides, the publication gave the defendant sufficient notice that the warrant could be vacated by him at January term, 1910, if it was insufficient. No real right of his has, therefore, been prejudiced. It is the policy of our Code system that amendments

of process, pleadings, and proceedings should be liberally allowed, so that causes may be tried or heard upon their merits, and to prevent a failure of justice for reasons, sometimes technical, if not frivolous, which do not affect the substantial rights of the parties. Pell's Revisal, § 507, and cases cited in the note. "The court or judge thereof shall, in every stage of the action, disregard any error or defect in the pleadings or proceedings which shall not affect the substantial rights of the adverse party; and no judgment shall be reversed or affected by reason of such error or defect." Revisal, § 509.

[2] Where, in a proceeding of attachment, it appears from the whole record that the provisions of the statute have been substantially complied with, the action will not be dismissed nor the attachment dissolved. *Grant v. Burgwyn*, 79 N. C. 513; *Best v. Mortgage Co.*, 128 N. C. 351, 38 S. E. 923.

[3] Where process is erroneously made returnable before the clerk, instead of to the term of the court, the court at term having afterwards acquired jurisdiction may make all necessary amendment of the process and proceedings, in order to give effectual jurisdiction, and such amendment may be considered as made, if no intervening and vested right is injuriously affected. *Elliott v. Tyson*, 117 N. C. 114, 23 S. E. 102; *Ewbanks v. Turner*, 134 N. C. 77, 46 S. E. 508. The process, when amended, justifies the original service or any official action previously taken under it, if the intervening rights of innocent persons are not prejudiced. *Elliott v. Tyson*, supra. But it appears by reasonable intentment in this case that the process of attachment is and was made returnable to the term of the court, and, if this were not so, the slight informality will be removed by amendment or disregarded, and the court has ample power and discretion in the premises. These objections to the form of the process and the right of amendment are fully met and answered in *Grant v. Burgwyn* and the other cases cited supra, and especially by *Bank v. Blossom*, 92 N. C. 695, where it was held that the court in the exercise of its discretion may order a new publication to be made and defects to be cured by amendment.

[4, 5] Nor do we think the objection to the affidavits upon which the attachment was issued is sound. The statute was sufficiently followed in this respect. Pell's Revisal, § 759, and note; and the affidavit for publication was also sufficient. Revisal, § 442. The affidavits show that the defendant cannot after due and diligent search be found in this state, and is a nonresident thereof, and has property in this state, that the court has jurisdiction of the action, and that the plaintiff has a cause of action against the defendant, arising out of contract, by which

he expressly promised to pay a specific sum, \$500, for professional services rendered at his request, which is now due and owing. What Chief Justice Smith said in *Bank v. Blossom* is peculiarly appropriate to be repeated here: "It is a singular coincidence that the defendant makes a special appearance as he may do according to the rules of practice, and comes into court complaining of the disregard of some technical provision necessary to give him legal notice of what his presence and motion show he already, in fact, knows, and then objects to the plaintiff being permitted to give him legal notice." He has lost no right by any irregularity in the course of the proceeding, but will have his day in court and can set up his defense, if he has a meritorious one, and defeat the plaintiff's recovery, as will be shown hereafter.

[6] We now come to the serious and really the only material question in this case. Defendant requested the court to set aside the judgment and allow him to defend the action. This application was made upon affidavit, which alleged that the defendant has a good and meritorious defense to the action, and the judge substantially so finds as a fact, and that the defendant had no actual notice of the pendency of the action until after the judgment was rendered therein. The judgment was given at January term, 1910, and the motion to vacate it was made on March 21, 1910, within the time fixed by statute. The statute requires that a nonresident upon good cause shown must be allowed to defend after judgment, if his application to do so is made within one year after notice of the judgment, and within five years after its rendition, preserving the rights acquired by innocent purchasers. Pell's Revisal, § 449. We cannot imagine any better cause for setting aside a judgment recovered upon constructive or substituted service than that which is assigned by the defendant in this case. He had no knowledge of the judgment, and was not guilty of any laches, and he has a good defense. The right to be let in for the purpose of defending the action does not depend upon the exercise of the judge's discretion. The terms of the statute are mandatory, and the judge must set aside a judgment and permit a defense, if good cause be shown, and what is sufficient cause must be a question of law. *Bacon v. Johnson*, 110 N. C. 114, 14 S. E. 508. There was no neglect shown, excusable or inexcusable. In *Rhodes v. Rhodes*, 125 N. C. 191, 34 S. E. 271, the court took this view, wherein the present Chief Justice said: "The object of this section is to enable a nonresident who has not been personally served with summons to come in within the prescribed time after judgment, and assert his rights as fully in every respect as he could have done before judgment had he been personal-

ly served, saving as the section provides the rights of any one who has bought the property in good faith under the decree of sale in the cause. The defense intended to be allowed one who has not been actually, but only constructively, in court, is not confined to those matters which, if pleaded in apt time, would defeat the action. Being a remedial statute, a just construction is that it allows the party against whom a judgment has been taken to set up also any exception which would have prevented or modified the judgment." The judge sustained the attachment proceedings, but refused to set aside the judgment, and to permit the defendant to come in and make good his defense. In the latter ruling there was error.

[7] The judgment will be vacated, and defendant will be allowed to defend the action, and for that purpose will be given a reasonable time, to be fixed by the court, for filing his answer or other pleading. The property attached will remain in the custody of the court, to await the determination of the action. This secures the plaintiff, if he has a good cause of action and is able again to obtain a judgment. He is not in law or equity entitled to any more. It is unnecessary, after what has been said, to consider defendant's objection that the judgment by default was irregularly entered; there having been no proper proof of the indebtedness under Revisal, § 556, as we have ordered the judgment to be vacated on another ground. Defendant may release his property from the attachment by complying with the provisions of Revisal, §§ 774, 775. The case is remanded, with direction to proceed as herein indicated.

Error.

(159 N. C. 33)

#### THORP v. DURHAM TRACTION CO.

(Supreme Court of North Carolina. April 17, 1912.)

#### 1. CARRIERS (§ 320\*)—INJURIES TO PASSENGERS—PRIMA FACIE CASE—NONSUIT.

The testimony of a street car passenger suing for a personal injury received while alighting from a car that she informed the conductor that she desired to alight at a certain street, that as the car approached the street the conductor called out its name, that the passenger went to the door of the car, and that, as she made a step to alight, the car, without any warning, gave a sudden jerk, and stopped at the street, established, if true, a prima facie case of actionable negligence, authorizing denial of nonsuit.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 1118, 1126, 1149; Dec. Dig. § 320.\*]

#### 2. TRIAL (§ 140\*)—NONSUIT—WHEN AUTHORIZED.

Where the testimony of plaintiff, if taken as true, establishes a prima facie case, a nonsuit is properly denied.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 334, 335; Dec. Dig. § 140.\*]

**3. CARRIERS (§ 348\*)—INJURIES TO PASSENGERS—INSTRUCTIONS.**

Where, in an action for injuries to a street car passenger while alighting, the evidence of plaintiff showed that, while attempting to alight, she was thrown to the ground by the sudden jerk of the car without warning, and the company showed that plaintiff was injured while attempting to alight from the car in motion, instructions that it was not negligence per se for a passenger to move towards the door of the car with a view of alighting when it was approaching a crossing where he intended to alight, and after it had slowed down for the purpose, was justified by the evidence.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1403-1407; Dec. Dig. § 348.\*]

**4. CARRIERS (§ 347\*)—INJURIES TO PASSENGERS—CONTRIBUTORY NEGLIGENCE.**

A street car passenger attempting to alight from a slowly moving car approaching a place to stop to permit passengers to alight is not as a matter of law guilty of contributory negligence precluding a recovery for injuries sustained by being thrown from the car, but the question of contributory negligence is for the jury.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1346, 1397, 1402; Dec. Dig. § 347.\*]

Appeal from Superior Court, Durham County; O. H. Allen, Judge.

Action by Sallie Thorp against the Durham Traction Company. From a judgment for plaintiff, defendant appeals. Affirmed.

W. L. Foushee and P. C. Graham, for appellant. Bryant & Brogden, for appellee.

HOKE, J. There was evidence on the part of plaintiff tending to show: That on January 5, 1911, between 6 and 7 o'clock in the evening, she was a passenger on the street car of defendant company, and in handing her transfer ticket to the conductor she informed him that she desired and intended to alight at Dillard street, and he replied, "All right." That as the car approached this crossing the conductor called out "Dillard street" as much as three times, and on the last call the car stopped at Dillard street. That a white passenger named Reid, sitting just behind witness, got up and went toward the door of the car, and plaintiff and her young son, also a passenger, followed. That Reid got off on the north side of the car, and plaintiff was endeavoring to get from the south side, and, as she made a step in the effort to alight, the car, without any warning, gave a sudden jerk, causing plaintiff to fall in the street, and by which she was severely and painfully injured. The attending physician testified that plaintiff was severely bruised and hurt, was rendered unconscious, and had to be sent to the hospital for treatment. There was testimony on the part of defendant in contradiction of this evidence, and tending to show that the car moved across Dillard street at a slow and even pace, stopping at the usual place, and there was no sudden jerk of the car made, and that plaintiff was

hurt in the effort to get off the car when same was in motion.

[1, 2] Considering this testimony under the rules applicable in such cases, the plaintiff's evidence, if accepted by the jury, made out prima facie a cause of action against defendant company and the motion for nonsuit was therefore properly overruled. *Kearney v. Railroad*, 74 S. E. 593, at the present term; *Morarity v. Traction Co.*, 154 N. C. 586, 70 S. E. 938; *Darden v. Railroad*, 141 N. C. 1, 56 S. E. 512; *Clark v. Traction Co.*, 138 N. C. 77, 50 S. E. 513, 107 Am. St. Rep. 528. And on the way that the testimony should be considered and dealt with on motions of this character, see, among other cases, *Reid v. Rees' Sons Co.*, 155 N. C. 230, 71 S. E. 315; *Horne v. Railroad*, 153 N. C. 239, 69 S. E. 132; *Deppe v. Railroad*, 152 N. C. 80, 67 S. E. 282.

[3] It was chiefly urged for error on the part of defendant that the court, after directing the jury in general terms that plaintiff could not recover if she was injured in endeavoring to alight from the car when in motion, qualified the proposition in a later portion of the charge as follows: "If you find from the evidence in this case that defendant's car at the time of the alleged injury slowed down for the stop at Dillard street and the conductor called out Dillard street, and was running very slowly, and was about to stop for passengers desiring to get off at that point to alight and find that the plaintiff was a passenger at said time, then it would not necessarily be negligent for her to get up from her seat, if she were sitting down, in order that she might be ready to alight, nor would it necessarily be negligence for her to move towards the platform of the car for the purpose of being ready to alight, or to attempt to alight, not necessarily." And further: "If you find the evidence in this case, and by its greater weight, that, before the car came to a full stop at Dillard street, it slowed down in such a way as to cause a person of reasonable care and prudence to believe that it had really stopped, when it had not, for passengers to alight, and the conductor called out Dillard street, and that the plaintiff, reasonably believing it was about to stop, attempted to move from the inside of the car to the platform, and, in doing so, acted as a person of reasonable care and prudence would have done under similar circumstances, and that, while so acting, there was a sudden and unexpected movement of the car forward, and that such movement was the real cause of her injury, under these findings the defendant would be guilty of negligence, and you would answer the first issue 'Yes,' in considering that phase of the evidence; that is, as to whether the car was moving, if the plaintiff has not satisfied you by the greater weight of the evidence that she got off when it stopped. I have already said to you that ordinarily

a passenger should not get off of a moving car. There are some exceptions, and this last instruction is intended to embrace an exception; and it is for you to say whether the facts come under it or not." There were facts in evidence upon which to base these excerpts, and, in so far as they embody the proposition that it is not negligence per se for a passenger to arise from his seat and move towards the door with a view of getting off when the car is approaching the station where he intends to alight and after it has slowed down for the purpose, the charge is in full accord with the authorities, and the principle finds direct support in our own decisions. *Suttle v. Railroad*, 150 N. C. 668, 64 S. E. 778; *Tillett v. Railroad*, 118 N. C. 1031, 24 S. E. 111; *Thompson on Negligence*, § 3591.

[4] And the charge may well be sustained in directing the jury, as it did, in effect that, although the car was in motion at the time, the plaintiff would not be barred of recovery if she went out on the platform after the conductor had called the street where she was to get off, and the car had slowed down in such a way and to such an extent as to lead a person of reasonable care and prudence to believe that it was about to stop or that it actually had stopped; and plaintiff, acting as a reasonable and prudent person in so doing, was injured in her effort to alight by the car being suddenly moved or jerked forward by defendant or its employees in charge. A passenger injured is not always and as a matter of law barred of recovery because injured in the attempt to board or alight from a moving car. As applied to the facts suggested and made the basis of his honor's charge, the correct doctrine is very well stated in *Thompson on Negligence* as follows: "Where the car has been brought to a stop, or where it has been slowed so that its motion is very slight, and the passenger attempts to alight, and, while making the attempt, the car is suddenly started, so that the passenger is thrown down, negligence will not be imputed to the passenger as matter of law, but the question of the negligence, both of the carrier and the passenger, will go to the jury; but this presupposes that the passenger has in some way given the trainmen notice of his intention to alight. A passenger is not imputable with contributory negligence as a matter of law from the mere fact that he commences the act of alighting from the car before the car has come to a full stop. But if, while he is in the act of alighting, the car is negligently started forward with a sudden jerk, whereby he is thrown down and injured, the cause of the injury will be imputed to the negligence of the carrier, and not to his own negligence." And the statement is approved by decision of the courts here and elsewhere. *Darden v. Railroad*, 144 N. C. 1, 56 S. E. 612; *Whisenant v. Railroad*, 137 N. C. 349,

49 S. E. 559; *Hodges v. Railroad*, 120 N. C. 555, 27 S. E. 128; *Nance v. Railroad*, 94 N. C. 619; *Washington & Georgetown R. R. v. Harmon*, Adm'r, 147 U. S. 571, 13 Sup. Ct. 557, 37 L. Ed. 284. There is nothing in *Shaw v. Railroad*, 143 N. C. 312, 55 S. E. 713, or *Denny v. Railroad*, 132 N. C. 340, 43 S. E. 847, or *Browne v. Railroad*, 108 N. C. 34, 12 S. E. 958, or in the other authorities cited, in conflict with this position on the facts as presented and embodied in this charge. In *Shaw's Case* recovery was denied because the passenger was on the platform of a moving railroad train, contrary to the rules of the company made under express authority of a statute, and it was held that there was no evidence that the company or its agents had done anything to abrogate or waive the operation and effect of the rule. See the interpretation of *Shaw's Case* appearing in *Borden's Case*, supra. In *Denny's Case* the nonsuit of defendant's cause was sustained, the court being of opinion that there was nothing in the circumstances to warn or notify defendant's engineer that plaintiff was or would be on the platform in violation of the company's rules made and posted in pursuance of this same statute, and for that reason there were no facts upon which the negligence could be imputed. But in both of these cases and in that of *Browne v. Railroad*, 108 N. C. 34, 12 S. E. 958, while the general rule is approved that a passenger injured while attempting to alight from a moving train or car has no cause of action, it is also recognized that, under exceptional conditions, recovery is not necessarily denied. We agree with his honor that on the facts as suggested the case may be properly considered as coming within the exceptions to the rule, and that no reversible error to plaintiff's prejudice is presented. After careful consideration of the entire record, we are of opinion that the cause has been correctly tried, and that the judgment in plaintiff's favor should be affirmed.

No error.

#### STATE v. BOOZER.

(Supreme Court of South Carolina. April 22, 1912.)

#### CRIMINAL LAW (§ 1101\*)—APPEAL—RECORD.

Where the record filed by counsel of accused, convicted of murder, was not agreed to by the solicitor, and the case was not settled by the circuit judge, and the exceptions related to the charge, and only a part of the charge was set out, the court, on appeal, would order accused's counsel within a specified time to make and serve his case, with exceptions, as required by law.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3204; Dec. Dig. § 1101.\*]

Appeal from General Sessions Circuit Court of Newberry County; Ernest Gary, Judge.

Sam Boozer was convicted of murder, and

he appeals. Order requiring the making and serving of case, with exceptions, entered.

G. G. Sale, of Newberry, for appellant. Solicitor R. A. Cooper, of Laurens, for the State.

**PER CURIAM.** The defendant in this cause was convicted of murder and sentenced to be executed. The record filed by defendant's counsel is not agreed to by the solicitor, and the case has not been settled by the circuit judge. The exceptions relate to the charge, and only a portion of the charge is set out.

It is therefore ordered that defendant's counsel, within 10 days from the filing of this order, make and serve his case, with exceptions, as required by law, so that the cause may be ready for hearing by this court within 20 days.

It is ordered, further, that a copy of this order be mailed forthwith to defendant's counsel.

(91 S. C. 323)

#### FULLER v. McLEOD.

(Supreme Court of South Carolina. April 23, 1912.)

#### 1. CHATTEL MORTGAGES (§ 161\*)—CONSTRUCTION.

A provision of a chattel mortgage covering mules sold that if, before the note was due, the mortgagor "shall attempt to make way with or remove said goods and chattels, or any part thereof, from the place where they now are," the mortgagee could take possession, only prevented the mortgagor from removing the mules in a way so as to impair the mortgagee's security, so that it was error to instruct that the condition against removal would not be broken by any removal of the property from one place to another, unless it was with the view of taking it out of the mortgagee's reach to prevent him from getting it.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. §§ 282-285; Dec. Dig. § 161.\*]

#### 2. APPEAL AND ERROR (§ 1066\*)—HARMLESS ERROR—INSTRUCTIONS.

In claim and delivery proceedings by a chattel mortgagee of mules to recover the mules upon breach of condition, entitling the mortgagee to take possession if mortgagor attempted to remove the chattels from the place "where they now are" before payment of the note, error in instructing that the condition against removal could not be broken by the removal of the property from one place to another unless it was with a view of taking it out of mortgagee's reach was not prejudicial, where there was no evidence that the taking of the mules in the usual course of the mortgagor's business to another town would impair the mortgagee's security.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4220; Dec. Dig. § 1066.\*]

#### 3. CHATTEL MORTGAGES (§ 172\*)—PLEADING—SPECIAL DAMAGES.

In claim and delivery proceedings by a chattel mortgagee of mules to recover the mules upon breach of condition, defendant could not recover on his counterclaim for willfully taking the mules from him, his traveling expenses in procuring sureties on his undertaking to regain possession after plaintiff had

seized the mules, or his personal expenses at the place where the mules were seized by plaintiff, without specially pleading them, as they were special damages, but could recover the amount paid for feeding the mules after they were seized.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. §§ 306-315; Dec. Dig. § 172.\*]

Appeal from Common Pleas Circuit Court of Sumter County; J. W. De Vore, Judge.

"To be officially reported."

Action by H. B. Fuller against C. L. McLeod, in which defendant counterclaimed. From a judgment for defendant, plaintiff appeals. Affirmed upon remittance of part of the recovery, otherwise reversed and remanded.

L. D. Jennings, of Sumter, for appellant. Lee & Moise, of Sumter, for respondent.

**WOODS, J.** The defendant on March 29, 1910, purchased from the plaintiff two mules, and for \$360.18 of the purchase money gave him a note secured by a mortgage of the mules. The mortgage contained the following stipulation: "And provided, further, that said mortgagor shall retain possession of said goods and chattels until default; be made in the payment of said note, but if the same is not paid when due, or if before the said note is due, the said mortgagor shall attempt to make way with or remove said goods and chattels, or any part thereof, from the place where they now are, then, and in either event, the said mortgagee, or his agent, shall have the right, without suit or process, to take possession of said goods and chattels, wherever they may be found and may sell the same or as much as may be necessary, at public auction for cash, after giving notice by advertisement ten days and shall apply the proceeds of said sale to the discharge of said debt, interest and expenses, and pay any surplus to said mortgagor and his assigns."

Both the plaintiff and the defendant were residents of the town of Bennettsville. Plaintiff's place of business was in that town, but the defendant was engaged in the logging business in different parts of the state. In April, 1910, the defendant, having occasion to go to Sumter to attend the trial of a cause in which he was interested as a party, drove the mules to that place. Thereupon Hardison, an agent of the plaintiff, went to Sumter, and made a demand for the possession of the mules on the ground that the defendant had breached the condition of the mortgage against removal of the mules by driving them out of Marlboro county. Upon refusal of the demand, the plaintiff brought this action in claim and delivery. The mules were seized by the sheriff on Monday, and the defendant on the following Wednesday gave the necessary undertaking and regained possession. In his answer the

defendant denied that the condition of the mortgage had been broken, and set up a counterclaim, alleging that the plaintiff had willfully, wantonly, and maliciously brought the action, and had taken the mules from him in violation of his rights. On the trial the verdict was in favor of the defendant for the possession of the mules, and for \$25 actual damages and \$150 punitive damages.

[1] The presiding judge instructed the jury that the condition against removal contained in the mortgage would not be broken by any removal of the property from one place to another, unless the removal by the mortgagor was "with the view of taking it out of the reach of the party to whom he mortgaged to keep him from getting it." This we think was error. The condition of the mortgage "that, if before the said note is due, the said mortgagor shall attempt to make way with or remove said goods and chattels or any part thereof from the place where they now are," cannot be construed literally, for such construction would have forbidden the removal of the mules from the stable where they then were, or driving them from place to place in the ordinary use for which they were purchased. The reasonable construction is that the provision was intended to protect the mortgagee against any removal of the mules which he could fairly regard an impairment of his security. This was the construction of a like provision on which the case of *Marshall Springs & Co. v. Smith*, 85 S. C. 196, 67 S. E. 129, was decided. There the mortgagee obtained on the mortgage supplies to be used in the cultivation of a tract of land known as the "Jones place." The mortgagor thereafter moved away from the Jones place taking the mules with him. This was a removal which the mortgagee had a right to regard an impairment of his security, since it was accompanied by a complete change in the mortgagor's business.

[2] But we do not think there should be a new trial for this error of the circuit judge, because there is not the slightest evidence that the defendant did anything more than use the mules in the ordinary course of his business, or that the plaintiff had any reason to suppose that driving the mules to Sumter on an ordinary business trip would have any effect on his security. This being so, the court will not order a new trial. "This court should not order a new trial where from an examination of the record it has no doubt the verdict of any fair jury would have been the same, even if no error had been committed. In such a case the errors should be regarded not prejudicial." *Edgefield Manufacturing Co. v. Maryland Casualty Co.*, 78 S. C. 73, 58 S. E. 969.

[3] The trial court was also in error in allowing the defendant to prove as actual damages his personal expenses at Sumter and his traveling expenses incurred in the

effort to procure sureties on his undertaking. These were special damages not alleged in the complaint, and were therefore not recoverable. *Sonneborn v. Southern Ry. Co.*, 65 S. C. 502, 44 S. E. 77. The only admissible item of actual damages proved was \$6.75, paid by defendant for feed of the mules after they were seized. For this error there must be a new trial, unless the defendant will remit all the actual damages included in the judgment except \$6.75.

The judgment of this court is that the judgment of the circuit court be affirmed on condition that the defendant shall remit thereon, in writing, within 30 days after the filing of the remittitur \$18.75 of the actual damages recovered, and that, if he shall fail to do so, the cause be remanded for a new trial.

GARY, C. J., and HYDRICK, J., concur.

(91 S. C. 305)

LOWRY NAT. BANK OF ATLANTA, GA., v. SEYMOUR.

(Supreme Court of South Carolina. April 18, 1912.)

BILLS AND NOTES (§ 537\*)—BONA FIDE PURCHASER—DIRECTION OF VERDICT.

In an action on a note, plaintiff offered in evidence the note which was in his possession with the name of the payee indorsed thereon, and introduced positive evidence of the payment of value by him, opposed to which defendant offered nothing that amounted to more than conjecture. *Held*, that a verdict was properly directed for plaintiff. (Affirmed by divided court.)

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1862-1894; Dec. Dig. § 537.\*]

Appeal from Common Pleas Circuit Court of Greenwood County; R. C. Watts, Judge.

Action by the Lowry National Bank of Atlanta, Ga., against E. Z. Seymour. From judgment for plaintiff, defendant appeals. Affirmed.

Grier, Park & Nicholson, of Greenwood, for appellant. Giles & Ouzts, of Greenwood, for respondent.

WOODS, J. Reversal of judgment in this case would be a precedent seriously impairing without reason the value of negotiable instruments to the great injury of borrowers as well as lenders of money.

The defendant, E. Z. Seymour, made his promissory note at Greenwood, S. C., on March 11, 1910, for \$770, payable to the order of Southern Flour & Grain Company on October 15, 1910. The plaintiff, the Lowry National Bank of Atlanta, Ga., as an indorsee for value before maturity, brought this action against the maker. The defendant alleged in his answer that the note was given for the purchase money of flour; that the agent of Southern Flour &



Grain Company had guaranteed him against a decline in the price of flour, and had also expressly warranted the quality; that the price did decline, and the flour turned out to be below the grade guaranteed; and that the plaintiff was not a purchaser for value before maturity. After hearing the entire evidence, the circuit judge directed a verdict in favor of the plaintiff for the full amount of the note on the ground that the evidence showed beyond doubt that the bank was a purchaser for value before maturity.

[1] The plaintiff offered in evidence the note in its possession with the name of the payee indorsed thereon. The vice president of the bank, the cashier, the receiving teller, and the discount clerk each testified that the bank discounted the note for value with the indorsement of the payee on March 12, 1910, and that the note had ever since remained the property of the bank. In addition to this, the discount clerk testified to the correctness of entries made by him on the books of the bank on March 13, 1910, showing the discount of the note on the 12th; and the receiving teller testified to the correctness of a deposit ticket dated March 12, 1910, indicating that the note in suit had been discounted, and the net amount placed to the credit of Southern Flour & Grain Company on that day. The court had before it, not only this evidence of the officers of the bank, but also the presumption that the holder of a promissory note with the name of the payee indorsed thereon is an indorsee for value before maturity without notice. *First Nat. Bank v. Anderson*, 28 S. C. 143, 5 S. E. 343; *Park v. Funderburk*, 87 S. C. 76, 68 S. E. 963.

Against this evidence there is not a single positive statement of the witnesses for the defense—nothing that amounts to more than conjecture. The defendant, Seymour, testified on his direct examination that he went to the Bank of Greenwood, which held the note for collection, for the express purpose of examining it, and ascertaining whether it had been negotiated by the payees. When asked by his counsel if the indorsement of the payees was on it, he could testify only in this language: "To my best recollection it belonged to the parties I bought the flour from. I don't think it had it on it at all to the best of my recollection. No, sir; I didn't see that—have no recollection of seeing it at all, pretty positive. Of course, I couldn't be sure, but I don't think it was there." On the cross-examination the witness repeated, in substance, what he had said to his own counsel, but with commendable frankness testified that the indorsement might have been on the note when he examined it, and that he had no independent recollection whether it was or not.

[2] This evidence means that, after the maker had looked at it to see whether it had been indorsed, he could only testify at the trial that he had some sort of impression

that it had not, but no recollection whether it had or not, and that he could not deny that the indorsement was there. Caution in giving testimony, it is true, often indicates that weight should be given to the testimony; but, where a witness deeply interested institutes an inquiry as to the one particular matter vital to his own interest—that is, whether a name has been indorsed on a paper, and examines the paper to find out—his testimony that to the best of his recollection the indorsement is not there, but that he has no independent recollection on the subject is not evidence but mere conjecture. No importance is to be attached to the fact that defendant's counsel after hearing his statement advised him not to pay. That advice is by no means unusual; for, where the maker of a note has a good defense against the payee, he often wishes to have a trial on the question whether the indorsement was made bona fide, for value before maturity.

The defendant further submits that there was evidence that the note, though written and dated March 11, 1910, was not signed at Greenwood till the morning of the 12th, and could not have reached Atlanta until 4 or 5 o'clock on the afternoon of March 12th, after banking hours. His own testimony was not positive whether the note was signed on the 11th or 12th, but his brother, M. T. Seymour, who signed the note for him, testified positively that the note was not signed until the morning of the 12th, and that he thought the first train that day left Greenwood about 11 or 12 o'clock, and arrived in Atlanta after 4. This testimony is relied on as evidence that the note could not have reached Atlanta in time for discount on March 12th, the day on which the books of the bank and the testimony of its officers indicated the discount had been made. It is true that banks usually transact their main current business with customers before 4 o'clock in the afternoon, but it is also true that the custom is by no means invariable, and that it is a general custom of banks at their discretion to accommodate their customers by transacting business with them after the ordinary banking hours. There is not a particle of evidence as to the banking hours of the Lowry National Bank.

[3] If the court should take judicial notice of the usual banking hours, and attribute them to the plaintiff bank, it must also take notice of the custom of banks in departing from them whenever the circumstances seem to them to justify such a course. Even if it be assumed, then, that the note did not reach Atlanta until after 4 o'clock on March 12, 1910, this fact is no foundation for an inference that the bank did not discount the note on that day. The force of the presumption from the possession of the note duly indorsed that the plaintiff was a bona fide indorsee for value, before maturity, and of the positive evidence of the officers of the bank that the note was so indorsed on 12th March,

1910, is not at all impaired by the evidence that the indorsement could not have been made until after 4 o'clock on that day.

For these reasons, I think it perfectly clear that only one reasonable inference could be drawn from the evidence, and that the circuit judge was right in directing a verdict.

The judgment of this court is that the judgment of the circuit court be affirmed.

HYDRICK, J., concurs.

FRASER, J. The question in this case was the date of the transfer to the plaintiff. If the defendant had said the indorsement was not on the note when it was due, there would have been no question that the case ought to have gone to the jury. Not that the date of the entry was material in itself. The date of the entry became material when the plaintiff's witnesses said the entry was made on the day of the transfer. The plaintiff's witnesses were positive. The defendant hesitated. Such hesitation could arise from one of three causes: (1) A defective memory; (2) "a troublesome conscience"; (3) a desire to escape punishment for perjury.

If the second cause operated, then the testimony was entitled to very great weight. Which cause did operate? I do not know. I have no power to know any more than the circuit judge. It was the province of the jury to say, and I think they ought to have been allowed to do so. The statement on the back of the note is: "Purchased from Southern Flour and Grain Co. March 12, 1910 and now owned by us." Was that an afterthought, or was the bank preparing for trouble, or was it an entirely honest entry? I think these were questions for the jury. For these reasons, I concur with the CHIEF JUSTICE.

GARY, C. J. (dissenting). This is an action on a promissory note dated at Greenwood, S. C., 11th day of March, 1910 (but delivered next day), whereby the defendant promised to pay to the order of Southern Flour & Grain Company on the 15th day of October thereafter \$770 for value received.

The plaintiff contends that the said note was indorsed by the Southern Flour & Grain Company and came into its possession in the usual course of business in the city of Atlanta, Ga., on the 12th day of March (the day on which it was delivered to the Southern Flour & Grain Company), and that they are now bona fide holders of the note. The defendant claims that the plaintiff did not acquire the note before maturity, and that it therefore is not an innocent holder; that the consideration of the note was certain flour purchased by the defendant from the Southern Flour & Grain Company under a contract in which said company guaranteed that the price of flour would not de-

cline before a certain time, and represented that the flour purchased was of a certain quality, as to both of which—the guaranty and the representation—there was a breach. At the close of the defendant's testimony, his honor, the presiding judge, directed the jury to render a verdict in favor of the plaintiff for the amount claimed, on the ground that only one inference could be drawn from the testimony, and that was that the plaintiff was an innocent purchaser for value before the maturity of the note without notice. The only question in the case is whether his honor, the presiding judge, erred in so ruling.

We reproduce the following testimony of E. Z. Seymour, the defendant, for the purpose of showing that there was some testimony tending to prove that the note was not indorsed by the Southern Flour & Grain Company until it was past due: "Mr. Grier: Q. Where was that note when you got that letter? [The letter was dated October 8, 1910, was sent by the Southern Flour & Grain Company to the defendant, and was as follows: "Your note for \$770.00 will be due and payable Oct. 15th. Please give same prompt attention."] A. In the Bank of Greenwood. Q. Did you or not examine that note in the bank? A. Yes, sir; I looked at it. Q. Will you please state to me whether or not it had at that time the indorsement there of the Southern Flour & Grain Company, 'per R. O. Wallace, Secretary,' on it? A. I can't be positive about this. I went to look at the note, and came back, and told you at the time about the note, and you advised me not to pay it; that it certainly belonged to the Southern Flour & Grain Company. Mr. Giles: We object. Mr. Grier: Q. You can't tell that. State whether or not, to the best of your recollection, it had been indorsed by the Southern Flour & Grain Company, and the Lowry National Bank at that time. A. To my best recollection it belonged to the parties I bought the flour from. Mr. Giles: I object. Mr. Grier: Q. You will have to answer the question. From your best recollection, did or not the note at the time you inspected it have on it the indorsement of these people, the Southern Flour & Grain Company, to your best recollection? A. I don't think it had it on it at all to the best of my recollection. Mr. Giles: We object. Mr. Grier: Q. To your best recollection, will you please state to me whether you saw this indorsement there: 'Purchased from Southern Flour & Grain Company on March 12th, 1910, and now owned by us'? A. No, sir; I didn't see that—have no recollection of seeing it at all. Q. You are pretty clear on that? A. Yes, sir; I am pretty clear on that—have no recollection of seeing that at all. Q. And you examined the note? A. Yes, sir; Mr. Long let me see it. I asked him to let me see it, and he did so. Q. Why did you want to look at it, to see whether it was negotiated or turned over to

somebody else or not? A. Yes, sir. Q. For what purpose? A. I wanted to make the men I bought this flour from sue me themselves, didn't want the note to go into third party's hands, and I went for that purpose, to see whether it was in third party's hands or not. Q. Do you know whether or not the note remained in the bank from the time you saw it until after it was due? A. Yes, sir; it did. Q. It didn't go out of there? A. I don't think it went back until the 19th of October. I think that was when the bank sent it back. Q. And you are pretty positive this thing down here [indicating] wasn't written on it? A. Pretty positive. Of course, I couldn't be sure, but I don't think it was there. Q. You went there for the purpose of seeing whether it had passed to the hands of a third party? A. Yes, sir. Q. You can't tell what you said, but did you report what you saw to Messrs. Grier & Park, your attorneys? Mr. Giles: We object to that. The Court: What was that last question? Mr. Grier: I didn't ask him to state the conversation, but after he saw it, if he came to the office of his attorneys and stated to them, what he saw on the note—not to go into the statement. The Court: He can state he made a statement, and stop at that. Witness: Yes, sir; I went to them and made a statement. Mr. Grier: Q. And in consequence of what occurred there you refused to pay this note to the Lowry National Bank? A. Yes, sir. Q. Will you please state under what conditions this note was given, and for what it was given? Mr. Giles: We object to that. The Court: I think that is a proper question. Mr. Giles: We object on the ground that it is now owned and held by an innocent purchaser for value, and without notice of any defects, or anything in the note, and that— The Court: That would be a very proper objection, and one that ought to be sustained, if it was all one way and they were innocent purchasers for value, but that has got to be one of the circumstances in this case now. Mr. Giles: We submit that this testimony is not competent until they show that we are not innocent purchasers. There is no testimony at all at this time going to show, or tending to show, that the plaintiffs are not innocent purchasers for value without notice. The Court: There is a scintilla of testimony here to go to the jury on that at present as to whether or not you did acquire these notes at the time you allege in the complaint, or whether they got them later."

Again, he testified as follows: "Q. When was it you said you first saw that note in the bank? A. I think it was the 15th, or maybe later than the 15th. Q. That was the day it was due? A. Yes, sir; after it was due. Q. You went there to see it? A. Yes, sir. Q. And you are not certain what was on the back of the note? A. No, sir; I am not certain what was on the back of it.

Q. Was there anything on the back? A. To my best recollection, there wasn't any red writing on the back at all. Q. According to your best recollection, there was no red writing? A. Yes, sir; to my best recollection it was just handed to the bank for collection. Q. It might have been there, and you might not have noticed it? A. I don't know—it might have been. Yes; I suppose it could. Q. Might have been there? A. But I went for that purpose, to see whether it was there or not, and my best recollection it wasn't, because I came back and told Mr. Grier. Q. If it had not been there, wouldn't you have had a distinct recollection that it wasn't there? A. My actions prove it wasn't there, because I went right to Mr. Grier. Q. But you have no independent recollection of what was on the back of the note? A. No, sir; I don't recollect for certain. I couldn't swear positive to that. Q. And you don't have any independent recollection of what was on the back of the note? A. Well, I don't suppose I do."

"A bona fide holder for value of negotiable paper is one who has acquired title in the usual course of business, for a valuable consideration, in good faith, from one capable of transferring it, and without notice or knowledge of defenses or circumstances, which should put him on inquiry." 7 Cyc. 924.

"Unless negotiable paper is payable to bearer, in which case title will pass by delivery, indorsement is necessary to constitute the holder of such paper a purchaser in the ordinary course of business; and where he receives the paper from the original payee, by assignment or sale, instead of indorsement, he obtains no title superior to that of the payee." 7 Cyc. 926.

"If a bill or note is originally payable to a person named or his order, the legal title can be transferred only, in the first instance, by indorsement." 24 Enc. of Law, 252.

"Where an instrument payable to order is negotiated by delivery without indorsement, the holder acquires thereby the same rights only as would pass to the assignee of a bill or note not negotiable, or other chose in action; that is, he acquires only such title as the transferor had, and takes the instrument subject to all the defenses and equities, to which it was subject in his hands." 4 Enc. of Law, 253.

These authorities show that, if the Southern Flour & Grain Company did not indorse the note until it was past due, then it could not be said that the plaintiff became the owner thereof in the usual course of business, and it would not be a bona fide holder.

It is true the defendant does not testify positively that the note had not been indorsed by the Southern Flour & Grain Company before maturity, but he states facts from which the inference may reasonably be drawn that the note had been indorsed by the payee, until it was past due. Mr. Wigmore in vol-

ume 1, § 726, of his work on Evidence, thus states the rule as to such testimony: "The general rule is that recollection should adequately correspond to observation. It is in a qualitative way that the deficiency usually occurs. The witness, it may happen, cannot recollect 'positively,' 'is not sure,' 'thinks' it was so, has an 'impression,' 'believes,' or the like. How far is such a degree of recollection satisfactory? It is a commonplace of judicial experience that testimony most glibly delivered, and most positively affirmed, is not always the most trustworthy. The honest witness who will not exaggerate the strength of his recollection is well worth listening to because of this very caution. Moreover, to accept such 'impressions' and 'beliefs,' is, after all, not dangerous, since they carry in themselves a warning of their evidential weakness. The best judicial opinion does not insist on a high degree of positiveness in the recollection, but accepts whatever the witness feels able to present."

There are several other facts and circumstances upon which the appellant relies to show that the plaintiff is not an innocent holder of the note. We do not, however, deem it necessary to consider them in detail, but only to call attention to the following statement of the rule in *Railroad v. Partlow*, 14 Rich. 237: "It may be that no one of the facts would of itself warrant the inference, and yet, when taken together, they may produce belief, which is the object of all evidence. In 1 Greenleaf, Ev. § 51, it is said: 'It is not necessary that the evidence should bear directly upon the issue. It is admissible, if it tends to prove the issue or constitutes a link in the chain of proof, although alone it might not justify a verdict in accordance with it.' All the circumstances mentioned in this ground may be regarded as links in the chain of proof, from which the jury might deduce the inference of the defendant's privity and direction in the acts of trespass. This is usually the case when an issue depends on circumstantial evidence."

I think the judgment should be reversed, and the case remanded for a new trial.

(91 S. C. 342)

#### STATE v. SEAY.

(Supreme Court of South Carolina. April 24, 1912.)

#### CRIMINAL LAW (§ 1131\*)—APPEAL—DISMISSAL—GROUNDS.

An appeal by the state will be dismissed, where it appears that the only notice served was upon an attorney not authorized to accept service, and who only accepted on condition that he should be employed by respondent, and where the time for appealing had expired.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2971-2979, 2985; Dec. Dig. § 1131.\*]

Appeal from General Sessions Circuit Court of Spartanburg County; G. W. Gage, Judge.

Cleveland Seay was accused of an offense, and the state appeals from the judgment. Appeal dismissed.

J. C. Otts, Sol., of Spartanburg, for the State.

GARY, C. J. It appearing, upon the call of this case, that the only notice served by the appellant was upon an attorney who was not authorized to accept service for the respondent, and who only accepted on condition that he should be employed by the respondent, and it further appearing that the time for appealing has expired, it is therefore ordered that the appeal be dismissed.

(91 S. C. 316)

#### ARTHUR et al. v. BROWN.

(Supreme Court of South Carolina. April 23, 1912.)

#### 1. EVIDENCE (§ 420\*)—PAROL EVIDENCE—CONTRADICTING NOTES.

One unconditionally signing a note cannot, when sued thereon, show that it was not intended that he be bound, though he wrote the letter "c" after his signature, to show, as he testified, that the execution was conditional.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1929-1944; Dec. Dig. § 420.\*]

#### 2. BILLS AND NOTES (§ 96\*)—LIABILITY ON NOTES—ESTOPPEL.

Defendant executed a note to a bank for \$6,000, which recited that he had deposited with it as collateral a bond and mortgage executed by S. for the same amount, and defendant was credited with that amount by the bank, when he gave a check therefor to S., who used it for his own purposes, but the transaction was really at the suggestion of the bank's president, and was, with defendant's knowledge, for the purpose of enabling the president to use the bank's funds by making a loan under the appearance of taking defendant's obligation, in order to avoid the banking laws, and to prevent the discovery of the nature of the transaction by the bank examiner. Held that, since the transaction was in breach of the bank president's duty, defendant could not claim that the understanding was that he was only an accommodation maker on the note, and should not be liable thereon, so that he was liable as a maker.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 165; Dec. Dig. § 96.\*]

#### 3. BILLS AND NOTES (§ 518\*)—ACTIONS—SUFFICIENCY OF EVIDENCE.

In an action on a note executed by defendant as maker to a bank, evidence held to show that defendant knew that the note was being executed merely to enable the bank president to use the bank's money under the guise of a loan to defendant.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1816-1821; Dec. Dig. § 518.\*]

#### 4. PRINCIPAL AND SURETY (§ 115\*)—DISCHARGE OF SURETY—FAILURE TO RECORD SECURITY.

A creditor's failure to record a mortgage securing a note would not discharge the surety on the note, but would only entitle him to have credit for the depreciation of the security in value, caused by the failure to record.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. §§ 244-268; Dec. Dig. § 115.\*]

Appeal from Common Pleas Circuit Court of Union County; Robt. Aldrich, Judge.

"To be officially reported."

Action by B. F. Arthur and others, as receivers of the People's Bank, against J. A. Brown. From a judgment for defendant, plaintiffs appeal. Reversed and remanded for new trial.

Wallace & Barron, of Union, for appellants. J. Ashby Sawyer, of Union, for respondent.

WOODS, J. On April 18, 1907, J. A. Brown made his promissory note to the People's Bank of Union, whereby he promised to pay on demand \$6,000, with interest after maturity at the rate of 8 per cent. per annum. The note expressed that Brown had deposited with the bank as collateral a bond and mortgage executed on the same day by W. H. Sartor for \$6,000. The sum of \$6,000 was credited to Brown as a deposit made by him, and he immediately gave a check to W. H. Sartor or order for the entire amount. Sartor indorsed the check, received credit for it on his account, and afterwards checked it out for his own purposes. The bank failed in August, 1908, and B. F. Arthur, Wm. H. Gist, and H. B. O'Shields were appointed receivers. In this action by the receivers against Brown, the maker of the note, the verdict was for the defendant. The exceptions are numerous, but few of them need be referred to in detail.

The defendant admitted the making of the note, and set up two defenses: First. That the note was given by him without consideration, and entirely for accommodation at the instance of B. F. Arthur, president of the bank, and upon an express agreement with Arthur and Sartor that he was not to be liable thereon. Second. That the bond and mortgage given by Sartor, while nominally to the defendant, were intended for the bank; that the defendant allowed his name to be used merely to avoid the appearance of the bank taking the papers directly; that the bond and mortgage were immediately assigned to the bank and left with it; that the bank greatly impaired the security of the mortgage by failing to have it recorded; and that, if he was ever liable on the note, he was discharged by the negligence of the bank in failing to record the paper.

The defendant testified in support of his first defense that Arthur, the president of the bank, was personally concerned that Sartor should obtain a loan of \$6,000 from the bank, and solicited the defendant to sign the note and take from Sartor the bond and mortgage, and assign them to the bank as an accommodation; that he at first declined, but finally signed the note, allowed the bond and mortgage to be given to him, assigned them to the bank, allowed the \$6,000 to be placed to his credit, and gave Sartor a check therefor on an express agreement made by

Arthur, the president of the bank, that he should not be liable on the note, in short, that the whole transaction was on his part a matter of form merely; and that the note though in form a promise to pay was not so in fact. The defendant further testified that he placed a small letter "c" after each of his signatures to indicate the condition that he was not to pay. This testimony and that of other witnesses tending to corroborate defendant's account of the transaction was objected to by counsel for plaintiff as an attempt to alter the terms of a written instrument by parol testimony.

[1] This case does not call for discussion of the intricate distinctions made in the application of the rule that parol evidence is inadmissible to alter the terms of written instruments. No authority has been cited, and we think none can be found, which would allow the defendant to do what he has here done, namely to make in writing a promise to pay, on which the money of a bank was paid out by one of its officers, and then prove by parol evidence that the written promise was no promise, and was to have no force or effect of any kind. Making the letter "c" after the signature does not make the testimony competent. Even if the word "conditional" had been written out, it might possibly have made competent parol evidence that the defendant's promise was made on some condition to be performed by the bank, that his promise made in the note was conditional, but it would not have made competent evidence that there was never any promise at all to pay, conditional or unconditional. In *Cline v. Farmers' Oil Mill*, 83 S. C. 204, 85 S. E. 272, it was held that a simple promissory note for \$150 for one bay mare mule cannot be defeated by parol evidence to the effect that that sum was only to be paid in case the maker collected \$50 of one man and \$50 of another, as this evidence would vary the terms of the note. To the same effect is *Cape Fear Lumber Co. v. Evans*, 69 S. C. 93, 48 S. E. 108.

[2] Let it be assumed, however, that the evidence was competent, and that it established beyond controversy that Arthur, the president of the bank, did agree with defendant that he should not be liable on the note. When such evidence is considered in connection with the reason assigned by the defendant for the transaction, it tended rather to fasten responsibility on the defendant than to relieve him of it. On this point defendant testified as to Arthur's statements to him: "He said that Sartor was obliged to have \$6,000, and he intimated that there was more interest for him to have it than Sartor, and Mr. Sartor had to have it, and he went over the whole thing. Said that Mr. Sartor had the security, plenty of security, but under the banking laws, and on account of the examiner, they could not take paper on real estate and loan money on it, and asked me if I would do he and Mr. Sartor

that favor and let them use my name; said they would fix the papers, and I would have no expense whatever." Taking this statement of the defendant as true, its effect extends altogether beyond the doctrine of ultra vires. The inquiry is not whether the president of the bank was acting within the apparent scope of his authority in making the promise that the defendant should not be liable, but whether the president was not proposing a breach of trust to which the defendant assented and in which he undertook to participate. Stated in its naked verity, the plan proposed by the president and agreed to and carried out by the president, the defendant, and Sartor was that the note should be given in order that the president might use the funds of the bank by making a loan in which he had a personal interest, under the appearance that he had taken the obligation of the defendant when he had not; and that this pretense should be adopted for the purpose of evading a supposed law, and misleading the bank examiner into the belief that the defendant was liable for a loan of the bank's funds, when, in fact, he was not. Having entered into this scheme, it seems evident beyond argument that the defendant cannot be allowed to say that the apparent liability was not a real liability. The scheme of deception was a manifest breach on the part of the president of the trust reposed in him, under the charter, by the stockholders and directors of the bank, in which breach of trust the defendant was a participant with full knowledge. Attributing to the president the fullest power to manage the credits of the bank as its representatives, the instant he proposed a breach of his trust to the defendant and the defendant knowingly entered into it, the president was stripped of his representative character and of his power to bind the bank. The president and the defendant, then, stood together in antagonism to the bank, the president's power to bind the bank fell from him, and hence his agreement that the defendant should not be liable was not the agreement of the bank. As between himself and Sartor, and himself and Arthur, the defendant might have been an accommodation maker of the note, but when he entered into the plan imputed by him to Arthur and signed the note, and had the bank's money placed to his credit, as to the bank, he was a maker of the note for value. In *State v. Talley*, 77 S. C. 99, 57 S. E. 618, 11 L. R. A. (N. S.) 988, 122 Am. St. Rep. 559, the principle is thus stated: "Corporations, public and private, as well as individuals, must often be held by the fraudulent acts of officers or trustees in their dealings with other persons who are innocent of fraud. But it is axiomatic that, where the officer or the trustee and the person dealing with him are both guilty of fraud in the transaction, the fraud completely strips off the quality of representation, and the trustee or officer is to be con-

sidered the mere instrument or conduit through which the fraud is perpetrated." The same principle was applied in *Knobelock v. Bank*, 50 S. C. 259, 27 S. E. 962. The testimony offered in support of the first defense did not tend to relieve the defendant of liability on the note. Therefore, even if the testimony had been competent to contradict or vary the terms of the note, it was irrelevant because it did not support any defense.

[3] By the charge the question was submitted to the jury whether, under the evidence above set out, the defendant was deceived into signing the note as indorser or surety by the false promise that he would not be liable, in order to allow the principal debtor to use certain securities which he otherwise could not use; and the instruction was given that, if the defendant signed the note under those conditions, a fraud was perpetrated upon him, and he would not be liable. The instruction was erroneous because no such issue was made by the testimony, and there is not a particle of evidence that the defendant was in any way deceived into signing the note. On the contrary, as we have shown, he fully understood the purpose of taking his note and the illegal scheme which he agreed to assist the president of the bank in carrying out. The instruction should have been that there was no evidence to sustain the first defense. This conclusion renders unimportant Arthur's testimony that he did not make the agreement attributed to him and that he took the note for the money paid out on it.

As to the second defense, the court refused the following request of the plaintiff: "That if the jury find that the bank failed to record the collateral mortgage of W. H. Sartor, which was put up by Brown with the bank, and that as a consequence of such nonrecording Brown has lost the benefit of such mortgage in any extent, then the amount which Brown shows, or which the evidence shows, Brown has lost by such failure to record such mortgage, should be allowed as a credit on the debt by the jury; but if the jury find that the bank failed to have the said mortgage recorded in time, relying upon the instruction of Brown and Sartor or of Sartor with Brown's consent or acquiescence, to keep the same off the record, then the fact that there has come a loss to Brown, the amount of which he lost by the failure to record the mortgage, even if the amount be clearly shown by the evidence, would not constitute a defense, or credit on the debt evidenced by the note, and should not be allowed by the jury." Contrary to this request, the court charged in effect that if the bank, having the mortgage in possession as a collateral, failed to record it without the consent or acquiescence of the defendant, he would be entirely discharged.

[4] Even if Brown were a surety, and if

he did not acquiesce in the failure to record the mortgage, the failure to record was mere passive inaction which would not discharge the surety, but, at most, only give him a right to have credit for the depreciation in the value of the security due to the failure to record. The most favorable statement of the law on this subject that the defendant could ask was contained in the request submitted by plaintiff's counsel above quoted. In *Lang v. Brevard*, 3 Strob. Eq. 59, in consequence of the failure of the bank to record a mortgage held as security its value was impaired; and the court said with respect to the surety, Brevard: "In the case we are considering Alfred Brevard, if he had been himself active and vigilant, might have easily discovered that the mortgage was not recorded. He might have demanded that the mortgagee should have it recorded, or that it should be delivered to him for that purpose. If this legitimate demand were refused, and injury had resulted to the surety from the nonregistry of the mortgage, he would have been entitled to relief. In not pursuing this course he has not himself been vigilant and the maxim, 'Vigilantibus et non dormientibus,' etc., applies." *Jackson v. Patrick*, 10 S. C. 197; *Rosborough v. McAlley*, 10 S. C. 235; *Fales v. Browning*, 68 S. C. 13, 46 S. E. 545; *Fretwell v. Carter*, 83 S. C. 553, 65 S. E. 829.

We are not called upon at this time to decide whether the defendant was entitled to credit for the impairment of the value of the mortgage security by the failure to record, as that point was conceded at the trial by the plaintiffs in their request to charge.

It is the judgment of this court that the judgment of the circuit court be reversed, and the cause remanded for a new trial.

GARY, C. J., and HYDRICK, WATTS, and FRASER, JJ. concur.

(70 W. Va. 507)

### CARTRIGHT v. CARTRIGHT et al.

(Supreme Court of Appeals of West Virginia.  
March 19, 1912.)

#### (Syllabus by the Court.)

1. PARTIES (§ 84\*)—OBJECTIONS—DEMURRER. Want of necessary parties, not appearing on the face of the bill, cannot be raised by demurrer.

[Ed. Note.—For other cases, see Parties, Cent. Dig. §§ 134-142, 171; Dec. Dig. § 84.\*]

2. PARTIES (§ 84\*)—OBJECTIONS—DEMURRER. A bill against a number of parties, as heirs of a decedent, is not demurrable because it does not aver that the parties named are all of the heirs.

[Ed. Note.—For other cases, see Parties, Cent. Dig. §§ 134-142, 171; Dec. Dig. § 84.\*]

3. LOST INSTRUMENTS (§ 5\*)—ESTABLISHMENT—JURISDICTION OF EQUITY.

Equity will entertain the suit of a grantee of real estate to establish a lost deed, when

such relief is necessary for the protection of his rights in respect to the land granted, although no other relief be demanded by his bill.

[Ed. Note.—For other cases, see Lost Instruments, Cent. Dig. § 12; Dec. Dig. § 5.\*]

4. LOST INSTRUMENTS (§ 8\*)—TITLE TO REALTY.

The right to have his title appear properly upon the record is a substantial property right which the law guarantees to a landowner.

[Ed. Note.—For other cases, see Lost Instruments, Cent. Dig. § 8; Dec. Dig. § 3.\*]

5. LOST INSTRUMENTS (§ 7\*)—ESTABLISHMENT—BILL.

A bill to establish a lost deed need not aver the boundary lines contained in the deed. If the bill identifies the land, the boundaries may be proven.

[Ed. Note.—For other cases, see Lost Instruments, Cent. Dig. § 16; Dec. Dig. § 7.\*]

6. BOUNDARIES (§ 36\*)—EVIDENCE—SURVEY.

A survey and map, made after the deed was lost by a surveyor who acted only upon information in relation to the boundaries therein contained, is not evidence to prove the boundaries.

[Ed. Note.—For other cases, see Boundaries, Cent. Dig. §§ 160-162, 164, 166-176; Dec. Dig. § 36.\*]

7. WITNESSES (§ 139\*)—COMPETENCY—TESTIMONY AS TO TRANSACTIONS WITH PERSON SINCE DECEASED.

In a suit to establish a lost deed, brought by the grantee against the heirs at law of the deceased grantor, the heir is not a competent witness to prove a conversation between himself and the deceased grantor, relating to the alleged nondelivery or destruction of such lost deed.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 582-597; Dec. Dig. § 139.\*]

8. LOST INSTRUMENTS (§ 8\*)—EVIDENCE—DELIVERY.

Delivery of a deed is an essential element of its due execution; and the burden is on him who claims title under a lost deed to prove its delivery. But it may be established by proof of the grantor's declarations and admissions.

[Ed. Note.—For other cases, see Lost Instruments, Cent. Dig. § 17; Dec. Dig. § 8.\*]

9. WITNESSES (§ 139\*)—COMPETENCY—TRANSACTIONS WITH PERSONS SINCE DECEASED.

The husband of a deceased wife, who joined her in the making of a lost deed conveying her separate real estate, although a party to the suit, is a competent witness against the heirs at law of his wife to prove delivery of the deed to the grantee, after the same was signed and acknowledged by himself and wife. The delivery, in such case, is not a personal transaction between himself and wife, but a transaction between his wife and the grantee.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 582-597; Dec. Dig. § 139.\*]

10. WITNESSES (§ 164\*)—COMPETENCY—TRANSACTIONS WITH PERSONS SINCE DECEASED.

If delivery of a deed to the grantee be fully proven by other competent witnesses, the grantee is then competent to prove its subsequent loss.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 683-686, 688-695; Dec. Dig. § 164.\*]

# 11. LOST INSTRUMENTS (§ 8\*) — ESTABLISHMENT—PLEADING.

If the answer to a bill setting up a lost deed admits that such deed was signed and acknowledged by the deceased grantor and her husband, it will be presumed that it was properly signed and properly acknowledged by both.

[Ed. Note.—For other cases, see Lost Instruments, Cent. Dig. § 17; Dec. Dig. § 8.\*]

# 12. LOST INSTRUMENTS (§ 10\*)—DISPOSITION OF CAUSE — REVERSAL — REMAND TO LOWER COURT.

On the reversal of a decree denying relief to plaintiff on a bill to establish a lost deed, this court will remand the cause, with instructions to the lower court to grant the relief by appointing a commissioner to execute a proper deed.

[Ed. Note.—For other cases, see Lost Instruments, Cent. Dig. §§ 18, 19; Dec. Dig. § 10.\*]

(Additional Syllabus by Editorial Staff.)

# 13. WITNESSES (§ 164\*)—COMPETENCY—TESTIMONY AS TO TRANSACTIONS WITH PERSONS SINCE DECEASED.

Plaintiff, in a suit to establish a lost deed, is not a competent witness against the heirs of the grantor to prove delivery.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 683-686, 688-695; Dec. Dig. § 164.\*]

Appeal from Circuit Court, Marion County.

Bill in equity by Bessie D. Cartright against Lowry F. Cartright and others. From a decree for defendants, plaintiff appeals. Reversed and remanded, with directions.

L. S. Schwenck and B. L. Butcher, for appellant. W. S. Meredith, for appellees.

**WILLIAMS, J.** Bessie D. Cartright brought suit in equity, in the circuit court of Marion county, against the heirs at law of Nancy A. Cartright, deceased, to establish title to a tract of land claimed by deed, alleged to have been lost and never recorded. She avers that the deed was made and delivered to her by Nancy A. Cartright, her grandmother, in 1903; that she then carefully put it away; that shortly after the grantor's death it disappeared from the place where she had kept it, without fault of her own; and that by diligent search she was unable to find it. She swears to her bill, and prays that her title be established, free from the claims of the heirs of Nancy A. Cartright, deceased, and that she be granted general relief.

Maria F. Snodgrass, a daughter of Nancy A. Cartright, is the only one of the numerous defendants who makes defense. She demurred to the bill and also answered. Her answer admits that the deed was signed, sealed, and acknowledged, but denies that it was ever delivered to plaintiff, or to any one else for her, and avers that Nancy A. Cartright retained possession of it until a short time before her death, and then destroyed it in respondent's presence. There was a general replication to the answer, depositions were

taken by plaintiff and by Maria F. Snodgrass, and the cause was heard on the 24th of June, 1908, and a final decree rendered, denying relief and dismissing plaintiff's bill, and she has appealed.

[1, 2] It is suggested in brief of counsel for appellees that it does not appear from the bill that all the heirs of Nancy A. Cartright are before the court. True it does not expressly aver that the numerous defendants named are all of her heirs at law; but their relationship to her is averred, from which it appears that they are her heirs at law. If there are other heirs, not named in the bill, it would be cause for a plea in abatement; but no such plea was filed. The bill does not disclose the absence of any necessary party to the suit; hence it is not demurrable for want of necessary parties.

[3, 4] It is also urged that equity will not entertain a bill to establish a lost instrument, or to compel re-execution of same, unless some additional relief, under the instrument, is demanded by the bill. We need not stop to consider whether such ancillary relief is essential to confer jurisdiction or not, because the averments of the bill disclose a substantial property right in plaintiff, which is necessary to be protected by the establishment and recordation of the lost deed. Plaintiff is not entitled to possession of the land; for the bill avers that, by the very terms of the lost deed, a life estate was reserved for grantor's husband, Thornton F. Cartright, who was living at the time the suit was instituted. But, so far as record evidence of title is concerned, on the death of Nancy A. Cartright, the land apparently descended to her heirs, subject to the life estate of Thornton F. Cartright; and there is danger that a bona fide purchaser from or a judgment creditor of the heirs may acquire a right, in respect thereto, superior to plaintiff, because of our recording statutes, and equity will entertain plaintiff's bill to protect her against such hazard, if for no other reason. Moreover, it is the policy of the law to secure to the owner the full enjoyment of his property, one essential element of which is the *jus disponendi*; and, while he may not be in immediate danger of an ouster, still if he is not able to deraign title by the record, and is compelled to rely upon the testimony of witnesses to establish it, the market value of his property will thereby be materially affected. In order to relieve the owner's title of such embarrassment and facilitate the transfer of his property, equity will restore a lost deed, even if no other relief be demanded, when the rights of others will not thereby be violated. The following cases will be found to support this conclusion, viz.: *Blight's Heirs v. Blanks*, 6 T. B. Mon. (Ky.) 192, 17 Am. Dec. 136; *Hord v. Baugh*, 7 Humph. (Tenn.) 576, 46 Am. Dec. 91; *Griffin v. Fries*, 23 Fla. 173, 2 South.



266, 11 Am. St. Rep. 351; *Cummings v. Coe*, 10 Cal. 529; *Lawrence v. Lawrence*, 42 N. H. 109; *Bohart v. Chamberlain*, 99 Mo. 622, 13 S. W. 85; *Shelmardine v. Harrop*, 6 Madd. 40; *Sharon v. Tucker*, 144 U. S. 533, 12 Sup. Ct. 720, 36 L. Ed. 532; *New Orleans, etc., R. R. Co. v. Mississippi College*, 47 Miss. 560.

In *Dower v. Suds*, 28 W. Va. 113, 57 Am. Rep. 646, this court entertained a bill brought to establish a lost will; and it does not appear that any rights, under the will, were sought to be enforced by that suit. The matter of jurisdiction seems not to have been there mooted. And, while the opinion does not deal with the question of jurisdiction, the court evidently regarded the case as one entitling the plaintiff to relief. There is no distinction between a suit to establish a lost will and one which seeks to set up a lost deed, so far as they relate to the question under discussion. Therefore the fact that plaintiff is not entitled to the present possession of the land is no ground for denial of her prayer. Her title in remainder is a vested estate. It has a present value, and is transferable. If her case is proven, she has a right to have her title established by decree of court, in order that she may enjoy more fully her property right, and be protected from the hazard of losing it in the manner above stated. Her bill shows that she has substantial rights to be protected.

[5] It is insisted that the bill does not sufficiently describe the land conveyed to enable the court to decree the re-execution of the lost deed. But we do not understand that plaintiff attempts to set out particularly, in her bill, the description of the land as it was given in the deed. The bill describes the land in a general way, for the purpose of identification. It does not purport to give the identical description that was contained in the lost deed. The contents of the deed do not have to be pleaded; that is a matter of proof. The averments of the bill identify the land and furnish a basis for proof of a more specific description, not inconsistent therewith. "Id certum est quod certum reddi potest." Thornton F. Cartright and Benjamin Cartright, husband of plaintiff, both testify concerning the description of the land. Benjamin Cartright says he read the deed, and his testimony in relation to the boundaries is as follows, viz.: "Commenced at the creek at two oaks on Phillip Gump's line; then it run west, or a little southwest, I believe, to a dogwood or an oak stump, and further to the mouth of the run to a sycamore." He further says this run is known as Long drain, and that the line ran "from the mouth of the run to the place of the beginning." Thornton F. Cartright's testimony is not quite so specific as to boundary lines.

[6] Plaintiff had a survey and plat of the land made by one A. C. Martin long after the death of Nancy A. Cartright. That sur-

vey, of course, cannot be regarded as evidence in support of the deed. But, if it coincides with the description in the deed, we see no reason why the court may not adopt it as a proper description of the land to be made when it directs the making of a new deed to take the place of the lost one. The correctness of the map and lines, proving the tract to contain 18 acres and 102 poles, is not disputed. Maria F. Snodgrass' answer contains the following admission in relation to the description in the deed, viz., "and this respondent is advised that the boundaries thereof, as shown in plaintiff's bill, are correct, and that said deed included all of said boundaries and appurtenances."

[7] In her answer, Mrs. Snodgrass admits that Nancy A. Cartright and her husband signed and acknowledged a deed to plaintiff for the land described in the bill. But avers, first, that it was done under duress; and, second, that the deed was never delivered. The burden of proving the first averment rests on defendant; and the only evidence of duress is found in the depositions of defendants Isaac C. Cartright and Mrs. Snodgrass, both of whom testify that their mother told them that she had been threatened with violence, if she did not make the deed. These witnesses, being interested parties to the suit, were clearly incompetent to testify, in relation to conversations had with their mother, against plaintiff, who claims to be her grantee, and their testimony was very properly suppressed by the lower court. Their testimony out, there is no proof whatever of duress.

[8] But delivery is one of the essential elements to establish due execution of a deed, and plaintiff must prove it. Without delivery, title does not pass.

[13] Plaintiff is not a competent witness, against the heirs of her grantor, to prove delivery. But there are a number of witnesses who testify that Nancy A. Cartright told them that she had made a deed to "Bessie," and had given it to her. So says Nathan Booth, Phillip Gump, Susan A. Rose, and McClelland Rose, all of whom were her near neighbors, and had frequent talks with her.

[8] Thornton F. Cartright, husband of Nancy and joint maker of the deed, was a competent witness to prove its delivery, and he testifies as follows, viz.: "Q. Do you remember anything about any deeds to Bessie Cartright? A. Why, yes; my wife and me made her a deed. Q. When was that? A. I don't remember the time. It's been seven or eight, or maybe ten, years ago. Q. What did you do with the deed? A. She has the deed, I reckon. Q. What did you do with it when you made it? A. It was given to her, to Bessie. Q. Who acknowledged it? Do you remember who the notary was? A. I cannot remember who it was now. Q. Was it Bill Daskin? A. I

think not. It might have been. I cannot tell you. I forget."

Plaintiff is a granddaughter of Nancy A. Cartright, deceased, and lived with her from infancy. When she grew to womanhood, she married her cousin, Benjamin Cartright, and they together made their home with their grandparents, and plaintiff took care of her grandmother, who was a very old lady, until a short time before her death, when plaintiff herself became ill, and was not able to do so. However, she still continued to live in the same house with her. Maria F. Snodgrass is a married daughter of Nancy A. Cartright, and lived in the state of Kansas. She visited her mother during her last illness, in Marion county, W. Va., and remained with her until she died. She and her niece, the plaintiff, appear not to be on very friendly terms. The deed sought to be established was made in November, 1903, nearly three years before Nancy A. Cartright died. At that time, Mrs. Cartright, who was growing old and feeble, concluded to dispose of her land. Accordingly, she and her husband signed and acknowledged the deed to plaintiff, and two other deeds, one of which was to Mrs. Snodgrass and her brother, Isaac C. Cartright, who lived in Jasper county, Mo., and the other to the same grantees and to the heirs of John Cartright, deceased, jointly. In all of these conveyances, Mrs. Cartright retained a joint life estate for herself and husband. But the deeds to Mrs. Snodgrass and her brother were not delivered to her until August, 1906, when she came to visit her mother in her last illness. It was some time during this visit that plaintiff claims her deed disappeared from the place where she kept it.

[10] Delivery of the deed to plaintiff having been proven by competent witnesses, we are of the opinion that plaintiff is competent to prove its subsequent loss. She testifies that, when her own deed was delivered to her, her grandmother also gave her other deeds for safe-keeping, and that she kept them all in a receptacle under the bed in a room occupied by her grandmother and herself; that one day, while Mrs. Snodgrass was there, her grandmother called her into the room and sent Mrs. Snodgrass out, and asked her to get Mrs. Snodgrass' deed, and she did so, and handed it to her grandmother, and she gave it to Mrs. Snodgrass; that she last saw her own deed about the 1st of September, 1906, and first discovered that it was gone about the time her grandmother died, which was October 24, 1906. The clear inference to be drawn from plaintiff's testimony, although she does not expressly so state, is that Mrs. Snodgrass found out where the deed was and got possession of it and destroyed it. On the other hand, Mrs. Snodgrass and her brother, Isaac Cartright, testify that their mother asked for the deed which she had made to plaintiff;

that her husband got it and delivered it to her, and that she tore it up in their presence; and that her husband took the torn paper into an adjoining room and burned it. But they were not competent witnesses; and their testimony was properly suppressed by order of the court. Neither was plaintiff competent to prove what took place between herself and her grandmother; and her testimony can only be read for the purpose of proving where she kept her deed when she last saw it, and when she discovered that it was missing. It is fair to say that Mrs. Snodgrass and Isaac C. Cartright are contradicted by the testimony of Thornton F. Cartright on the question of the deed having been destroyed by Nancy A. Cartright. He testifies that the deed was not destroyed by him, or by his wife in his presence. But he, being a party to the suit, and his testimony being in relation to what did, or did not, take place between himself and the deceased ancestor of defendants, may also be an incompetent witness. However, it is not necessary to decide whether he is competent to testify on that point or not, because there is no legal evidence that the old lady destroyed the deed. But, even if it were proven that the deed was destroyed in the manner claimed by defendant, that would not divest plaintiff of title. The proof is that delivery of the deed was made at the time it was acknowledged, about three years before it is claimed to have been destroyed. Title passed upon delivery; and the subsequent loss or destruction of the deed could not divest title.

[11] Another question raised in brief of counsel is that it does not appear that the deed had been signed by the husband at the time it was acknowledged by the wife, and that, unless such fact affirmatively appears, the deed must be held not sufficient to pass the wife's title. *Cecil v. Clark*, 44 W. Va. 659, 30 S. E. 216; *Amick v. Ellis*, 53 W. Va. 421, 44 S. E. 257, and *Wynn v. Louthan*, 86 Va. 948, 11 S. E. 878, are cited in support of the proposition. We are of the opinion, however, that it does sufficiently appear that the deed was properly signed and acknowledged by both wife and husband. We think this fact is established by the pleadings. The bill avers that the deed was signed, sealed, and acknowledged by Nancy A. Cartright and her husband on the 11th day of November, 1903, and that it was delivered to plaintiff. The answer admits that it was duly made and acknowledged, which is evidently an admission that it was properly acknowledged by both parties, but denies that it was ever delivered. It is therefore not necessary to prove the virtually admitted fact that the deed was first signed by the husband before it was acknowledged by the wife. But *quære* whether it should not be presumed that the husband signed a deed before the wife ac-

knowledgeed it, if it appear that they both signed and acknowledged the same instrument of writing, and it does not affirmatively appear when the husband's name was signed thereto. *Cedl v. Clark*, supra, is a case in which the husband had not joined in the execution of his wife's deed, and afterwards attempted to make the wife's conveyance good by executing another conveyance, in which his wife did not join, for the same property. *Amick v. Ellis* was a suit to enforce against the wife a contract, not acknowledged by her, for the sale of land; and *Wynn v. Louthan* was a case involving a certificate of acknowledgment, defective in form, to a deed by a married woman. It does not appear from the report of that case whether the husband had, or had not, signed the deed at the time the acknowledgment was made by the wife. But it is not necessary to pass upon this question, because we think the admission in the answer removes all doubt of the fact that the deed was properly signed and acknowledged by both husband and wife.

[12] We will reverse the decree appealed from, and will remand the cause, with direction to the lower court to appoint a commissioner to make and deliver to plaintiff a deed for the land described in her bill, conveying such title as was vested in her by the lost deed from Nancy A. Cartright and Thornton F. Cartright, her husband, on November 11, 1903, reserving therein a life estate to the said Thornton F. Cartright.

(70 W. Va. 533)

SCOTT et al. v. DIXIE FIRE INS. CO.  
(Supreme Court of Appeals of West Virginia.  
March 19, 1912.)

(Syllabus by the Court.)

1. EXECUTORS AND ADMINISTRATORS (§ 438\*)  
—ACTIONS ON POLICIES—PARTIES—JOINDER OF PLAINTIFFS.

A partnership is composed of several members. One dies, but the partnership is not closed, and the share or assets of the decedent is not withdrawn, but the firm business goes on in the firm name as before; his administrator acting as a copartner. In this state of things, a fire insurance policy, after such death of a member, is issued in the name of the firm, insuring a house belonging to it, though the legal title is in the members as individuals. The administrator may join the other members, in a suit in the names of all, as partners on the policy to recover the loss from destruction of the house by fire. It is no misjoinder of plaintiffs.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 1765-1785, 1790; Dec. Dig. § 438.\*]

2. INSURANCE (§ 282\*) — AVOIDANCE—OWNERSHIP OF PROPERTY.

A lot of land is conveyed to a number of persons in their individual names, but with intention to be used in the business of a partnership, and by them put into the partnership business and used in it; the firm in possession of and using the lot and house on it in its business. One of the partners died; his share of

the naked legal title being in his heirs. After his death, the house is insured against loss by fire in the name of the firm. There is here no violation of a clause in the policy that "if the interests of the assured in the property be not truly stated herein," \* \* \* or "if the interests of the assured be other than unconditional and sole ownership," the policy shall be void. And the firm has an insurable interest.

[Ed. Note.—For other cases, see *Insurance*, Cent. Dig. §§ 601-635; Dec. Dig. § 282.\*]

3. INSURANCE (§ 115\*) — "INSURABLE INTEREST"—PARTNERSHIP REAL ESTATE.

Real estate acquired for partnership with partnership means, and used in its business, gives the partnership an "insurable interest" to warrant a policy insuring it against loss by fire.

[Ed. Note.—For other cases, see *Insurance*, Cent. Dig. §§ 139-157, 177; Dec. Dig. § 115.\*]

For other definitions, see *Words and Phrases*, vol. 4, pp. 3670-3674; vol. 8, p. 7690.]

4. INSURANCE (§ 115\*) — INSURABLE INTEREST — EQUITABLE TITLE.

An equitable title to real estate gives an insurable interest to warrant a policy in the name of its owner, insuring it against loss by fire.

[Ed. Note.—For other cases, see *Insurance*, Cent. Dig. §§ 139-157, 177; Dec. Dig. § 115.\*]

5. INSURANCE (§ 559\*) — PROOFS OF LOSS — WAIVER—DENIAL OF LIABILITY.

Denial by an insurance company of liability on other grounds, within the time allowed for furnishing preliminary proofs of loss, is, in law, a waiver of the conditions of the policy requiring such proof.

[Ed. Note.—For other cases, see *Insurance*, Cent. Dig. §§ 1391, 1392; Dec. Dig. § 559.\*]

(Additional Syllabus by Editorial Staff.)

6. PARTNERSHIP (§ 68\*) — OWNERSHIP—REAL ESTATE.

Realty purchased with partnership assets for partnership purposes, though deeded to individuals, is partnership property, and is personal property as to creditors and between partners.

[Ed. Note.—For other cases, see *Partnership*, Cent. Dig. §§ 101-111; Dec. Dig. § 68.\*]

7. INSURANCE (§ 115\*) — "INSURABLE INTEREST."

In general, to give a party an "insurable interest" it is not necessary that he have actual right of property, legal or equitable, in the subject insured; but it is sufficient if he, or those whom he represents, will suffer any sort of loss by its destruction.

[Ed. Note.—For other cases, see *Insurance*, Cent. Dig. §§ 139-157, 177; Dec. Dig. § 115.\*]

Error to Circuit Court, Fayette County.

Action by L. P. Scott and others, partners, against the Dixie Fire Insurance Company. Judgment for plaintiffs, and defendant brings error. Affirmed.

Payne & Hamilton, for plaintiff in error.  
Dillon & Nuckolls, for defendants in error.

BRANNON, J. Dixie Fire Insurance Company issued an insurance policy to Scott & Calloway, insuring a house. The house being destroyed by fire, an action was brought against that company in the names, as plaintiffs, of L. P. Scott, J. B. Calloway, A. B. Ellis, S. S. Boyd, Shedrick Hughes, in his own right and as administrator of Randolph Hughes, deceased, as partners in the

name of Scott & Calloway, and, a judgment having been rendered on a verdict for the plaintiffs for \$1,050, the company obtained a writ of error.

[1] As one point of error, it is claimed that there could be no recovery because of a misjoinder of plaintiffs. Here it is said that the administrator cannot join with the other parties, and there could be no joint recovery. The facts are that the property was conveyed by one Smith to Scott, Calloway, and a number of others as individuals, the deed not indicating any partnership, but intended for such use. On its conveyance, the grantees formed a partnership, under the name of Thompson & Scott, to carry on the liquor business, using the house in such business, and treating the house as partnership property. By subsequent conveyance, the house came to be owned in the name of Scott, Calloway, Boyd, Ellis, Shedrick Hughes, and heirs of Randolph Hughes. Such was the title when the policy of insurance issued. The partnership name was changed from Thompson & Scott to Scott & Calloway. The house was occupied and used in the partnership business of Scott & Calloway when the policy issued to them in that name. The property was, so far as legal title is concerned, in the name, as individuals, of plaintiffs Scott, Calloway, Ellis, Boyd, Shedrick Hughes, and heirs of Randolph Hughes. Before the policy issued, Randolph Hughes had died, and Shedrick Hughes, as his administrator, still participated in the business; and it was carried on with him as a partner, individually and as administrator.

[6] Realty purchased with partnership assets for partnership purposes, though deeded to individuals, is partnership property, and is personal property as to creditors and between partners. *Davis v. Christian*, 15 Grat. (Va.) 11; *Brooke v. Washington*, 8 Grat. (Va.) 248, 56 Am. Dec. 142; *Pierce v. Trigg*, 10 Leigh (Va.) 406. As held in *Miller v. Ferguson*, 107 Va. 251, 57 S. E. 649, 122 Am. St. Rep. 840, 13 Ann. Cas. 138, it is to every intent considered personal property not only as between the partners and their creditors, but also between the survivors and the representatives of the deceased.

[2] It is so far personalty that a widow of a partner cannot have dower in the realty itself. *Parrish v. Parrish*, 88 Va. 529, 14 S. E. 325. I admit this is the rule in the court of equity, not law, and I do not say that such consideration alone would call for recovery; but I introduce that view to say that, though not technically at law the property of the firm, yet in equity it is, and that furnished right to the firm to take insurance in its name. In equity, partnership property, and in actual possession of the firm; the individuals holding title only for the firm, as a dry trustee holds for a cestui que trust in possession. The company chose to issue the policy thus; and it cannot raise

this question, which at best is one between the other parties.

[3, 7] We cannot say the title was misrepresented, as the firm was substantial owner. It had substantial interest to be injured by the burning of the house. "Whoever may fairly be said to have a reasonable expectation of deriving pecuniary advantage from the preservation of the subject of insurance, whether that advantage inures to him personally or as representative of rights of others, has insurable interest." *Hogg's Pl. & Forms*, § 29. If this firm had care and custody of the property for those holding legal title, though not expressed in the policy, it has an insurable interest. "In general, to give a party an insurable interest, it is not necessary that he have actual right of property, legal or equitable, in the subject insured; but it is sufficient if he, or those whom he represents, will suffer any sort of loss by its destruction." *Sheppard v. Peabody Co.*, 21 W. Va. 368. There it was held that an administrator has an insurable interest in realty, if the personalty is not sufficient to pay debts. If we regard this firm as owner, of course it has an interest; but say that the title is in the individuals. Then those individuals are trustees, holding for the firm; then the full equity is in the firm, and it is well settled that the owner of the equitable title may insure in his name. *Cooley's Briefs on Insurance*, vol. 1, 150, citing *Columbian Ins. Co. v. Lawrence*, 2 Pet. 25, 7 L. Ed. 335, and many other cases. This consideration clearly justifies insurance and recovery in the name of the firm. Moreover, it is seen in *Cooley's Briefs on Ins.* (volume 1, 151), that "possession, though without title, is sufficient to give the possessor an insurable interest. And where the possession is complete with a beneficial use, the possessor has an insurable interest." "The interest one must have in the property insured, in order to give him an insurable interest, need be only slight and contingent." 1 *Cooley's Briefs on Insurance*, 149. I stop to ask, How can the insurance company raise a question on this ground? If the firm had to account to the holder of the legal title, payment by it to the firm would be good. But it is owner. Its members own.

I have been considering the case as if the policy issued in Randolph Hughes' life. This being a money demand, the administrator could unite with the others in suit. In *Clarkson v. Booth*, 17 Grat. (Va.) 490, it is held that, where one of several tenants in common owned a slave and one died, his administrator must join in an action to recover the slave. The policy issued after his death. His administrator, as a matter of fact, continued his assets in the business; and while he was a partner the insurance was taken out. Here is a contract with the firm, the administrator a member—a contract with him. A mere money demand

comes from it. He, as administrator, has an interest. Under those facts, it is much plainer that the administrator could join. Legal title to the money was in him jointly with others. Again, if the administrator is not a proper party, as the right would be in the survivors, would not his presence be treated as surplusage? *Goshorn v. County Court*, 42 W. Va. 735, 26 S. E. 452. So I conclude there was no misjoinder.

[4] I opine that the defense most relied upon is a falsity under that clause of the policy saying that, "if the interest of the insured in the property be not truthfully stated herein, \* \* \* or if the interests of the insured be other than unconditional and sole ownership," the policy should be void. What is said above will largely apply under this head to show that the firm had insurable interests, equitable title—was real owner in possession. This clause "is held to refer to character and quality of title—to the actual and substantial ownership—rather than the strictly legal title; in other words, the insured interest must be such that he would sustain the whole loss, if the property is destroyed." Who but the firm would in this case? "If the insured has an equitable title, it is a sufficient compliance with the condition, requiring sale and unconditional ownership in the insured." 2 *Cooley's Briefs on Insurance*, 1367. One in possession under oral contract of sale surely could insure, though he has no title or color of legal title. I have above shown that the firm was full equitable owner. Moreover, the agent who took the policy knew the state of title. No false statement as to title was made. There were no questions asked, no statement made; and, if the insured had stated that right to the property was in the firm, it would have been true, under the law of insurance, for reasons above given.

[5] The policy contains a clause that loss should not be payable until 60 days after notice and proof of loss. No proof of loss was made; but it was waived. Soon after the loss, an adjuster examined the place of the fire, took measurements, and obtained full information. No objection made as to fact or extent of loss. The adjuster made objection only on the ground that plaintiffs were not sole owners, and admitted that the loss was greater than the amount of the insurance. He referred the matter to the general agent, who wrote, stating that the company resisted payment because the true ownership had not been stated in the policy. This was within 60 days. He did not demand proof of loss, or allege that as a ground of nonpayment. This was a waiver of that defense. *Medley v. German Ins. Co.*, 55 W. Va. 342, 47 S. E. 101, 2 Ann. Cas. 99; *Morris v. Dutchess Co.*, 67 W. Va. 368, 68 S. E. 22. If a company refuse to pay upon

independent ground before proof of loss is made, and before the time within which proof is to be made, such denial is a waiver of proof. After such denial of liability, suit could be brought at once; but was not brought before five months after the fire. We see no just defense to the insurance claim, no reason why the company should not make its policy good.

Judgment affirmed.

(70 W. Va. 522)

### CHAPMAN v. CHAPMAN.

(Supreme Court of Appeals of West Virginia.  
March 19, 1912.)

(Syllabus by the Court.)

#### 1. DIVORCE (§ 165\*) — DECREE — SETTING ASIDE.

A decree of divorce a mensa or a vinculo, based upon some ground authorized by sections 5 and 6, of chapter 64, Code 1906, alleged in the bill and supported by proof, pronounced after process duly served, and default of appearance by defendant, and which by section 8 of said chapter, cannot be upon bill taken for confessed, cannot at a subsequent term of the court be set aside upon motion by defendant pursuant to section 5, chapter 134, Code 1906. Such decree is final, and so far as based on the facts alleged and proven cannot be re-examined except upon appeal to this court by the party claiming to be aggrieved thereby.

[Ed. Note.—For other cases, see *Divorce*, Cent. Dig. §§ 533-542, 546, 548; Dec. Dig. § 165.\*]

#### 2. DIVORCE (§ 165\*)—APPEAL — DECREE—SETTING ASIDE.

Nor may such a decree be set aside after the term at which it was pronounced upon a petition or bill by defendant in the same court on the ground that the evidence on which the same was predicated is false or insufficient.

[Ed. Note.—For other cases, see *Divorce*, Cent. Dig. §§ 533-542, 546, 548; Dec. Dig. § 165.\*]

#### 3. DIVORCE (§ 157\*)—DECREE.

By section 13, chapter 64, Code 1906, "when a divorce from bed and board has been decreed for abandonment, or desertion, or other cause, and two years shall have elapsed from the bringing of the suit wherein such decree is entered," and such decree has not been revoked, as therein provided, and there has been no reconciliation, the injured party on his application to the court pronouncing the decree, alleging and showing such facts, "and the production of satisfactory evidence, taken in support of such application" is entitled to a decree of "divorce from the bonds of matrimony"; and the provision of said statute, giving the court authority, upon such application to read and consider the evidence in the cause taken and filed in the former hearing, will not justify the court on such application, in denying the appellant a decree of absolute divorce.

[Ed. Note.—For other cases, see *Divorce*, Cent. Dig. § 517; Dec. Dig. § 157.\*]

(Additional Syllabus by Editorial Staff.)

#### 4. DIVORCE (§ 314\*)—PROPERTY RIGHTS—"A MENSA"—"A VINCULO."

A divorce "a mensa" is by section 12, c. 64, of the Code, a decree of perpetual separation. It operates upon the after-acquired property of the parties, and upon their personal rights and legal capacities, the same as a decree "a vinculo," except that neither party is

permitted to marry again during the life of the other; and by section 11 of said chapter, such decree may perhaps be made to operate upon property previously acquired.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 809, 810; Dec. Dig. § 314.\*

For other definitions, see Words and Phrases, vol. 3, p. 2150.]

#### 5. WORDS AND PHRASES—"MAY."

The word "may," as used in section 13, c. 64, Code 1906, providing that in certain cases, where divorce from bed and board is decreed, an absolute divorce "may" be granted after certain requirements are fulfilled, means "shall" (citing 5 Words and Phrases, 4420).

Appeal from Circuit Court, Mason County.

Action by Frank A. Chapman against Mary A. Chapman. Decree for defendant, and plaintiff appeals. Reversed, and decree for plaintiff.

B. H. Blagg and Somerville & Somerville, for appellant. Rankin Wiley, for appellee.

MILLER, J. The original suit was by husband against wife for divorce from bed and board, on the ground of desertion. Process was duly executed by personal service on defendant in Mason County, where she resided and where suit was brought, but she entered no appearance until after the term at which final decree of separation was on March 18, 1908, on bill and evidence duly taken upon notice likewise served, pronounced against her.

The decree of June 26, 1911, appealed from, among other things, on motion of defendant, made at a subsequent term, pursuant to section 5, chapter 134, Code 1906, sets aside and annuls the decree of March 18, 1908; and on the original bill, and the supplemental bill filed by plaintiff against defendant, pursuant to section 13, chapter 64, Code 1906, after two years from the date of the bringing of his original suit in which he obtained said decree of separation, and the answer of defendant to the said supplemental bill, with replication thereto, and deposition and proofs taken and filed in the cause, said decree also dismisses said original and supplemental bills, with costs to defendant in each case.

Two reasons are recited in the decree for the action of the court in the premises: (1) That plaintiff in his evidence taken and filed on the original bill had failed to show the circumstances under which the alleged desertion and abandonment had taken place; (2) that said evidence does not specifically and clearly prove abandonment by defendant.

[1] The first question presented is, can a decree of divorce a mensa or a vinculo, based upon some ground authorized by sections 5 and 6, chapter 64, Code 1906, and pronounced after process duly executed by personal service upon and default of appearance by defendant, be set aside at a subsequent term on motion of defendant, under section 5,

chapter 134, Code 1906? We hold that it cannot; that such decree is final, and so far as it is predicated on the facts alleged and supported by the evidence taken and filed in the cause, it cannot be reheard or re-examined except on appeal to this court by the party claiming to be aggrieved thereby.

Our statute, section 8, chapter 64, Code 1906, provides that: "Such suit shall be instituted and conducted as other suits in equity, except that the bill shall not be taken for confessed, and whether the defendant answer or not, the cause shall be heard independently of the admissions of either party, in the pleadings or otherwise." The jurisdiction given the court or judge thereof by said section 5, chapter 134, to reverse a decree "for any error for which an appellate court might reverse it," as provided thereby, is specifically limited to "a decree on bill taken for confessed." But as no decree for divorce can lawfully be predicated on a bill taken for confessed, we do not see how a decree based on bill, evidence taken and filed in the cause in support thereof, after notice and upon process personally served on defendant, can on mere motion at a subsequent term be reviewed and set aside. If the statute did not deny the right to decree divorce on bill taken for confessed, then, because of said section 8, of chapter 64, we would hold, as courts in other states have held, that a decree on bill taken pro confesso and default of appearance by defendant, would be controlled by the statute applicable in other causes. 14 Cyc. 714. But our statute excepts divorce suits from the general rule authorizing decrees on bills taken for confessed, without further proof, and the provision of section 5, of chapter 134, relating to decrees on bills taken for confessed, ought not, we think, be construed as applying to decrees in divorce cases.

This conclusion, we think, well founded in reason. The decree we are dealing with here is a decree a mensa. In some states courts are prevented from vacating decrees of divorce at a subsequent term, because of the evil consequences likely to flow from so doing. 2 Nelson on Divorce, 1008. Where this is the law it has even been questioned whether courts can set aside their decrees obtained by fraud. Id. 1009. But Chief Justice Bigelow, in *Edson v. Edson*, 108 Mass. 590, 597 (11 Am. Rep. 393), said, in reply to that question, that it was "an established principle of jurisprudence, that courts of justice have power, on due proceedings had, to set aside or vacate their judgments and decrees, whenever it appears that an innocent party without notice has been aggrieved by a judgment or decree obtained against him without his knowledge, by the fraud of the other party. Nor is this principle limited in its operation to courts which proceed according to the course of the common law.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.

It is equally applicable to courts exercising jurisdiction in equity, and to tribunals having cognizance of cases which are usually heard and determined in the ecclesiastical courts. In tribunals of the last named description, whose decrees cannot be revised by writ of error or review, the proper form of proceeding is by petition to vacate the former decree as having been obtained by fraud upon the party and imposition upon the court."

[4] A decree of divorce a mensa is by section 12, chapter 64, of the Code, a decree of perpetual separation; it operates upon the after-acquired property of the parties, and upon their personal rights and legal capacities, the same as a decree a vinculo, except that neither party is permitted to marry again during the life of the other; and by section 11 of said chapter, such decree may perhaps be made to operate upon property previously acquired. *Chapman v. Parsons*, 66 W. Va. 307, 66 S. E. 461, 24 L. E. A. (N. S.) 1015, 135 Am. St. Rep. 1033, 19 Ann. Cas. 453. Wherefore we think, where defendant has been served with process, and an opportunity given for full and fair hearing, a decree of divorce ought not to be regarded lightly and subject to be set aside on mere motion at a subsequent term for cause which could have been presented and litigated. 1 Black on Judgments, section 320 and notes; 2 Bishop on Mar. & Div., section 720.

[2] The next question is, may such a decree be set aside after the term at which it was rendered upon petition or bill by defendant on the ground that the evidence on which it was predicated was false or insufficient? This was the only ground on which defendant relied in her bill filed against plaintiff to impeach the decree of March 18, 1908, and as we have seen is practically the same and only reason given by the court below in the decree appealed from for annulling that decree on defendant's motion. We hold that such decree cannot be impeached or annulled in that way. Under our statute the court in pronouncing such decree must necessarily find that the facts alleged constituting the grounds of divorce have been proven by the evidence, for nothing can be predicated on the bill as taken for confessed. Having so found, the court is without jurisdiction at a subsequent term to re-examine the evidence and on motion or bill set aside its decree for supposed error in its findings on the evidence. The case is then one of *res judicata*, and cannot be again re-examined except by the appellate court. In *Watson v. Wigginton*, 28 W. Va. 533, *Justis Anno*. 947, this court held that where the facts introduced into the cause on which the decree appealed from was based, were not treated by the court as facts taken for confessed and admitted, especially if defendant has appeared and opposed the entry of the decree based on those facts, such decree will not be regarded

as a decree on a bill taken for confessed, though defendant has not pleaded or answered, and that the court will entertain an appeal from it though no motion has been made in the court below to reverse or correct it. We think this rule applicable in divorce cases, where the statute forbids a decree on a bill taken for confessed. In 2 Nelson on Divorce and Separation, section 1051, it is said that "In all cases where a decree of divorce has been obtained by false or insufficient evidence, it will be vacated on the usual application and showing of the facts, as in other cases." No authority is cited for this particular proposition. Immediately following, in the same section, this writer says: "It is an open question whether fraud consisting of false and perjured testimony as to proof of the cause of action is sufficient cause for vacating the ordinary decree. The general rule in the case of ordinary judgments," says he, "is that the fraud for which a judgment may be vacated in equity must be in the procurement of the judgment, in preventing a defense, or in a false showing of the jurisdictional facts. But fraud in the cause of action is not sufficient." He further says: "This rule has been applied to actions to impeach decrees for divorce." Such also seems to be the rule in Illinois, *Kingman v. Kingman*, 61 Ill. App. 134. In *Greene v. Greene*, 2 Gray (Mass.) 361, 61 Am. Dec. 454, a leading case cited by this writer in the paragraph referred to holds that: "A decree of divorce from the bond of matrimony, although obtained by fraud and false testimony, cannot be set aside on an original libel, filed at a subsequent term." The Massachusetts court in that case says, page 364 of 2 Gray: "We take the rule to be, that a judgment of a court of competent jurisdiction, having jurisdiction of the subject and of the parties, by legal process duly served, when no appeal, writ of error, certiorari, review, or other legal process lies, for revising, affirming or reversing such judgment, or where no such process is commenced, by the party who would avoid the judgment, in the mode and within the time prescribed by law, is conclusive upon the same parties in any other proceeding at law, in equity, or before any other judicial tribunal." At page 363 of 2 Gray this court also says: "If a new and original libel may be brought, upon the ground that a former decree was obtained by false evidence, we see nothing to prevent the husband from bringing a third suit to reverse the decree of reversal, on a suggestion and offer of proof that the decree of reversal was obtained by perjury, subornation of perjury and other fraud, and thus reverse the second decree, and reinstate the original decree of divorce a vinculo." A mere difference of opinion as to the weight of the evidence will not justify reversal of a decree on a bill of review. *Tracey v. Sackett*, 1 Ohio St. 54, 59

Am. Dec. 610, and note page 615; Wood v. Wood, 59 Ark. 441, 27 S. W. 641, 28 L. R. A. 157, 43 Am. St. Rep. 42, notes 49; Lucas v. Lucas, 3 Gray (Mass.) 136. The rule is different of course when fraud has been practiced on the court in the procurement of the decree. Then a bill lies to impeach a decree of divorce for the fraud practiced as in other cases. 2 Nelson on Div., section 1052; 2 Black on Judgments, section 320.

[3, 5] Lastly, the question is, was plaintiff on his supplemental bill filed and proof taken therein, entitled to divorce from the bonds of matrimony? We are of opinion that he was, and that the court below should have so decreed. In our opinion the proper construction of section 13, chapter 64, Code 1906, indeed its language substantially is, that "When a divorce from bed and board has been decreed for abandonment, or desertion, or other cause, and two years shall have elapsed from the bringing of the suit wherein such decree is entered" and such decree has not been revoked, as therein provided, and there has been no reconciliation, the injured party on his application to the court pronouncing such decree, alleging and showing such facts, "and the production of satisfactory evidence, taken in support of such application," is entitled to a decree of "divorce from the bonds of matrimony." True the statute says the court "*may* . . . decree a divorce from the bonds of matrimony"; but this cannot mean that it is within the discretion of the court to grant or deny the relief, regardless of the facts alleged and proven in the cause. The statute, we think, confers a substantial right on the injured party, which he is entitled to enforce when the conditions of the statute have been complied with by him. There the word "*may*" in that event, we think, means "*shall*." Generally the rule of construction of statutes is that when the rights of the public or of third persons are involved the word "*may*" should be construed "*must*" or "*shall*." See 5 Words and Phrases, 4420. At all events the discretion of the court, if any, is a sound judicial discretion, not an arbitrary one. 1 Bishop on Mar. & Div., section 1837; 1 Nelson on Div. & Sep. 388; Duncan v. Duncan, 72 S. E. 742.

In the case at bar, the supplemental bill distinctly alleged and it was fully proved that the suit in which plaintiff obtained the divorce a mensa was begun more than two years before the application for a divorce a vinculo was applied for; that the decree had not been appealed from, vacated or otherwise annulled, and that there had been no reconciliation. Allegation and proof of these facts entitled plaintiff as matter of right to the decree. They constitute statutory grounds on which plaintiff was entitled to the relief. The fact that the statute says the court on such application "*may* consider the evidence in the cause taken, and filed on the former

hearing" does not imply that the court may reconsider its former decree, for we have decided that it cannot do so, but that this evidence may be considered in so far as applicable to the issue presented by the application for a complete divorce.

We are persuaded that a wrong may have been done defendant by the original decree, but the fault was largely hers. She should have appeared and defended. The error of the court, however, if any, in pronouncing that decree is one which cannot be corrected in the manner attempted, but only by appeal, and now it is too late to do that, and defendant must suffer the result of her own negligence. Litigation must end.

For these reasons we are of opinion that the decree below of June 28, 1911, must be wholly reversed, the decree of March 18, 1908, reinstated, the defendant's motion to reverse and vacate that decree overruled, her bill to impeach the same for fraud be dismissed at her costs, and that upon the supplemental bill of plaintiff and the issues and proofs taken therein, he be decreed a divorce from the bonds of matrimony in accordance with the statute so made and provided.

(70 W. Va. 516)

#### KENDALL v. PHARES et al.

(Supreme Court of Appeals of West Virginia.  
March 19, 1912.)

#### (Syllabus by the Court.)

#### 1. TAXATION (§ 619\*)—TAX SALE—ERRONEOUS ASSESSMENTS.

When taxes are paid on land under an assessment to the widow in possession thereof by an assignment of the same to her as dower, a tax sale thereof cannot be legally made under an assessment to decedent's heirs erroneously continued on the land book.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1274; Dec. Dig. § 619.\*]

#### 2. TAXATION (§ 88\*)—INTEREST SUBJECT—DOWER.

A widow in possession of land assigned to her as dower is deemed the owner thereof for the purpose of taxation.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 178, 179; Dec. Dig. § 88.\*]

#### 3. TAXATION (§ 525\*)—ASSESSMENT—PLACE OF LISTING.

Payment of taxes under an assessment listed in a magisterial district where only the smaller part of the land is situated is a sufficient acquittance of the taxes to save the land from sale under an erroneous assessment listed in the district where the greater part is situated.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 969; Dec. Dig. § 525.\*]

#### 4. TAXATION (§ 788\*)—TAX TITLES—ACTION TO TRY—TIME TO SUE.

A tax deed based on a sale under an assessment erroneously continuing in the name of the heirs of a decedent, when the land is assessed for taxation to the widow to whom it has been assigned as dower and the taxes are paid under the latter assessment, may be at-



tacked notwithstanding the expiration of five years from the time the deed is recorded.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1555, 1557, 1559-1569; Dec. Dig. § 788.\*]

Appeal from Circuit Court, Randolph County.

Bill in equity by Samuel M. Kendall against George W. Phares and others. From a decree for defendants, plaintiff appeals. Affirmed.

W. B. Maxwell, for appellant. Talbott & Hoover, for appellee Phares.

ROBINSON, J. In the year 1884, John M. Crouch, of the county of Randolph, died intestate, seized and possessed of various tracts of land. A widow and several children survived him. By decree in a suit in chancery, entered in 1892, three of the tracts, altogether containing 475 acres, were assigned to the widow as dower. In this assignment of dower, however, two of the tracts, together known as the "Armstrong Land," one of 275 acres and the other of 100 acres, were considered as one tract of 375 acres. The other tract assigned as dower, 100 acres, known as the "Lamb Land," lay adjoining the 375 acres. The 275 acres was situated partly in Middle Fork District and partly in Valley Bend District. All but about 35 acres thereof was in the first named district. The two other tracts making up the 475 acres assigned as dower were situated in Valley Bend District. Viewing the land as one body of 475 acres, one would find about 240 acres in Middle Fork and about 235 acres in Valley Bend.

From the death of John M. Crouch to the assignment of dower these lands were assessed for taxation in the name of "John M. Crouch's Heirs." The 275 acres was for those years so assessed in Middle Fork District, wherein lay the greater part of it. But after the assignment of the 475 acres to the widow as her dower, she had all of the same entered on the land book for taxation in her own name. It was entered in her name as two tracts, one of 375 acres and another of 100 acres, for so it had been considered in the dower assignment. This assessment to her, of lands lying partly in the one magisterial district and partly in another, was listed in Valley Bend District.

Notwithstanding this new assessment of the lands after the assignment of the same to the widow as dower, the former assessment of the 275 acres in the name of "John M. Crouch's Heirs," listed as hereinbefore observed in Middle Fork District, continued on the land book. So there was clearly a double assessment of the 275 acres. Though this 275 acres was assessed in Valley Bend District to the widow holding the same as dower, since it was included in the 475 acres of contiguous land therein assessed to her, it was also carried on the land book against

"John M. Crouch's Heirs" in Middle Fork District.

The taxes accruing under the assessment made to the widow were regularly paid by her for the years following that assessment. No taxes were paid under the assessment of the 275 acres in Middle Fork District for the year 1894, and for this alleged delinquency the tract was returned and advertised for sale by the sheriff. At the tax sale the plaintiff in this suit purchased 200 acres thereof. Under this purchase he obtained a tax deed for an undivided 7/10 of of the 200 acres which he had caused to be surveyed out of the 275 acres. He represents that 3/10 had been redeemed. This tax deed was recorded in 1897; upon it plaintiff has based this suit.

In 1898, the 275 acres was sold and conveyed by the widow and heirs to defendant George W. Phares. From the date of the assignment of dower, the widow had been in possession thereof and had continuously paid taxes under the assessment which we have shown was made to her. Phares took possession of the 275 acres when he purchased the same and has continued in possession thereof. He had the same assessed to him, in Middle Fork District. He has regularly and continuously paid the taxes accruing under that assessment.

The original assessment in the name of "John M. Crouch's Heirs" continued on the land book after plaintiff purchased at tax sale, and some subsequent sales for delinquency thereunder were made to Lakin and DeBerry. These subsequent sales pertained to certain undivided interests in the 275 acres. But plaintiff represents that the sales to Lakin and DeBerry and the deeds made in pursuance thereof, do not affect his tax title to the interest which he claims in the 275 acres.

Almost ten years after Phares bought the 275 acres from the widow and heirs, plaintiff brought this suit demanding that the land be partitioned between him and Phares, so that 7/10 of the 200 acres named in his tax deed, being a part of the 275 acres, be set off to him free and acquit of any claim or title of Phares, or of Lakin and DeBerry under their subsequent tax purchases.

Phares filed a cross-bill in which he asserted that the taxes on the 275 acres had been regularly paid, either by the widow during her enjoyment of the land as dower, or by himself since he purchased the same from her and the heirs; that the taxes on the tract were paid for the year 1894 under the assessment of 375 acres and 100 acres to the widow; and that, therefore, no delinquency for that year existed on which plaintiff's tax purchase and deed could legally rest. Phares prayed in this cross-bill that the tax sale and deed to plaintiff, as well as the subsequent sales and deeds to Lakin and DeBerry, based on the assessment to

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

"John M. Crouch's Heirs," be set aside and removed as clouds on his title. Plaintiff replied specially to the cross-bill. Lakin and DeBerry made no appearance in the case.

[1] Depositions taken show plainly that the taxes were regularly and continuously paid under the assessment to the widow, listed in Valley Bend District, and that they were paid thereunder for the year 1894. The tax receipts are exhibited. Phares proved the allegations of his cross-bill. The case, therefore, narrows down to the question whether or not the payment of taxes under the assessment to the widow rendered a sale under the other assessment in the name of "John M. Crouch's Heirs" void. The circuit court granted the relief asked by the cross-bill, and the plaintiff has appealed.

We are well satisfied that the decree, declaring plaintiff's tax purchase and deed void, is right. That the taxes have always been paid on the 275 acres, that they were paid for 1894, is beyond question. There was no delinquency, therefore, for the year as to which the sale relied on by plaintiff was made. The state had its taxes by collection under another assessment which it recognized as valid. Nor was there any delinquency for the years as to which Lakin and DeBerry purchased. The state could not legally sell the land to collect taxes thereon, for it had charged the same land with taxes by another assessment than that on which the tax sales rest, and had received for the taxes accruing thereon. At no time had it a lien or charge for taxes which it could enforce by a sale. *State v. Allen*, 65 W. Va. 335, 64 S. E. 140.

[2] On behalf of plaintiff, it is submitted that taxes could not be assessed against the widow, but that the assessment to the heirs was the regular one. True, after the death of Crouch, the land was properly entered for taxation against his heirs. The statute so directs. But just as properly the taxes were chargeable to the widow after the land was assigned to her as dower. She was then in possession of the freehold. The statute virtually directs that the dower lands be charged to her for taxation. Code 1891, c. 29, § 37; Code 1906, c. 29, § 49. It is usual and proper to charge a life tenant with taxes. "Taxes are annual payments, like interest payments upon an incumbrance, and it is therefore the duty of the life tenant to meet them regularly and promptly. Indeed it is expressly enacted in Virginia that the land shall be listed for taxation in the name of the life tenant, if there be one." 1 *Minor on Real Property*, § 219. The author refers to a provision of the Virginia Code which we find to be identical with the statute last herein cited. Moreover, we had at the date of this assessment, and still have, a more specific and direct statutory provision, in these words: "As to real property the person who, by himself or his tenant, has the freehold in his possession, whether in fee or for life,

shall be deemed the owner for the purpose of taxation." Code 1891, c. 29, § 40; Code 1906, c. 29, § 54. This indeed says that a widow in possession of land as dower shall be deemed the owner for the purpose of taxation. It virtually says the land shall be assessed to her while she so holds it. Hence, an assessment to the heirs of land held by the widow as dower is an erroneous and irregular one. The continuance of the assessment in the name of "John M. Crouch's Heirs" was not warranted. The tax sales involved in this case were clearly based on an invalid assessment, and, under the circumstances presented, the tax sales and deeds based on it are void.

[3] The validity of the assessment to the widow is challenged on the ground that the land was listed in Valley Bend District while the greater area of it was situated in Middle Fork District. We have observed that she had all these dower lands assessed to her in Valley Bend District. Practically half of the area was in that district. Perhaps the most valuable part lay in that district. Technically, it may be that they should have been listed to her in Middle Fork. But if that is the fact, it cannot make plaintiff's tax deed good. Though the assessment properly chargeable to her was irregular in this particular, the irregularity cannot avail to make good the totally erroneous assessment under which plaintiff bought. The state was satisfied. It accepted the taxes from her under this assessment, even if the land was listed in the wrong district. A sale under the assessment would have carried title to the tax purchaser; for, the statute expressly provides that listing in the wrong district, or listing two or more tracts as one, shall not invalidate the tax deed. Code 1906, c. 31, § 25. Surely the rule should work both ways. If the assessment is good for the enforcement of taxes by a sale, it certainly is good for an acquittance by payment of those taxes. *Bogges v. Scott*, 48 W. Va. 316, 37 S. E. 661. Besides, it would seem that Code 1891, c. 29, § 32, in force at the date of the assessment under consideration, was intended to meet instances like the one presented. Though that statute provided that tracts of 1000 acres or less lying partly in one county or assessment district and partly in another should be entered for taxation in the county or assessment district wherein the greater part in value was situated, yet it distinctly said that entry and payment in any county or district where any part of the land was situated should be a discharge of the taxes. It may be said that "assessment district" as here used does not mean a magisterial district. But why permit the rule to operate only as to assessments in the wrong county or general assessment district and deny it to assessments in the wrong magisterial district? The principle is the same in either case. More instances for its application are sure to arise as to magisterial dis-

tricts than as to counties and general assessment districts, because of the greater number of the former. Certain it is, the Legislature has never said that payment of taxes under a listing in a magisterial district where the smaller portion of the land is situated shall not be deemed an acquittance of those taxes.

[4] Plaintiff insists that his tax deed cannot be annulled in this suit, because Phares did not attack it within five years. The provision of the statute on which plaintiff relies in this particular, Code 1906, c. 31, § 27, does not apply to an erroneous assessment like that under which plaintiff bought. *Bradley v. Ewart*, 18 W. Va. 598, settles this point.

It is useless to take up the question of adverse possession on the part of Phares and the widow of Crouch as against the claim of plaintiff by his tax deed. In any event, the tax deed is void because plaintiff bought under a totally erroneous assessment, and for a year when there was no delinquency of taxes for which a sale could be made. The Lakin and DeBerry deeds are of course void on the same ground. The decree is a proper one. It will be affirmed.

(70 W. Va. 485)

#### JAMES v. PIGGOTT et al.

(Supreme Court of Appeals of West Virginia.  
March 5, 1912. Rehearing Denied  
April 26, 1912.)

#### (Syllabus by the Court.)

#### 1. FRAUD (§ 13\*) — ELEMENTS — STATEMENT WITHOUT KNOWLEDGE.

One under a duty to give information to another, who makes an erroneous statement when he has no knowledge on the subject, and thereby misleads the other to his injury, is as much liable in law as if he had intentionally stated a falsehood.

[Ed. Note.—For other cases, see *Fraud*, Cent. Dig. §§ 3-5; Dec. Dig. § 13.\*]

#### 2. TAXATION (§ 710\*) — REDEMPTION FROM TAX SALE—PAYMENT OR TENDER.

If one buy land at a delinquent tax sale and direct the sheriff to report it on his list of sales as purchased by himself and certain other named persons, and the sheriff does so report it, the purchaser thereby makes such other persons his joint purchasers and agents, and the former owner can redeem by payment of the amount necessary to any one of them.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. §§ 1436, 1437; Dec. Dig. § 710.\*]

#### 3. TAXATION (§ 717\*) — REDEMPTION FROM TAX SALE—EXCUSE FOR FAILURE TO REDEEM.

If the owner apply to any one of a number of joint purchasers to redeem his land within the time allowed for redemption, and is informed by him either that he did not buy the land, or that it had been redeemed by another, whose duty it was to pay the taxes, and the owner relies upon such statement and is thereby misled, he is excused from making further effort to redeem.

[Ed. Note.—For other cases, see *Taxation*, Dec. Dig. § 717.\*]

#### 4. TAXATION (§ 719\*) — REDEMPTION FROM TAX SALE—EXCUSE FOR FAILURE TO REDEEM.

Such misleading information, given to the owner by any one of a number of joint purchasers, affects the rights of all, and amounts to a fraud upon the owner.

[Ed. Note.—For other cases, see *Taxation*, Dec. Dig. § 719.\*]

#### 5. DEPOSITIONS (§ 7\*)—TIME FOR TAKING—TAKING BEFORE ANSWER.

Depositions taken on proper notice by plaintiff to prove the averments of his bill, before answer filed and issue joined, can be read on the hearing of the case. The taking of the depositions before answer is no cause for their suppression.

[Ed. Note.—For other cases, see *Depositions*, Cent. Dig. §§ 13-22; Dec. Dig. § 7.\*]

#### 6. ABATEMENT AND REVIVAL (§ 71\*)—DEATH OF PARTY—REVIVAL AGAINST HEIRS.

If a former owner of land, in whose name it is sold for taxes, has parted with title before the sale, and is made a party to a suit to avoid the tax deed, and dies pending the suit, it is not necessary to revive the suit against his heirs.

[Ed. Note.—For other cases, see *Abatement and Revival*, Cent. Dig. §§ 358-376; Dec. Dig. § 71.\*]

#### 7. TAXATION (§ 814\*) — TAX TITLES — REMEDIES OF PURCHASER OF INVALID TITLE.

Notwithstanding a tax purchaser has fraudulently prevented the owner from redeeming, he is, nevertheless, entitled to be reimbursed, on the setting aside of the tax deed, if the taxes for which the land was sold were a proper charge on the land.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. §§ 1612, 1613; Dec. Dig. § 814.\*]

#### 8. APPEAL AND ERROR (§ 1146\*) — DISPOSITION OF CAUSE — MODIFICATION OR REVERSAL.

If the decree avoiding the tax deed in such case fails to provide for his reimbursement, it is reversible error if the amount is more than \$100, and error which this court may correct before affirming the decree, if the amount is less than \$100.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4480-4482; Dec. Dig. § 1146.\*]

#### 9. TAXATION (§ 709\*) — REDEMPTION FROM TAX SALE—AMOUNT REQUIRED TO REDEEM—INTEREST.

A false statement made by the tax purchaser to the owner, which misleads and prevents him from redeeming, excuses a tender of the amount necessary to redeem and stops the accrual of interest.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. §§ 1430-1435; Dec. Dig. § 709.\*]

Appeal from Circuit Court, Wood County.  
Bill in equity by William James against J. T. Piggott and others. From a decree for plaintiff, defendants J. T. Piggott and others appeal. Modified and affirmed.

Dave D. Johnson, for appellants.

WILLIAMS, J. J. T. Piggott, R. H. Piggott, and James A. Watson have appealed from a decree of the circuit court of Wood county, made on the 4th of December, 1905, setting aside a tax deed made to them on the 19th of February, 1901, for two tracts of

land containing 12 acres and 47 acres, respectively, sold in February, 1900, for the delinquent taxes of the year 1897, assessed in the name of T. R. Clinton.

William James, the owner, brought the suit, and charges that the fraudulent conduct of defendants prevented him from redeeming. The land was conveyed to plaintiff by John L. McGee, trustee, by deed dated October 10, 1897. The taxes for that year had been assessed against the land in the name of T. R. Clinton, the former owner, and this is the tax for which it was sold. At the time plaintiff purchased from McGee, there was an agreement between them that McGee should pay all prior taxes.

The land was bid in at the tax sale by R. H. Piggott, son of J. T. Piggott, and, at his request, the sheriff reported it on his sales list returned to the clerk's office as purchased by "Piggott, Watson & Piggott." J. T. Piggott and James A. Watson both testify that they did not purchase the land, and did not know that they had been reported as purchasers until after the clerk had made them a deed. In the fall of 1900, long before the redemption year expired, plaintiff, hearing that his land had been sold for delinquent taxes, went to see the sheriff, and inquired of him concerning the rumor of the tax sale, and was told that the land had been sold to "Piggott & Watson." He then went to see McGee who was under obligation to him to pay the taxes. McGee insisted that he had paid the taxes for 1897, but, not finding the receipted tax bill, he told plaintiff to see Watson and Piggott, and ascertain from them if they had bought the land twice, and, if they had, to redeem it. They had bought it once before, in 1898, at a tax sale, for the taxes of 1895, and McGee had redeemed it, and he supposed this was the sale that plaintiff had heard of. In two or three weeks after this conversation with McGee, plaintiff again went to see the sheriff, to make sure that it was the taxes for 1897 for which the land was sold, and was told by him that it was. He then went to Watson's office and told him that he wanted to redeem the T. R. Clinton land. He says that, after examining his book of accounts, Mr. Watson replied that Mr. McGee had settled the taxes. Plaintiff further says that, believing the land had been redeemed, he gave the matter no further attention until the time of redemption had expired, and he was notified by R. H. Piggott to surrender possession. Mr. McGee corroborates plaintiff's testimony in relation to transactions and conversations between themselves, and further testifies that in December, 1900, he saw James A. Watson and J. T. Piggott in the county clerk's office in Wirt county, and asked them if they had purchased the land; that they then asked him if he had ever redeemed it from them at any time, and he said he had; and that they both replied that, if he had ever re-

deemed it, they did not have it. Thereafter McGee made no further investigation of the matter. S. W. Cain, clerk of Wirt county court, corroborates McGee. He testifies that McGee spoke to Watson and J. T. Piggott concerning the redemption of the Clinton land, and that Piggott replied that, if he had redeemed it once, they did not have it, "for they had only purchased it once."

R. H. Piggott testified that he bought in the land at the tax sale, and, finding that he did not have money enough to pay for it, went to his father, J. T. Piggott, and Mr. Watson, and told them that, if they would indorse a note for him, he would get it discounted, and would pay for the land and have it reported as purchased by Piggott, Watson & Piggott; that they thereupon indorsed the note for him; that he intended that each should have a one-third interest. But he says that he did not inform them that it was the Clinton land he had purchased.

[1] There is very little conflict in the testimony, and enough of it has been referred to to show the bearing it has on the matter of fraud charged in the bill. Whether the statement made to plaintiff by Watson, or the one made to McGee in the Wirt county clerk's office by Watson and J. T. Piggott, were made with intention of deceiving and misleading, or were made in ignorance of the facts stated, is not material, for the reason that the motive does not alter the effect thereby produced upon the minds of plaintiff and McGee, either of whom had the right to redeem—the former because he was the owner, and the latter because he was bound by agreement to pay the taxes. Let us therefore take the more charitable view and say that neither Watson or J. T. Piggott knew, at the time they made those statements, that they had been reported as joint purchasers of the land with the son of J. T. Piggott. Still the legal effect of those misstatements is the same as if an intention to deceive had then been present in their minds. There can be no question that plaintiff and McGee relied upon that information and were thereby misled and prevented from redeeming the land. One who is under a duty to give information to another, and who states a fact to be true when he has no knowledge on the subject, and thus misleads the other to his injury, is as much liable in law as for a fraud, as if he had willfully misstated a fact to be true when he knew it to be false. *Crislip v. Cain*, 19 W. Va. 438; *Mason v. Chappell*, 15 Grat. (Va.) 572.

[3] It is asserted in brief of counsel for appellants that plaintiff and McGee had no right to rely upon the statements made by Watson and Piggott because their interests were adverse. True, their interests were adverse, and true it is that the record was open to the inspection of all. But those things are no excuse or justification for the

deceit. They had a right to rely upon a statement of any one of the joint purchasers that the land had been redeemed, and the purchasers were under a duty to give correct information, if they undertook to give any at all. Suppose plaintiff had examined the record, he would have learned no more than he had already been told, that is, that the land had been purchased by Piggott, Watson & Piggott. The record would not have disclosed whether or not the land had been redeemed. They had no right to deposit the money with the clerk. The statute (section 16, c. 31, Code 1906), does not authorize payment in redemption of land sold at a tax sale to be made to the clerk, unless the purchaser refuses to receive the money, is a nonresident, or cannot be found. In this case the purchasers were known, were residents of Wood county, were actually found, and did not refuse to receive the money, but said the land had already been redeemed, and that they did not purchase it.

[4] R. H. Piggott has no right to complain, because he should have informed his joint purchasers of their interest with him. If he had done so, the land would have been redeemed. He is in no better situation than the others.

[2] By having them reported as joint purchasers with himself, he made them his partners, or agents, and it became the duty of any one of them to accept the redemption money for all. The law imposes no obligation on the owner to go to each one of several joint purchasers and pay to him his several share of the purchase money.

[5] It is insisted that exceptions to plaintiff's depositions should have been sustained on the ground that they were taken before answer filed and before issue joined. There is a rule of practice forbidding the taking of depositions to prove a matter before it has been pleaded. *Goldsmith v. Goldsmith*, 46 W. Va. 426, 33 S. E. 266; *Edgell v. Smith*, 50 W. Va. 349, 40 S. E. 402. That is because of the familiar rule of procedure which requires that averment shall precede proof. But in this case plaintiff had filed his bill before taking his proof, and we know of no rule of practice forbidding a plaintiff to support his allegations by proof, even before they have been denied, if he desires to do so. True, it might thereafter develop that he had gone to unnecessary trouble and expense to do so, because his bill might be taken pro confesso. The court did not expressly rule on these exceptions, but the final decree has, in effect, overruled them, and correctly so.

[8] Upon the death of T. R. Clinton, the suit was properly revived against his administratrix. Title, both legal and equitable, had passed from him by virtue of the trust deed to McGee, and by the sale and conveyance, in pursuance thereof, by McGee, trustee, to James. The title was fully be-

fore the court. There is no reason for a revival of the suit against Clinton's heirs.

Before this suit was brought, and shortly after the tax deed was executed, Piggott, Watson & Piggott had brought an unlawful detainer suit before a justice of the peace to recover possession, and that suit was perpetually enjoined. It follows from what we have already said that this was not error.

[7] The bill avers a tender of the money necessary to redeem, but the decree cancels the deed without directing its payment. This was error. One who seeks relief in equity must do equity. The taxes were properly assessed and constituted a charge on the land. The land was bound for the taxes, and the state had a right to sell it. This right is not questioned by the bill. Notwithstanding the owner was prevented from redeeming by the misleading information given to him by the purchasers, still the court should have required him to repay to them the amount of the taxes with interest thereon at the rate of 12 per centum per annum from the date of their purchase up to the time he applied to Watson to redeem. *Lohr v. George*, 65 W. Va. 241, 64 S. E. 609. Equity makes a similar application of the rule when, on setting aside a fraudulent conveyance, it remits the fraudulent grantee to his former rights, and when it subrogates him to the rights of creditors whose prior liens he has paid. *Kimble v. Wotring*, 48 W. Va. 412, 37 S. E. 606; *Duke v. Pigman*, 110 Ky. 756, 62 S. W. 867; *Irish v. Clayes*, 10 Vt. 51; *Ladd v. Wiggin*, 35 N. H. 421, 69 Am. Dec. 551; *Arnold v. Hoshildt*, 69 Minn. 101, 71 N. W. 829; 20 Cyc. 637.

[9] Plaintiff did not actually tender the amount of money necessary to redeem the land, but Watson's statement to him that the land had been redeemed was tantamount to a refusal to accept it, and is a good excuse for not making an actual tender. *Poling v. Parsons*, 38 W. Va. 80, 18 S. E. 379; *Koon v. Snodgrass*, 18 W. Va. 320.

[8] The decree should have directed plaintiff to pay to appellants, but without interest, the sum of \$13.23, that being the amount admitted by the bill and tendered in court as a condition precedent to the annulling of the tax deed. But this sum, being below the appealable amount, does not call for a reversal of the decree. The appeal, having been allowed on other assignments of error which, although held not to be well taken, are jurisdictional, gives us the right to correct the decree, and then to affirm it. *Jenkins v. Montgomery*, 69 W. Va. 795, 72 S. E. 1087. The decree will be modified so as to take effect only upon payment to appellants, or to the clerk of the court for their use, the sum of \$13.23, without interest. And, as thus corrected, the decree will be affirmed, with costs in favor of appellee, who has substantially prevailed.

BRANNON, P., absent.

(70 W. Va. 547)

MOORE v. DAVIS et al. (two cases).  
COONTZ v. SAME.

(Supreme Court of Appeals of West Virginia.  
March 26, 1912.)

(Syllabus by the Court.)

EQUITY (§ 419\*)—DECREE—OPENING AND  
VACATING.

Consideration of a motion to reverse a decree entered on bill taken for confessed is properly refused by the circuit court when notice has not been given to the parties relying on the decree, as required by Code 1906, c. 134, § 5, and no appearance has been made to the motion.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 972-985; Dec. Dig. § 419.\*]

Appeal from Circuit Court, Barbour County.

Suits in equity by S. A. Moore against O. C. Davis and others and by Isaac J. Coontz, administrator, against O. C. Davis and others. From a decree for plaintiffs, defendants O. C. Davis and another appeal. Affirmed.

Wm. T. George and John B. Dilworth, for appellants. Ware & Viquesney, for appellee Moore. Leroy V. Holsberry, for appellee Coontz.

ROBINSON, J. Three chancery causes, all affecting the same lands, and mainly against the same defendants, were consolidated as one. It will serve no purpose to define the character and object of each of these suits. No appearance was entered by any defendant; the bills were taken for confessed; and the consolidated causes were proceeded in to a decree directing a sale of the lands to satisfy liens sought to be enforced against them.

As to two of the causes, answers were filed at a term subsequent to the entry of the decree for sale. These answers, of course, came too late as a defense against the decree. In fact, the answers presented no valid defense against it, even if they had been in time. A petition by the defendant owners of the lands, filed long after the term at which the decree was entered, asked that the sale under the decree be stayed, on the ground that petitioners had not been served with process to answer one of the suits. The prayer of this petition was granted for a time. It was made to appear by an amendment to the return of service that the ground on which the stay rested did not actually exist. The order staying the sale was set aside and the commissioner was directed to proceed to sell under the decree. Then these defendants in open court moved to correct errors in the decree for sale, verbally specifying one alleged error. The court refused this motion, giving as a reason that no notice thereof had been given to the opposite parties. It entered a decree releasing the stay of the sale and refusing to consider the motion to reverse the decree for alleged error

in the proceedings. The defendants thus denied have obtained this appeal. They say that the decree directing the sale is erroneous, that the circuit court should have reversed it for many errors now assigned, and that because of the refusal of the court below to do so this court should now reverse the same.

Manifestly, the court did not err in refusing to consider the motion to reverse the decree for sale. No notice of the motion had been given, nor was there any appearance to the motion. Moreover, there was no proper specification of the errors now alleged. So we cannot look into the proceedings on which the decree for sale is based. That decree having been entered on bills taken for confessed must be dealt with below as to error, before it can be so dealt with here. Code 1906, c. 134, §§ 5 and 6; *Slingluff v. Gainer*, 49 W. Va. 7, 37 S. E. 771; *Morrison v. Leach*, 55 W. Va. 126, 47 S. E. 237. The decree could only be dealt with in that particular in the court below after notice to the opposite party—those relying on the decree for sale, which had long before become final. The statute expressly requires this notice. Why should we say more? The decree must be affirmed.

BRANNON, P., absent.

(70 W. Va. 549)

STATE v. ROSS.

(Supreme Court of Appeals of West Virginia.  
March 26, 1912.)

(Syllabus by the Court.)

1. INTOXICATING LIQUORS (§ 103\*)—LICENSES—ASSIGNMENTS—STATUTORY PROVISIONS.

No assignment of a druggist's license will protect the assignee thereof in making sale of spirituous liquors, unless first assented to on proper application by the tribunal, county court or municipal authorities, authorized to grant the original license, as provided by section 37, chapter 32, Code 1906, and other provisions of said chapter pertaining thereto. These statutes are mandatory and strict compliance therewith is required.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. §§ 108-112; Dec. Dig. § 103.\*]

2. INTOXICATING LIQUORS (§ 103\*)—LICENSES—ASSIGNMENTS.

An endorsement of a transfer on a druggist license previously granted by a county court, by the clerk thereof, without previous authority of such court lawfully given, is void; and the subsequent grant and confirmation of such transfer by such court, though regularly and lawfully done on proper application, will have no retroactive effect to protect the assignee of such license against the consequences of his prior unlawful act in making sale of spirituous liquors.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. §§ 108-112; Dec. Dig. § 103.\*]

3. INTOXICATING LIQUORS (§ 152\*) — OFFENSES—SALES BY DRUGGISTS.

Neither a druggist, nor registered pharmacist, not a licensed druggist, can under the

laws of this state, lawfully sell spirituous liquors, even upon the prescription of a physician, without a state license therefor, as required by section 1 of chapter 32, Code 1906.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. § 167; Dec. Dig. § 152.\*]

**4. INTOXICATING LIQUORS (§ 229\*)—CRIMINAL PROSECUTIONS—ADMISSIBILITY OF EVIDENCE—INTENT.**

When by statute, as in this state, an act is made an offense under the liquor laws without regard to the intent with which it is done, evidence on the subject of intent is not material, and on the trial of one charged with a violation of such statute, there is no error in rejecting such evidence, or instructions to the jury thereon.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. § 289; Dec. Dig. § 229.\*]

*(Additional Syllabus by Editorial Staff.)*

**5. INTOXICATING LIQUORS (§ 108\*)—LICENSES—ASSIGNMENT—PETITION FOR LEAVE.**

Code 1906, c. 32, § 87, authorizing assignments of liquor licenses, and providing that no assignment shall be of any effect, unless made in the manner prescribed in the section, and no transfer shall be authorized, excepting upon the petition of the proposed assignee, setting forth all the essential facts as required in the original application for the license, and in compliance with all other requirements of the law in relation thereto, does not require the presentation of a formal petition, as required by section 12 to obtain the original license.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. §§ 108–112; Dec. Dig. § 103.\*]

Error to Circuit Court, Braxton County.

R. M. Ross was convicted of unlawfully selling liquor without a license, and brings error. Affirmed.

Hall Bros., for plaintiff in error. William G. Conley, Atty. Gen., for the State.

MILLER, J. The indictment, in the usual form, charged defendant with unlawful selling at retail spirituous liquors, etc., without a state license therefor, as required by law. The indictment is good and the motion to quash was properly overruled.

On a verdict of guilty there was a judgment of fine and imprisonment, to which defendant is prosecuting this writ of error.

All points fairly raised on the trial and presented and argued here are substantially comprehended in the points adjudicated. Some points are immaterial, or do not fairly arise, and will not be further noticed.

The defenses sought to be interposed are, a sale (1) as a licensed druggist; (2) as a druggist or registered pharmacist, without license, upon the written prescription of a practicing physician in good standing in his profession, and not of intemperate habits, it being claimed that a sale in either capacity on such a prescription with or without a druggist's license constitutes no offense; (3) that though the business was being conducted in his name defendant did not in fact own the drug store; but was the mere agent or clerk of

S. R. Martin, with whom he had had negotiations for the purchase thereof; (4) the absence of intent to commit an offense, shown particularly by the proposed evidence of an attempt at least to comply with the law, and (5) that being a druggist, but not indicted as such, defendant cannot be punished on an indictment for unlawful retailing.

[1] To establish the first defense, defendant relied on proof of a druggist's license, originally issued to J. A. Martin, April 21, 1908, for the term beginning May 1, 1908, to June 30, 1909, assigned to S. R. Martin, September 17, 1908, and on to defendant October 5, 1908. The license itself was not produced. Defendant claimed he had lost it. But he was permitted to prove by the clerk of the county court, and the records, that such a license had in fact been issued, and that the index to the register of licenses, and transfers of licenses, showed the transfers referred to and that the clerk had endorsed on the license in question substantially as follows: "State of West Virginia, Braxton County, to-wit: I, E. W. Hefner, Clerk of the County Court of the County and State aforesaid hereby transfer the foregoing license to S. R. Martin, and on to R. M. Ross." Defendant then offered, but was not permitted to prove by the same witness, an order of the County Court made May 27, 1909, as follows: "The court doth grant and confirm the following drug license transfers: J. A. Martin, Sutton, W. Va., to S. R. Martin, Sutton, W. Va., S. R. Martin, Sutton, W. Va., to R. M. Ross, Sutton, W. Va., R. M. Ross, Sutton, W. Va., to S. R. Martin, Sutton, W. Va." And finally, in connection with its action in refusing to admit these records, the court also on motion of the State excluded all the evidence of the witness relating thereto.

[5] Section 37, chapter 32, Code 1906, authorizes assignment of licenses, "with the assent of the tribunal or tribunals which authorized such license," but provides that, "such tribunal or tribunals shall cause a memorandum of such assignment to be endorsed on the original license by the clerk of the county court, or if such place be within an incorporated city, town or village, the municipal authorities whereof are vested with the sole power to grant licenses therein, then by the clerk of the municipality, who shall immediately make report thereof in writing to the clerk of the county court, who shall thereupon make record thereof." A further provision of said section is: "But no assignment of a license shall be of any effect unless made in the manner prescribed in this section. And no transfer of a license mentioned in paragraphs b, c, d, e and f of the first section shall be authorized except upon petition of the proposed assignee, setting forth all the essential facts as required in an original application for such license, and in compliance with all other re-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

quirements of the law in relation thereto. Nor until there be filed with such petition a receipt from the proper officer showing the payment of the tax of fifty dollars upon such transfer hereinafter provided for."

It is contended by the attorney general that strict compliance with this statute is required, and that as there was no petition presented, and no action of the county court thereon assenting to the transfer of said license, the action of the clerk and of the court, proposed to be shown in evidence, was wholly void and furnished no protection to defendant.

The first section of said chapter 32 provides: "No person without a state license therefor shall \* \* \* (f) carry on the business of a druggist." We do not understand, however, that to obtain a license as druggist the applicant is required to present a formal petition, as by section 12 of said chapter he must do to obtain a license "for any of the purposes mentioned in paragraphs b, c or e" thereof. No statute specifically requires such formal petition. The only provision applying to a druggist license is section 11 of said chapter. It says: "Every person desiring to obtain a state license shall apply for a certificate therefor to the clerk of the county court, except as hereinafter provided. The words 'clerk of the county court' as used in this chapter shall in each instance be construed to mean the clerk of the county court who acts as the recorder of said county." By the subsequent sections such formal petitions are required only in cases covered by paragraphs b, c, and e. They constitute, for the most part, the exceptions referred to in section 11. The language of section 37, above quoted, may seem to imply that application by petition applies also to a druggist license; but observe that that section says, "setting forth all the essential facts as required in an original application for such license." While section 16 of said chapter clearly implies with respect to a druggist license, as does section 15 with respect to a hotel license, and a license to keep a bowling alley, covered by paragraphs a and g, that the county court, or in lieu thereof in certain cases, the municipal authorities, and not the clerk, shall grant the original license, and assent to any assignment or transfer thereof, yet no formal petition is required. Said section 16, so far as applicable, reads: "When the county court or license court shall have granted a license for any of the purposes mentioned in paragraphs b, c, d, e or f of said first section, as provided herein, the clerk of the county court shall issue a certificate of license in the form to be prescribed by the state tax commissioner." Doubtless, for convenience and accuracy, the application to the clerk should be in writing, giving the name and place of business of the applicant, and request or pay for the license desired, and of course there could be no objection to such application being in the

form of a petition, but a formal petition is certainly not required.

Another provision of the statute showing the irregularity, if not invalidity, of the alleged assignment or transfer of the Martin license is section 19 of said chapter 32, as follows: "No license for any purpose mentioned in the first section shall be granted unless the tribunal granting the same shall be satisfied, and so enter upon its record, journal or minutes, that the applicant for such license is not of intemperate habits, and has not been convicted of a felony, or who shall be convicted hereafter of selling intoxicating liquors on Sunday." Section 20 of the same chapter also says: "The granting of a license to any person to carry on any business for which a license is required, under any of the provisions of this chapter, shall not be construed to authorize him to carry on said business, unless he shall have complied with all the provisions of law requiring him to make any payment, obtain any certificate or permit, or to do any act as a condition of carrying on any such business."

[2] Though we have concluded that no formal petition to obtain the assent of the county court to the assignment of a druggist's license is necessary, we are clearly of opinion that the several provisions of the statute quoted relating thereto, properly construed, require, as a condition precedent to any valid assignment or transfer thereof, the prior application to the clerk and the assent of the county court, or other tribunal having authority, thereto, in the same manner as required to obtain an original license, and that until such authority and assent has been so obtained the clerk is without authority to endorse on the original license assent thereto.

In the case at bar no evidence was introduced or proposed showing or tending to show compliance with the law. By the very language of said section 37 of chapter 32, "No assignment of a license shall be of any effect unless made in the manner prescribed in this section," that is as upon application for an original license. No order was shown or offered to be shown evidencing compliance with the provisions of said section 19. Compliance with this statute was a pre-requisite condition to any valid assent to such assignment. And by section 20, neither the granting of an original license, nor assent to an assignment thereof can be construed to authorize the licensee to carry on the business "unless he shall have complied with all the provisions of law requiring him to make any payment, obtain any certificate or permit, or do any act as a condition of carrying on any such business." The subsequent act of the county court in attempting to "grant and confirm" said transfer, could not protect a prior sale by defendant; besides that order was probably void for non-compliance with said section 19.



These statutes would seem to be conclusive of the correctness of the rulings of the court below in rejecting the records of the assignments and transfers of said license, and the action of the county court thereon, as well as the evidence of the clerk in relation thereto. That these statutes are mandatory and strict compliance therewith required has been affirmed by this court in prior decisions. *Devanney v. Hanson*, 60 W. Va. 3, 53 S. E. 608; *State v. Moore*, 67 W. Va. 559, 68 S. E. 177; *State v. Hotel McCreery Co.*, 68 W. Va. 131, 69 S. E. 472. See, also, 17 Am. & Eng. Ency. Law (2d Ed.) 331, 245.

The clerk having been without authority, therefore, his transfer or consent to the transfers of the license issued to Martin furnished defendant no protection. The authority and discretion was not his but that of the county court. *Joyce on Intox. Liq.*, section 280; 1 *Woollen & Thornton Intox. Liq.*, section 412. His transfer was therefore absolutely void. *Thorn v. City of Atlanta*, 77 Ga. 661. Nor, if the subsequent act of the county court in attempting to "grant and confirm" said transfer had been otherwise valid would it have had any retroactive effect so as to relieve defendant of his previous unlawful act. *Joyce on Intox. Liq.*, section 289.

[3] But does proof of a sale by a druggist or registered pharmacist, not a licensed druggist, on the prescription of such a physician constitute a good defense to an indictment for unlawful selling? This question is raised by exceptions to the rulings of the court on the evidence, and on instructions to the jury given and refused. Our answer to the proposition is in the negative. In support of their contention defendant's counsel rely mainly on the particular language of section 5 of said chapter 32. That language is: "If any druggist shall sell" &c., not saying "licensed druggist." They argue, first, by reference to definitions given by lexicographers, and in judicial decisions, that one may be a druggist though not a licensed druggist. This may all be true enough, but the chapter in question is dealing with the subject of licenses and license taxes, and to be a druggist within the meaning of that section one must be a licensed druggist. The language of this section presupposes that the druggist has obtained license to carry on the business of a druggist, as required by that chapter, otherwise he would be conducting his business unlawfully, and would not be protected in making sales of spirituous liquors, without the state license required by section 1. As used in prior, and subsequent sections the word "druggist" means necessarily a licensed druggist, and as argued by the attorney general, quoting 2 Lewis, *Suth. Stat. Const.*, section 399, "A word or phrase repeated in a statute will bear the same meaning throughout the statute unless a different intention appears." Under the statute only a licensed druggist can sell on the

prescription of a physician. In *State v. Denoon*, 34 W. Va. 139, 141, 11 S. E. 1003, 1004, this court said, not by way of obiter, as defendant's counsel argue but in actually deciding the point there as it is here presented: "The defendant here was not indicted as a druggist, and he offered no proof that he was a licensed druggist. In the absence of such proof it was wholly immaterial that he sold the whisky to Goodwin on a proper prescription, because under the statute no one but a licensed druggist is authorized to sell upon a prescription."

Nor does the fact that defendant, as he proposed but was not permitted to prove, was a registered pharmacist, affect the question of his guilt. Section 29b I, chapter 150, Code 1906, the chapter relied on, says: "It shall be unlawful for any person not a registered pharmacist, or who does not employ as his salesman a registered pharmacist, within the meaning of this act, to conduct any pharmacy, *drug store*, apothecary shop or store for the purpose of retailing, compounding or dispensing medicines or poisons for medical use, except as hereinafter provided."

The proposition of defendant's counsel, based on this statute, is that a registered pharmacist, carrying on the business of a druggist, without a druggist's license, may sell upon prescription of a physician, without violating the law. We can not accede to this proposition. The words "druggist" and "pharmacist," as used in our statutes, are not synonymous or used interchangeably, as argued, or in any such way as to protect a registered pharmacist carrying on the business of a druggist from the consequences of his act in selling spirituous liquors, even on prescription, without a druggist license. The letter as well as spirit of our laws are plainly opposed to any such construction. Pharmacists and druggists, so far as registering and licensing them, are dealt with in separate and distinct chapters. For instance, observe the language of section 29b IX, of said chapter 150: "Nothing in this act contained shall be construed so as to protect any druggist or registered pharmacist from any penalty or forfeiture prescribed in any other law regulating the sale of alcoholic or other intoxicating liquors; \* \* \* Nor shall this act be construed to authorize any person to carry on the business of a druggist without first having obtained a license therefor." Now while defendant undertook to show that he was a registered pharmacist, he also proposed to show that by assignment he was a licensed druggist. He was in fact carrying on the business of a druggist, under an invalid and void assignment of a license, which did not protect him. Having failed to prove himself a duly licensed druggist, therefore, evidence that he was a registered pharmacist was not improperly rejected. It would not have excused his offense.

The third defense based on the theory

that defendant did not in fact own the drug store, and was not in fact carrying on the business of a druggist, rests solely on his own evidence. He admits he was in possession, that the business was being run in his name, that the licenses had been assigned to him, and he substantially admits that the sale in question was made by him. His pretension, without going into details, is that he had not completed his purchase. Other witnesses gave evidence of contrary declarations by him. The jury were the judges of the facts, and we must interpret their verdict as a finding against defendant on this issue, if it was material.

[4] Next, as to the defense of want of intent to commit the offense. The general rule is that one intends that which he does, and that ignorance of the law excuses no one. The evidence rejected did show some attempt to comply with the law respecting the assignment and transfer of the druggist license. We may fairly assume that application was made to the clerk, and the evidence offered, but rejected, tended to show an assignment by the licensee and the endorsement on the license by the clerk assenting thereto; but as we have seen the action of the clerk was invalid and void, and the subsequent action of the court, if regular and valid, would have had no retroactive effect. The evidence offered, but rejected, shows, we think, that the action on the assignment by the municipal authorities of the Town of Sutton, was regular and valid. That record even shows compliance with the statute requiring a previous order showing that the applicant was not of intemperate habits and had not been convicted of felony. Not so with respect to the action of the county court and its clerk. As we have shown their actions were wholly void. "Where by statute," as in this state, "an act is made an offence under the liquor laws without regard to the intent with which it is done, evidence of intent is not material." *Joyce on Intox. Liq.*, sec. 680; *White v. Com.*, 78 Va. 484, 487. There was no error therefore in rejecting the evidence and instructions offered by defendant on this subject.

Lastly, was defendant, not a licensed druggist, indictable and subject to punishment for selling in violation of section 1 of said chapter 32? We answer in the affirmative, upon the authority of *State v. Cox*, 23 W. Va. 797, and *State v. Denoon*, 34 W. Va. 139, 11 S. E. 1003. As we have already held a druggist is not protected in making sales of spirituous liquors, even upon the prescription of a physician, unless he be a licensed druggist. Unless he has a license as druggist, his sales though upon prescription are as unlawful as a sale by any one else without a license would be. This construction of our statute seems to us not only sound law, but good sense as well.

We regret the necessity of affirming the judgment, but we see no escape from it. We

are rather persuaded from the record that defendant made an honest effort to comply with the law; if he did he did not succeed in doing so. Having failed the judgment of the law must fall upon him. If entitled to relief he must find it in executive clemency. Judgment affirmed.

(70 W. Va. 358)

# UNION BANK & TRUST CO. v. LONG POLE LUMBER CO.

(Supreme Court of Appeals of West Virginia.  
March 26, 1912.)

(Syllabus by the Court.)

## 1. PRINCIPAL AND AGENT (§ 151\*)—RIGHTS AND LIABILITIES OF THIRD PERSONS—AUTHORITY TO AGENT—TERMINATION.

On the termination of an agency, persons who have dealt with the principal through the agent may continue to do so, in the absence of knowledge of the fact, and, as to them, such acts of the former agent will bind the principal.

[Ed. Note.—For other cases, see *Principal and Agent*, Cent. Dig. §§ 564-566; Dec. Dig. § 151.\*]

## 2. CORPORATIONS (§ 397\*)—POWERS AND LIABILITIES—REPRESENTATIONS BY OFFICERS AND AGENTS.

The general principles of the law of agency apply to private corporations and their officers.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. §§ 1585, 1586, 1588, 1589, 1596-1601; Dec. Dig. § 397.\*]

## 3. CORPORATIONS (§ 423\*)—POWERS AND LIABILITIES—REPRESENTATIONS BY OFFICERS AND AGENTS.

To protect itself against subsequent action, on its behalf by an officer or agent, whose powers have been terminated, as to persons with whom it had previously transacted business through him, a private corporation must give notice of the termination of his powers, unless actual knowledge thereof has otherwise been obtained by such persons. Mere publication of the fact in a newspaper is insufficient.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. §§ 1692-1695; Dec. Dig. § 423.\*]

## 4. CORPORATIONS (§ 399\*)—POWERS AND LIABILITIES—REPRESENTATIONS BY OFFICERS AND AGENTS.

If a thing done by an officer of a corporation is part and parcel of its general and ordinary business, and he apparently has the general management and control of its business, it is within his apparent authority, and binds his principal in favor of a third person, relying in good faith upon such authority in the transaction.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. §§ 1583, 1602-1610; Dec. Dig. § 399.\*]

## 5. PRINCIPAL AND AGENT (§ 161\*)—AUTHORITY OF AGENT—RATIFICATION OF UNAUTHORIZED ACTS.

A principal, benefited by an unauthorized act of his agent, cannot deny the authority of the agent to do the act from which such benefit accrued, without first having restored the property or other thing so acquired, or paid to the injured party the value thereof.

[Ed. Note.—For other cases, see *Principal and Agent*, Cent. Dig. §§ 614-618; Dec. Dig. § 161.\*]

**6. PRINCIPAL AND AGENT (§ 121\*)—AUTHORITY OF AGENT—EVIDENCE—TESTIMONY OF AGENT.**

On an issue as to the authority of an agent, he is a competent witness and may testify to acts done on behalf of his principal and the latter's knowledge thereof, in favor of a third person, even though such third person is not shown to have had knowledge thereof.

[Ed. Note.—For other cases, see *Principal and Agent*, Cent. Dig. §§ 413-415; Dec. Dig. § 121.\*]

**7. PRINCIPAL AND AGENT (§ 101\*)—LIABILITIES TO THIRD PERSONS—AUTHORITY OF AGENT—APPARENT AUTHORITY.**

A third person may recover from a principal on a contract made by the agent on proof of apparent authority in the latter, within the scope of which the act in question is included.

[Ed. Note.—For other cases, see *Principal and Agent*, Cent. Dig. §§ 255, 256, 330, 346; Dec. Dig. § 101.\*]

Error to Circuit Court, Mercer County.

Action by the Union Bank & Trust Company against the Long Pole Lumber Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Sexton & Roberts and Ritz & Ritz, for plaintiff in error. Sanders & Crockett, for defendant in error.

**POFFENBARGER, J.** This writ of error involves the propriety of rulings on evidence and instructions in a controversy as to the liability of a corporation, the plaintiff in error, as indorser of a certain note, made by its president in renewal of others previously discounted by it.

It is a single note for a balance of \$2,628.60, remaining due and unpaid June 24, 1908, on some of the following notes: Jamestown Veneer Door Company, \$738.56; F. L. Knowles, \$500; James H. Cranwell, \$560; James H. Cranwell, \$720; Wakefield Manufacturing Company, \$200; Toler & Sons, \$314; and J. W. Holloway & Co., \$769.70, all payable to Soble Bros., assigned to the Long Pole Lumber Company and by it discounted at the Union Bank & Trust Company October 15, 1907—and the following notes: Century Furniture Company, \$252.52; Crouch & Beahen Company, \$216.53; and Jamestown Veneer Door Company, \$400, likewise payable, assigned, and discounted, November 6, 1907. Between those dates and June 24, 1908, some of these notes were wholly and others partially paid. Some of them or portions thereof were combined in a new note, executed by Soble Bros. payable to W. J. Newenham, president of the company, and indorsed successively by him and the company. This, with others of the original notes wholly or partially unpaid, constituted the balance for which Soble Bros. then executed their note, payable in 60 days to Newenham, who, until the 9th day of the same month had been president of the Long Pole Lumber Company. He indorsed it in his individual name, wrote the name of the lumber company on the back

of it, and gave it to the bank in exchange for the remaining notes. Defense to this action on said last-mentioned note is founded upon the hypothesis of lack of authority in Newenham to indorse it for and on behalf of the Long Pole Lumber Company, which, it is said, neither the by-laws nor any course of conduct, known to the defendant in error, conferred, while he was president, and which, of course, he did not possess after his resignation, made and accepted June 9, 1908. In opposition to this denial of authority, a by-law and conduct are relied upon as conferring it, supplemented by lack of notice to the bank of termination thereof by resignation.

[1] The only evidence adduced to prove notice of the termination of such authority as Newenham had was oral testimony to the publication of a notice of the resignation in a newspaper. That is wholly insufficient, in the absence of proof that it was seen and read by the agents of the bank, who deny that they ever saw it. On the termination of an agency, persons who have dealt with the principal through the agent may continue to do so, in the absence of knowledge of the fact, and the principal will be bound by the acts of the former agent as fully as if his authority had not ceased. *Spencer v. Wilson*, 18 Va. 130; *Smith v. Watson Summer & Co.*, 82 Va. 712, 1 S. E. 96; *Clark & Skyles, Agency*, p. 414, § 173; 31 Cyc. 1305; 1 Am. & E. Enc. L. 1220. The duty of the principal to notify third persons of the termination of the agency is of the same character and requires the same degree of certainty as that which the law imposes upon the members of a copartnership in the case of dissolution as a measure of protection from liability by reason of subsequent acts of the former members of the dissolved firm. *Clafin v. Lenheim*, 66 N. Y. 301; *Gragg v. Home Ins. Co.* (Ky.) 107 S. W. 321.

[3] In all such cases, persons who have dealt with the principal through the agent will be protected in continuing to do so, unless and until they have in some way obtained actual notice of the termination of the relation, and, as to them, mere publication of notice in a newspaper and local notoriety of the fact are not sufficient. *Werner Co. v. Calhoun*, 55 W. Va. 246, 46 S. E. 1024.

[2] The general principles of the law of agency are applicable to corporations, and the policy of the law forbids such results as would flow from denial of their application under the circumstances here disclosed. "A corporation is subject to the same extent as a natural person to the general principle that one who holds out another, or allows him to appear as having authority to act, as his agent with respect to his business generally, or with respect to a particular matter, is estopped, as against persons dealing with him in good faith, to deny that his apparent authority is real." *Clark & Mar. Cor.*

p. 2161, § 708. The acts of a person acting as treasurer of a corporation, though not legally elected to the position, are binding. *Bank v. Gas & Light Co.*, 159 Mass. 505, 34 N. E. 1083, 38 Am. St. Rep. 453. In a case involving the exercise of the powers of the president of a railroad corporation, the principle was declared and applied, as follows: "Persons who deal with an agent before notice of the recall of his powers are not affected by the recall." *Hatch v. Coddington*, 95 U. S. 48, 24 L. Ed. 339. Here Newenham had been not only ostensibly, but actually, the president, and, as such, dealt with the plaintiff, and the latter had had no notice of the termination of his authority at the time the note in question was indorsed by him in the company's name. Hence he still had apparent authority, and the principle of estoppel applies as in other cases of agency. This conclusion accords with general legal principles also. A status or condition shown to exist is presumed to continue until the contrary appears.

The letters transmitting the notes to Newenham, president of the company, to be by him discounted, are relied upon as notice to the bank of a special authority in him. These letters are not addressed to the bank. Its officers may never have seen them. If they did, their terms wholly fail to sustain any such contention. They bear only the signature of the treasurer of the company, and import no direct or special authority from the board of directors from which an inference of lack of general authority might arise. They transmit the notes pursuant to an understanding between the writer and the president, and then the first one says: "After having these notes discounted, I would like to have a memorandum showing the proceeds of each note." The other says: "We will need all the money we can possibly raise at present, to meet our present obligations and to arrange for our pay roll, and I hope you will be able to negotiate all the notes that I have sent to you." On the contrary, these letters carry on their faces an implication, assumption, or recognition of authority in the president to discount notes and bills for and on behalf of his company. The president kept an office of the company in Bluefield, and the secretary and treasurer kept its books at another office in Pocahontas, Va. His testimony is that he had the entire management and control of the corporation, made its contracts, borrowed money for it, and conducted its business generally, with the knowledge, acquiescence, and approbation of the directors. At Bluefield, the city in which the business of the plaintiff bank was conducted, he kept an office open, over the door of which was the name of the company. His incumbency of the office of president covered a period of more than seven years, and seemingly he transacted its business, or at least a large

portion of it, in the city of Bluefield during that entire period. The manager of a fire insurance agency says he made practically all of the numerous and large contracts of insurance with his agency. After the notes sent to him for discount had been accepted by the bank, with the indorsement of the company by him as president, the proceeds thereof were deposited to the credit of the company. He then drew checks for this money, payable to the company, subscribed its name thereto by him as president, and sent them to the treasurer, who deposited them in a bank at Pocahontas, by which they were collected and so came back to the bank on which they were drawn. Later, and before the note in question here was indorsed and delivered in exchange for the others, Newenham, as president, deposited \$500 in the plaintiff bank, which he had received for the company from another source, and drew the company's check for it, payable to the company itself, and sent it to the treasurer, which was likewise received and collected. All these transactions are admitted by the treasurer. Other deposits were made and checks drawn by Newenham as president on the funds of the company in the plaintiff bank and payable to other persons than the company were put in evidence, but the treasurer denied all knowledge of them, and likewise any authority in the president to draw them. He successfully contradicts a portion of Newenham's testimony by the production of checks and notes of the company signed by himself as treasurer and countersigned by Newenham as president, the latter having testified that he alone executed practically all of the company's checks and notes. This contradiction or refutation of the claims of Newenham, however, does not disprove or negative the exercise by the president of very broad contractual powers. In the early part of 1908, according to the contention of the defendant, he became grossly neglectful of the company's business, and the management was to some extent taken out of his hands. On the 9th day of June he tendered his resignation as president, and it was accepted. His office in Bluefield seems then, or shortly afterwards, to have been closed, and all of the records and papers therein pertaining to the company's business went into the possession of other representatives of the company. Just when this took place is not disclosed, nor does it appear who took possession of the contents of the Bluefield office. The secretary and treasurer denies that certain papers which ought to have been among those records were found there, but he does not state what he did find. He says the old notes taken up from the plaintiff bank by renewal and otherwise were not among these papers, but he is unable to show what became of them. Whether the directors held any meetings during the

incumbency of the office by Newenham does not appear. Claiming to have exercised full power of management and control of the company's business, with the knowledge and approval of the directors, he does not state how they approved his action, whether by resolution or in meeting or individually, and this important phase of the company's methods is not disclosed by any other evidence. There was a meeting of the directors on the 9th day of June, 1908, when the resignation of Newenham was accepted, and another man elected president to take his place.

The assignments of error relating principally to the admission and rejection of evidence and rulings upon the instructions are dependent upon the character of the issue and the evidence, considered in the light of legal principles. They stand upon the assumption of a conflict of evidence as to the authority of the president, and this claim rests upon certain contentions as to the law applicable under the circumstances. Our conclusion as to these factors in the case will, therefore, virtually dispose of all of them.

[4] The issue involves, not so much the authority actually conferred upon the president, as that which he apparently had and exercised with the knowledge and consent or acquiescence of the board of directors. In other words, the inquiry goes to the extent of the power he was permitted to exercise, rather than the extent of the power actually conferred. The law does not sustain the view that one dealing with a corporation through its officers must, under all circumstances, go to its by-laws as the exclusive evidence of his authority. On the contrary, the corporation is estopped to deny acts of an officer done and performed by permission of its board of directors, evidence by its knowledge of his acts, acquiescence therein, and silence. And this principle extends, not only to things actually done with their knowledge and acquiescence, but to all others of the same general class or character, for the things so done establish a status or relation, defining the scope of apparent authority of the agent to represent the principal. Hence the inquiry is rather as to the character of the things done than their number or the persons with whom the transactions were had for and on behalf of the principal. Another circumstance having important bearing is the nature of the company's business. If the thing done is part and parcel of the general and ordinary business of the corporation, and the officer in question has, to all appearances, the general management and control of that business, the act is necessarily within his apparent authority, and persons have a right to deal with the corporation upon that theory. "And in all cases the president binds the corporation by his acts and contracts when he is expressly authorized so to act or contract,

or when he has been permitted by the corporation for some time to act and contract for it." Cook, Corp. § 716. "If a corporation, therefore, or its directors, either intentionally or negligently, clothe a particular officer or agent with an apparent authority to act for it in a particular business or transaction, and persons deal with him in good faith, it will be bound to the same extent precisely as if such apparent authority were real. \* \* \* Although a person dealing with a corporation is bound to know whether or not the officer or agent who acts for it is authorized to do so, yet, if he is, and the act is within the apparent scope of his authority, the person dealing with him is not chargeable with notice of extrinsic facts, making it improper for him to act in the particular case." Clark & Mar. Corp. § 708. In a case involving a question similar to the one we have here, the Supreme Court of the United States held as follows: "Where an officer of a railroad construction company has full charge for it of the location and construction of a railroad, and is authorized to draw checks and drafts, and charged with the general management of the business of the company in the absence of contrary instructions by the board of directors, notes given by him for moneys used to pay off indebtedness of the company arising in the construction of the road cannot be held to be in excess of his powers. It was the duty of the directors to give contrary instructions if they wished to withdraw the general management from the president, and to disaffirm the action of their agents promptly if they objected to it." Construction Co. v. Fitzgerald, 137 U. S. 98, 11 Sup. Ct. 36, 34 L. Ed. 608. In Bank v. Kimberlands, 16 W. Va. 555, Judge Green, speaking of the apparent authority of an officer of a corporation, said: "If the acts he was in the habit of doing were not thus numerous and variant, to justify the inference that he had authority to do the particular act or make a particular contract for the corporation, an act so done must be of the same general character, so as to involve the same general power, though it may be applied in the particular act or contract done or made to a different subject." The doctrine thus expressed is well sustained by authority. Bank v. Bank, 10 Wall. 604, 19 L. Ed. 1008; Sparks v. Transfer Co., 104 Mo. 531, 15 S. W. 417, 12 L. R. A. 714, 24 Am. St. Rep. 351; Jones v. Williams, 139 Mo. 1, 39 S. W. 486, 40 S. W. 353, 87 L. R. A. 682, 61 Am. St. Rep. 436; Oakes v. Water Co., 143 N. Y. 430, 38 N. E. 461, 26 L. R. A. 544; Curnan v. Railroad Co., 138 N. Y. 480, 34 N. E. 201; Bank v. Trust Co., 163 N. Y. 332, 57 N. E. 477; Chambers v. Lancaster, 160 N. Y. 342, 54 N. E. 707; Fuel Co. v. Lee, 102 Wis. 426, 78 N. W. 584; Bank v. Sherman, 17 S. D. 396, 97 N. W. 12, 106 Am. St. Rep. 778; Crossley v. St. Philip Nori, 74 N. J. Law,

653, 67 Atl. 27; *Martin v. Webb*, 110 U. S. 7, 3 Sup. Ct. 428, 28 L. Ed. 49; *Stokes v. N. J. Pottery Co.*, 46 N. J. Law, 237; *Morawetz, Corp.* § 538.

As has been stated, Newenham was to all outward appearances managing and controlling the business of the company, and in his transactions with the bank exercised power of the same general kind and character as that which his principal now attempts to repudiate. He came with the notes of the company to borrow money from the bank as if such action were a part of the general business intrusted to him. He discounted the notes, and then drew checks on the fund in the bank as if he had authority to do that under all circumstances. He deposited at least one other sum of money in the bank, and drew the company's check for that. The bank knew all these acts on his part had passed through the Pocahontas office of the company without any objection or protest or notice of want of authority. It knew, therefore, either that the directors had approved these acts, or were allowing the president to manage the business of the company just as he seemed to be doing. That the company had a treasurer who indorsed the checks for and on its behalf carried no implication or notice of less authority in Newenham than he was apparently exercising. The latter was, to the knowledge of the bank and also his principal, handling the paper of the company and using its money as if he were its chief executive officer. These transactions were such as ordinarily fall within the province of such an officer of a corporation. This was a trading concern engaged in the lumber business in some way, incurring indebtedness, accepting commercial paper, and necessarily using and disposing of it. The indorsement, renewal, and payment of such paper falls clearly within the general management of such a concern. In addition to this knowledge, the officers of the bank knew the company maintained an office in Bluefield of which its president had charge, apparently as the active manager of the company's business. These officers, therefore, knew from transactions had with him as well as common notoriety as to his status and character that he was the active head of the corporation. Against this evidence we have practically nothing except the fact that the notes and checks of the company were generally signed by the treasurer and countersigned by the president, but not that indorsements were made otherwise than as the latter had originally made them. Proof of by-laws, showing no devolution of such power as he was exercising, is a circumstance of absolutely no weight, since it does not appear that the plaintiff had any knowledge of them. Their contents, therefore, argues nothing against the extent of the apparent authority of the president.

[5] Another legal principle in the light of which the rulings of the court must be con-

sidered is that which holds a principal bound by the unauthorized act of his agent upon the theory of implied ratification. The note sued on here was accepted in exchange for other notes which the bank at the time held. These went into the hands of Newenham as president of the defendant company. What their value was is not shown, but presumptively they had some value. They have never been returned nor tendered to the bank. But for the execution of this new note the bank would no doubt have tested their value by proceeding to enforce the collection thereof, and would have proceeded against the defendant itself as well as the makers, for it was bound for their payment by its indorsement. Having obtained the possession of these notes by the alleged unauthorized indorsement of the president, the defendant obtained at least the benefit of a release from liability upon them, and may have obtained still further benefit. The treasurer says these notes were not found among the papers left in the office by the president, and are not now in the hands of the company. This, however, in our opinion, is immaterial, since the bank delivered them to the defendant's agent, and was not thereafter responsible for his acts. Had the treasurer and the directors of the defendant company exercised due diligence in the premises, it might now be able to account for those notes, and show what became of them. On the face of these facts, it is plain that the defendant has obtained a benefit and inflicted a detriment upon the plaintiff by the conduct of its officer. No matter whether he had authority to make the indorsement or not, or whether the bank had the right to believe he had such authority, his principal is estopped to deny it, and is deemed to have ratified his act by its failure to restore what it obtained from the bank. "Perhaps the most common method of implied ratification is by the acceptance by the principal, with full knowledge of all the facts, of the benefit of the agent's unauthorized act, if such an act as can be ratified by parol, and the principal, knowing all the facts, accepts and retains the benefit of such act, he will be held to have ratified it." *Clark & Skyles, Con.* § 140a. "When a principal, upon receiving property or other benefits, is informed that they were obtained in his name, it is not enough that he merely informs the seller that the purchase or other obtaining of benefits was unauthorized; but he should also, within a reasonable time, either restore the property or benefits, or pay for them if he converts them into his own use." *Id.* § 140d. These principles have been applied by this court in *Bank v. Mfg. Co.*, 56 W. Va. 446, 49 S. E. 544, and *Bank v. Kimberlands*, 16 W. Va. 555, and we think them applicable under the circumstances of this case.

[6] Much of Newenham's testimony as to the extent of the powers exercised by him

and knowledge thereof on the part of the board of directors was objected to upon two grounds: (1) That he stated conclusions rather than facts; and (2) that some transactions related by him were not shown to have come to the knowledge of the plaintiff. It was not improper to permit him to say he had had full management and control of the affairs of the company, and attended to all kinds of its business, buying and selling and looking after its finances, and was under the duty of executing notes, checks, and other papers, and did all these things with the approbation of the directors. These were all statements of fact, not mere expressions of opinion or conclusions. This testimony was admissible on the question of actual authority, provable by parol as well as documentary evidence. Hence proof of plaintiff's knowledge of these facts was not a prerequisite to the admission of the evidence thereof. Nothing in the law, charter of the corporation, or its by-laws inhibited a parol delegation of authority by the directors to the president, and an agent is a competent witness on the question of his authority. *Piercy v. Hedrick*, 2 W. Va. 458, 98 Am. Dec. 774; *Garber v. Blatchley*, 51 W. Va. 148, 41 S. E. 222. On the same principle and for the same purpose the testimony of the witness Bowman as to contracts of insurance made by Newenham with his agency was admissible, for these contracts were traced back to the company and its knowledge thereof shown. Debts so made, covering a period of years, were paid by the company. There was no error in the rejection of the offered testimony of director Wickham to the effect that Newenham failed to disclose the indebtedness to the plaintiff bank at conferences had with him about the affairs of the company at or shortly before the date of his resignation. If true, the fact was wholly immaterial. It had no tendency to prove authority or lack thereof nor to contradict any witness. Newenham had not been examined as to what transpired at any such meeting or conference and the transaction was subsequent to the indorsement in question.

Plaintiff's instruction No. 7, complained of, told the jury in substance that, if they believed from the evidence Newenham was authorized to discount the original notes, the company received the proceeds thereof, some of the notes were not paid, Newenham indorsed the name of the company on the note sued on in renewal thereof and received in exchange therefor the unpaid notes and the officers believed, with good reason, Newenham had the same authority, at the time, that he had had at the dates of the discounting of the original notes and knew nothing to the contrary, they should find for the plaintiff, even though they should further believe Newenham was not president of the company at the date of such renewal. The

legal principles already adverted to sustain the ruling of the court on this instruction. The subsequent act was of the same character in general as the previous ones, which indicated authority to bind the company by contract. The evidence justified an instruction even more favorable to the plaintiff, as intermediate acts of Newenham reflected further light upon his apparent authority. Moreover, the uncontradicted evidence of ratification by retention of benefits would have sustained the direction of a verdict for the plaintiff.

All of the eight instructions requested by the defendant were refused. Of these Nos. 3 and 6 only call for any discussion, as the others were palpably bad. No. 3 was intended to warn the jury that the burden of proof was on the plaintiff as to all material allegations of the declaration. Some of these allegations were admitted and uncontroverted, or fully proved by uncontradicted evidence. This fully justified refusal of the instruction. *Kuykendall v. Fisher*, 61 W. Va. 87, 56 S. E. 48, 8 L. R. A. (N. S.) 94, 11 Ann. Cas. 700; *Parker v. B. & L. Ass'n*, 55 W. Va. 134, 46 S. E. 811.

[7] No. 6 is bad because it attempted to make the issue turn on the questions of actual authority, or ratification of unauthorized action. Evidence of apparent authority, sufficing to sustain the issue, was wholly ignored by it. To say the least, it would have been misleading in that it failed to define or extend ratification so as to include estoppel, based upon evidence of apparent authority.

Seeing no error in the judgment, we affirm it.

(70 W. Va. 409)

# AMERICAN NAT. BANK OF BLUEFIELD v. RITZ.

(Supreme Court of Appeals of West Virginia.  
Feb. 27, 1912. Rehearing Denied  
April 26, 1912.)

(Syllabus by the Court.)

BANKS AND BANKING (§ 116\*) — FUNCTIONS AND DEALINGS — REPRESENTATION BY OFFICER—NOTICE.

Knowledge by one of the officials of a bank, acquired in a capacity other than as its representative, relating to infirmity in commercial paper offered for discount, is not notice to the bank when that official is also an officer of the corporation seeking the discount and has an interest in the transaction so adverse to the bank that the reasonable presumption is that he would not communicate the knowledge to it.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 282-287; Dec. Dig. § 116.\*]

Error to Circuit Court, Mercer County.

Action by the American National Bank of Bluefield against Harold A. Ritz. From a judgment for defendant, plaintiff brings error. Reversed, and new trial awarded.

Sanders & Crockett, for plaintiff in error. A. W. Reynolds, D. E. French, John M. McGrath, and Russell S. Ritz, for defendant in error.

ROBINSON, J. By this action in debt, the plaintiff bank seeks to recover from defendant the amount of two negotiable notes which he endorsed. The notes were made by the Southern West Virginia Fuel Company, and were discounted by the plaintiff for the benefit of that company.

Fowler, at whose request defendant endorsed, was president of the fuel company, and also president of the bank—a director in both corporations. Defendant also was a director in both corporations.

Defendant filed a special plea in which he avers, substantially, that he was merely an accommodation endorser of the notes at the request of Fowler as president of the fuel company; that Fowler represented to him that the company was sorely in need of funds and money must be raised for its use by discounting notes; that he signed the notes with a distinct agreement between himself and Fowler that the other directors of the company would endorse them before they were discounted; that it was also agreed that the notes should not be used until a writing was signed by all the endorsers stipulating that the directors of the company as endorsers were liable only in proportion to their stock; that such a writing was prepared by defendant and was signed by him, Fowler and Shands; that Fowler was to obtain the signatures of the other directors to this writing as well as to the notes; that, notwithstanding these agreements, Fowler had the notes discounted at the bank, endorsed only by himself, the defendant and Shands, without the endorsement of the four other directors and without securing these others to sign the writing relating to the extent of liability; and that, at the time the notes were discounted, the bank had notice of these agreements in the premises and was therefore advised of the infirmity of the paper in relation to defendant when it became the holder of the same.

A trial by jury resulted in a verdict and judgment for defendant. Plaintiff, by writ of error, comes seeking a reversal.

Defendant rests his case on the assertion that the bank had notice of the infirmity in the paper through the knowledge of Fowler, its president and managing officer. That knowledge, it will be observed, Fowler obtained as an officer of the fuel company. It did not come to him as an officer of the bank.

An instruction was given on behalf of defendant over the objection of plaintiff. It is as follows: "The court instructs the jury that if they believe from the evidence in this case that William E. Fowler was President of the American National Bank, the plaintiff in this case, and that he agreed with the defendant that the notes sued on in this

case, or the notes for which said notes, or either of them, is a renewal, should not be discounted at said bank until they had been endorsed by William E. Fowler, William Shands, J. Lee Harne, S. M. Smith, W. P. Hawley, F. L. Black and the defendant, Directors of the Southern West Virginia Fuel Company, and that said notes should not be discounted at said Bank until the written agreement introduced in evidence in this case had been signed by all of said directors of the Southern West Virginia Fuel Company, and if the jury further believe from the evidence in this case that the said William E. Fowler violated the said agreement with the defendant by causing the said notes to be discounted and the amount thereof placed to the credit of the said Southern West Virginia Fuel Company without the endorsements of all the persons aforesaid and without all of said persons having signed the said contract in accordance with the said agreement, then the jury shall find for the defendant." Plainly, this instruction assumes that the knowledge which Fowler had of the agreement that the notes were not to be delivered until the proposed endorsements and signatures were obtained was notice to the bank of which he was president. Was the trial court justified in thus virtually assuming as matter of law that notice to Fowler was notice to the bank?

It does not appear that the exclusive management of the bank had been committed to Fowler. No resolution of the directors or long existing custom held out to the public establishes that he had the power to act absolutely in behalf of the bank. It is not shown that he alone was the bank, so that there could be no other channel of notice to it. On the other hand it appears that the bank had a full board of directors. It is not proved that they were so derelict in their duties that those duties necessarily passed to Fowler. We must assume that they were managing the bank as the law required them to do, since it does not appear that they were not. Besides, the bank had an active cashier, who was also a director. We must assume that he exercised his powers as a director and as the cashier. The identity of Fowler and the bank were not the same. He was not the bank—he was merely one of its agents. So there were others entitled to information in the affairs of the bank. There were other officers to whom it was Fowler's duty to communicate knowledge received by him affecting the bank, and to whom it must ordinarily be presumed he would communicate such knowledge. They had the power to disapprove his acts.

The general rule that knowledge or notice on the part of the agent is notice to the principal is based on the duty of the agent to communicate all material information to his principal and the presumption that he has done so. In short, this rule rests on the presumption that the agent will do his duty



to the principal by communicating material information to the latter. The rule cannot stand without this presumption. In this case, the presumption does not arise. It is not to be presumed that Fowler communicated to the other officers of the bank the knowledge which he had as to the infirmity in the notes. It was to his interest to remain silent. He was president of the corporation which needed the funds by a discount of the notes. He was acting for an interest which was adverse to the interest of the bank. So an exception to the general rule applies. That exception prevails "in case of such conduct by the agent as raises a clear presumption that he would not communicate the fact in controversy, as where the agent acts for himself in his own interest and adversely to that of the principal." 1 Amer. & Eng. Enc. Law, 1145. "No agent who is acting in his own antagonistic interest or who is about to commit a fraud by which his principal will be affected does in fact inform the latter, and any conclusion drawn from a presumption that he has done so is contrary to all experience of human nature." *Gunster v. Scranton, etc., Co.*, 181 Pa. 327, 37 Atl. 550, 59 Am. St. Rep. 650.

Defendant was a director of the bank and of course knew that Fowler was also a director and the president. He also knew that Fowler in the particular transaction of the discount of these notes had an interest adverse to the bank. Defendant, therefore, could not rely on the mere knowledge which Fowler had received in a transaction outside of his line of duty as a bank official as being notice to the bank. He was bound to observe that this knowledge was not the kind of notice to an officer that is directly imputable to the bank in any event, but that to make it notice there must be a presumption that Fowler would communicate it to the bank. He could not rely on such a presumption, for he well knew Fowler's adverse interest. Under such circumstances he should have given direct notice to the bank, if he desired to protect himself. He should have given notice that would be presumed to reach the bank. Instead, defendant in fact constituted Fowler as his agent to see the notes perfected and the writing fully signed, entrusting that agent with negotiable instruments which he could pass to an innocent holder and thereby bind defendant. If there is loss should it not fall on defendant? He should have observed that he placed Fowler in a position to have the bank innocently part with its funds on the faith of paper that appeared sound on its face. True, the best of men sometimes neglect. But duty to himself, as well as duty to the bank of which he was a director, demanded that he do more for the protection of both himself and the bank than he did. Applicable to this case are the following: "If the third person has notice of the agent's adverse interest in a former transaction in regard to which the

agent was acting not for the bank, and the knowledge gained in such a transaction is such that needs to be communicated to the bank in order to bind it, that is to say, if it is knowledge acquired by the officer outside of his duties, there will be no presumption of a communication where the officer has an interest or a duty in concealing the matter." *Zane on Banks and Banking*, sec. 112. "If the third party, C., knows that A. has an adverse interest tending to cause him to withhold his knowledge from B. the bank, C. has no right to regard A. and B. as identical in the transaction, and cannot hold B." *Morse on Banks and Banking*, § 106.

It is submitted that the evidence shows that the board of directors did not pass the discount of the notes, but that the same was done by Fowler alone. That cannot alter the case. They could have overthrown his act. Though Fowler took the paper from himself into the bank, it must be presumed that the other officials who were disinterested and qualified to act on that paper acquiesced in his action only because they had no notice of the infirmity in the notes. It is not reasonable to think that these disinterested officials would have silently approved his action if they had known what he knew about the paper. These disinterested officers of the bank received the paper as regular and valid. Defendant cannot rely, as he undertakes to do, on a conduit of notice that did not lead to the real entity—the bank itself through its disinterested officers. To hold that Fowler as president acted alone for the bank and that he had absolute power to bind it for his own private interests or those of a company in which he was privately interested, notwithstanding there were other officials of the bank who naturally would have intervened in its behalf if the knowledge which he possessed had been known to them, would mean no regard for the interests of depositors and stockholders.

In the transaction of the discount of the notes, Fowler was acting really not for the bank but for other interests—those of the fuel company. The directors who permitted the paper to remain as the property of the bank acted for it. Fowler's interest was so adverse to the bank that he was disqualified from representing it. A reputable authority says: "When an agent of a corporation himself contracts with the company, or otherwise deals with it in a transaction in which his interests are opposed to the interests of the company, his knowledge will not be deemed the knowledge of the company as to matters connected with the transaction; for the agent could not represent the company in such a transaction. So if a person is an officer of two companies, and these companies enter into dealings with each other, the knowledge of the common officer cannot be attributed to either company in a transaction in which he did not represent it." 1

Morawetz on Private Corporations (2d Ed.) § 540c. And says Mr. Justice Mitchell in *Gunster v. Scranton, etc., Co.*, supra: "If it be urged, as in some cases, that the principal having put the agent in his place should, as a matter of public policy, be held answerable for all the latter does, a sound answer is suggested by the court in *Allen v. So. Boston R. R.*, 150 Mass. 200, 206 [22 N. E. 917, 5 L. R. A. 716, 15 Am. St. Rep. 185], that an independent fraud committed by an agent on his own account is beyond the scope of his employment, and bears analogy to a tort willfully committed by a servant for his own purposes, and not as a means of performing the business intrusted to him by his master."

By claiming the notes and suing on them, the bank did not adopt Fowler's act in discounting the notes with notice. All that the bank adopted of his act is what it knew of the act. As far as it appeared to the bank, the notes which Fowler passed into the bank as agent of the fuel company and received as agent of the bank were entirely regular and valid. The bank took the notes as paper of that character. Why should its insistence for payment charge it with an adoption it never intended to make—one that in reason cannot be imputed to it?

The giving of the instruction for defendant was error. The instructions requested by plaintiff properly presented the law of the case, in view of the evidence. We deem it unnecessary to discuss plaintiff's objection to the special plea, based on the ground that proof under it violates the rule that parol evidence is not admissible to change a written contract. It suffices to say that proof of the plea is admissible.

The judgment will be reversed, the verdict set aside, and a new trial awarded. Plaintiff asks for judgment here, but it does not plainly appear that defendant cannot make a different case at another trial. He may be able to prove notice.

(70 W. Va. 402)

**RUTHERFORD v. CITY OF WILLIAMSON.**  
(Supreme Court of Appeals of West Virginia.  
Feb. 27, 1912. Rehearing Denied  
April 26, 1912.)

*(Syllabus by the Court.)*

**1. APPEAL AND ERROR (§ 536\*)—RECORD—SCOPE AND CONTENTS—BILL OF EXCEPTIONS.**

A bill of exceptions is sufficiently identified if be signed and certified by the trial judge, and designated in his certificate by the words or numbers placed upon it for identification, and be described in the same manner in the order making it a part of the record.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 2402, 2403; Dec. Dig. § 536.\*]

**2. MUNICIPAL CORPORATIONS (§ 385\*)—PUBLIC IMPROVEMENTS—DAMAGES—CHANGE OF GRADE OF STREET.**

If a municipality lay out and open its streets to public use on the natural grade, and

permit lot owners to build on their lots abutting thereon, with reference to such natural grade, it becomes liable in damages to such lot owners for injury resulting from a subsequent change in the grade line.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 925-928; Dec. Dig. § 385.\*]

**3. MUNICIPAL CORPORATIONS (§ 753\*)—TORTS—ACTS OF OFFICERS.**

A municipality acts through its authorized officers, and is not liable for the acts of such of its officers as have no authority in the premises.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1584, 1586; Dec. Dig. § 753.\*]

**4. MUNICIPAL CORPORATIONS (§ 753\*)—PUBLIC IMPROVEMENTS—ACTS OF OFFICERS.**

A city, whose council is given the power and authority, by its charter, to "open, alter, grade and keep in good repair [its] roads, streets, and alleys, \* \* \* and to order the pavement, sidewalk, \* \* \* to be kept in good order," is not liable to a lot owner for the unauthorized act of its mayor in causing such lot owner to lay a sidewalk along the street in front of his lot in such way as to injure his lot.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1584, 1586; Dec. Dig. § 753.\*]

**5. MUNICIPAL CORPORATIONS (§ 395\*)—PUBLIC IMPROVEMENTS—DAMAGES.**

The true measure of damages to a lot abutting on a street, occasioned by a change in the grade line of the street, is the difference between the value of the lot immediately before and its value immediately after the street improvement, less any special or peculiar benefits to the lot because of the improvement of the street, but leaving out of account such general benefits as accrue to it in common with other property similarly situated.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 946-948; Dec. Dig. § 395.\*]

*(Additional Syllabus by Editorial Staff.)*

**6. MUNICIPAL CORPORATIONS (§ 394\*)—PUBLIC IMPROVEMENTS—DAMAGES.**

Where the excavation in a street for a sidewalk made it necessary to build a retaining wall to preserve an adjoining owner's property and to protect it from further injury, it is proper to take into consideration the reasonable cost of building the wall in estimating damages.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 938, 945; Dec. Dig. § 394.\*]

**7. EVIDENCE (§ 502\*)—PUBLIC IMPROVEMENTS—DAMAGES—EXAMINATION OF WITNESS.**

In an action against a city for damages from the change of grade of a street, it was not error to refuse to permit counsel for the city, on cross-examining witnesses in relation to the matter of damages, to ask them if, in making their estimate, they took into account any special benefits accruing to plaintiff's property, where there was no evidence of such benefits shown, being general in their nature.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 2306, 2307; Dec. Dig. § 502.\*]

Error to Circuit Court, Mingo County.

Action by A. G. Rutherford against the City of Williamson. Judgment for plaintiff, and defendant brings error. Reversed, and remanded for new trial.

G. R. C. Wiles and Campbell, Brown & Davis, for plaintiff in error. Sheppard, Goodykoontz & Scherr, for defendant in error.

WILLIAMS, J. A. G. Rutherford recovered a judgment for \$275 against the city of Williamson, in the circuit court of Mingo county, as damages for an alleged injury to his real estate, occasioned by excavations for the laying of sidewalks on a level with the grade line of two streets abutting thereon, and the city has brought the case here on writ of error.

[1] The motion to dismiss the writ, for the alleged reason that the bill of exceptions which embodies the evidence was not properly certified by the judge and identified by the order making it a part of the record, must be overruled. There are a number of bills of exceptions, and they are all identified in the order by numbers, as No. 1, No. 2, etc. No. 1 embodies the evidence. It begins on page 14 of the record and ends on page 186. The judge signs a certificate, at the conclusion of it, stating that it contains all the evidence, and identifies it as "bill of exceptions No. 1." The vacation order, making it a part of the record, identifies it in the same manner. This makes its identity reasonably certain, which is all that the law requires. *Duckworth v. Stalnaker*, 68 W. Va. 197, 69 S. E. 850 (pt. 13, Syl.); *Marshall v. Stalnaker et al.*, 74 S. E. 48, recently decided by this court, but not yet officially reported.

[2] Plaintiff's lot is situated at the corner of Second avenue and Dickinson street, which were opened and used as public streets, on the natural grade line, for a number of years. Plaintiff had built his house with reference to the natural grade. His declaration avers that the city thereafter lowered the natural grade line of these two streets, and hereby damaged his lot. The declaration states a good cause of action, and the demurrer was properly overruled. *Harman v. Bluefield*, 73 S. E. 296; *Blair v. Charleston*, 43 W. Va. 62, 26 S. E. 341, 35 L. R. A. 852, 64 Am. St. Rep. 837.

[3, 4] But counsel for the city insist that it has never changed the grade line on Dickinson street, and has not established any grade line for that street. The majority of plaintiff's evidence proves that his chief cause of complaint is on account of an excavation along Dickinson street, which he made himself, for the purpose of laying a public, cement sidewalk. This excavation was from four to five feet deep in places, and made it necessary for plaintiff to build a retaining wall to protect his lot. But if the city did not fix a grade line, and did not direct plaintiff to build the sidewalk, it ought not to be held liable. The proof is that the mayor employed an engineer to run a line on Dickinson street, and then told plaintiff to lay the sidewalk by the engineer's stakes, which plaintiff did. But the engi-

neer was not the city engineer; nor is there any proof that the mayor was authorized to employ him, or that the council adopted his survey as the grade line, or that he ever reported his work to them. The mayor acted beyond the scope of his authority, and, the council not having ratified his acts, the city cannot be held liable. A municipality acts through its authorized officers; and it cannot be held liable for the acts of those who have no authority in the premises. In *Gardner v. City of St. Joseph*, 96 Mo. App. 657, 71 S. W. 63, the court says: "The city can only be held responsible for the acts of its officers and agents in changing the grade of a street when the change is authorized by ordinance." To the same effect is *Page v. Belvin*, 88 Va. 985, 14 S. E. 843.

By its charter, the council of the city of Williamson is given power to "lay off, vacate, close, open, alter, grade and keep in good repair the roads, streets, and alleys \* \* \*; to regulate the width of the pavements and sidewalks on the streets and alleys and to order the pavement, sidewalk, \* \* \* to be kept in good order," etc. The common council is the legislative body of the city, and to it the Legislature has delegated the authority and power to determine the locations and grades of its streets, and to keep them in repair. This authority, being delegated to the council, cannot be, by it, delegated to another. *Dillon, Munic. Corp.* (5th Ed.) § 244; 2 *Abbott, Munic. Corp.* § 517; *Page v. Belvin*, supra; *Cross v. Morristown*, 18 N. J. Eq. 305; *Zottman v. San Francisco*, 20 Cal. 96, 81 Am. Dec. 96; *Mayor v. Porter*, 18 Md. 284, 79 Am. Dec. 686; *Ruggles v. Collier*, 43 Mo. 353; *Thomson v. Booneville*, 61 Mo. 282; *Smith v. Stephens*, 10 Wall. 321, 19 L. Ed. 933. This does not mean, however, that a city council, having control of the streets, cannot delegate to some one else, or to a committee of its own members, the performance of merely ministerial duties, such, for instance, as making surveys, superintending the work of construction, and the like. But it cannot delegate its authority where discretion and judgment are to be exercised, as in the case of opening a public street, or adopting a grade line for it. In respect to these things, it is invested with a legislative discretion; and the familiar maxim that authority once delegated cannot be redelegated applies. *Dancer v. Mannington*, 50 W. Va. 323, 40 S. E. 475; *Brannon's Fourteenth Amendment*, 212; 15 A. & E. E. L. (2d Ed.) 742.

There is no evidence in the record of any official action taken by the city council in respect to Dickinson street. Plaintiff introduced a copy of an order of the common council, passed on September 3, 1906, which reads as follows, viz.: "On motion, it is ordered that all property owners west of fill on 2nd Ave. to Prichard St., be compelled to lay a 6½ ft. concrete sidewalk, according to grade of city engineer." But this order does

not embrace Dickinson street, which runs at right angles to Second avenue. Moreover, this is no evidence that the city engineer ever located a grade line for Dickinson street. After Day ran the line on Dickinson street, at the instance of the mayor, the city did a little excavating in the road, on that street, but not for the purpose of permanently improving the street, and the excavation was not down to the line run by Day. But that excavation is not the thing of which plaintiff complains. It is the excavation for the sidewalks on both streets which he says injured his property. But there is no evidence that the city council authorized the laying of the sidewalk on Dickinson street, or that it adopted Day's grade line, and consequently no proof of the city's liability for the injury occasioned by excavating for the sidewalk on that street. In building the sidewalk on Dickinson street, plaintiff seems to have acted on two erroneous assumptions: (1) That the ordinance, above quoted, required him to lay a sidewalk on that street; and (2) that the mayor had the power, independent of the council, to establish a grade line which would be binding on the city. But his misunderstanding of the ordinance certainly would give no cause of action against the city; and the law is well settled that it cannot be held liable for the unauthorized acts of its officers. So far as the record discloses, the mayor acted without color of authority in causing plaintiff to lay the sidewalk on Dickinson street. It was therefore error to admit evidence of damages in relation thereto.

In respect to the damages claimed on account of the excavation for the sidewalk on Second avenue, plaintiff's case stands on a much better footing. The city, acting through its council, established a permanent grade line, and paved Second avenue in 1906. But the city had, previous to that time, plowed and scraped it, and had lowered the natural grade; but just when the excavation was made does not clearly appear. Plaintiff bought his lot in 1901, and, if the work was done before that time, he cannot complain of it. He says he thinks it was in 1902. But witness Thompson, who was one of the contractors that did the work, says it was in 1900; and a copy of the order of the council, appropriating money to pay this witness and his co-contractor, Lemaster, for moving dirt in the streets and making fills, bears date the 9th of November, 1900. This documentary evidence would seem to indicate that witness Thompson is more nearly correct in his recollection of the time than plaintiff is. However, the time of that work is not very material, for the reason that plaintiff himself admits that, if it had not been for the laying of the sidewalk on Second avenue, he would not consider that he had been damaged very much on account of the permanent improvement of that street. Furthermore, the testimony of Mr. Gaujot, who was then

city engineer, proves that the establishment of the permanent grade line on Second avenue by him in 1906 made very little change in the surface of the street from what he then found it. He says that the paving of the street raised the grade line in front of plaintiff's property from a foot to 18 inches. This restored it more nearly to the natural surface grade than it was when he bought the lot. But the thing of which plaintiff complains is the excavation which was made in order to bring the sidewalk down to a level with the curb line. If he was thereby injured, he has a right to recover, because the ordinance passed by the city council required him to lay a sidewalk on Second avenue, on a line with the curb. No witness, however, undertakes to state what is a fair estimate of the damages on Second avenue alone. The evidence, relating to damages, includes the damages resulting from the laying of sidewalks on both Second avenue and Dickinson street. The cost of building the retaining wall along the line of plaintiff's property on both streets is given as their estimate of plaintiff's damages by many of his witnesses. The wall was built around the corner and along both streets; and the highest part of it is on Dickinson street. No witness gives a separate estimate of damages on Second avenue.

[5] Plaintiff is entitled to such damages, if he has sustained any on account of the excavation on Second avenue, as will make him whole. But, in estimating his damages, the city is entitled to have set off against them such special or peculiar benefits, if any, as have accrued to the property on account of the improvement. It is difficult to define what is meant by special benefits, and we will not undertake to give a general definition. But, whatever they are, they certainly are not such benefits as are shared, in common, by owners of other property situated on the same street. These common, or general, benefits the property owner is entitled to as a taxpayer; and, in estimating his damages, he is not to be charged with any enhancement in value of his property on account thereof. The rule for estimating damages, in cases such as this, is, no doubt, a fair one; but it is attended with such complications as to make its practical application difficult. It is hard to estimate the value of property immediately after a street improvement, and leave out of consideration the general benefit accruing to it from the improvement. Yet this is what the rule requires, and, in view thereof, a property owner may be entitled to recover damages, notwithstanding his property may have a greater market value just after the improvement is made than it had immediately before. In *Harman v. Bluefield*, 73 S. E. 296, recently decided by us, we laid down the following rule for estimating damages to property on account of street improvements, viz: "The true measure of damages to a

lot abutting on a street, occasioned by a change in the grade line of the street, is the difference between the value of the lot immediately before and its value immediately after the street improvement, less any special or peculiar benefits to the lot because of the improvement of the street, but leaving out of account such general benefits as accrue to it in common with other property similarly situated."

[6] If the excavation for the sidewalk on Second avenue made it necessary to build a retaining wall to preserve plaintiff's property, and to protect it from further injury, it is proper for the jury to take into consideration the reasonable cost of building the wall in estimating damages. *Harman v. Bluefield*, supra, and *Godbey v. Bluefield*, 61 W. Va. 604, 57 S. E. 45. Many of the witnesses testified that, in their opinion, the cost of building the wall would be a fair estimate of the damage.

[7] It was not error to refuse to permit counsel for the city, on cross-examining certain witnesses in relation to the matter of damages, to ask them if, in making their estimate, they took into consideration any special benefits accruing to plaintiff's property, because there is no evidence of any such benefits. So far as the record discloses, all the benefits to plaintiff's property were general in their nature.

In view of what we have already said in respect to the want of evidence to prove any liability on the city for the improvement of Dickinson street, it was error to give plaintiff's instructions numbered 1 and 2. If they had authorized the jury to estimate damages on account of the change in Second avenue alone, they would have been correct. Defendant's No. 1 was properly refused, because it does not correctly state the rule for the measure of damages. It was error to refuse defendant's instructions Nos. 6 and 7.

We reverse the judgment, set aside the verdict, and remand the case for a new trial.

(70 W. Va. 448)

#### MALE v. MOORE.

(Supreme Court of Appeals of West Virginia.  
March 5, 1912. Rehearing Denied  
April 26, 1912.)

(Syllabus by the Court.)

#### 1. TAXATION (§ 734\*)—TAX SALE—DEED.

To support a tax sale and deed there must be a valid assessment—one that will impart full notice to the owner or taxpayer and make the proceedings due process of law.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. §§ 1470-1473; Dec. Dig. § 734.\*]

#### 2. TAXATION (§ 734\*)—ASSESSMENT—ERROR IN NAME—VALIDITY OF SALE.

An assessment of land under a name so erroneous in departure from the correct name of the person chargeable with the taxes as to be liable to mislead one whose duty it is to pay or whose right it is to redeem, is invalid as a basis of tax sale and deed where the tax-

payer or person entitled to redeem has no notice of the error.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. §§ 1470-1473; Dec. Dig. § 734.\*]

Appeal from Circuit Court, Tucker County.

Bill by Mary E. Male against John H. Moore. Judgment for plaintiff, and defendant appeals. Affirmed.

C. O. Strieby, for appellant. J. Wm. Harman, for appellee.

ROBINSON, J. The decree sets aside and annuls a tax sale and deed in relation to plaintiff's house and lot. Defendant, the purchaser at the tax sale and grantee in the deed, has appealed.

Hornbrook was a former owner of the property. Defendant claims it was validly sold under an assessment made in the name of this former owner. But the assessment relied on is in the name of Hoonbrook. The copy from the land book, certified by the county clerk, so gives it. A photograph of the name as it appears in the assessment list shows the same to be Hoonbrook. One would quite naturally so read it. The sheriff certainly so interpreted the name, for he returned the taxes as delinquent in that name. No wonder he could not find Hornbrook to collect the taxes from him. Evidently he was looking for one of an entirely different name. No wonder the taxes became delinquent since they were sought from one who could not be found—sought from Hoonbrook, who did not exist.

This erroneous assessment of the property plainly misled the sheriff and his deputies. The proceedings as a whole show that these officers did not consider the assessment as one against a person by the name of Hornbrook. Since the assessment misled them, must we not reasonably assume that it was liable to mislead the subsequent owner of the property in seeking to pay the taxes or to redeem from the delinquency and the sale?

The proceedings throughout are erroneous and misleading. Though the property was erroneously assessed and returned as delinquent in the name of Hoonbrook, it was even more erroneously advertised for sale in the name of Hashbrook. The sale and deed were made in the name of Hoanbrook. See how many interpretations of the name in the assessment roll were given by the officers in acting on it! Is it at all strange that the plaintiff did not observe it to be her property?

[1] Of course errors in the delinquent list and subsequent proceedings are cured after the deed is made. But the error in the assessment is covered by no such curative statute. There must be a valid assessment; otherwise the proceedings are void. There must be notice to the owner or taxpayer by an assessment that gives notice. A sale and deprivation of property cannot stand with-

out due process of law by such a notice. The assessment must be one that will call to the owner or taxpayer to pay the taxes. If the assessment is in a name that does not so call to the owner or taxpayer, or the property is so defectively described therein that he is not notified in relation to it, no valid proceedings for sale can be based on that assessment. It must be an assessment that will give notice—not one that will mislead. "Care should be taken that the name given in the list be the correct one; for any misleading error would be fatal." 1 Cooley on Taxation (3d Ed.) 729. We do not say that errors in names in the assessment list will always invalidate proceedings for sale; for, a taxpayer may have notice of an error so as to bind him. Or he may pay under an erroneous name and thereby adopt it so that he has notice of it in the future. But, in this case, we have no such showing. Here a subsequent owner was presumably looking for the name of a former owner without knowledge of error therein. In one of our cases it is pertinently said: "The name of the former owner is one of the most important requirements of all these tax proceedings. Nothing could be more calculated to mislead and prejudice the owner than to omit his name from the assessment roll or the delinquent or sales return. This fact has long been regarded in Virginia and this state; and if land were assessed in the wrong name, or in some name calculated to mislead or deceive the true owner, such assessment and sale has been held void and of no effect as against the title of the true owner." *Collins v. Reger*, 62 W. Va. 195, 57 S. E. 743.

[2] So we hold that the assessment in the name of Hoonbrook was no assessment in the name of Hornbrook. It was an assessment in a wrong name—an assessment that misled. It could not perform the function of notice to the owner or taxpayer. The error no doubt caused the failure of the sheriff to collect the taxes from Hornbrook. If the assessment had been made in the proper name, presumably no occasion for the sale of the property would have arisen. In any event, plaintiff would have had notice to redeem, which she could not have by reason of the error. In *Collins v. Reger*, supra, we held: "Assessment and sale for taxes in the name of Martha Hedrick of land belonging to Martha Helmick, or in some way calculated to mislead or deceive such true owner, are void if without her knowledge or consent; the rule of *idem sonans* being inapplicable to assessment rolls or to delinquent and sales returns." Some jurisdictions do not require this degree of strictness in the assessment roll, but it applies with us. It is recognized on sound reason elsewhere. In California, an assessment in the name of S. M. Whipple, where the property was owned by S. B. Whipple, who had always been known by the latter name and no other, was

held to be void because there was no designation of the proper owner. *People v. Whipple*, 47 Cal. 591. In the same state, an assessment in the name of Castero when the owner's name was Castro was held void. *Emeric v. Alvarado*, 90 Cal. 444, 27 Pac. 356. See also, *State v. Sloss*, 87 Ala. 119, 6 South. 309. And why not so? To be notice, the listing must be a correct one. An erroneous one may not notify; it may mislead. It will be presumed to mislead if the contrary does not appear. "This listing is necessary in order to describe and identify the property and to insure that it is taxed in the name of the rightful owner. These matters must be set forth in some specified public record, and set forth truly and accurately, so that the party who owns the land may be given the opportunity to examine and see that his land is made liable to taxation. This is the foundation upon which the valuation of the land and the levy of the tax must rest. However correct they may be, the owner will have received no legal notice thereof, unless his land has first been properly listed. Without it there will be no due process of law. \* \* \* So, if the party to whom the property is listed is not the true owner, any assessment of the valuation or taxes thereon is invalid. The conclusive effect given by statute to the tax-deed will not prevent the true owner from establishing the error in the listing." *Minor on Tax Titles in Virginia*, 131.

There was no assessment of the property in the name of Hornbrook. The change of name may have been caused by mere error in copying, but nevertheless the error made the name to be other than the correct one. It matters not how it came, the assessment was in a name that did not impart complete notice to the owner or taxpayer. Though Johnson is only inadvertently written Johns, still the error publishes a wholly different name. One looking for Hornbrook does not see it when he finds Hoonbrook. He cannot be held to notice of an error merely because the two names are similar in some respects. Must one looking for Miller take notice that Mitter is intended for it, simply because the name could be inadvertently so written by crossing the middle letters? If the officer making up the assessment list changes an *r* to an *o*, as may have been done in this case, and the effect is to write a different name so that the owner or taxpayer is misled, then notice is not imparted to him. Officers, in justice to owners and taxpayers, must not make such mistakes. They must list property accurately, if they would make the listing to be the basis of depriving owners of title. They can no more call on Hornbrook to pay taxes by the use of the name Hoonbrook than they can call on John Hatfield by the name of John Hayfield. The decree will be affirmed.

BRANNON, P., absent.

(70 W. Va. 470)

**WALDRON v. W. M. RITTER LUMBER CO.**  
(Supreme Court of Appeals of West Virginia.  
March 5, 1912. Rehearing Denied  
April 26, 1912.)

*(Syllabus by the Court.)***INJUNCTION (§ 38\*)—TRESPASS.**

Equity, at the suit of a claimant out of possession, will enjoin the cutting of timber by another claimant, pending a suit at law brought or about to be brought to try the legal title thereto.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 86-90; Dec. Dig. § 38.\*]

Appeal from Circuit Court, McDowell County.

Bill by John W. Waldron against the W. M. Ritter Lumber Company. Decree for plaintiff, and defendant appeals. Affirmed.

Cook, Litz & Howard and Anderson, Strother & Hughes, for appellant. Sanders & Crockett, for appellee.

**MILLER, J.** Defendant has appealed from sundry decrees refusing to dissolve and continuing in force the injunction, awarded on the original bill, on May 27, 1910, restraining it from cutting and removing the timber on a tract of land in McDowell County. By the last of said decrees, pronounced in vacation on September 7, 1910, the court below, on the second amended and supplemental bill filed, and demurrer and answer of defendants thereto, and on the respective motions of the defendant to dissolve and of the plaintiff to continue said injunction, refused to dissolve the same and ordered that it be continued in force until the final hearing.

Plaintiff in his second amended and supplemental bill alleges that learning from the answers of defendants that they denied plaintiff's title to the land in controversy, he had instituted a suit in ejectment to try the title; and the prayer of that bill is that the injunction theretofore awarded be continued until the final determination of that action, and for general relief.

On awarding an appeal from said decrees this court on September 10, 1910, ordered that said injunction be thereby stayed and wholly suspended in its operation pending the determination of the appeal and supersedeas here, or until the further order of the court, such suspension to be ineffective, however, until appellant or some one for it should have given bond before the clerk of the circuit court, with good personal security, to be approved by him, in the penalty of twenty-five hundred dollars, conditioned to protect and save harmless the plaintiff from any and all damages incurred by reason of such suspension of the injunction, if the appeal and supersedeas should be dismissed or determined adversely to appellant, and otherwise conditioned according to law.

In the recent case of *Pardee v. Camden*

*Lumber Company*, — W. Va. —, 73 S. E. 82, we decided, fourth point of the syllabus, overruling prior decisions, that "When the title to land is in dispute, and an action of ejectment has been, or is about to be, instituted by the claimant out of possession, he may enjoin the other from cutting timber on the land pending the determination of the question of title in the law court." The principles enunciated in that case control this, and for the reasons there given, we affirm the decrees.

The decree of affirmance here will provide, however, that right of action on said suspending bond, if one has been executed by appellant, be stayed to abide the final judgment and determination of said suit in ejectment.

**BRANNON, P.**, absent.

(138 Ga. 29)

**SCOTT v. STATE.**

(Supreme Court of Georgia. April 9, 1912.)

*(Syllabus by the Court.)***1. ADMISSION OF EVIDENCE—RESTRICTION OF PURPOSE—NO ERROR.**

The admission of evidence upon which error was assigned, when considered in connection with the statement of the judge, made at the time and in the presence of the jury, as to the restrictive consideration of it by the jury, was not cause for the grant of a new trial.

**2. CRIMINAL LAW (§ 957\*)—TRIAL—VERDICT—IMPEACHMENT BY JUROR.**

It is a well-settled rule that a verdict cannot be impeached upon the evidence of one of the jurors who returned it.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2392-2395; Dec. Dig. § 957.\*]

**3. SUFFICIENCY OF EVIDENCE—REFUSAL OF NEW TRIAL.**

The evidence was sufficient to support the verdict, and there was no error in refusing a new trial.

Error from Superior Court, Bryan County; W. W. Sheppard, Judge.

Henry Scott was convicted of crime, and brings error. Affirmed.

J. H. Smith and R. F. C. Smith, of Eden, for plaintiff in error. N. J. Norman, Sol. Gen., of Savannah, and T. S. Felder, Atty. Gen., for the State.

**FISH, C. J.** Judgment affirmed. All the Justices concur.

(137 Ga. 346)

**CENTRAL OF GEORGIA RY. CO. v. PHILLIPS.**

(Supreme Court of Georgia. April 9, 1912.)

*(Syllabus by the Court.)***APPEAL AND ERROR (§ 1005\*)—REVIEW—SUFFICIENCY OF EVIDENCE.**

The motion for a new trial raising only the complaint that the verdict was contrary to

law and the evidence, and against the weight of the evidence, and there being sufficient evidence to support the finding of the jury, and the presiding judge having approved it, this court will not interfere.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3860-3876, 3948-3954; Dec. Dig. § 1005.\*]

Error from Superior Court, Carroll County; R. W. Freeman, Judge.

Action by W. D. Phillips against the Central of Georgia Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

J. E. Hall, of Macon, Hall & Cleveland, of Griffin, and R. D. Jackson, of Carrollton, for plaintiff in error. Jas. Beall and R. W. Adamson, both of Carrollton, for defendant in error.

LUMPKIN, J. Judgment affirmed. All the Justices concur.

(137 Ga. 853)

CITY OF SWAINSBORO v. COLEMAN et al. (Supreme Court of Georgia. April 9, 1912.)

(Syllabus by the Court.)

MUNICIPAL CORPORATIONS (§ 916\*)—ISSUE OF BONDS—LIMITATIONS.

The city of Swainsboro is limited by its charter to the issuing of bonds for the purpose of purchasing land upon which to erect schoolhouses, and for building and furnishing the same, and for the establishment of an electric lighting plant and waterworks system, to an amount not exceeding in the aggregate the sum of \$20,000.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1907, 1908; Dec. Dig. § 916.\*]

Error from Superior Court, Emanuel County; B. L. Rawlings, Judge.

Proceeding by the State against the City of Swainsboro in the matter of issuance of waterworks bonds. J. C. Coleman and others intervene. Judgment against the issuance of bonds and the City of Swainsboro brings error. Affirmed.

Saffold & Larson, of Swainsboro, and Hines & Jordan, of Atlanta, for plaintiff in error. Alfred Herrington, Sol. Gen., of Swainsboro, R. L. Gamble, of Louisville, and Smith & Kirkland, of Swainsboro, for defendants in error.

FISH, C. J. The solicitor general of the Middle circuit having been notified, in accordance with the statute, that an election had been held in the city of Swainsboro on April 17, 1911, to determine whether there should be an issuance of bonds in the sum of \$40,000, the proceeds of which should be applied to the erection of electric lights and waterworks in and for the city, and that the election was in favor of the issuance of such bonds, filed, in the office of the clerk of the superior court of the county in which the election was held and such city situated,

a petition in the name of the state and against the city of Swainsboro, directed to the superior court of such county, and obtained an order from the judge of such court requiring the municipality to show cause at a given time and place, in accordance with the statute, why the bonds should not be confirmed and validated. When the hearing came on, J. C. Coleman and other resident citizens and taxpayers of the city were allowed to intervene and file their objections, on various grounds, to the validation of the bonds. After the submission of evidence, the judge of the superior court upon the hearing rendered a judgment against the issuance of the bonds, and refusing to validate the same. The city of Swainsboro thereupon sued out a bill of exceptions, in which, among other assignments of error, was one excepting to the judgment of the judge refusing to confirm the issuance of, and to validate, the bonds.

One of the objections set forth by the interveners was that the charter of the city of Swainsboro limits the power of the city to issue bonds to the aggregate sum of \$20,000 for the building of schoolhouses, furnishing the same, and for the purpose of purchasing ground whereon to build schoolhouses, and also for the purpose of establishing electric lights and waterworks. The twenty-eighth section of the charter of the city (Acts 1900, p. 435) is as follows: "Be it further enacted, that, within six months after the passage of this act, the city council may order an election to be held in said city of Swainsboro on the question of issuing bonds of said city for public improvement, and especially for the purpose of building suitable houses and providing furniture and apparatus for the public school in said city, as well as the ground whereon to build said houses; also electric lights and waterworks, in the discretion of the city council; that thirty days' notice of such election shall be given in the newspaper published in said city, and the same shall be held as all elections are held for said city; that all persons entitled to vote for city council of said city shall be entitled to vote in said election; that ballots cast at such election shall have thereon 'For Bonds' or the words 'Against Bonds,' and that the returns of said election shall be returned to the city council of said city, who shall, in the presence of and together with the managers of such election, consolidate and declare the result of the same; that if two-thirds of the qualified voters of said city voting at said election shall have voted 'For Bonds,' then the city council of said city shall be and they are hereby authorized and empowered to issue bonds of said city not exceeding in the aggregate the sum of twenty thousand dollars, of such denomination as the city council shall determine, to be due and payable at any time in thirty years after issue, as the said city council shall determine; said bonds shall bear interest not to exceed

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes



six per cent. per annum, which interest shall be paid annually; that said bonds shall be signed by the mayor of said city and countersigned by the mayor and council, and shall be negotiated in such a way and manner as said city council shall determine to be for the best interest of said city of Swainsboro." Section 29 of the charter is as follows: "Be it further enacted, that the funds arising from the sale of such bonds will be placed on deposit in a bank selected by the city council, to be used by a board of school commissioners to be appointed by the city council of the city of Swainsboro, to be used by said board of school commissioners for buying suitable lands, building a suitable school building for the public school of said city, and for providing furniture and apparatus for the same, as they shall deem best for the interest of said school."

No objection to the issuance and validation of the bonds in question was made on the ground that under the charter of the city an election for the issuance of bonds for public improvement had to be held within six months after the adoption of the charter, although such point was made in the brief of counsel for the interveners, who are defendants in error. We are not called upon, therefore, to pass on that question. In our opinion, the objection was well taken that the power of the city of Swainsboro to issue bonds for the building of schoolhouses, etc., and the establishment of electric lighting plants and waterworks, was limited for the aggregate of such bonds to the sum of \$20,000, and that therefore the trial judge properly refused to confirm the issuance of and the validation of bonds for the sum of \$40,000 for the establishment of an electric lighting plant and waterworks for the city. While the language of section 28 is somewhat involved, we are of the opinion that a proper construction of it is that if, in the discretion of the city council, an election should be held in accordance with the charter on the question of the issuance of bonds for "electric lights and waterworks," the sum of such bonds as might be issued both for the purchase of ground for schoolhouses and the building and furnishing of the same, and for "electric lights and water works," should not exceed "in the aggregate the sum of twenty thousand dollars." Whatever may have been the power of the city, in the absence of such limitation in its charter, as to the issuance of bonds within the constitutional limitation, there can be no question as to the binding force of the charter, limiting the authority of the city as to the issuance of bonds to the sum of \$20,000. *Grace v. Hawkinsville*, 101 Ga. 553, 28 S. E. 1021; *Farmer v. Thomson*, 133 Ga. 94, 99, 65 S. E. 180.

It is contended in behalf of the city that the language of section 29 clearly indicates that section 28, authorizing and empowering the city "to issue the bonds \* \* \* not

exceeding in the aggregate the sum of twenty thousand dollars," refers only to the aggregate sum of bonds to be issued for the purpose of purchasing land upon which to build schoolhouses and for building and furnishing the same. We do not concede the soundness of this contention. In our opinion section 29 should be construed as referring alone to the funds arising from the sale of bonds for the purpose of purchasing land and building and furnishing schoolhouses placed thereon. If an election had been held and carried for the issuance of bonds for such school purpose, and for the erection of an electric lighting plant and a waterworks system, then, under the provisions of section 29, the funds arising from the sale of the bonds issued for school purposes would be disposed of as provided in section 29, and the proceeds of the sales of the bonds issued, respectively, for the other purposes named, would be used for the carrying out of those purposes. The language used in section 28, viz., "also electric lights and waterworks, in the discretion of the city council," followed by the language, "that if two-thirds of the qualified voters of said city voting at said election shall have voted 'For Bonds,' then the city council of said city shall be and they are hereby authorized and empowered to issue bonds of said city not exceeding in the aggregate the sum of \$20,000," has induced us to conclude that it was the intention of the Legislature, in granting the charter to the city of Swainsboro, to limit its powers in the issuance of bonds for school purposes and for electric lights and waterworks to the sum of \$20,000. Having reached this conclusion, it is unnecessary to pass upon other questions made in the record.

Judgment affirmed. All the Justices concur, except HILL, J., not presiding.

(138 Ga. 23)

### SHEALY v. STATE.

(Supreme Court of Georgia. April 9, 1912.)

(Syllabus by the Court.)

#### 1. HOMICIDE (§ 338\*)—EVIDENCE—PREJUDICIAL ERROR.

Although evidence that, shortly after a homicide was committed, the sound of a gunshot was heard not far from the scene of the killing, may have been irrelevant, in the light of the entire evidence, its admission was not such prejudicial error as to require a reversal.

[Ed. Note.—For other cases, see *Homicide*, Cent. Dig. §§ 709-713; Dec. Dig. § 338.\*]

#### 2. INVOLUNTARY MANSLAUGHTER.

The evidence did not require a charge on the subject of involuntary manslaughter.

#### 3. REJECTION OF EVIDENCE.

In view of the note appended by the trial judge to the third ground of the motion for a new trial, and of the colloquy between counsel and the court, the complaint made in such ground as to the rejection of evidence was not well taken.

**4. SUFFICIENCY OF EVIDENCE.**

The verdict was supported by the evidence, and there was no error in overruling the motion for a new trial.

Error from Superior Court, Sumter County; Z. A. Littlejohn, Judge.

Jack Shealy was convicted of murder, and brings error. Affirmed.

L. J. Bialock, of Americus, for plaintiff in error. J. R. Williams, Sol. Gen., of Americus, and T. S. Felder, Atty. Gen., for the State.

**LUMPKIN, J.** Judgment affirmed. All the Justices concur.

(138 Ga. 21)

**MITCHELL v. STATE.**

(Supreme Court of Georgia. April 9, 1912.)

*(Syllabus by the Court.)*

**1. HOMICIDE (§ 234\*)—MURDER—EVIDENCE.**

There was no complaint that any error of law was committed upon the trial. There was evidence to authorize the verdict.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 482, 493; Dec. Dig. § 234;\* Criminal Law, Cent. Dig. §§ 1127-1138.]

**2. CRIMINAL LAW (§ 941\*)—NEW TRIAL—NEWLY DISCOVERED EVIDENCE.**

The alleged newly discovered evidence was merely cumulative, as tending to corroborate the testimony of a number of witnesses who testified on the trial in behalf of the accused, and, moreover, in all probability it would not cause a different result on another trial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2328-2330; Dec. Dig. § 941.\*]

**3. JURY (§ 132\*)—BIAS OF JUROR—EVIDENCE.**

It did not sufficiently appear that one of the jurors who tried the case was not a fair and impartial juror because of bias against the accused.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 583-585; Dec. Dig. § 132.\*]

Error from Superior Court, Harris County; S. P. Gilbert, Judge.

Bud Mitchell, alias Bud Smith, was convicted of murder, and brings error. Affirmed.

Henry C. Cameron, of Columbus, and A. L. Hardy, of Hamilton, for plaintiff in error. T. T. Miller, of Columbus, C. F. McLaughlin and Geo. C. Palmer, Sol. Gen., both of Columbus, and T. S. Felder, Atty. Gen., for the State.

**FISH, C. J.** Bud Mitchell, alias Bud Smith, was convicted of murder, with a recommendation that he be confined in the penitentiary for life. He excepted to the overruling of his motion for a new trial.

[1, 2] What is stated in the first two head-notes needs no elaboration.

[3] The only ground of the motion for a new trial not dealt with in such notes was as follows: "Because movant did not have a trial by a fair and impartial jury," in this,

to wit: Movant and Rob Johnson were jointly indicted for the murder of George Reese. Upon the trial the state severed, and movant was put on trial. J. B. (Tip) White, one of the jurors in said case, when sworn and put upon his voir dire, at first disqualified on account (as it was afterwards learned) of his partiality for and bias in favor of Rob Johnson, thinking that said Rob Johnson was on trial; that, after learning that Rob Johnson was not on trial, but that the state had severed, and movant was the defendant on trial, said White announced (not giving his reasons) that he was not disqualified in the case of movant, and was taken as juror in said case. After the trial of movant, and a verdict was rendered finding movant guilty, it was ascertained that the cause of said juror disqualifying in the first instance was on account of his bias in favor of and partiality for Rob Johnson, and as the evidence on the trial of said case, as movant contends, showed that Rob Johnson, and not movant, was the slayer of George Reese, movant contends that in the issue so drawn the said White, on account of his bias and partiality as aforesaid for Rob Johnson, was not a fair and impartial juror on the trial of movant." The only evidence submitted on the hearing of the motion for new trial to sustain the ground thereof which is quoted above was the affidavits of two witnesses, in which they deposed that, after the rendition of the verdict in the case, White, the juror whose qualification was attacked, stated to the deponents that: "All of the Johnson negroes are as mean as hell, except Rob Johnson; I raised him, and he is one of the best negroes I ever saw." The character of the deponents was vouched for by several witnesses, and the accused and his counsel made affidavits as to their want of knowledge of the juror's disqualification until after the trial. Upon the hearing of the motion the affidavit of the juror White was put in evidence by the state, the material portion of which is as follows: "Deponent further swears that, whatever opinion he may have had as to Rob Johnson, said opinion did not influence or control him in making up his mind as a juror as to the guilt of Bud Mitchell. Deponent further swears that at the time he made his answers upon the voir dire that what he said relative to his qualifications as a juror in said case was true, and that at the time he was accepted as a juror in said case that his mind was perfectly impartial between the state and the accused, Bud Mitchell, and that his mind was free from any bias or prejudice either for or against the accused, Bud Mitchell. Deponent further swears that if, in his opinion, the evidence adduced upon the trial of the defendant, Bud Mitchell, had not convinced this deponent of the guilt of the said Bud Mitchell beyond a reasonable doubt, he would have promptly voted for a

verdict of not guilty against the said Bud Mitchell."

It will be seen from the foregoing that the only support of the contention in this ground of the motion, to the effect that the juror White was not a fair and impartial juror to try the movant, and that the juror first disqualified on his voir dire because of his bias in favor of Rob Johnson—thinking Rob Johnson and not movant, was on trial—was the statement of the juror after the trial that "all of the Johnson negroes are as mean as hell, except Rob Johnson; I raised him, and he is one of the best negroes I ever saw." We do not think that, from such statement alone of the juror, it could be fairly inferred that he first disqualified himself on his voir dire because of his bias in favor of Rob Johnson, believing that he was on trial, and that on account of such bias he was not qualified as a juror to try Bud Mitchell, the movant. Our conclusion is, especially in view of the affidavit of the juror, that this ground of the motion did not require the grant of a new trial, and that the trial judge did not abuse his discretion in overruling the motion.

Judgment affirmed. All the Justices concur.

(128 Ga. 15)

**MCDONALD v. GEORGIA SOUTHERN & F. RY. CO.**

(Supreme Court of Georgia. April 9, 1912.)

*(Syllabus by the Court.)*

**JUDGMENT (§ 572\*)—CONCLUSIVENESS—JUDGMENTS CONCLUSIVE ON DEMURRER.**

Grounds of general and special demurrer were urged to the plaintiff's petition filed in the city court. The judge ordered that the "same is ordered sustained, and the case is dismissed, unless the plaintiff will amend his declaration, before the next term of this court, to meet the objections raised by the demurrer." No amendment was offered and allowed within the specified time; but at the ensuing term the judge passed another order, reciting the one above named, also reciting the fact that no amendment had been filed, and adjudging that the defendant "do have and recover of the plaintiff" the costs, etc. To a subsequent suit, filed by the plaintiff in the superior court on the same cause of action, the defendant pleaded the judgment on demurrer rendered in the city court as res adjudicata. *Held*, that there was no error in refusing to strike such plea; and, upon the introduction of uncontradicted evidence supporting it, there was no error in directing a verdict in favor of the defendant.

(a) The request to review and reverse or modify the ruling made in the second headnote of the case of *Gunn v. James*, 120 Ga. 482, 48 S. E. 148, which has been followed as late as *McClaren v. Williams*, 132 Ga. 352, 64 S. E. 65, is refused.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1047-1049; Dec. Dig. § 572.\*]

Error from Superior Court, Tift County.

Action by H. A. McDonald, by guardian, against the Georgia Southern & Florida Rail-

way Company. Judgment for defendant, and plaintiff brings error. Affirmed.

W. R. Hammond, of Atlanta, for plaintiff in error. Jno. I. Hall, J. E. Hall, and M. P. Hall, all of Macon, for defendant in error.

ATKINSON, J. Judgment affirmed. All the Justices concur.

(138 Ga. 22)

**ELLIOT v. STATE.**

(Supreme Court of Georgia. April 9, 1912.)

*(Syllabus by the Court.)*

**1. CRIMINAL LAW (§ 762\*)—INSTRUCTIONS—EXPRESSION OF OPINION.**

It is not error for the judge to charge the jury, on the trial of one indicted for murder, that "the defendant is presumed by law to be innocent, and that presumption remains with him until his guilt is established (in the case of circumstantial evidence, such as is true in this case) by evidence consistent with his guilt and inconsistent with his innocence, and which establishes his guilt to the exclusion of every other reasonable hypothesis save that of his guilt of the crime charged against him"; it being manifest that the use of the language "such as is true in this case" was not an expression of the court's opinion that the defendant's guilt was established by circumstantial evidence, but, instead, that it was true that the case for the state was based upon circumstantial evidence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1731, 1750, 1754, 1758, 1759, 1769; Dec. Dig. § 762.\*]

**2. CRIMINAL LAW (§ 922\*)—INSTRUCTIONS—IMPEACHMENT OF WITNESSES.**

It is inaccurate, but not cause for a new trial in this case, for a judge to charge the jury, on the trial of one accused of murder, in the following language on the subject of impeachment: "The court instructs you, when a witness is successfully impeached as to a material matter, his credit as to other matters is for the jury. It is a question of fact, to be determined by the jury solely, whether a witness has been impeached or not. A witness is impeached only when his unworthiness of credit is absolutely established in the minds of the jury."

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2210-2218; Dec. Dig. § 922.\*]

**3. CRIMINAL LAW (§ 784\*)—INSTRUCTIONS—CIRCUMSTANTIAL EVIDENCE.**

Where one is on trial charged with murder, and the state relies upon circumstantial evidence for conviction, it is not error for the court to charge the jury: "If you believe from the evidence in the case that such evidence is consistent with the guilt of the defendant and inconsistent with his innocence, and that the same establishes his guilt to the exclusion of every other reasonable hypothesis, except, as stated, his guilt of the crime charged against him, you would be authorized to find the defendant guilty."

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1883-1888, 1922, 1960; Dec. Dig. § 784.\*]

**4. HOMICIDE (§ 253\*)—MURDER—EVIDENCE.**

The verdict is supported by the evidence.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 523-532; Dec. Dig. § 253.\*]

Error from Superior Court, Fulton County; W. E. Thomas, Judge.

Lucky Elliot was convicted of murder, and brings error. Affirmed.

Anderson, Felder, Rountree & Wilson, of Atlanta, for plaintiff in error. Hugh M. Dorsey, Sol. Gen., of Atlanta, and T. S. Felder, Atty. Gen., for the State.

HILL, J. Lucky Elliot was found guilty of the crime of murder, and, on recommendation of the jury trying him, sentenced to life imprisonment in the penitentiary. His motion for new trial being overruled by the court, he excepts, and assigns as error certain portions of the judge's charge to the jury, and that the verdict is contrary to law, contrary to the evidence, and without evidence to support it, etc.

[1] 1. The first ground of the amended motion for new trial alleged error because of the following charge of the court to the jury: "The defendant is presumed by law to be innocent, and that presumption remains with him until his guilt is established, in the case of circumstantial evidence, such as is true in this case, by evidence consistent with his guilt and inconsistent with his innocence, and which establishes his guilt to the exclusion of every other reasonable hypothesis, save that of his guilt of the crime charged against him." It is contended by the plaintiff in error that the use of the words "such as is true in this case" was an expression of opinion on the part of the court as to the facts in the case—that this was an expression of his opinion that the defendant's guilt was established by circumstantial evidence. Rightly construed, we do not think the trial judge intended to express an opinion as to the guilt of the defendant being established by circumstantial evidence; but, instead, the clear intent and meaning of the court was that the case against the defendant was based upon circumstantial evidence, and it was true, as contended, that the state relied upon circumstantial evidence for conviction. While the principle stated in this excerpt from the charge was inaptly expressed, the meaning we give to it is evident from reading the context, and could not, we think, have misled the jury into thinking the court had expressed his opinion to the effect that the defendant's guilt was established by the circumstantial evidence offered by the state in the case on trial.

[2] 2. The fifth and sixth grounds allege error in the same charge of the court on the question of impeachment of witnesses, and will be considered together. The charge complained of is as follows: "The court instructs you, when a witness is successfully impeached as to a material matter, his credit as to other matters is for the jury. It is a question of fact, to be determined by the jury solely, whether a witness has been impeached or not. A witness is impeached only

when his unworthiness of credit is absolutely established in the minds of the jury." The charge of the court is undoubtedly inaccurate, at least where he uses the words "successfully impeached" for "successfully contradicted," as employed by the Code (Civil Code, § 5884), yet we cannot say that the charge taken as a whole was calculated to mislead the jury and prejudice the defendant's rights, and was cause for the grant of a new trial. The decisions in *Powell v. State*, 101 Ga. 19, 29 S. E. 309, 65 Am. St. Rep. 277, *Smith v. State*, 109 Ga. 479, 35 S. E. 59, *Rouse v. State*, 136 Ga. 356, 361, 71 S. E. 667, *Ector v. State*, 120 Ga. 543, 48 S. E. 315, and *Stafford v. State*, 55 Ga. 592 (4), defining what is meant by "successful impeachment," were dealing with the question as to whether the witness, as a witness, had been so discredited with the jury as to be unworthy of credit as a witness entirely. They were not dealing with the fact that the jury might disbelieve a witness as to a particular fact, or state of facts, and that it might be proved that the witness had not told the truth as to that particular fact, or particular set of facts, and yet they might give credit to the witness as to other facts. In the Code it is said that, when a witness is successfully contradicted as to a material fact, his credit as to other matters is for the jury. Code, § 5880, declares that a witness may be impeached by disproving the facts testified to by him, but it also recognizes that impeachment in this method as to certain facts does not necessarily exclude the jury from believing him as to other facts testified to. The one is dealing with the fact that it is possible that there may be such a thing as successful contradiction, or impeachment, in part, or as to certain things, without necessarily destroying the credit of the witness in toto. While our decisions, relating to the technical meaning of successful impeachment, were dealing with the impeachment of a witness as a whole, the breaking down of the credibility of the witness so as to destroy the force of anything he says, and when the jury believes that the witness is so broken down and so impeached that everything that comes out of that origin is from an incredible source, then the whole ought to be rejected, unless it is corroborated from a pure and unimpeached source. But these decisions did not deal with the question that the Code recognizes "successful contradiction," and hence a possibility of "successful impeachment," which does not necessarily reach to the testimony of the witness in toto, but only reaches to certain facts to which he has testified. Section 5884 of the Code recognizes the fact that the jury may disbelieve a witness, and not credit him as to one fact testified to by him, without necessarily disbelieving him in toto. That feature was not discussed or presented in these previous decisions, which were deal-

ing with the credibility of a witness, and not the credibility or overthrowing of certain parts of his testimony.

Taking the judge's charge in this case—while unfortunate in using the word "impeachment," which is a word susceptible of two kinds of meaning; that is, of successful impeachment, or of meaning an attack on her—it would have been better to have followed the language of the Code. Nevertheless, taking his two charges together, it means about this: If you believe that this witness has been successfully impeached—that is, found unworthy of credit as to certain facts, not as a whole, but that her credit as to certain particular facts that she has testified to has been overcome, so that you do not believe what she says on that subject—nevertheless, what credit you will give her, if any, as to the other facts, is open to you. And he did not charge in the first part objected to that, if a witness is successfully impeached, the jury might nevertheless believe her. He simply said, if she is successfully impeached as to some material matter. Therefore, he did not mean by that to instruct the jury that, if the witness is altogether unworthy of credit, they might yet credit her; but he evidently meant by that that, if the attack on her testimony as to certain parts thereof is successful, nevertheless there may be other parts in which the jury might believe her, and he was dealing with the question of overcoming, or disproving, or not believing, some part of her testimony. He was not charging on the question which is dealt with in the cases dealing with successful impeachment; and while his language was not as apt or accurate as it should have been, taken in connection with the statement that, if she is successfully impeached as to a material matter, it is pretty evident that he simply meant by that if the jury found the evidence was such that they could not believe her evidence as to this fact—not that she is impeached as a whole, but if she is successfully impeached as to that fact—if they did not believe her testimony on this point, still they might believe her on other points. If we may coin an expression, he was instructing the jury about partial successful impeachment, of successful impeachment as to one fact, and not as to unworthiness to be believed at all. He was instructing the jury about that kind of impeachment, and, taken in its proper sense, it is evident that that is what he meant. He meant that the successful overthrowing of a witness as to one fact did not destroy the jury's right to believe her as to other facts. But he was not dealing with the question of overthrowing her credit as a witness as a whole, and was not using the words "successful impeachment" in that sense. Although we have spoken of that as a technical meaning of it, yet we have never coupled it with successful impeachment as to one material fact, as meaning successful im-

peachment of the whole testimony. The difference between the judge and the Code was "successful impeachment," instead of "successfully contradicted" as to a material fact; but, taking the two together, it is evident that he was instructing the jury on the question of attacking her testimony on one material point, and not as to her whole testimony.

[3] 3. It is insisted that the court committed error in giving the jury the following charge: "If you believe from the evidence in the case that such evidence is consistent with the guilt of the defendant and inconsistent with his innocence, and that the same establishes his guilt to the exclusion of every other reasonable hypothesis, except, as stated, his guilt of the crime charged against him, you would be authorized to find the defendant guilty." Movant contends that this charge was erroneous for the following reasons: (1) It was not a statement of a correct rule of law applicable to the facts of the case. (2) Because the jury was instructed that they would be authorized to find the defendant guilty if they believed that the evidence was consistent with the guilt of the defendant and inconsistent with his innocence, and if they believed that the same established his guilt to the exclusion of every other reasonable hypothesis, except, as stated, his guilt of the crime charged against him. (3) Because neither in the excerpt from the charge quoted, nor in any other portion of the charge, did the court instruct the jury the rule as to reasonable doubt; that is to say, that they could not find the defendant guilty unless "there [was] sufficient testimony to satisfy the mind and conscience beyond a reasonable doubt." (4) Because the court should have charged the jury the rule as to circumstantial testimony and the rule as to reasonable doubt. (5) Because in the excerpt quoted, after the word "believed," the court should have inserted the words "beyond a reasonable doubt." While we think it is better to give both sections of the Penal Code (sections 1012 and 1013) in charge to the jury, and in cases where circumstantial evidence is relied upon for conviction also to give section 1010, this court has ruled, in the case of Bone et al. v. State, 102 Ga. 387, 30 S. E. 845, that where the court had charged the jury, it was not cause for new trial; "it being apparent from the instructions as to reasonable doubt, taken altogether, that the judge intended to convey to the jury the idea that the reasonable and moral certainty of guilt to which he referred was mental conviction excluding any reasonable doubt of guilt." *Id.*

[4] 4. The verdict is supported by the evidence. And even if the testimony of Carrie Moncrief, the witness whose testimony was sought to be impeached, and on whom the state relied largely for conviction, is excluded, there is sufficient evidence still left to sustain the verdict. The evidence shows that

the defendant, Lucky Elliot, had Ida Ferguson, the deceased, for his mistress; that on the evening before her death she went to the house where Lucky boarded, though she was an entire stranger there. She remained in the room with the defendant and others, all drinking beer (except Ida Ferguson) and talking, until she left the house in company with Elliot, about 11:30 p. m. One witness heard the defendant tell the deceased, before they left the house, that he ought to have killed her "on account of her low-down ways." Soon after the defendant and deceased left the house, one witness heard some one holla, "Oh!" This noise came from the direction in which the blood was found, about 167 feet from the house they had just left. The dead body of Ida Ferguson was found next morning, near the house she and the defendant had left at 11:30 o'clock. Her throat was cut, and she had been dragged a short distance from where the blood was found, and thrown down an embankment. A knife was found 79 feet from the dead body, where it had been thrown into a gully. The knife was bloody, and was identified by several witnesses as the knife of defendant. There were tracks on the embankment over which the knife was dropped. The tracks turned right back towards the house from where the knife was lying. Next morning the defendant said to some of the inmates of the house where he boarded, "Don't we be talking too much," or "Don't we say anything about what passed here last night." On the Saturday after the homicide the defendant denied knowing Ida Ferguson at all. He admitted afterwards that he knew her, and said, "I know her all right; I just lied about it."

Judgment affirmed. All the Justices concur.

(138 Ga. 16)

#### JONES v. MCCOLLOUGH.

(Supreme Court of Georgia. April 9, 1912.)

(Syllabus by the Court.)

#### 1. ATTORNEY AND CLIENT (§ 52\*)—DISBARMENT PROCEEDINGS—PETITION.

The allegations in the petition set forth facts showing that the defendant, acting under employment as an attorney at law for a named corporation of which the relator is president, had been guilty of deceit and willful misconduct relative to his client and to his professional engagement, and the general demurrer thereto was properly overruled. Civil Code 1910, § 4967(3).

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 69, 70; Dec. Dig. § 52.\*]

#### 2. NEW TRIAL (§ 30\*)—GROUNDS—IRREGULARITIES.

The fact that after the conclusion of the trial, and before the rendition of the judgment by the judge trying the case without the intervention of a jury, an affidavit was made by a witness who testified upon the trial, changing his testimony as given at the hearing of the cause, and that this affidavit was

sent to the judge while he had the case under consideration, will not, though an irregularity, require the grant of a new trial: the trial judge having stated, in his certificate to this ground of the motion for a new trial, that the affidavit was not considered by him as evidence in the case.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. § 45; Dec. Dig. § 30.\*]

#### 3. ATTORNEY AND CLIENT (§ 57\*)—PROCEEDINGS FOR DISBARMENT—REVIEW—EVIDENCE.

The case having been submitted to the court without the intervention of a jury for trial under the evidence and the law, and it appearing that the evidence was sufficient to authorize the finding of the court that the defendant had been guilty of deceit and willful misconduct in his profession in respect to the matters charged against him, the court's finding and consequent removal of the attorney will not be disturbed.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 81, 82; Dec. Dig. § 57.\*]

Error from Superior Court, Fulton County; W. D. Ellis, Judge.

Disbarment proceedings, on the relation of J. E. McCollough, against Virgil Jones. From the judgment, defendant brings error. Affirmed.

Rosser & Brandon, Jas. W. Mason, and Watkins & Latimer, all of Atlanta, for plaintiff in error. H. M. Dorsey, Sol. Gen., and Smith, Hammond & Smith, all of Atlanta, for defendant in error.

BECK, J. Judgment affirmed. All the Justices concur.

(138 Ga. 41)

#### TAYLOR v. COLLEY et al.

(Supreme Court of Georgia. April 10, 1912.)

(Syllabus by the Court.)

#### 1. EQUITY (§ 94\*)—VENUE (§ 31\*)—NECESSARY PARTIES.

In an equitable petition for an injunction, cancellation of deeds, and other equitable relief, in which it is sought to have a conveyance of land delivered up and canceled, the grantee in the deed is a necessary party, as well as the grantor; and the equitable petition could be brought in the county of the residence of the grantee or in the county of the grantor.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 252; Dec. Dig. § 94.\* Venue, Dec. Dig. § 31.\*]

#### 2. EQUITY (§ 150\*)—MULTIFARIOUSNESS.

"A bill is not multifarious because all of the defendants are not interested in all of the matters contained in the suit. It is sufficient if each party has an interest in some matter in the suit which is common to all, and that they are connected with the others." *Blaisdell v. Bohr*, 68 Ga. 56.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 342, 371-379; Dec. Dig. § 150.\*]

#### 3. EQUITY (§ 76\*)—LACHES—PERSONAL DISABILITY.

Where the father of an infant, without taking legal steps to be appointed guardian of such infant, takes charge of property, consisting of both realty and personality, and, after attainment of majority by the infant,

wrongfully withholds a part of the property to which the child had title, and soon after attainment of majority by the child, without disclosing to the latter the amount, character, and value of the property, and, while the child "is totally without mental capacity to contract," deeds to the child a portion only of the property to which he is legally entitled, and takes from the child a deed of conveyance to other portions of the property in excess of that to which he was legally entitled, and also takes from the child a receipt purporting on its face to be in consideration of a full settlement between the father and child, such a settlement and mutual exchange of deeds will not bar the right of action on the part of the child after the lapse of 16 years; it appearing that the child during that time was without mental capacity to comprehend the nature of a contract, or his legal rights, and that, shortly after the recovery from the mental disabilities under which the child was laboring, the latter instituted legal proceedings to ascertain and establish his right and title to the property involved in the settlement made between the father and the child.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 241; Dec. Dig. § 76.\*]

#### 4. CANCELLATION OF INSTRUMENTS (§ 23\*)—RIGHT TO MAINTAIN SUIT—CONDITIONS PRECEDENT.

This being an equitable proceeding, and it appearing from the allegations of the petition that the property which the father deeded to the child was only a part of that to which he was legally entitled at the time of the conveyance, it is not necessary for the child to offer to return or reconvey that which the father had conveyed to him in order to maintain the present action.

[Ed. Note.—For other cases, see Cancellation of Instruments, Cent. Dig. § 32; Dec. Dig. § 23.\*]

Error from Superior Court, Calhoun County; Frank Park, Judge.

Action by G. R. Colley and others against E. D. Taylor, administrator. Judgment for plaintiffs, and defendant brings error. Reversed.

The petition alleges that in 1873, when petitioner was but a few months old, her mother died intestate, leaving, besides certain personalty, an estate consisting of four lots of land in Calhoun county; that her only heirs at law were petitioner and petitioner's father, G. R. Colley; that said Colley immediately took charge of the entire estate left by his deceased wife, without administration, and without being appointed the legal guardian of petitioner, and without giving the guardian's bond required by law; that he married again, and had other children, and petitioner grew up in ignorance of the fact that she had inherited any property from her mother, and was not apprised of this fact by her father, or any one else, until the year 1894, shortly after she became 21 years of age, when her father then sent for her and informed her that her mother had left her an interest in her estate, but not telling her of what this estate consisted, and executed a deed conveying to petitioner one of the lots of land above mentioned, and took from petitioner a deed conveying to him

the other three lots embraced in the estate of her deceased mother. At the same time the said G. R. Colley caused petitioner to execute a receipt reading as follows: "Received of G. R. Colley deed to one lot of land 102 in the 4th Dist. of Calhoun county, in full for all demands, and in full settlement of all claims that I hold against him." Petitioner alleges that at the time she undertook to make this settlement and signed the deed and receipt she was "totally without mental capacity to contract"; that from that time on she was "gradually losing her mind, which continued until 1901, when she, upon the application of the said G. R. Colley, was tried for lunacy, found by the jury to be a lunatic, and sent to the asylum at Milledgeville, Ga." She alleges that, notwithstanding she was released from the insane asylum in December, 1901, she continued to be of such unsound mind as to be incapable of comprehending the nature of a contract, or to "attend to any business of any kind or nature whatsoever," until about the 1st of January, 1909, when she was for the first time capable of looking after and attending to business matters to some extent, at which time she employed counsel and began proceedings to establish her rights in the premises. The petition alleges that at the time said G. R. Colley was married to petitioner's mother he had no property whatsoever, but that "with the money received from her mother's estate, and with the increment from said estate, in all of which your petitioner had a one-half undivided interest," he purchased a certain other lot of land in Calhoun county, which he afterwards deeded to his present wife for love and affection, and that the latter has since traded the same for a house and lot in Arlington, Ga. And the petition charges that G. R. Colley has deeded to the present Mrs. G. R. Colley portions of the original lots of land embraced in petitioner's mother's estate, in which petitioner claims an interest; that he executed a deed conveying to Unice Colley Sheffield, who is the daughter of G. R. Colley and his present wife, 50 acres of land, being a portion of one of the lots of land originally belonging to the estate of petitioner's deceased mother; that both the present Mrs. Colley and Unice Colley Sheffield took the deeds above referred to with full knowledge of petitioner's claim of title to an interest in the lands sought to be conveyed. It is further alleged that said Unice Colley Sheffield is in possession of all of lots 108, 109, and 144, as the tenant of G. R. Colley, under a five-year lease, having full knowledge of petitioner's claim to an interest in said lots. Besides other equitable relief, petitioner prays for an accounting on the part of G. R. Colley; that the deed executed by petitioner, conveying to said Colley lots of land 108, 109, and 144, be canceled, and that all deeds whereby said Colley sought to convey to the present Mrs. Colley

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.

and to Unice Colley Sheffield portions of the estate of petitioner's deceased mother be canceled, and that it be decreed that petitioner have a one-half undivided interest in all of said estate, and a like interest in the house and lot in Arlington, Ga., now held by Mrs. Colley; and that process issue, making both Mrs. Colley and Unice C. Sheffield parties defendant, as well as G. R. Colley.

The defendants filed general and special demurrers; but the court dismissed the petition on general demurrer, without passing upon the special demurrers. The petitioner, Mrs. Davis Baker, died pending the decision of this court, and the case is proceeding in the name of her administrator.

Calhoun & Rambo, of Arlington, for plaintiff in error. W. D. Sheffield, of Arlington, and Hawes & Pottle, of Blakely, for defendants in error.

BECK, J. (after stating the facts as above).

[1] 1. Under the allegations in the petition Unice Colley Sheffield, who resides in Calhoun county, is a necessary party. Substantial relief is prayed against her. The plaintiff is seeking to have a deed made by G. R. Colley to Unice Colley Sheffield, conveying certain lands in Calhoun county, set aside and canceled; it being shown in the petition that plaintiff claims title to a part of these lands, and that Unice Colley Sheffield had knowledge of plaintiff's claim of title at the date of the execution of the deed. If plaintiff's allegation of fraud against her father, G. R. Colley, can be established, she will be entitled to recover an interest in this land in Calhoun county upon proof that Unice Colley Sheffield took with knowledge of the plaintiff's title to the premises in dispute, which lie in the county in which the suit is brought. Other equitable relief is also sought against G. R. Colley and Unice C. Sheffield, which it is unnecessary to set forth here, because sufficient ground for holding that Unice C. Sheffield is a necessary party to these proceedings is shown by the statement above made. Consequently the suit was properly in the county of Calhoun.

[2] 2. The petition also sets forth a case entitling her to substantial equitable relief against the wife of G. R. Colley. The relief sought relates to conveyances of title to portions of the lands which descended from the former wife of G. R. Colley, the mother of the plaintiff. In fact, the entire controversy revolves about the controlling question as to whether or not the plaintiff is entitled to recover the lands which it is alleged descended from the former Mrs. G. R. Colley to this petitioner and her father, and both the present Mrs. G. R. Colley and Unice Colley Sheffield are interested in that controlling question, and a full settlement of the controversy between the plaintiff and her father relative to their respective interests and rights in

the property which G. R. Colley and petitioner inherited from the mother of petitioner, the former wife of G. R. Colley, could not be determined without making both Unice Colley Sheffield and the present Mrs. G. R. Colley parties to the suit.

[3] 3. It is insisted by way of general demurrer that the petition "shows on its face that plaintiff is barred of her action, if any she had, by laches and lapse of time, and no sufficient reason is alleged why the action was not sooner brought, or why plaintiff did not sooner discover the alleged fraud which had been perpetrated upon her." Upon demurrer, we are to treat the allegations of the petition as true; and, taking them as true, the ground of the demurrer just quoted is entirely without merit. The plaintiff was less than a year old when her mother died, and the petition detailed circumstances showing that she was kept in ignorance of the fact that her mother had left any property to which plaintiff had any claim of title, until the year 1894, a few months after her attainment of her majority, and that then her father, who had never been appointed her legal guardian, but was acting as guardian without authority so to do, relatively to one-half of the property which constituted her deceased mother's estate, made only a partial disclosure as to the property which had descended to petitioner, and that, even if he had made a full disclosure at that time, she was utterly unable to comprehend her rights, or to take any steps to ascertain and have them established. He executed a deed of conveyance to petitioner of a part of the lands of the estate of the deceased wife and mother, which was far less than the plaintiff's portion of these lands, both as to quantity and as to value, and took at that time a deed from petitioner to the remaining portion of her mother's estate, and a receipt signed by petitioner; and this receipt and these deeds are relied upon to show a settlement between father and daughter or an accord and satisfaction. Under the facts alleged in the petition, it could not amount to either in contemplation of the law. A settlement between parties of matters in controversy, or an accord and satisfaction, implies capacity to contract upon the part of the parties to the settlement, or to the accord; and in the present case one of the parties was a man of mature years and of business experience, in the full possession of his faculties, and he was dealing with his own daughter, and that daughter was a woman barely 21 years of age, who had been reared in total ignorance of her property rights, and who "was totally without mental capacity to contract." That being true, the alleged settlement, or accord and satisfaction, was entirely without binding effect upon the rights of the plaintiff in this case.

The mere statement of the proposition is sufficient. If the complainant was not bar-



red by the alleged accord and satisfaction, she is not barred of her action "by laches and lapse of time," as the demurrant insists. She gives ample reason "why the action was not sooner brought, or why plaintiff did not sooner discover the alleged fraud which had been perpetrated upon her." She was totally lacking in mental capacity to contract at the time of making the alleged settlement in 1894, and from that date her mind became gradually weaker, until in 1901, in proceedings instituted by her father, she was adjudged a lunatic and sent to the asylum for the insane, where she remained until the 25th day of December, 1901, and "from the date of her return from the asylum to about the 1st day of January, 1908, petitioner's mind was in such an impaired and unsound condition that she was wholly, absolutely, and totally unfit to attend to any business of any kind or nature whatsoever, but that from the 1st day of January, 1908, her mind began gradually to clear, \* \* \* and it was not until on or about the 1st day of January, 1909, that she was able to look after and attend to the ordinary business of an ordinary person, and soon thereafter, discovering the fraud perpetrated on her by her father, \* \* \* she employed counsel and caused an ejectment suit against G. R. Colley to be brought." The ejectment suit referred to was brought by petitioner on the 18th day of April, 1909, to recover her interest in lot of land 108, together with her interests in lots of land 109 and 144 in the fourth district of Calhoun county, which includes a part of the land brought into controversy by the present suit. Subsequently petitioner dismissed the ejectment suit referred to, and "in lieu thereof" brought this equitable petition. Under the facts and circumstances set forth above, we do not understand how it can be seriously contended that petitioner is barred by lapse of time or laches from maintaining this action. If she can maintain the allegations in her petition by evidence, she is clearly entitled to relief in equity.

It will be observed that we are here dealing only with the general demurrer, as it was expressly stated in the order of the court below that the special demurrers were not passed upon, and the plaintiff's petition was dismissed on general demurrer.

[4] 4. This being an equitable proceeding, and it appearing from the allegations of the petition that the property which the father deeded to the child was only a part of that to which she was legally entitled at the time of the conveyance, it is not necessary for her to offer to return or reconvey that which the father had conveyed to her in order to maintain the present action. See *Collier v. Collier*, 74 S. E. 275, decided by this court February 27, 1912.

Judgment reversed. All the Justices concur.

(138 Ga. 18)

## SOUTHERN RY. CO. v. PAYNE.

(Supreme Court of Georgia. April 9, 1912.)

(Syllabus by the Court.)

## 1. JUSTICES OF THE PEACE (§ 2\*)—APPOINTMENT—CONSTITUTIONAL LAW.

Section 381 of the Civil Code of 1910 is not in conflict with article 6, § 8, par. 1, of the Constitution of this state (Code, § 6526).

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 2-4; Dec. Dig. § 2.\*]

## 2. JUSTICES OF THE PEACE (§ 8\*)—ABOLITION OF MILITIA DISTRICT—POWERS OF JUSTICE.

Where a militia district is abolished by being absorbed in the territory of an adjoining militia district, the commissioned notary public of the abolished district can continue legally to discharge the functions of the office until the term of his office expires.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 11-14; Dec. Dig. § 8.\*]

Action by W. O. Payne against the Southern Railway Company. Judgment for plaintiff, and defendant brings error. The Court of Appeals has certified certain questions to the Supreme Court. First question answered in the affirmative, and the second in the negative.

The Court of Appeals has certified to the Supreme Court the following questions:

"1. Where a militia district is abolished, by being absorbed in the territory of an adjoining militia district, can the commissioned notary public of the abolished district continue legally to discharge the functions of his office, and can he legally enter judgments after the abolition of the militia district which he was appointed to serve?"

"2. Is section 381 of the Civil Code of 1910, which reads as follows: 'Making or Changing Districts, Consequences. If, in laying out a new district or in changing the lines of old districts, or in consolidating or abolishing old districts, the residences of justices of the peace or constables elected or appointed are included in the new district, or cut off from the district for which they were elected or appointed, they have authority to discharge their duties for the district for which they were elected or appointed, until their terms of office expire and their successors in such districts are qualified, unless elected or appointed to the same office in the new district to which they are eligible'—in conflict with article 6, § 8, par. 1, of the Constitution of this state, which provides that: 'Commissioned notaries public, not to exceed one for each militia district, may be appointed by the judges of superior courts in their respective circuits, upon recommendation of the grand juries of the several counties. They shall be commissioned by the Governor for a term of four years, and shall be ex officio justices of the peace, and shall be removable on conviction for malpractice in office'—for the reason that under the operation of said act, in some instances,

there might or would be more than one commissioned notary public and ex officio justice of the peace?"

Geo. A. H. Harris & Sons of Rome, for plaintiff in error. C. I. Carey and Ennis & Shaw, all of Rome, for defendant in error.

BECK, J. [1] It does not seem that the statute in question (section 381 of the Civil Code) is so clearly repugnant to the constitutional provision which it is claimed that the statute violates as to render the statute unconstitutional and void. It is unnecessary here to restate the numerous rulings of this and other courts declaring that the presumption is always in favor of the constitutionality of a statute, that every reasonable doubt must be resolved in favor of the statute, and that the courts will not hold the statute to be invalid unless its violation of the Constitution is complete and unmistakable. "All legislative acts in violation of the Constitution are void, and it is the duty of the judiciary so to declare." But in considering and passing upon the question of the constitutionality of a law, the rule is too well established and settled to be departed from 'that it must be made to appear that the statute, before it is declared inoperative for that cause, must be plainly and palpably in violation of the Constitution.' "McMahon v. Mayor, etc., 66 Ga. 222, 42 Am. Rep. 65. And in the case of *Nicholas v. Hovenor*, 42 Ga. 514, it was said: "Courts cannot declare acts unconstitutional, except in violation of the express words of the Constitution. Contrary to the spirit or concealed intention is not sufficient to invoke the judicial interference; for this would be the substitution of the judgment of the court for the will of the Legislature. The act of 1870 is contrary to no express words, and therefore, as invoked in this case, will be sustained by the court." The section of the Constitution relied upon to show the invalidity of the statute in question (section 3526 of the Code) provides: "Commissioned notaries public not to exceed one for each militia district may be appointed by judges of the superior courts. They shall be commissioned by the Governor for a term of four years, and shall be ex officio justices of the peace, and shall be removable on conviction for malpractice in office." The strict words of the paragraph of the Constitution just quoted prohibit the appointment of more than one commissioned notary public for each militia district. It does not in express words prohibit the exercise of the functions of that office by a commissioned notary public, who has by change of district lines been imported into another militia district.

[2] But we do not have to thus stick in the bark in order to uphold the statute in question. The paragraph of the Constitution under consideration provides further

that these commissioned notaries public shall be commissioned for a term of four years, and shall be removable on conviction for malpractice in office. The Constitution evidently does not contemplate the removal of a commissioned notary public for any other cause than that stated in the Constitution itself. And yet, if that portion of the Constitution in question be given the construction placed upon it by the party to this case attacking, on constitutional grounds, the Code section under consideration, it would virtually enable certain county authorities, acting under the provisions of section 376 et seq. of the Code, to remove a duly appointed and commissioned notary public from his office. We think it is clear that the provisions of section 381, which relate in terms to justices of the peace, include also commissioned notaries public, who are ex officio justices of the peace, as effectually as if the words "commissioned notaries public who are ex officio justices of the peace" had been added to the statute immediately after the words "justices of the peace," where the latter expression occurs in the statute. We are of the opinion that the legislative intent, as expressed in the statute, can be given effect by placing upon the statute a construction which authorizes justices of the peace and notaries public who are ex officio justices of the peace, in any districts which have been consolidated with another district, to continue to discharge the duties of their respective offices until their terms of office expire. Certainly it cannot be said that under this construction there is any clear and palpable repugnance between the statute and the constitutional provision which it is alleged to be in violation of.

From what we have said above, it follows that the first of the two questions propounded by the Court of Appeals is answered in the affirmative, and the second—that is, the question relating to the constitutionality of section 381 of the Civil Code—is answered in the negative. All the Justices concur.

(11 Ga. App. 62)

LUNSFORD v. MILLEDGEVILLE COTTON CO. (No. 3,812.)

(Court of Appeals of Georgia. April 16, 1912.)

(Syllabus by the Court.)

SALES (§ 52\*)—EVIDENCE—CONTRACT.

No material error of law appears, and the verdict is fully supported by the evidence.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 118-144, 1045; Dec. Dig. § 52.\*]

Error from City Court of Covington; W. H. Whaley, Judge.

Action by the Milledgeville Cotton Company against C. C. Lunsford. Judgment for plaintiff, and defendant brings error. Affirmed.

R. W. Milner and C. C. King, both of Covington, for plaintiff in error. Rogers & Knox, of Covington, and Hines & Jordan, of Milledgeville, for defendant in error.

HILL, C. J. The Milledgeville Cotton Company sued C. C. Lunsford in the city court of Covington to recover damages for an alleged breach of contract in writing, and a verdict was returned in favor of the plaintiff, and the defendant's motion for a new trial was overruled. The contract sued upon is as follows: "Georgia, Newton County. August 28, 1909. This agreement, made this day, by and between C. C. Lunsford and the Milledgeville Cotton Company, of Milledgeville, Ga., witnesseth: That the said C. C. Lunsford, for and in consideration of the sum of one dollar (\$1) to him in hand paid by the said Milledgeville Cotton Company, of Milledgeville, Ga., receipt of which is hereby acknowledged, has this day sold and agreed to deliver to the said Milledgeville Cotton Company, of Milledgeville, Ga., between the 1st day of October and November 20th, at Mansfield, Ga., 75 bales of cotton, in good merchantable condition, to average five hundred (500) pounds per bale, and the said C. C. Lunsford shall accept for said cotton the sum of 12 cents per pound for all cotton grading Liverpool good middling. In case any or all portions of the cotton shall be graded above Liverpool good middling,  $\frac{1}{4}$ ¢ per pound shall be added to the price stipulated to be paid for Liverpool good middling cotton. In case all or any portion shall grade below Liverpool good middling cotton, the difference to be taken off shall be according to the rates posted on the Savannah Cotton Exchange the day previous to the date of delivery. It is agreed that the cotton to be delivered can be of any grade from Liverpool good middling to American low middling, inclusive, and, if tinged, not below middling tinged, and, if stained, not below middling stained. In case the said C. C. Lunsford should dispose of any part of his crop before the contract is filled, then the entire number of bales due under this contract shall become due. It is further expressly understood and agreed to that time is the essence of this contract, and that the cotton is to be delivered strictly within the time herein mentioned. Should both parties to this contract not agree as to the grades of the cotton to be delivered on this contract, and friendly settlement should be out of the question, then both, either the seller or the Milledgeville Cotton Company, shall have the right to leave the settlement of the disagreement to the New York Cotton Exchange, and both, either the seller or the Milledgeville Cotton Company, shall abide by the decision of the arbitration committee of the New York Cotton Exchange. All expenses caused by such arbitration shall be borne by the loser. This contract is executed in duplicate. Witness our hands and seals this the 28th day of

August, 1909. Milledgeville Cotton Company, per R. L. Wall. [Seal] C. C. Lunsford. [Seal] Witness, J. W. Henderson."

It was alleged that this contract had been breached by the defendant, resulting in damage to the plaintiff in the sum of \$937.50, being the difference between the price at which the defendant had agreed to sell the cotton and the market price of the cotton at the place where it was to be delivered on the day it was to be delivered. On the trial the defendant admitted in *judicio* that he had signed the contract sued upon in duplicate, that he had never complied with the contract, that the price of the cotton was as alleged in plaintiffs' petition, and that the number of bales sued for was correct. The defense relied upon was that the contract had never become binding by reason of the nonexecution thereof on the part of the plaintiff, that it had never signed the same, and that the defendant had never received any duplicate of the contract as agreed, or any notice of the acceptance thereof by the plaintiff. It is admitted that the contract, if it had been signed by the plaintiff, was a valid contract binding the plaintiff to buy and the defendant to sell to it 75 bales of cotton, and it is insisted that the consideration of \$1, recited in the contract to have been paid by the plaintiff to the defendant, was never paid and never received, and the contract was never mutually binding, because the plaintiff, either had not signed it at all, or had unreasonably delayed signing it.

While there is some conflict in the evidence, the verdict establishes the following facts as the truth of the transaction: The contract in question was procured by one Henderson, who seems to have been a cotton broker, at the instance of Lunsford, the defendant. Lunsford first signed the contract and delivered it to Henderson, who sent it to the Milledgeville Cotton Company, the plaintiff, and he received it back from the plaintiff in a week's time, properly signed, and it was held by him for Lunsford and subject to his order. The \$1 recited as part consideration in the contract was paid by the Milledgeville Cotton Company to Henderson for Lunsford, and Henderson offered the \$1 to Lunsford, who refused it, on the ground that he did not care for it. One bale of cotton was delivered by the agent of Lunsford on this contract to Henderson for the Milledgeville Cotton Company. This evidence, in connection with the admissions heretofore recited, clearly established the correctness of the verdict in favor of the plaintiff, so far as the general grounds of the motion are concerned.

Several special assignments of error are made in the amended motion for a new trial, based upon the judgment of the court on the admissibility of testimony and errors in the charge. We have given these assignments careful consideration, and find that they are without merit. Indeed, we are clear that

the verdict for the plaintiff in this case is not only supported by the evidence, but that no other verdict would have been authorized, and for this reason the assignments of error made in the amended motion are immaterial.

Judgment affirmed.

(11 Ga. App. 67)

**JONES & PHILLIPS, Inc., v. PATRICK.**  
(No. 3,870.)

(Court of Appeals of Georgia. April 16, 1912.)

(*Syllabus by the Court.*)

**APPEAL AND ERROR (§ 1033\*)—WHO MAY APPEAL—PARTY AGGRIEVED.**

There is no principle of law that will justify a defendant in complaining of a verdict against him on the ground that under the evidence the verdict should have been for a larger amount. The error in the amount of the verdict, if error at all, was one that did not injure the defendant; and in no case is error without injury a rational cause for complaint.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4052-4062; Dec. Dig. § 1033.\*]

Error from Superior Court, Fulton County; W. D. Ellis, Judge.

Action by J. L. Patrick against Jones & Phillips, Incorporated. Judgment for plaintiff before a justice. From a judgment for plaintiff on appeal, defendant brings error. Affirmed, with damages.

Thos. B. Brown, of Atlanta, for plaintiff in error. R. B. Blackburn, of Atlanta, for defendant in error.

HILL, C. J. Patrick sued Jones & Phillips in a justice's court to recover \$50.25 as damages resulting from the breach of a contract of employment. A judgment was rendered in favor of the plaintiff, and on appeal a verdict in his favor for \$36.35 was rendered in the superior court. The defendants' motion for a new trial being overruled, they excepted. The only point stressed by them in this court is that the verdict for \$36.35 was unauthorized by the evidence, that the terms of the written contract fixed the amount of salary, that it was not disputed that the contract was breached, and that the only verdict that would have been authorized for the plaintiff would have been a verdict for the full amount of the suit, to wit, \$50.25.

There was no issue raised by the evidence regarding the amount due to the plaintiff; the only defense being that he was lawfully discharged by the defendants because of the want of fidelity on his part as an employé, under the terms of the contract. The court charged the jury, in effect, that if they believed that the plaintiff had fulfilled his contract, and had been discharged without cause, he would be entitled to recover the full amount sued for, and if, on the other hand, they believed, under the evidence, that the defendants had sufficient cause to dis-

charge the plaintiff, he would not be entitled to recover; and it is therefore very earnestly insisted by counsel that the verdict did not cover the issue made by the pleadings and evidence and charge of the court, as required by Civil Code 1910, § 5924. Reduced to its last analysis, the complaint is that the verdict was for too small an amount of money, and that under the evidence it should have been for the full amount sued for.

Counsel for the plaintiffs in error, in his brief, in replying to the very obvious contention of the defendant in error as to this question, that the plaintiffs in error should not be heard to complain because the verdict was smaller than it should have been, makes the following perfervid statement: "This attitude would densify reason, make a farce of the courtroom, and establish a principle that never was and never will be recognized by the law." Yet this is the very attitude which the Supreme Court of the state has definitely and distinctly declared to be the law. In *Pullman Co. v. Schaffner*, 128 Ga. 609, 55 S. E. 933, 9 L. R. A. (N. S.) 407, it is declared that "a defendant against whom a verdict has been returned cannot complain that the verdict is for a less amount than that demanded by the evidence"; and in *Central Ry. Co. v. Trammell*, 114 Ga. 315, 40 S. E. 259, 261, the court says, without reservation, "We know of no principle upon which a defendant can complain that a verdict for a less amount than that demanded by the evidence was returned against him." In *Strickland v. Hutchinson*, 123 Ga. 399, 51 S. E. 348, it is held that a party to a suit is not entitled to a new trial because of an error in his favor. In *Roberts v. Rigden*, 81 Ga. 440, 7 S. E. 742, Chief Justice Bleckley says: "A defendant certainly has no right to a new trial because the verdict was too small." These decisions are based upon the well-settled rule that error without injury is harmless.

We are asked to grant damages for frivolous appeal in this case, and we think the request should be granted. The record shows that the plaintiff in the court below was clearly entitled to recover from the defendants the amount of \$50.25. The judgment of the justice found this amount in his favor, and the only ground of the plaintiffs in error's complaint is that, on appeal, the jury should have found a verdict against them for \$50.25, instead of for \$36.35, the amount of the finding. The rare opportunity is therefore afforded to this court of pleasing both parties in the decision. By giving damages we substantially answer the complaint of the plaintiffs in error that the verdict against them was too small, and we comply with the very reasonable request of the defendant in error that, since he was entitled under the evidence to a larger verdict, the plaintiffs in error should be made to pay damages for an appeal based only on the contention that

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.

the verdict rendered against them was too small. The judgment is therefore affirmed, with 10 per cent. damages on the amount of the judgment recovered by plaintiff in the court below.

Judgment affirmed, with damages.

(11 Ga. App. 69)

**J. G. & M. L. CROWLEY v. McCracken.**  
(No. 3,865.)

(Court of Appeals of Georgia. April 16, 1912.)

*(Syllabus by the Court.)*

**1. APPEAL AND ERROR (§ 1083\*)—REVIEW—HARMLESS ERROR.**

A defendant cannot complain because a verdict rendered against him was too small under the evidence, and should have been for a larger amount. *Jones v. Patrick*, 74 S. E. 700, this day decided; *Pullman Co. v. Schaffner*, 126 Ga. 609, 55 S. E. 933, 9 L. R. A. (N. S.) 407; *Central Ry. Co. v. Trammell*, 114 Ga. 316, 40 S. E. 259; *Strickland v. Hutchinson*, 123 Ga. 399, 51 S. E. 348; *Roberts v. Rigden*, 81 Ga. 440, 7 S. E. 742.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4052-4062; Dec. Dig. § 1033.\*]

**2. COSTS (§ 260\*)—ON APPEAL—DAMAGES FOR FRIVOLOUS APPEAL.**

No specific error of law is complained of, and the verdict is supported by the evidence. The judgment is affirmed, with 10 per cent. damages on the amount of the judgment recovered in the court below, for delay on account of suing out and prosecuting the writ of error.

[Ed. Note.—For other cases, see Costs, Cent. Dig. §§ 983-996, 1002, 1003; Dec. Dig. § 260.\*]

Error from City Court of Nashville; W. D. Buie, Judge.

Action by J. F. McCracken against J. G. & M. L. Crowley. Judgment for plaintiff, and defendants bring error. Affirmed, with damages.

J. W. Powell, J. H. Hull, and W. G. Harrison, all of Nashville, for plaintiffs in error. Hendricks & Christian, of Nashville, for defendant in error.

**HILL, C. J.** Judgment affirmed, with damages.

(11 Ga. App. 95)

**CANNON v. MAYOR, ETC., OF CITY OF AMERICUS.** (No. 4,084.)

(Court of Appeals of Georgia. April 16, 1912.)

*(Syllabus by the Court.)*

**1. MUNICIPAL CORPORATIONS (§ 642\*)—VIOLATION OF ORDINANCE—PROCEEDINGS TO REMOVE CAUSE—BONDS.**

When the writ of certiorari is applied for to review a judgment of conviction in a police court, bond must be given or affidavit of inability to do so, in conformity with the requirements of sections 5192-5194 of the Civil Code of 1910. Where bond is given, the better practice would be to exhibit with the petition for the writ a copy of the bond, and

allege affirmatively that bond was given and approved as required by law; yet failure to make this allegation or attach the copy bond furnishes no reason for refusing to order that the writ issue, when the petition is accompanied with a certificate of the presiding officer or clerk, if there be a clerk, of the inferior judicatory, that bond was given and approved as required by law.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1412-1415; Dec. Dig. § 642.\*]

**2. MUNICIPAL CORPORATIONS (§ 591\*)—POWERS—DELEGATION TO OFFICERS.**

In the absence of express statutory authority so to do, a municipal corporation cannot delegate to the mayor power conferred upon it to fix the amount of a license fee to be paid by one pursuing an occupation within the limits of the municipality.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1310; Dec. Dig. § 591.\*]

Error from Superior Court, Sumter County; Z. A. Littlejohn, Judge.

J. P. Cannon was convicted of violating an ordinance of the City of Americus. From a judgment refusing to sanction a petition for certiorari to review the conviction, defendant brings error. Reversed.

Jas. A. & Jno. A. Fort, of Americus, for plaintiff in error. Hollis Fort, of Americus, for defendant in error.

**POTTLE, J.** The writ of error is sued out to review the judgment of the superior court refusing to sanction a petition for certiorari. There is no allegation in the petition that the applicant had given bond or made a pauper's affidavit in lieu of bond; but accompanying the petition is the following certificate, signed by the presiding officer of the police court in which the plaintiff in error was convicted: "I, J. E. Mathis, the recorder who presided in the above-stated case, certify that, no costs having accrued, none are due by the defendant, the said J. P. Cannon. I further certify that he has given bond and security as required by law, and that the said bond has been duly approved by me." The accused was convicted of conducting a concert or exhibition in Americus without paying a license fee of \$500, which had been assessed against him by the mayor, under authority of a municipal ordinance, in the following language: "Concerts or exhibitions of any character, not given or performed in a licensed opera house, shall have to take out a license to be fixed by the mayor." The point made is that the ordinance is void, because the corporate authorities of the city cannot delegate to the mayor the power conferred by the charter to impose an occupation or business tax or license.

[1] 1. Prior to the act approved December 10, 1902 (Acts 1902, p. 105), one convicted of the violation of a municipal ordinance could have the conviction reviewed in the superior court upon certiorari, by paying the

accrued costs and giving the bond required by law, or, in lieu thereof, filing an affidavit that on account of his poverty he was unable to pay the costs or give the bond. The writ of certiorari operated in all cases as a supersedeas. The act of 1902 required that, before certiorari would issue to review a conviction in a municipal court, bond should be filed with the clerk or judge of that court, payable to the municipal corporation, "conditioned for the personal appearance of the defendant to abide the final order, judgment, or sentence of said court, or of the superior court in said case"; that the pauper's oath might be taken in lieu of bond, and, when taken, the judge should grant a supersedeas, but the defendant should not be set at liberty. The act of 1909 (Civil Code 1910, §§ 5192-5194) does not materially change the procedure provided by the act of 1902; but the scope of the later act is broader, in that it applies to all inferior judicatories (except constitutional city courts) exercising criminal or quasi criminal jurisdiction. The condition of the bond under the act of 1909 is that the defendant will "personally appear and abide the final judgment, order, or sentence upon him in said case." The manifest purpose and effect of this act was to supersede and repeal the act of 1902, and, if there is any conflict between them, the procedure now provided for in sections 5192-5194 of the Civil Code must be followed, and no certiorari will lie in any case therein referred to unless bond or affidavit in lieu thereof is given as required by those sections.

It is argued that the judge properly refused to order that the writ issue, because he had before him no sufficient evidence that the precedent requirements of the law in reference to making bond or affidavit in lieu thereof had been met. If bond be given, it must be filed with the police judge or his clerk. When the petition for the writ of certiorari is presented to the judge of the superior court, he must, before he can order that the writ issue, have before him evidence that the bond or pauper affidavit required by law has been made and filed. But, where bond is given, it is not necessary that the original bond should accompany the petition. The better practice would be to attach a certified copy, so that the sufficiency of the bond be not left to inference; but a certificate from the presiding officer or clerk, if there be one, of the inferior judicatory, that bond has been made and approved as required by law, should be accepted as *prima facie* true. If the writ issue, then all the papers, including the bond, or a certified copy, should be sent up, in order that the judge may see that the law has in fact been complied with. In the present case, the recorder having made certificate that a lawful bond had been given, the absence of the

bond itself, or a copy thereof, or the failure to allege that bond was given, constituted no sufficient reason for refusing to sanction the petition.

[2] 2. Municipal corporations are creatures of statute, and only those powers granted, either expressly or by fair implication, can be exercised by them. The power to tax will not be implied, and, when granted expressly, must be exercised in the manner pointed out in the statute. The power to tax or exact a license fee is nondelegable. If the corporation be granted the discretionary power to impose a license fee upon a business, it cannot delegate this power to a member of the council, nor can it, by ordinance or otherwise, relieve itself of the duty of fixing the amount to be exacted. The charter of Americus does not confer upon the corporation the authority to delegate its power to license, or to fix the amount thereof; but, on the contrary, the charter confers upon the "mayor and city council," as a corporation, the power to raise revenue in part by licensing various occupations and business enterprises, including "theatrical performances, shows, circuses and exhibitions of all kinds." Acts 1889, p. 966, § 25. The exact point was ruled in *Johnson v. City of Macon*, 62 Ga. 645 (5), where it was held: "The mayor and council, having the power delegated to them by the General Assembly to tax, cannot delegate it to the mayor alone, and so much of the ordinance as so delegates this power is void." See, also, *Dillon, Municipal Corporations* (5th Ed.) § 1383. Since the act of the mayor in imposing a license fee of \$500 was unlawful, the plaintiff in error cannot be punished for refusing to pay the fee, and his certiorari should be sanctioned.

Judgment reversed.

(11 Ga. App. 52)

COBB v. STATE. (No. 3,636.)  
(Court of Appeals of Georgia. April 16, 1912.)

(Syllabus by the Court.)

1. CRIMINAL LAW (§§ 789, 823, 825\*)—TRIAL—INSTRUCTIONS—REASONABLE DOUBT—NECESSITY FOR REQUEST.

Though the instruction to which exception is taken might be subject to criticism if read apart from its context, still the charge of the court upon the subject of reasonable doubt, when considered as a whole, is full and fair, and not in any wise likely to mislead the jury. The trial judge has the right to make plainer by definition, if he can, the phrase "a reasonable doubt," and it is not error to inform the jury that the term does not include any doubt which is capriciously or arbitrarily created, or which may not arise from consideration of the evidence.

(b) Where the court gives in charge to the jury the statute in regard to the defendant's statement to them, he is not required, in the absence of a timely request, to present a theory dependent upon the statement, or to refer to the statement in charging upon the effect

of the evidence as the jury may find it to be true in the case.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1846-1849, 1904-1922, 1960, 1967, 1992-1995, 3158, 2005; Dec. Dig. §§ 789, 823, 825.\*]

**2. HOMICIDE (§ 203\*)—EVIDENCE—DYING DECLARATIONS—ADMISSIBILITY.**

The court properly instructed the jury that statements of a deceased person are not to be considered as dying declarations, unless the jury are satisfied, not only that the declaration was in articulo mortis, but also that the declarant was conscious that he was dying.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 430-437; Dec. Dig. § 203.\*]

**3. HOMICIDE (§ 286\*)—INSTRUCTIONS—MALICE.**

There being testimony which would authorize the conviction of the defendant of the offense of murder, it was not error for the court to define to the jury both express and implied malice.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 586-591; Dec. Dig. § 286.\*]

**4. HOMICIDE (§ 309\*)—INSTRUCTIONS—INVOLUNTARY MANSLAUGHTER.**

The evidence authorized the instruction upon the law of involuntary manslaughter in the commission of a lawful act without due caution and circumspection, and the charge of the court upon that subject was pertinent and correct.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 649-656; Dec. Dig. § 309.\*]

**5. CRIMINAL LAW (§ 363\*)—EVIDENCE—RES GESTÆ.**

Inquiry as to whether particular sayings constitute a part of the res gestæ of the transaction turns on the particular circumstance of each case, and is directed rather to the spontaneity of the events related, considered as a part of the occurrence under investigation, than to the precise time which may have elapsed between the main fact and the statements made in reference to it.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 804; Dec. Dig. § 363.\*]

**6. WITNESSES (§ 318\*)—CRIMINAL LAW (§ 1169\*)—CORROBORATION OF WITNESSES—HARMLESS ERROR.**

Though the court erred in admitting the testimony complained of, the fact that the jury found the defendant guilty only of involuntary manslaughter conclusively evidences that the error was not injurious to the accused. The fact that a witness might, at some time prior to the trial, have made in effect the same statement of facts as that sworn to by him as a witness, does not tend to corroborate or sustain his testimony, when there has been no attempt to impeach him by testimony of contradictory statements made by him, and cannot properly be used to reinforce his testimony. However, in the present instance the error is immaterial, because it is apparent that the impeachment of the witness was completely successful.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1084-1086; Dec. Dig. § 318; Criminal Law, Cent. Dig. §§ 3137-3143; Dec. Dig. § 1169.\*]

Error from Superior Court, Mitchell County; Frank Park, Judge.

Charley Cobb was convicted of involuntary manslaughter, and brings error. Affirmed.

E. E. Cox, of Camilla, for plaintiff in error. W. E. Wooten, Sol. Gen., of Albany, F. A. Hooper, of Atlanta, for the State.

**RUSSELL, J.** The plaintiff in error was indicted for the offense of murder, and convicted of involuntary manslaughter in the commission of a lawful act without due caution and circumspection. Upon the trial the defendant did not deny the killing, but his statement would have authorized the conclusion that the homicide was a pure accident. There was also some evidence supporting the defendant's theory of the case, and, of course, if this testimony and the statement of the accused had been credited by the jury, an acquittal should have resulted. There is also evidence in the record which fully supports the theory that the death of the deceased resulted from the discharge of a gun lawfully in the hands of the accused, who was handling it in a careless and reckless manner, but who had no intention of killing the deceased, or of discharging the gun. Evidently the verdict was based upon their belief that this testimony represented the truth of the transaction, for there was testimony from one witness to the effect that the accused deliberately pointed, aimed, and discharged his gun into the body of the deceased coincidentally with publicly proclaiming deliberately his intention to kill her, and, of course, if the jury had believed this witness, a verdict of murder would have been demanded. We say that the defendant, under the testimony last mentioned, must necessarily have been convicted of murder, because in addition to the testimony as to the killing, itself, there was other testimony of motive, as well as of previous threats, which would have fully authorized the jury to conclude that the killing was the result of deliberate and cold-blooded "afterthought." We make this much reference to the evidence, for the reason that there are certain assignments of error which are well taken, and yet, in our view of the record as a whole (and especially in view of the verdict actually rendered), are not sufficiently material to effect a reversal of the judgment refusing a new trial. We do not subscribe to the doctrine that in any criminal case a defendant can be held to be so manifestly guilty as not to be entitled to the right of a fair and impartial trial, or so guilty as that he should be deprived of any substantial right. We merely adhere to the rule that, while injury will ordinarily be presumed to result from error, still injury as well as error must appear, before it can be said that the refusal of a new trial, in a case in which the evidence authorized the verdict rendered, although there is conflict in the testimony, is reversible error. And in a case in which it is perfectly manifest that the only serious error in no wise affected or contributed to the finding of the

jury, the very existence of the error itself becomes wholly immaterial. Passing for the present the general ground of the motion for new trial (which was overruled), for the reason that it will in this case be necessarily dealt with in the consideration of the special assignments of error, we will deal with the grounds of the amendment to the motion for new trial in their order.

[1] 1. Exception is taken to the following excerpt from the charge of the court: "The burden is upon the state to rebut the presumption of innocence, and to show by evidence that he is guilty, before you would be authorized to return a verdict against him; and the evidence must be sufficiently strong to satisfy the minds and consciences of the jurors, beyond a reasonable doubt, of his guilt, before they would be authorized to convict the defendant. \* \* \* While this is the rule, and is founded on justice and reason, it must not be understood by the jury that, after the consideration of the evidence, the existence of any doubt, or a doubt of any degree, in the minds of the jury, is sufficient to authorize the return of a verdict of not guilty." This instruction is immediately followed in the charge of the court, as it appears in the record, by the further instructions: "While no person can be legally convicted without plain and manifest proof of guilt, yet moral and reasonable certainty is all that can be expected or is attainable in legal investigations, and, in deciding whether the evidence is legally sufficient to show guilt, the true question is, not whether it be possible that the conclusion at which the testimony points may be false, but whether there is sufficient testimony to satisfy the minds and consciences of the jurors beyond a reasonable doubt. The reasonable doubt of the law is one that grows out of the evidence or the lack of the evidence adduced upon the trial, and leaves a reasonable mind wavering and unsettled, not satisfied from the evidence. The juror cannot create a doubt for himself and act upon it. He cannot raise an artificial or captious doubt in order to acquit. The doubt should be real, and honestly and fairly entertained, after all reasonable effort to find out the facts." It will be seen that these instructions are so full as to relieve the excerpt first quoted from the criticism that the language of the instruction is so vague and indefinite and subject to misconstruction by the jury as to lead them to believe that they were hampered in their right to discharge the accused if they had any reasonable doubt as to his guilt. Though the instruction to the jury to the effect that it must not be understood that after consideration of the evidence the existence of any doubt, or doubt of any degree, in the minds of the jury, is sufficient to authorize the return of a verdict of not guilty, when standing apart from its context, is somewhat inapt and contradictory to the usual rule, still, when the instruction upon

this subject is considered as a whole, it is very plain that the judge was correctly instructing the jury that, while a mere fanciful doubt would not authorize an acquittal, they should acquit the defendant if they entertained a reasonable doubt of his guilt, and thus the instruction falls in the same class as the instruction approved by the Supreme Court in *Jordan v. State*, 130 Ga. 406 (1), 60 S. E. 1063. See, also, *Vann v. State*, 83 Ga. 45, 9 S. E. 945; *Fletcher v. State*, 90 Ga. 468, 17 S. E. 100.

The further complaint urged as to this instruction, that the court erred in failing to charge in this immediate connection that a reasonable doubt may arise from the prisoner's statement, is controlled by the ruling in the *Jordan Case*, supra, as well as by the ruling in *Walker v. State*, 118 Ga. 34, 44 S. E. 850. As has been several times held by this court, it is not necessary to reiterate instructions, when once correctly given, even though the omission to give the instruction at all might be gross error, and for that reason it was not necessary for the court to instruct the jury, in the absence of request, in connection with his charge upon the subject of reasonable doubt, that a reasonable doubt might arise from the manner or conduct of the witness in testifying, or from the credibility of the witness, or from other facts and circumstances connected with the case, inasmuch as the judge gave these matters very fully and fairly in charge to the jury in another portion of his instructions.

Our view of the fourth assignment of error disposes also of the fifth ground of the amended motion for new trial, in which the plaintiff in error complains of the court's instruction: "I charge you that, for your verdict to be a legal and proper one, it must be founded on the evidence in the case, yet in this connection I give you another rule, which may or may not, as you must determine, affect your finding. In all criminal trials the prisoner shall have the right to make to the court and jury such statement in the case as he may deem proper in his own defense. It is not made under oath, and it shall have such force only as the jury may think right to give it. You may believe it in preference to the sworn testimony in the case." It is contended that this was an incorrect statement of the law, confusing to the jury, and excluding from their consideration the statement of the defendant, and denying them the right to find a legal and proper verdict upon the statement of the defendant. It seems clear to us that the jury was not confined to the evidence, when the judge, after correctly informing them that their finding must be based upon evidence (in accordance with their oaths, which require their verdict to be according to the evidence), instructed them that, nevertheless, they might give preference to the statement of the defendant, over all the evidence in the case.



The same point was ruled adversely to the plaintiff in error in *Jordan v. State*, supra.

[2] 2. The court's instructions as to dying declarations are approved as a correct, full and explicit statement of the law upon that subject. No declaration can be properly denominated a dying declaration, and be as such considered by the jury, if at the time it was made the declarant was not in articulo mortis, or, even if he was in fact in a dying condition, was not conscious of his true condition. For the unsworn statement of a decedent to be admissible in evidence as a dying declaration, two essential facts must concur. The declarant must be actually in a dying condition, and he must be convinced that he is dying. The existence of both conditions is requisite to create the presumption that the solemnity of the consciousness of impending dissolution will be equivalent to the sanctity of the witness' oath. The complaint is also made, as to the instructions upon dying declarations, that the jury were excluded from determining from the statement of the defendant whether or not a dying declaration was made by the deceased, and that the charge of the court denied the jury the right to believe the statement of the defendant as to dying declarations, if they found from the evidence that she had hope or expectation of living. The court was not required, in the absence of a request, to repeat the reference he had already made to the defendant's statement in connection with the case as a whole; but the jury were to determine from the statement, or from the evidence, whether the statements of the deceased submitted for their consideration were in fact dying declarations. The instruction of the court to the effect that the statement of the deceased should be disregarded by the jury, if they found from the evidence that the deceased had hope or expectation of living at the time she made the statement, was correct. It is only when presumably all hope of living has been abandoned by the declarant that his unsworn statements can be received as evidence.

[3] 3. There is no error in the instruction of the court upon the subject of malice, nor did the court err in defining express and implied malice. The defendant was indicted for murder, and there was evidence which would have authorized his conviction of that offense, for the witness Lonnie Batchelor testified that he heard the defendant threaten the deceased, and saw him take deliberate aim and shoot her down without any apparent cause or provocation. There was also testimony from other witnesses as to previous threats, and evidence of a previous attempt upon the life of the deceased by the defendant.

[4] 4. The eighth ground of the amended motion for new trial complains that the court erred in charging the jury upon the subject of involuntary manslaughter in the commis-

sion of a lawful act without due caution and circumspection, because, as insisted, the offense was not involved in the case, under the evidence submitted, and because the charge of the judge upon that subject was an incorrect statement of the law. The testimony of more than one of the witnesses introduced by the defendant authorized the defendant's conviction of the offense of involuntary manslaughter in the commission of a lawful act without due caution and circumspection. Paul Caldwell and Gentleman Brown, introduced by the defendant, both testified that they were present at the time of the shooting of Clara Widner, the deceased, and that the defendant had his gun in his hand while he was laughing and talking, and was standing up, swinging his gun up and down, when it went off and shot the deceased. The record does not show how the defendant was swinging the gun, or the position in which he held it at the time it was discharged; but it appears that these witnesses illustrated to the jury the exact position in which he held the gun. It is undisputed that the defendant knew the gun was loaded, and the testimony shows that, while he was lawfully in possession of the gun, he was absolutely careless and reckless in handling it; and for this reason the case falls clearly within the ruling in *Austin v. State*, 110 Ga. 748, 36 S. E. 52, 78 Am. St. Rep. 134, following previous rulings in *Pool v. State*, 87 Ga. 526, 13 S. E. 556, and *Burton v. State*, 92 Ga. 449, 17 S. E. 99. It appears to us that the jury believed these witnesses, and that the death of Clara Widner resulted from the discharge of a gun in the hands of the defendant, and that while, according to the testimony of his witnesses, he had no intention to kill, nor any intention to discharge the gun, yet the death was due, not to accident, but to the criminal, though unintentional, negligence of the defendant, and the jury, while not accepting the defendant's statement, disregarded testimony which would have authorized the defendant's conviction of the offense of murder. Certainly, in the state of the evidence in the record, it would have been error for the judge not to have charged the law of involuntary manslaughter in the instant case, and his instructions are in accord with the rulings in the *Austin Case*, supra.

[5] 5. It cannot be said that the court erred in excluding the statement of the defendant, made several minutes after the shooting, in reference to his lack of intention to discharge the gun, and to the effect that the shooting was accidental. As ruled in *Thornton v. State*, 107 Ga. 683, 33 S. E. 673, the issue as to whether sayings constitute a part of the res gestae of any transaction is often more properly determined by the circumstances of the particular case than by the time which may have elapsed. The inquiry is rather into events than into the exact amount of time which may have trans-

pired. Is it an event happening naturally and spontaneously as a part of the occurrence under investigation? Tested by this rule, we do not think the judge erred in excluding the testimony. If it had not been an "afterthought," it seems likely that it would have been made as soon as the witness appeared upon the scene. Furthermore, even if the court misjudged the circumstances, the plaintiff in error was not hurt by the ruling upon the testimony of the particular witness now under consideration, for the reason that the excluded remark was proved by other witnesses without objection; these witnesses testifying that it was made to them immediately on the heels of the shooting.

[8] 6. We entertain no doubt that the court erred in permitting testimony to the effect that a witness, Lonnie Batchelor, whom it was sought to impeach by proof of contradictory statements, had, upon other occasions, made the same statements as those testified to by him upon the trial, and statements to the effect that his previous contradictory statements were false; the evident purpose of this testimony being to corroborate the testimony of Lonnie Batchelor as delivered by him upon the trial. The fact that a witness might at some time prior to the trial have made in effect the same statement of facts as that sworn to by him as a witness does not tend to corroborate or sustain his testimony, when there has been an attempt to impeach him by proof of contradictory statements made by him, and cannot properly be used to reinforce his testimony. However, the error in the present instance is immaterial, because it is apparent that the impeachment of the witness was completely successful. If this testimony, erroneously admitted, had served its purpose, and the testimony of Lonnie Batchelor had been corroborated thereby and sustained in the opinion of the jury, the result of the trial must necessarily have been the conviction of the defendant of the offense of murder. The fact that the jury found the defendant guilty only of involuntary manslaughter is demonstrative of the fact that they wholly disregarded the testimony of the witness whose veracity it was sought to sustain by the evidence erroneously admitted. The verdict rejected the evidence which it was sought to reinforce, and consequently, as ruled by this court in *Hall v. State*, 8 Ga. App. 748 (3), 70 S. E. 211, a new trial will not be granted, although the error is apparent. It is to be presumed prima facie that a manifest error is injurious; but, when it affirmatively appears that an error has not resulted in injury, a new trial will not be granted for that error. "In determining whether error has resulted in injury, the court may look to the record as a whole." *Hall v. State*, supra.

7. A very careful review of the record in this case convinces us that the finding of

the jury is fully supported by the evidence, and that the plaintiff in error has no cause for complaint.

Judgment affirmed.

POTTLE, J., not presiding.

(11 Ga. App. 75)

ALLEN v. STATE. (No. 3,943.)

(Court of Appeals of Georgia. April 16, 1912.)

(Syllabus by the Court.)

1. GAME (§ 3½\*)—POWER TO PROTECT AND REGULATE.

In the exercise of the police power of the state, the Legislature may prohibit the killing of wild game, or any traffic or commerce in it, if deemed necessary for its preservation or protection, or for the public good, and, to accomplish this end, may make it criminal for any person to sell or offer for sale any of such game, or to have in possession any such game, during the closed season, whether the game which he sells or offers for sale, or has in his possession, was killed or taken within or without the state.

[Ed. Note.—For other cases, see *Game*, Cent. Dig. § 2; Dec. Dig. § 3½\*]

2. GAME (§ 7\*)—STATUTORY PROVISIONS—CONSTRUCTION.

Under the terms of the act of 1911, commonly known as the "game law" (Acts 1911, p. 137), it is unlawful to purchase or sell, or offer for sale, in this state, at any time, any of the game protected by the prohibitory sections of the act, or to have in possession any of such game during the closed season specified in the act, without regard to where it was killed or taken, whether within or without the state. The Legislature intended, by the explicit and broad provisions of the statute, to insure the preservation and protection of the game there specified within this state, by making the act of selling it, or offering it for sale, or having it in possession during the closed season, specific offenses, whether the game was killed or captured within the limits of the state or elsewhere.

[Ed. Note.—For other cases, see *Game*, Cent. Dig. §§ 6, 7; Dec. Dig. § 7\*]

Error from City Court of Savannah; Davis Freeman, Judge.

R. W. Allen was convicted of violating the game law, and brings error. Affirmed.

Twiggs & Gazan, of Savannah, for plaintiff in error. W. C. Hartridge, Sol. Gen., and M. H. Bernstein, both of Savannah, for the State.

HILL, C. J. Allen was convicted on an accusation charging a violation of the game law of this state, as embodied in the act of 1911 (Acts 1911, p. 137), and the case is here on exception to the judgment overruling his motion for a new trial. The specific charge against the accused was a violation of section 12 of the act, which makes it a misdemeanor for any person "to purchase or sell, or export for sale, or offer to sell," any of the game birds or animals mentioned in section 11 of the act, and also a violation of section 14 of the act, which makes it a misdemeanor for any person to have in his

possession any of the game birds or animals enumerated in the act between certain specified dates, constituting the closed season. The evidence is not in conflict, and the accused admitted that he sold to the Oglethorpe Club, in Savannah, Chatham county, Ga., on October 2, 1911, "a summer or wood duck," and that on that date (which was within the closed season for wood duck, under the act) he had it in his possession. Among the game birds protected by the provisions of the act (enumerated in section 11) are "summer or wood duck." The defense relied upon was that the summer or wood duck which the accused had in his possession, and sold to the Oglethorpe Club as stated, was killed in the state of South Carolina, where it was entirely lawful for him to kill a wood duck at that time.

The case, on the facts, was submitted to the judge without the intervention of a jury, and he held that "the purpose of the act of 1911 was to forbid the sale or purchase *at any time*, and the *having in possession during the closed season*, of any of the game birds or animals described in the act, without regard to the place where killed or captured, whether within or without the state." Before coming to the construction of the act in question, certain general principles may be stated that are well settled.

[1] From the days of feudalism in England, as well as on the continent of Europe, the right to acquire ownership in game or animals *ferre naturæ* was recognized as being subject to governmental authority and under its regulation and control. See *Geer v. Connecticut*, 161 U. S. 523, 16 Sup. Ct. 600, 40 L. Ed. 794, in which there is a very learned and interesting opinion by the present Chief Justice of the United States Supreme Court. In England the ownership of game is vested in the sovereign power, and individual right thereto has always been held subject either to regulation or restriction. 2 Blackstone, Commentaries, 394, 410; *Magner v. People*, 97 Ill. 333. In the United States the ownership of game is in the people of each state, and no person has any private right in or title to the game, and it is held by the state as the sovereign authority, in trust for all the people in the state. It follows, therefore, that each state has a right to enact such laws for the protection of its game as to it seems best for the accomplishment of that purpose, and this includes the right, not only to prohibit the killing or taking of the game by the citizen, but its importation or exportation. Even before the passage of the Lacey act, May 25, 1900 (Act May 25, 1900, c. 553, 31 Stat. 187 [U. S. Comp. St. 1901, p. 290]), which gave to each state express authority to legislate for the protection and preservation of its game, it was frequently expressly held that provisions in state laws prohibiting the sale of game and its possession out of season were a proper exercise of the police power, and

did not deny the due process of law guaranteed by the fourteenth amendment of the federal Constitution, and that provisions of state laws which made their prohibitive terms applicable to game, whether taken in foreign countries, where it was lawful to take it, and subsequently bringing it into the state, where its sale or possession was forbidden, were lawful. *People of State of New York v. Hesterberg*, 211 U. S. 31, 29 Sup. Ct. 10, 53 L. Ed. 75, and citations. The cases of *Geer v. Connecticut* and *People v. Hesterberg*, *supra*, so clearly and conclusively settle the unrestricted right of the state to legislate on the subject of its game by virtue of its police power that any further discussion of this feature of the case is deemed wholly unnecessary. Certainly since the passage of the so-called Lacey act there can be no question as to the validity of the game statutes in the different states, so far as interstate commerce is concerned.

[2] Learned counsel for the plaintiff in error, in his argument and brief, concedes the right of the state to legislate on the subject, but insists that in the enactment of the statute now under consideration the Legislature of this state legislated with knowledge of the provisions of the Lacey act; and it is earnestly insisted that the omission by the Legislature to expressly prohibit the importation of game into this state from other states or foreign countries was evidence of a legislative purpose not to make such importation unlawful, and that this view of the legislative intent is strengthened by the fact that the statute did expressly prohibit the *exportation* of game. Counsel insists that such a provision cannot be properly written into the act of 1911 by judicial construction. In support of this contention attention is called to the fact that, wherever the courts have held that the prohibitory terms of the act apply to game taken or captured without the limits of the state or in foreign countries, the act in question contained provisions making their prohibitive terms applicable to game killed or captured in foreign countries or other states, where the killing or capturing was lawful, and subsequently brought into the state during the closed season, or sold in the state in which it was imported in violation of the act. The statute of New York, construed in the *Hesterberg* Case, *supra*, contained a provision as follows: "Wherever in this act the possession of fish or game, or the flesh of any animal, bird, or fish is prohibited, reference is had equally to such fish, game or flesh *coming from without the state as to that taken within the state.*" Laws 1900, c. 20, § 141. Of course, where the legislative intent is thus expressed, there remains no room for judicial construction; but many of the courts of this country and of England, even in the absence of such express provisions, have construed the prohibitive terms of the statute to apply to game lawfully taken or captured in foreign

countries or other states, on the theory that such construction is necessary and expedient to carry out the legislative intent for the protection and preservation of the local game of the state. *Roth v. State*, 51 Ohio St. 209, 37 N. E. 259, 46 Am. St. Rep. 566; *Ex parte Maier*, 103 Cal. 476, 37 Pac. 402, 42 Am. St. Rep. 129; *Stevens v. State*, 89 Md. 669, 43 Atl. 929; *Magner v. People*, 97 Ill. 320. In the *Magner Case* the learned justice cogently expresses the reason for this construction of game statutes: "It is obvious that the prohibition of all possession and sale of such wild fowls or birds during the prohibitive season would tend to their production, in excluding the opportunity for the evasion of such law by clandestinely taking them, when recently killed or captured here, beyond the state and afterwards bringing them into the state for sale, or by other subterfuges and evasions." It would not be profitable to attempt to reconcile the conflicting views of the courts on this subject. Those interested will find the cases on both sides collated in *Ex parte Maier*, 42 Am. St. Rep. 138, and *Davis v. McNair*, 21 Cent. Law J. 480.

Looking to the terms of the act itself, we are clear that it was the legislative purpose to prohibit the sale in this state at any time of any of the game or animals enumerated, regardless of the place where killed or captured. The language of the act is explicit, and leaves no room for construction, and this court is not at liberty, even if it felt disposed to do so, to place a limitation on the meaning of the Legislature not authorized by the act itself, and directly contrary to its express terms. If the lawmakers intended to make it lawful to allow game to be brought into this state and sold here, they would have so declared, for it was a matter of great importance. If they had intended to make the possession of game in this state presumptive evidence of the fact that it was killed in this state, and place the burden of rebuttal upon the accused, they would doubtless have done so. The act of 1903 (Pen. Code 1910, § 592) did make the possession of game prima facie evidence of a violation of the law; but in the game law as enacted in 1911, which was held by this court, in the case of *Hammond v. State*, 10 Ga. App. 143, 72 S. E. 937, to have been intended by the Legislature as a substitute for all previous or existing laws on the subject, this provision was left out, and the purchase or sale, or the having in possession during the closed season, of any of the game enumerated in the act, were made specific offenses. Even if the language of the Legislature was fairly susceptible of two different constructions as to the point now under consideration, we would prefer that which excludes and prevents consequences that would be mischievous in effect or would

contravene the manifest purpose of the legislature, which was to protect and preserve the game in the state, and everything contributing thereto would seem to be within the purview of the act. Of course, there is nothing in the act which prohibits the importation of game for the purpose of propagation; indeed, the importation of game for this purpose would be in harmony with the purpose of the legislative intent, which was to preserve and increase the game in the state.

Judgment affirmed.

(11 Ga. App. 102)

LEWIS v. STATE. (No. 4,088.)

(Court of Appeals of Georgia. April 16, 1912.)

(Syllabus by the Court.)

1. CRIMINAL LAW (§§ 561, 789\*)—INSTRUCTIONS—"REASONABLE DOUBT."

There was no error in the following charge defining "reasonable doubt": "It means the doubt of a reasonable man and juror, who is honestly in search after the truth of the case, and which doubt grows out of evidence, want of evidence, or circumstances in the case." The court having instructed the jury fully and correctly upon the law relative to the prisoner's statement, the omission to state that a reasonable doubt might arise from the statement was not prejudicial; nor is the charge subject to the criticism that the jurors were permitted to consider "circumstances in the case" not developed by the evidence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1267, 1846-1849, 1904-1922, 1960, 1967; Dec. Dig. §§ 561, 789.\*]

For other definitions, see Words and Phrases, vol. 7, pp. 5958-5972; vol. 8, p. 7779.]

2. CRIMINAL LAW (§ 572\*)—ALIBI.

The following instruction was not erroneous: "When an alibi is set up by the defendant as a defense, the burden of showing the truth of the alibi rests upon the defendant. He is not bound to show the truth of alibi beyond a reasonable doubt, but to the satisfaction of the jury. He is not bound to show it by any higher proof or greater degree of evidence than is necessary to show any other material fact set up in his defense." To carry the burden of proof successfully, it is always necessary to satisfy the jury, and it is not prejudicial so to charge, when, in connection therewith, the correct rule is given in reference to the weight of the evidence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1268, 1289-1291; Dec. Dig. § 572.\*]

3. SUFFICIENCY OF EVIDENCE.

The evidence fully supports the verdict.

Error from Superior Court, Early County; W. C. Worrill, Judge.

W. J. Lewis was convicted of crime, and brings error. Affirmed.

W. W. Wright and B. R. Collins, both of Blakely, for plaintiff in error. J. A. Laing, Sol. Gen., of Dawson, and R. R. Arnold, of Atlanta, for the State.

POTTLE, J. Judgment affirmed.

(11 Ga. App. 102)

CEASAR v. STATE. (No. 4,087.)

(Court of Appeals of Georgia. April 16, 1912.)

*(Syllabus by the Court.)*

## 1. FORMER DECISION CONTROLLING.

As to the special assignments of error, this case is fully controlled by the decision in *Lewis v. State*, 74 S. E. 708, this day rendered.

## 2. SUFFICIENCY OF CHARGE—NEW TRIAL REFUSED—SUFFICIENCY OF EVIDENCE.

The judge presented to the jury clearly and fully all the material issues made by the evidence, and the excerpts from the charge objected to in the amended motion for a new trial contain no material error. The evidence supports the verdict, and no reason appears why another trial should be granted.

Error from Superior Court, Early County; W. C. Worrill, Judge.

John Caesar was convicted of crime, and brings error. Affirmed.

Byron R. Collins, of Blakely, for plaintiff in error. J. A. Laing, Sol. Gen., of Dawson, and R. R. Arnold, of Atlanta, for the State.

HILL, C. J. Judgment affirmed.

(11 Ga. App. 98)

PIRKLE v. STATE. (No. 4,086.)

(Court of Appeals of Georgia. April 16, 1912.)

*(Syllabus by the Court.)*

## 1. ROBBERY (§ 24\*)—EVIDENCE.

The evidence supports the verdict.

[Ed. Note.—For other cases, see *Robbery*, Cent. Dig. §§ 32-36; Dec. Dig. § 24.\*]

## 2. CRIMINAL LAW (§ 38\*)—AIDING AND ABETTING—DEFENSE.

Where one is present, aiding and abetting in the commission of a crime, and relies upon the defense that his presence and participation was due to coercion or compulsion by those who actually committed the offense, he must show such facts and circumstances as would indicate that he was in danger of present and immediate violence, and that he acted solely through such fear.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 43; Dec. Dig. § 38.\*]

## 3. CRIMINAL LAW (§ 59\*)—AIDING AND ABETTING—EVIDENCE.

The trial judge, with substantial fairness and accuracy, submitted to the jury the issue made by the evidence and the statement of the accused as to whether his presence and participation was voluntary or due to coercion.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 71-74, 76-81; Dec. Dig. § 59.\*]

Error from Superior Court, Hall County; J. B. Jones, Judge.

Roe Pirkle was convicted of robbery, and brings error. Affirmed.

Johnson & Johnson, of Gainesville, for plaintiff in error. Robt. McMillan, of Clarksville, for the State.

HILL, C. J. Roe Pirkle was jointly indicted with William Tumlin and Charlton Henry for robbery. On the trial they severed. Tumlin and Henry were convicted, and on

the next day Pirkle was convicted. He excepts to the refusal of his motion for a new trial.

The evidence, briefly stated, shows that the prosecutor had been to Gainesville, Ga., and had sold \$25 worth of hogs and apples, and was about 2½ miles from Gainesville on his way home, driving his wagon, when the three defendants overtook him. They were in a buggy, and Pirkle was driving the horse. Pirkle drove his buggy by the prosecutor's wagon, and immediately turned his horse and buggy in front of the prosecutor's team and stopped him, whereupon Tumlin and Henry jumped out of the buggy, one of them holding a pistol on the prosecutor, the other demanded his money, and in fear of his life he delivered up his money. While the act of robbery was taking place, Pirkle remained in the buggy, holding the horse, and did not take any active part in the actual robbery. As soon as the robbery was consummated, the three men drove off in the buggy, leaving the prosecutor in the road. It was also shown that the three defendants stopped at a farmer's house and inquired as to how long it had been since the prosecutor passed with his wagon; Pirkle participating in the inquiry. This witness also testified that Pirkle asked him for a pistol, stating that he was with "a rough crowd" and wanted a pistol. The accused, in his statement, claimed that he had nothing to do with the robbery; that the other two men compelled him to go with them, and that he would have run off and left them, but was afraid they would shoot him.

[1] It is insisted that there was no evidence indicating that he had participated in the commission of the crime; that at most the evidence showed that he was simply present, but not in any manner aiding or abetting the other two men in the robbery. There was some evidence from which the jury might have inferred that the plaintiff in error was not only present at the time the crime was committed, but that he also aided and abetted his two companions. His act of intercepting the team of the prosecutor by driving immediately in front of him, his remaining in the buggy holding the horse, and driving off with the other two after the commission of the crime, and his previous inquiry as to how long it had been since the prosecutor passed the farmhouse, were circumstances from which the jury might have inferred his criminal participation. It is immaterial whether his participation was as a principal in the first degree or in the second degree. His statement that he was coerced in what he did by the other two men, and was forced to remain with them, was entirely a question for the jury, and his statement was not accepted as the truth. On the general grounds, therefore, we conclude that the evidence was sufficient to warrant the verdict of guilty.

1. After the accused had made his state-

ment to the jury, the court allowed the state to introduce, over the defendant's objection, the witness mentioned above, who testified in reference to the conversation that took place between him and the three men when they were apparently following the prosecutor; the objection being that this was not in rebuttal of the statement, and that the solicitor general did not request the court to allow him to introduce the witness on the ground that he had forgotten or overlooked the testimony. The evidence seems to have been in rebuttal of the statement. However, the question of allowing additional evidence and reopening the case for that purpose at any stage of the trial is a matter in the discretion of the trial judge.

[2] 2. The following excerpt from the judge's charge to the jury is objected to: "I charge you that, if a man is compelled to do a thing that he ordinarily would not do, the evidence and circumstances must convince the jury that the man acted in what he did do through fear." It is insisted that this was placing "a too heavy burden of proof" upon the accused, as he was only required to raise in the minds of the jury a reasonable doubt as to whether or not he voluntarily participated in the offense, or was coerced or compelled to do so against his will. The language of the judge is inapt, and probably subject to the criticism made against it; but, considered in the light of the context of the entire charge, we do not think the error is of sufficient gravity to require the grant of a new trial. The court did charge expressly that the burden was on the state to prove to the satisfaction of the jury, beyond all reasonable doubt, that the accused did participate in the commission of the offense.

[3] 3. Objection is also made to the following excerpt from the charge: "If a man should unwillingly go into an unlawful enterprise, and engage in it or abet in it, though he himself might not point a gun or pistol, yet if he was a well-wisher to it, took part in it, and aided it, he would be just as guilty as the man who did point the pistol." It is claimed that this charge was argumentative; that it in effect told the jury that, if the accused was simply a well-wisher, this would be sufficient to make him guilty of participation in the crime; that it was too general and indefinite, and did not with sufficient clearness define to the jury the meaning of the words "aid and abet"; that it was the duty of the court to have told the jury explicitly that the accused could not be guilty unless he did some overt act in the commission of the crime. The use of the word "well-wisher" would have been improper, if unexplained in the context. Mere presence or acquiescence in, or silent consent to, the commission of a crime, would not be sufficient to prove that one was an actual participant in the commission of the offense,

unless his presence was such as to encourage those who did participate in the crime, or unless he was aiding and abetting in the commission of the crime by keeping watch while his companions actively committed the offense. Keeping watch, where several join together to commit a crime, makes the watcher a principal in the second degree; and in this case, if the jury believed that the accused did nothing more than to stand by, holding the horse and buggy, so that his confederates might have a convenient opportunity of escape after the commission of the crime, they would have been authorized to find that he was aiding and abetting. But, when we consider the context in which this word "well-wisher" was used, it is manifest that the jury could not have been misled by it; for the charge clearly instructed them that the evidence must show that the accused took part in the commission of the crime and aided in it, although he did not actually point the pistol and demand the money, before he could be found guilty.

We do not think the charge is subject to the other objections made to it, but that it substantially stated the law correctly.

Judgment affirmed.

(11 Ga. App. 66)

YOUMANS et al. v. MOORE. (No. 3,839.)  
(Court of Appeals of Georgia. April 16, 1912.)

(Syllabus by the Court.)

1. LIMITATION OF ACTIONS (§§ 54, 157\*)—RUNNING ACCOUNT—PAYMENT—APPLICATION.

In mutual running accounts, where there has been no accounting or liquidation of the indebtedness, or other like act, by which a new point was established from which the statute could begin to run, none of the accounts would be barred until the last item charged is barred. *Madden v. Blain*, 66 Ga. 52; *Gunn v. Gunn*, 74 Ga. 568, 58 Am. Rep. 447; *Walker v. Mercer*, 41 Ga. 44. In the absence of direction, creditors have the right to apply payments to the oldest item of indebtedness, so as to avoid the bar of the statute of limitations. *Hobbs v. Crawford*, 4 Ga. App. 585, 62 S. E. 157.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 295-298, 631-634, 636; Dec. Dig. §§ 54, 157.\*]

2. EVIDENCE (§ 596\*)—INSTRUCTIONS—BURDEN OF PROOF.

In a civil case it is improper and misleading to instruct the jury that the burden of proof is on the party asserting a fact, to carry the burden to a "moral certainty." The burden is successfully carried when the facts asserted are established by a preponderance of the evidence to the satisfaction of the jury. *Civil Code* 1910, §§ 5730, 5731; *Supreme Conclave v. Wood*, 120 Ga. 338, 47 S. E. 940. Where the material issues are close under the evidence, such erroneous instruction requires a new trial.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2446-2448; Dec. Dig. § 596.\*]

3. SET-OFF AND COUNTERCLAIM (§ 44\*)—ACTION AGAINST FIRM—INDIVIDUAL DEBTS OF PLAINTIFF.

"The debt of a firm is the debt of each of its members." Therefore, where a firm is sued on a note made by the firm, and each individual member of the firm is served, the right of set-

off would exist in favor of the individual members for indebtedness due by the plaintiff to them, as well as for indebtedness due by the plaintiff to the firm.

[Ed. Note.—For other cases, see Set-Off and Counterclaim, Cent. Dig. §§ 82-99; Dec. Dig. § 44.\*]

#### 4. APPEAL AND ERROR (§ 1078\*)—REVIEW—ABANDONMENT OF GROUNDS OF ERROR.

Grounds of error, not covered by the brief or the argument, will be treated as abandoned. The general statement in the brief that grounds not referred to or argued are nevertheless not abandoned will not be sufficient to change the rule above announced. Courts of review have the right to expect assistance from counsel by citation of authority or argument, and will be apt to accept the inference that the lack of interest by counsel is due to a conviction of the lack of merit.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4256-4261; Dec. Dig. § 1078.\*]

Error from City Court of Swainsboro; H. R. Daniel, Judge.

Action by D. J. Moore against E. S. Youmans and others. Judgment for plaintiff, and defendants bring error. Reversed.

Williams & Bradley, of Swainsboro, for plaintiffs in error. Smith & Kirkland, of Swainsboro, for defendant in error.

HILL, C. J. Judgment reversed.

(11 Ga. App. 89)

SMITH v. STATE. (No. 4,064.)

(Court of Appeals of Georgia. April 16, 1912.)

(Syllabus by the Court.)

#### 1. JURY (§ 56\*)—CHALLENGES—GROUNDS.

The right to claim exemption from jury service, allowed to a minister of the gospel, is a privilege, and affords no ground for challenge. Penal Code 1910, § 871.

[Ed. Note.—For other cases, see Jury, Cent. Dig. § 264; Dec. Dig. § 56.\*]

#### 2. JURY (§ 126\*)—CHALLENGES—GROUNDS.

Nor is it ground for challenge, after a jury has been selected in a misdemeanor case, that one of the jurors whose name appears on the list was absent from the courtroom while the jury was being selected, and the accused was unable to view the juror before selecting the jury. In a misdemeanor case, the practice of striking a jury from a list is the legal equivalent for challenging. O'Byrne v. State, 29 Ga. 36.

[Ed. Note.—For other cases, see Jury, Cent. Dig. § 555; Dec. Dig. § 126.\*]

#### 3. INTOXICATING LIQUORS (§ 139\*)—OFFENSES—KEEPING LIQUORS AT PLACE OF BUSINESS.

To an accusation charging the keeping of intoxicating liquor at a place of business, it is no defense that such liquor has not been sold by the accused; and evidence tending to negative the sale is irrelevant, especially so when it is not denied that the liquor was kept at the place claimed by the state to be the place of business of the accused.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 149; Dec. Dig. § 139.\*]

#### 4. CRIMINAL LAW (§ 880\*)—EVIDENCE—CHARACTER OF ACCUSED—DOCUMENTARY EVIDENCE.

The accused having put his character in issue, evidence that he had been convicted of

the offense of riot was admissible; and the record of his conviction was not inadmissible, either because there was no affirmative proof of the identity with the accused of the person convicted (the name being the same), or upon the ground that the prosecutor, and not the solicitor of the city court, had signed the accusation.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 843, 845; Dec. Dig. § 380.\*]

#### 5. INTOXICATING LIQUORS (§ 233\*)—CRIMINAL PROSECUTIONS—ADMISSIBILITY OF EVIDENCE.

Evidence was relevant that a room in which intoxicating liquor was found, and which was maintained by the accused, was under the same roof as another room, in which the accused conducted a grocery business; and this evidence, in connection with other facts proved, authorized the conviction.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. §§ 293-297, 298½; Dec. Dig. § 233.\*]

#### 6. CRIMINAL LAW (§ 1152\*)—TRIAL—CONDUCT IN GENERAL—VIEW BY JURY.

Even if the judge has the power to permit the jury in a criminal case to leave the courtroom and view the place where the crime is alleged to have been committed, his refusal to do so is not a matter for review by this court. Johnson v. Winship Machine Co., 108 Ga. 554, 33 S. E. 1013; County of Bibb v. Reese, 115 Ga. 346, 41 S. E. 636.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3053-3057; Dec. Dig. § 1152.\*]

#### 7. WITNESSES (§ 246\*)—EXAMINATION—QUESTIONS BY JUDGE.

The trial judge may, in order to elicit the truth, propound to a witness a leading question, provided in so doing he does not violate the provisions of section 1058 of the Penal Code of 1910, forbidding the judge to express or intimate any opinion as to what has or has not been proved. The questions propounded by the judge in the present case were not objectionable.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 852-857; Dec. Dig. § 246.\*]

#### 8. CRIMINAL LAW (§ 1169\*)—HARMLESS ERROR—ADMISSIBILITY OF EVIDENCE.

It being undisputed that intoxicating liquor was found at the defendant's place of business, it was not prejudicial error to admit evidence that at the same time and place several dozen bottles of beer of the kind generally sold in "near beer" saloons were also found, even though it was not shown that the beer was intoxicating.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3137-3143; Dec. Dig. § 1169.\*]

#### 9. INTOXICATING LIQUORS (§ 139\*)—OFFENSES—KEEPING LIQUOR—"PLACE OF BUSINESS"—"AT THEIR PLACE OF BUSINESS."

This court reaffirms the ruling in Jenkins v. State, 4 Ga. App. 859, 62 S. E. 574, that "the phrase 'at their place of business,' appearing in the general prohibition statute of 1907 (Acts 1907, p. 81, § 1), includes in its meaning the immediate room or place in which the business in question is conducted, also any nearby room or place used by the proprietor in connection with the business or in such a relation to the actual 'place of business' as to indicate that the nearby room, compartment, etc., is a convenient place which the proprietor would probably use for keeping therein such liquors as he might desire to furnish to others for the purpose of inducing trade, or for keeping therein liquors intended

for unlawful sale under cover of the business carried on in the main place." It was not error to instruct the jury in the language above quoted.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. § 149; Dec. Dig. § 139.\*

For other definitions, see *Words and Phrases*, vol. 1, pp. 593-599; vol. 8, p. 7585; vol. 6, pp. 5390-5392.]

**10. INTOXICATING LIQUORS (§ 239\*)—CRIMINAL PROSECUTIONS—INSTRUCTIONS.**

The following instruction was not one of which the accused can justly complain: "If you find that the place, out there, was so nearly connected with the business of the defendant as to convince you that it was used in conjunction with the business, then that would be such a place of business as contemplated by the law; if it is not so shown, then it would not be."

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. §§ 331-347; Dec. Dig. § 239.\*]

**11. CRIMINAL LAW (§ 828\*)—TRIAL—INSTRUCTIONS—NECESSITY FOR REQUEST.**

The case not being one dependent solely upon circumstantial evidence, it was not erroneous, in the absence of a timely written request, to fail to charge the rules of law relating to this character of evidence.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 2007; Dec. Dig. § 828.\*]

**12. INTOXICATING LIQUORS (§ 236\*)—CRIMINAL PROSECUTIONS—SUFFICIENCY OF EVIDENCE.**

No error of law was committed, and the evidence fully supports the verdict.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. §§ 300-322; Dec. Dig. § 236.\*]

**Error from City Court of Brunswick; D. W. Krauss, Judge.**

Raiford Smith was convicted of keeping on hand intoxicating liquors at his place of business, and brings error. Affirmed.

Francis H. Harris, of Brunswick, for plaintiff in error. Ernest Dart, Sol., of Brunswick, for the State.

**POTTLE, J.** The accused was convicted of having and keeping on hand intoxicating liquors at his place of business, and excepts to the overruling of his motion for a new trial.

[12] The chief contention of counsel for the plaintiff in error is that the evidence demanded a verdict of not guilty. Taking the evidence most strongly for the state, as it must be taken in this court, the facts were as follows: The accused was in possession of four rooms, all under one roof, and referred to in the evidence as rooms A, B, C, and D. A was a front room, in which the accused conducted a grocery business. In the rear of A was a door leading into B. C was entered by means of a door from B, and another door connected C with D, which was a small room about 4½ by 8 feet. A restaurant had been conducted by the accused in one of the rear rooms of these apartments, but was not in operation when the arrest was made, though a cook stove, a little

table, and some chairs were in the room. Several dozen bottles of "Magnolia beer" were found in an ice box in room C, and in D were found 15 bottles of rye whisky, 6 bottles of corn, and 1 of gin. Some of the whisky was in a satchel, and some between the mattress and springs of a cot. The mattress was old and dirty, and there were no sheets, pillows, or bedding of any sort. The accused resided across the block from his store. He admitted ownership of the liquor, but claimed that he bought it for his personal use, and that he did not keep it at his place of business, but kept it in a room used by him as a place to sleep, and where he did sleep occasionally, so as to be near his business.

We cannot agree with his counsel that the conviction was not authorized. Manifestly rooms B, C, and D were convenient adjuncts to room A, wherein the grocery business was being conducted. Certainly the place was not his residence, because he lived elsewhere. It is immaterial that the beer may not have been shown to be intoxicating. There was too much liquor that would produce drunkenness. The circumstances were too suspicious. The cot and dirty mattress were but a flimsy pretext. The presence of the stove, chairs, and table, all indicate that the rooms B and C and D were maintained as a part of the establishment, and as a convenient place in which to keep intoxicating liquors for unlawful use.

[9] In this connection we reaffirm the decision in *Jenkins v. State*, 4 Ga. App. 859, 62 S. E. 574, which is controlling here. See, also, *Bashinski v. State*, 5 Ga. App. 3, 62 S. E. 577. The judge properly gave in charge the excerpt from the *Jenkins* Case, quoted in the ninth headnote of this decision. It is not so much the kind of place as the use to which it is put that determines whether it is a "place of business" within the meaning of the prohibition law. *Lyons v. State*, 6 Ga. App. 248, 64 S. E. 713. No definite rule can be laid down as applicable to all cases; but the safe course is not to have "in" or "at" or "near" or "around" one's place of business intoxicating liquors of any description. This court is not disposed to indulge in refinements of logic or subtleties of definition, to aid in evasion of the prohibition law. One charged with a violation of this act, like every other person charged with crime, is entitled to a fair and impartial trial, and it is the bounden duty of the trial court and this court to see that he gets it. But the declared policy of the state, as announced in the statute, should meet with the vigorous and hearty co-operation of the judicial department. With the wisdom of the law we have, as judges, no concern. Rigid enforcement of the law is in accord with the settled policy of the state, and this court will lend its aid by giving such an interpreta-



tion to the act as will effectuate its declared purpose.

The conviction in this case was fully authorized. There are numerous assignments of error. Such of them as require special notice are dealt with in the headnotes which do not need elaboration.

[11] The case was not one in which the court was bound to charge without request the rules of law relating to circumstantial evidence, even if the conviction can be properly said to rest even in part upon this character of evidence. *Harvey v. State*, 8 Ga. App. 660, 70 S. E. 141. The trial was free from prejudicial error.

Judgment affirmed.

(11 Ga. App. 87)

**CENTRAL OF GEORGIA RY. CO. v. CHAS. WACHTEL'S SON.** (No. 3,985.)

(Court of Appeals of Georgia. April 16, 1912.)

*(Syllabus by the Court.)*

**EXEMPTIONS (§ 48\*)—WAGES OF LABORER.**

The wages of one employed as a gatekeeper at a railway depot, whose duties consist in standing at the gate and letting in persons who have tickets and keeping out those who do not, in assisting passengers to the train and helping lady passengers with their baggage, in occasionally assisting in the baggage room, and in keeping the stoves filled with coal in the winter and the coolers with water, are exempt from the process of garnishment, though, as a part of his duties, he occasionally reports infractions of the law in and about the depot and causes arrests to be made. In *Tabb v. Mallette*, 120 Ga. 97, 47 S. E. 587, 102 Am. St. Rep. 78, the duties of the laborer were mainly supervisory in their nature, requiring intellectual skill, and the performance of manual labor was only incidental; whereas, in the present case, the laborer's duties were chiefly of a physical nature and only incidentally involved the exercise of mental ability.

[Ed. Note.—For other cases, see Exemptions, Cent. Dig. §§ 64-72; Dec. Dig. § 48.\*]

Error from Superior Court, Bibb County; W. H. Felton, Judge.

Action by Chas. Wachtel's Son against the Central of Georgia Railway Company. Judgment for plaintiff, and defendant brings error. Reversed.

West & Dasher, Mallary & Wimberly, and R. C. Jordan, all of Macon, for plaintiff in error. O. C. Hancock, of Macon, for defendant in error.

**POTTLE, J.** Judgment reversed.

(11 Ga. App. 96)

**MATHIS v. STATE.** (No. 4,079.)

(Court of Appeals of Georgia. April 16, 1912.)

*(Syllabus by the Court.)*

**1. DRUNKARDS (§ 11\*)—INTOXICATION ON HIGHWAY—INFORMATION.**

The description of the public road was sufficiently specific and definite. It was necessary that the accused be apprised of the public road upon which he was accused of being

intoxicated, but this requirement was complied with when the accused was informed that it was a public road passing the residences of two named landowners and citizens.

[Ed. Note.—For other cases, see Drunkards, Cent. Dig. §§ 12-18; Dec. Dig. § 11.\*]

**2. DRUNKARDS (§ 11\*)—INTOXICATION ON HIGHWAY—EVIDENCE.**

The fact that a road is a public highway may be proved in either of four ways. *Johnson v. State*, 1 Ga. App. 195, 58 S. E. 265. The evidence of dedication in the present case is clear and direct, and, in addition, the circumstance that the road was worked by convicts under the direction of the county authorities is sufficient to authorize the inference that the road had been formally laid out and adopted as a public road by the county authorities.

[Ed. Note.—For other cases, see Drunkards, Cent. Dig. §§ 12-18; Dec. Dig. § 11.\*]

**3. SUFFICIENCY OF EVIDENCE.**

The evidence authorized the conviction.

Error from City Court of Fitzgerald; E. Wall, Judge.

Henry Mathis was convicted of drunkenness on a public road, and brings error. Affirmed.

Elkins & Wall, of Fitzgerald, for plaintiff in error. A. J. McDonald, Sol., of Fitzgerald, for the State.

**RUSSELL, J.** Judgment affirmed.

(11 Ga. App. 65)

**SMITH v. REINHART.** (No. 8,835.)

(Court of Appeals of Georgia. April 16, 1912.)

*(Syllabus by the Court.)*

**REVIEW ON APPEAL.**

No specific error of law is complained of, and the undisputed evidence demanded the finding excepted to.

Error from City Court of Dublin; K. J. Hawkins, Judge.

Action between T. D. Smith and G. H. Reinhart. From the judgment, Smith brings error. Affirmed.

R. Earl Camp, of Dublin, for plaintiff in error. W. C. Davis, of Dublin, for defendant in error.

**HILL, C. J.** Judgment affirmed.

(11 Ga. App. 65)

**E. E. FORBES PIANO CO. v. OLIVER.** (No. 3,832.)

(Court of Appeals of Georgia. April 16, 1912.)

*(Syllabus by the Court.)*

**1. EVIDENCE (§ 353\*)—DOCUMENTARY—BILL OF SALE.**

An instrument purporting to be a bill of sale with reservation of title, to be valid as against third parties, must be executed in the presence of, and attested by and approved before, one of the officials named in section 3257 of the Civil Code of 1910, and must also be recorded within 30 days from its date. In this case the instrument upon which the suit was predicated, not having been executed or recorded as required by the statute, was properly excluded from evidence; the defendant being a third party, and there being in the evi-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

dence nothing to impeach the bona fides of her title or possession.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1404-1431; Dec. Dig. § 353.\*]

**2. TROVER AND CONVERSION (§ 66\*)—EVIDENCE—NONSUIT.**

The judgment of nonsuit was properly awarded, since the plaintiff failed to make out a prima facie case by showing ownership and right to possession of the property for the recovery of which he instituted his action in trover.

[Ed. Note.—For other cases, see Trover and Conversion, Cent. Dig. §§ 288-294; Dec. Dig. § 66.\*]

Error from City Court of Bainbridge; W. V. Custer, Judge, pro hac.

Action by the E. E. Forbes Piano Company against Rosebud Oliver. Judgment for defendant, and plaintiff brings error. Affirmed.

J. C. Hale, of Bainbridge, for plaintiff in error. Roscoe Luke, of Thomasville, and M. E. O'Neal, of Bainbridge, for defendant in error.

HILL, C. J. Judgment affirmed.

POTTLE, J., disqualified.

(11 Ga. App. 66)

**WILLIAMS v. ALDRIDGE. (No. 3,848.)**

(Court of Appeals of Georgia. April 16, 1912.)

*(Syllabus by the Court.)*

**1. REVIEW ON APPEAL.**

The instructions to the jury fully, fairly, and accurately presented the issues made by the pleadings and evidence, and the assignments of error, as to excerpts from the charge, on the ground that the contentions of the defendant were not correctly stated, are entirely without merit.

**2. PAYMENT OF NOTES.**

This was a suit on promissory notes, and the only issue was one of payment. This issue was fairly presented to the jury in the charge, and the evidence fully supports the verdict in favor of the plaintiff.

Error from City Court of Baxley; A. V. Sellers, Judge.

Action by Stephen Aldridge against J. A. Williams. Judgment for plaintiff, and defendant brings error. Affirmed.

W. W. Bennett, of Baxley, for plaintiff in error. Parker & Highsmith, of Baxley, for defendant in error.

HILL, C. J. Judgment affirmed.

(11 Ga. App. 93)

**ALBERT v. STATE. (No. 4,071.)**

(Court of Appeals of Georgia. April 16, 1912.)

*(Syllabus by the Court.)*

**FALSE PRETENSES (§ 14\*)—FRAUDULENT REPRESENTATIONS—EVIDENCE.**

A representation, although false and fraudulent, and made with intent to cheat and defraud, does not constitute the statutory of-

fense of cheating and swindling, unless the person to whom the representation was made was in fact cheated and defrauded thereby. Construed by the foregoing legal rule, the accusation failed to show the commission of any offense, and the demurrer should have been sustained.

[Ed. Note.—For other cases, see False Pretenses, Cent. Dig. § 14; Dec. Dig. § 14.\*]

Error from City Court of Fitzgerald; E. Wall, Judge.

Wade Albert was convicted of swindling, and brings error. Reversed.

Elkins & Wall, of Fitzgerald, for plaintiff in error. A. J. McDonald, Sol., of Fitzgerald, for the State.

HILL, C. J. Wade Albert was convicted in the city court of Fitzgerald on an accusation charging him with the offense of cheating and swindling. The accusation charged that, "with intent to cheat and defraud the Josey Shoe & Clothing Company, the said Wade Albert did falsely and fraudulently represent to E. E. Roach, a member of the partnership firm of the Josey Shoe & Clothing Company, that he did not owe anything on a certain gold watch then in his possession, and that he owed nothing to the commissary of the receivers of the Atlanta, Birmingham & Atlantic Railway Company, and did then and there, by said false and fraudulent representation, induce said E. E. Roach, a member of the partnership firm of the Josey Shoe & Clothing Company, to sell to him, the said Wade Albert, the following merchandise, to wit: 1 pr. shoes of the value of \$4, one pr. sox of the value of 25 cents, one pair of pants of the value of \$5, one hat of the value of \$5, one pr. gloves of the value of \$1, aggregating \$15.25, the said representation being wholly false, and having been made falsely and fraudulently and with intent to deceive, and did deceive, the said E. E. Roach, a member of the partnership firm of the Josey Shoe & Clothing Company, and the said Roach having relied upon the said false and fraudulent representations as being true, and, upon the faith of said false and fraudulent representation, sold to the said Wade Albert the aforesaid merchandise for the total sum of \$15.25, and was thereby defrauded and cheated in the sum of \$15.25, all to the loss and damage of the said Josey Shoe & Clothing Company." The trial judge overruled a general demurrer to the accusation, and to this judgment exception is taken.

We think the demurrer should have been sustained, and the accusation quashed. The accusation is very loosely drawn, and sets forth no offense. Both counsel for the plaintiff in error and the state seem to concur in the view that the accusation was framed under section 719 of the Penal Code of 1910, which is the general or omnibus section, covering all other offenses of cheating and

swindling not specifically provided for. It is somewhat difficult to tell, from the allegations of the accusation, whether this is true or not. It would seem to fall within the specific offense as covered by section 703 of the Penal Code of 1910, making it a misdemeanor to fraudulently obtain credit by false representations as to respectability, wealth, or mercantile correspondence and connections. The allegations of the accusation fail to show how the Josey Shoe & Clothing Company was cheated or defrauded by reason of the representations alleged to have been false. In fact, the accusation fails to allege that the firm or copartnership was defrauded or cheated, but that only E. E. Roach was defrauded and cheated by the false representations.

However this may be, it is clear that, legally speaking, the representations could not have defrauded and cheated either the firm or Roach as a member of the firm. The gold watch, which the accused is alleged to have stated that he had fully paid for, could not have been the legal basis for any credit extended to him, because it could not have been seized or sold for his debts, it being exempt as a part of his wearing apparel from levy and sale; and the additional representation alleged to have been made by the accused, that he did not owe the commissary of the receivers of the Atlanta, Birmingham & Atlantic Railway Company, does not fall within the category of deceitful means or artful practices, within the meaning of section 719, *supra*. Even if the representation was false, unless the person relying upon it was damaged thereby, it would be in a legal sense harmless; and there is no allegation in the accusation which discloses how this general statement could have resulted, even if false, to the injury of the party to whom it was made. The allegations of the accusation were palpably insufficient to show the commission of any offense, and the demurrer should have been sustained.

Judgment reversed.

Ben Ponder was convicted of crime, and brings error. Reversed.

Henry O. Farr, of Barnesville, for plaintiff in error. E. M. Owen, Sol., of Zebulon, for the State.

RUSSELL, J. The evidence authorized the conviction of the plaintiff in error, and for that reason any discussion of the usual grounds of the motion for new trial is useless. However, a special assignment of error presents a point of great importance, and the determination of the question presented, in our judgment, requires the grant of a new trial. When the jury returned the verdict of guilty, the defendant demanded, as was his right, that the jury be polled, and two of the jurors answered that, while they consented to the verdict, they did not do so freely and voluntarily. In our judgment the court should have instructed the jury to further consider the case, and if a voluntary and unanimous agreement could not be reached a mistrial should have been declared. Under our law no one can be deprived of his life, liberty, or property, except upon the unanimous verdict of the jury impaneled to pass upon the issue. The identical question which arises in this case was not presented in any of the prior decisions of this court or of the Supreme Court which have been cited. We have found no ruling in this state which would have the effect of denying one accused of crime the right to demand that he be deemed innocent until his guilt was established to the satisfaction of the entire jury impaneled to try him. Any diminution of this right would work a great innovation in jury trials, and in our judgment seriously impair the right of trial by jury.

The ruling in *Dyson v. State*, 72 Ga. 206, is not in point, because there was in that case merely an effort on the part of the jurors to impeach their finding by attempting to show that the verdict was made under a misapprehension as to the effect of recommendation to mercy. The rule is uniform that the jurors will not be heard to impeach a verdict in which they participate. In the present case the statement of the juror was made, on a poll of the jury, that the verdict, though agreed to by him, was not freely and voluntarily made. The verdict was not complete, because the statement was made upon the poll of the jury. It was not an attempt to impeach a verdict, but a declaration going to show that no verdict had actually been reached. We were at first inclined to think that the decision of the present case was controlled by the ruling in the case of *Parker v. State*, 81 Ga. 332, 335, 6 S. E. 600, 601, in which the Supreme Court said: "There was no error in overruling the motion upon the sixth ground thereof, to wit, that one of the jurors, when polled, answered that he had agreed to the verdict, but had agreed to

(11 Ga. App. 60)

PONDER v. STATE. (No. 3,689.)

(Court of Appeals of Georgia. April 16, 1912.)

(Syllabus by the Court.)

CRIMINAL LAW (§ 872½\*)—VERDICT—POLLING JURY.

A juror who has agreed to a verdict may dissent from it at any time before it has been received by the court. A verdict should not be received when, upon the defendant's exercise of his right to poll the jury, it appears that a juror has not freely and voluntarily agreed to the finding as reported to the court, or that for any reason the verdict read is not the unanimous conclusion of the jury.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 872½.\*]

Error from City Court of Zebulon County; E. F. Dupree, Judge.

it reluctantly. If a juror agrees to a verdict, that in law is sufficient. If verdicts are to be set aside because some of the jurors agree to them reluctantly, very few verdicts in important cases would be allowed to stand. The law does not inquire as to the degree of reluctance or willingness with which a juror's mind assents to the verdict. Its only inquiry is: Does he agree to it? If he does, that is sufficient." However, upon more mature consideration, and upon a reading of the opinion in *State v. Austin*, 6 Wis. 205, we are convinced that there is a great difference between agreeing reluctantly to a verdict and so unwillingly consenting to a verdict as to seize the first proper opportunity to declare that fact. To agree to a verdict reluctantly involves the idea that, however reluctant the jury may be, and no matter to what the reluctance may be due, the feeling is one of internal consciousness within the juror's own control, and the issue is finally determined (no matter how reluctantly) by juror himself. But when the juror states that his assent to a verdict of guilty was not freely nor voluntarily given, it is necessarily to be implied that his consent is due to external pressure, and that his concurrence is not due to his own volition, but to the volition of another substituted in place of his own.

The jurors in the present case had no opportunity of explaining to the court the acts or conduct of the jury, or his own act in the jury room; so neither the trial judge nor this court has any means of knowing exactly what was meant by the statement that he did not freely and voluntarily consent to the verdict. But, *prima facie*, this statement is enough to raise the inference that the finding of the jury was not concurred in by each of the jurors, and this being true there was no legal verdict.

Judgment reversed.

POTTLE, J., not presiding.

(11 Ga. App. 79)

MITCHELL et al. v. R. J. CRAIG & CO.  
(No. 3,946.)

(Court of Appeals of Georgia. April 16, 1912.)

(*Syllabus by the Court.*)

**1. PARTNERSHIP (§ 35\*)—EXISTENCE—ESTOPPEL TO DENY.**

Where one procures an extension of credit to a partnership of which he, by his conduct, admissions, or otherwise, holds himself out as a member, he is estopped, as against the creditor, to deny the partnership relation and set up nonliability for the debt as a member of the putative firm. *Mims v. Brook*, 3 Ga. App. 247, 59 S. E. 711.

[Ed. Note.—For other cases, see *Partnership*, Cent. Dig. § 50; Dec. Dig. § 35.\*]

**2. NEW TRIAL (§ 108\*)—GROUNDS—NEWLY DISCOVERED EVIDENCE—ADMISSIBILITY OF EVIDENCE.**

Upon the principle stated in the preceding headnote, the verdict against the plaintiff in error was authorized. The evidence objected to, if irrelevant, was not prejudicial. The alleged newly discovered evidence tended only to disprove the existence of a partnership in fact, and did not negative the existence of facts raising an estoppel upon the defendant to deny the partnership. The verdict was right, and will not be disturbed.

[Ed. Note.—For other cases, see *New Trial*, Cent. Dig. §§ 226, 227; Dec. Dig. § 108.\*]

Error from City Court of Atlanta; H. M. Reid, Judge.

Action by R. J. Craig & Co. against Pete Mitchell and others. Judgment for plaintiffs, and defendants bring error. Affirmed.

F. E. Radensleben and Malvern Hill, both of Atlanta, for plaintiffs in error. Moore & Pomeroy and W. W. Hood, all of Atlanta, for defendants in error.

POTTLE, J. Judgment affirmed.

(11 Ga. App. 92)

BOGGS v. STATE. (No. 4,069.)

(Court of Appeals of Georgia. April 16, 1912.)

(*Syllabus by the Court.*)

**1. INDICTMENT AND INFORMATION (§ 191\*)—OFFENSE CHARGED—SEDUCTION—CONVICTION OF FORNICATION.**

Following the decision in *Hopper v. State*, 54 Ga. 389, under an indictment for seduction by promise of marriage, the accused may be convicted of fornication, if it appear from the evidence that he and the female were both unmarried, even though it be not affirmatively alleged in the indictment that the defendant is a single man. It follows that evidence that the accused was unmarried when the act of sexual intercourse was committed is not inadmissible, though this fact be not alleged in the indictment. *Bennett v. State*, 103 Ga. 66, 29 S. E. 919, 68 Am. St. Rep. 77, and similar cases hold merely that the proof must show that both of the parties to the criminal act were unmarried, and do not conflict with the present ruling.

[Ed. Note.—For other cases, see *Indictment and Information*, Cent. Dig. §§ 604-621; Dec. Dig. § 191.\*]

**2. REVIEW ON APPEAL.**

The evidence was sufficient to authorize the verdict.

Error from Superior Court, Floyd County; John W. Maddox, Judge.

Charles Boggs was convicted of crime, and brings error. Affirmed.

Moses Wright and M. B. Eubanks, both of Rome, for plaintiff in error. John W. Bale, Sol. Gen., of La Fayette, for the State.

POTTLE, J. Judgment affirmed.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

(11 Ga. App. 74)

DE LOACH et al. v. KICKLIGHTER et al.  
(No. 3,936.)

(Court of Appeals of Georgia. April 16, 1912.)

*(Syllabus by the Court.)***1. APPEAL AND ERROR (§ 627\*)—RECORDS—TRANSMISSION TO APPELLATE COURT—EFFECT OF DELAY.**

Following the decision of this court in *Easterling v. State*, 9 Ga. App. 464, 71 S. E. 774, and decisions of the Supreme Court therein cited, where it appears that the clerk of the trial court has failed to transmit to the Court of Appeals, within the time prescribed by law, the bill of exceptions and the transcript of the record, and the certificate of the clerk of the trial court shows that an attorney for the plaintiff in error "has been the cause of the delay by consent, direction, or procurement of any kind," the writ of error will be dismissed.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 2744-2749, 3146; Dec. Dig. § 627.\*]

**2. APPEAL AND ERROR (§ 627\*)—RECORDS—TRANSMISSION TO APPELLATE COURT—EFFECT OF DELAY.**

The bill of exceptions was filed in the trial court December 1, 1911, and in the office of the clerk of the Court of Appeals on January 3, 1912. The transcript of the record was certified on January 1, 1912, and reached the office of the clerk of this court on January 3, 1912. The clerk of the trial court certifies that "the reason that the record in the within case was not sent up earlier is because on the day on which the bill of exceptions was filed the attorneys for the plaintiff in error took the bill of exceptions and the record out of the clerk's office and kept them out until December 30, 1911." Upon these facts, the motion of the defendant in error to dismiss the writ of error must be sustained.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 2744-2749, 3128; Dec. Dig. § 627.\*]

Error from City Court of Statesboro; H. B. Strange, Judge.

Action between C. C. De Loach and others and M. J. Kicklighter and others. From the judgment, De Loach and others bring error. Dismissed.

J. J. E. Anderson, of Statesboro, for plaintiffs in error. Fred T. Lanier, of Statesboro, for defendants in error.

POTTLE, J. Writ of error dismissed.

(11 Ga. App. 85)

ALABAMA GREAT SOUTHERN R. CO. v. CURETON. (No. 3,980.)

(Court of Appeals of Georgia. April 16, 1912.)

*(Syllabus by the Court.)***RAILROADS (§ 428\*)—NEGLIGENT KILLING OF DOG—ACTION FOR DAMAGES.**

This case is controlled by the decisions of the Supreme Court in *Jemison v. Southwestern Railroad*, 75 Ga. 444, 58 S. E. 476, and *Strong v. Georgia Railway & Electric Co.*, 118 Ga. 515, 45 S. E. 366, holding that a suit cannot be maintained against a railroad company for the negligent killing of a dog. For this reason (though perhaps there should be legislation to the end that dogs should be

treated as property, just as other domestic animals) the court erred in charging the jury that the plaintiff was entitled to recover.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. § 1899; Dec. Dig. § 428.\*]

Error from Superior Court, Dade County; A. W. Fite, Judge.

Action by W. W. Cureton against the Alabama Great Southern Railroad Company. Judgment for plaintiff, and defendant brings error. Reversed.

Foust & Payne, of Chattanooga, Tenn., for plaintiff in error. J. P. Jacoway, of Trenton, for defendant in error.

RUSSELL, J. It appears, from the record, that the trial judge, in passing upon the defendant's motion to award a nonsuit, stated that: "The status of a dog should be determined in Georgia, as well as anything else. I am going to charge the general section, that they [meaning the railroads] must use all ordinary and reasonable care and diligence. I am going to put them upon the same basis as a hog, or other property, and get it before the court, and let it be settled. I am going to charge the presumption is against you, and when the killing is shown the presumption is that you were negligent." In accordance with this view of the case, the only question submitted by the judge to the jury was as to the value of the dog, which was shown to have been killed by a train of the defendant company.

As very clearly intimated in the opinion in *Vaughn v. Nelson*, 5 Ga. App. 105, 62 S. E. 708, this court would be inclined, if the question were an open one, to rule, as the trial judge did, that the owner of a dog, whose death was due to negligence, could recover its value. In fact, we think this is in accord with the rational trend of modern authority. If the question had not been foreclosed by adjudications of the Supreme Court, we should not reverse the judgment refusing a new trial, although the judge practically directed the verdict, because there is no special assignment of error based upon the ground that the verdict was directed. But the question is not an open one, and, under the constitutional amendment creating this court, we are bound by the decisions of the Supreme Court as precedents. It was expressly ruled in *Jemison v. Southwestern R. R.*, 75 Ga. 444, 58 S. E. 476, that the owner of a dog cannot maintain case for its unintentional, though negligent, destruction, and that, where a dog is killed by a railroad train, a presumption does not arise against the company, as in case of injury to person or property. This ruling was reaffirmed by the Supreme Court in *Strong v. Georgia Railway & Electric Co.*, 118 Ga. 515, 45 S. E. 366, and it would be needless to ask the Supreme Court to review and overrule the decision in the *Jemison Case*, because in the *Strong*

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Case, *supra*, the Supreme Court expressly refused to overrule the *Jemison* Case, for the reason that it had stood as good law since December 1, 1885, and the General Assembly had passed no act changing it.

Individually we concur in the opinion of Justice Cobb in his special concurrence in the *Strong* Case, as well as the opinion of the trial judge in the case at bar, that there is no good reason why the dog should not have the same status before the law as the hog, the barnyard fowl, or any other domestic animal usually found about homes and barns. But we are bound by the precedent, and, until the Legislature sees fit to enact a statute to the contrary of the ruling in the *Jemison* Case, there can be no recovery for destruction of a dog in Georgia, caused by negligence, unless it be so great as to amount to willfulness and wantonness. In the present case there was no evidence that any of the servants of the defendant company saw the dog, or any other circumstances to indicate that the dog was wantonly and intentionally killed, and in fact the evidence as to the speed at which the train was running shows conclusively that it would have been practically impossible to stop the train at the point where the dog was killed. And the trial judge recognized this, because he did not take the view that the killing was wanton and intentional. His view of the law was that the usual presumption of negligence attached upon proof that the dog was killed by the running of the train, and that there could be a recovery based upon negligence. The rulings in the *Jemison* and the *Strong* Cases, *supra*, are to the contrary upon the subject of the usual presumption also, and are controlling until the Legislature shall intervene and change the rule.

Judgment reversed.

(11 Ga. App. 80)

GEORGIA AGR. WORKS v. PRICE.  
(No. 3,973.)

(Court of Appeals of Georgia. April 16, 1912.)

(Syllabus by the Court.)

1. SALES (§ 340\*)—CONTRACT—AUTHORITY OF AGENT.

Where a purchaser refuses to take and pay for goods bought, the seller may, after notice to the purchaser, "store or retain the property for the vendee and sue him for the entire price."

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 927-942; Dec. Dig. § 340.\*]

2. EVIDENCE (§ 417\*)—PAROL CONTRACT BY AGENT—SALE.

Where a contract of sale provides that no agreement or stipulation made between the agent and the purchaser, not set forth in the written contract, is binding and enforceable on the seller, an agreement made by the agent with the purchaser, and not embodied in the contract of sale, that the purchaser might, under specified conditions, countermand the order for the goods, is not binding on the seller.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1874-1899; Dec. Dig. § 417.\*]

3. SALES (§ 81\*)—CONTRACT—CONSTRUCTION—"AT ONCE."

A stipulation in a contract of sale to deliver certain described machinery "at once" binds the seller to deliver without unreasonable delay.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 217-223; Dec. Dig. § 81.\*]

For other definitions, see Words and Phrases, vol. 1, pp. 610, 611.]

Error from City Court of Wrightsville; J. L. Kent, Judge.

Action by S. M. Price against the Georgia Agricultural Works. Judgment for defendant, and plaintiff brings error. Reversed.

On or about August 9, 1910, the defendant gave to the plaintiff a written order for the purchase of a ginning outfit. The order was, on August 10th, accepted in writing by the plaintiff. The contract as thus made provided that the machinery should be shipped to the defendant "at once." There was a further stipulation in the contract as follows: "There are no verbal representations or agreements not herein expressed in writing. This contract is not binding upon the Georgia Agricultural Works unless and until accepted by them, in which event it is not subject to countermand." At the time the order was given, the agent of the plaintiff told the defendant that the plaintiff did not have on hand all the machinery necessary to fill the order, but would procure some of it elsewhere and would ship the machinery after assembling it. On August 12th the defendant telegraphed to the plaintiff, countermanding the order for the machinery, and immediately the plaintiff wrote to the defendant, declining to assent to the countermand. Thereafter the plaintiff assembled the machinery, and notified the defendant that the outfit was held subject to his order, and would be stored and retained for him. The defendant having again declined to take and pay for the goods, the plaintiff brought suit for the agreed price. The defendant's answer contains a general denial of indebtedness and of the material allegations in the petition, and sets up the special defense that the plaintiff's agent who negotiated the sale represented to the defendant that his gin house was suitable for the accommodation of the machinery, with the exception of some minor changes to be made in the house; whereas, in point of fact, it was necessary to tear down and remodel the house entirely, and that the defendant tore the house down and rebuilt it at an expense of \$1,000, or other large sum.

The defense really insisted on in the brief of the defendant's counsel is not pleaded. There appears in the evidence a copy of a document, dated August 9, 1910, and signed by the agent of the plaintiff who negotiated the sale, in which document the agent agreed that the order given by the defendant for the ginning outfit would not be binding on the defendant unless another order, given at the same time by the defendant to the R. D.

Cole Manufacturing Company for an engine and boiler, should be accepted and the goods shipped. It appears from the evidence that the defendant did give an order to the Cole Manufacturing Company for an engine and boiler, and that this sale was likewise negotiated by the same person who acted as agent of the plaintiff and sold the ginning outfit. It further appears that the engine and boiler were, under the terms of the order then given, to be shipped "at once." Upon ascertaining that it would be necessary for the Cole Manufacturing Company to make the engine and boiler before they could ship them, the defendant countermanded this order, with the consent of the seller. He claims that the reason for his countermand of both of the orders was that he found that he would not be able to get the machinery in time to install it for the current ginning season.

The president of the plaintiff company testified that, immediately upon receiving the defendant's order for the ginning outfit, the plaintiff began to assemble the different parts of the machinery necessary to make up the outfit, and that the machinery was assembled and gotten together in exact conformity with the order and within 10 or 12 days after receiving the order. He further testified that there was no other contract or agreement touching the transaction between the plaintiff and the defendant concerning the original order. The plaintiff's agent who negotiated the sale testified that he was not the agent of the R. D. Cole Manufacturing Company, but that simply as a matter of convenience to the defendant, and in order to facilitate the delivery of the machinery, he took the order for the boiler and engine, and agreed with the defendant that, unless the Cole Manufacturing Company accepted this order, he would not be compelled to take and pay for the ginning outfit. In a letter from the plaintiff to the defendant, acknowledging receipt of his countermand and declining acceptance of it, the plaintiff stated that the only contingency upon which the order for the ginning machinery was not to be accepted was the refusal of the Cole Manufacturing Company to accept the order for the engine and boiler. It is undisputed in the evidence that the Cole Manufacturing Company did accept the defendant's order, and that his countermand thereof was assented to by that company.

The case was submitted to the presiding judge without the intervention of a jury, and he found in favor of the defendant. The plaintiff has brought the case here upon a direct writ of error, complaining of this judgment.

A. L. Hatcher, of Wrightsville, and O. L. Shepard, of Ft. Valley, for plaintiff in error. B. B. Blount, of Wrightsville, for defendant in error.

POTTLE, J. (after stating the facts as above). [1] 1. Where a purchaser refuses to

take and pay for goods bought, the seller has three remedies: He may retain the goods, and recover the difference between the contract price and market price at the time and place of delivery; he may sell the property, after giving due notice to the purchaser, and recover the difference between the contract price and the price on resale; or he may store or retain the property for the defendant, and sue the purchaser for the entire price. Civil Code 1910, § 4131; *Castlen v. Marshburn*, 8 Ga. App. 400, 69 S. E. 317. In the present case the plaintiff gave prompt notice to the defendant that the machinery was held subject to his order, and would be stored and retained by the plaintiff for the defendant. The plaintiff thus brought itself squarely within the terms of the section of the Code above referred to, and clearly had the right to bring suit against the defendant for the full amount of the purchase price. Counsel for the defendant cites *Oklahoma Vinegar Co. v. Carter*, 116 Ga. 140, 42 S. E. 378, 59 L. R. A. 122, 94 Am. St. Rep. 112, as authority for the proposition that the statutory remedy to retain the goods and sue for the price was not available to the plaintiff in the present case, but that its only remedy was to sue for damages for the breach of the contract. That case is not authority for the position taken by counsel. It distinctly appears in that case that the seller delivered the goods to the carrier for the purchaser, and Mr. Justice Little, speaking for the court, refers to the three statutory remedies open to a seller where a purchaser refuses to take and pay for goods sold, and then says: "While, under this last provision, the seller might have stored and retained the property for the buyers, after notice by the buyers that they would not receive the goods, it is sufficient to say that it did not do so, but, without so doing, sought to recover the price agreed on. Had it done so, it might have brought an action against the buyers for the entire price of the goods."

[2] 2. The contract with the defendant expressly stipulated that no agreement not expressed in the contract would be binding upon the plaintiff, and that after acceptance the order was not subject to countermand. Under this provision of the contract the plaintiff was not bound by the agreement, not expressed in the contract and made between the plaintiff's agent and the defendant, to the effect that the contract would not be binding unless an order to another manufacturer for other machinery should be accepted. *Outcault Advertising Co. v. National Furniture Co.*, 7 Ga. App. 150, 66 S. E. 480. The case is presented to this court by counsel for the defendant upon the theory that there was an entire contract between the parties, under the terms of which it became necessary that the defendant should receive both the engine and boiler and the ginning outfit, and that, this being true, when the defendant failed to receive the engine and boiler within the

time fixed by the contract, the entire agreement became nugatory. It is very plain that this is an altogether erroneous theory of the case. The only contract which the plaintiff made was that it would sell and deliver the ginning outfit to the defendant upon the terms and conditions stated in the writing. The agreement of its agent in reference to the engine and boiler was not a part of the contract, and was not binding upon the plaintiff. Even if it be granted that the letter from the plaintiff indicated such a ratification upon its part of the agreement made by its agent in reference to the engine and boiler as to be binding upon the plaintiff, it appears from this letter that the plaintiff's understanding of the agreement was that the delivery of the gin machinery was contingent only upon the acceptance by the Cole Manufacturing Company of the defendant's order for the engine and boiler, and the evidence is undisputed that the order was accepted. The verbal agreement which the defendant claims the plaintiff's agent made in reference to the building which was to contain the machinery is, of course, not binding upon the plaintiff, and the defendant's counsel do not so contend in their brief.

[3] 3. The contract provided that the machinery was to be shipped "at once." The defendant himself testified that when the order was given he was informed by the plaintiff's agent that certain parts of the machinery would have to be procured by the plaintiff from other manufacturers, and that the ginning outfit would be shipped to the defendant after all the parts composing it had been assembled. The ordinary significance of the words "at once" imports immediate action, but plainly these words have no such meaning in a contract of the nature of the one involved in this case. To give them such a meaning would be to make the contract impossible of performance. The words mean simply that the plaintiff would use reasonable expedition, under all the circumstances, to deliver the machinery to the defendant as early as possible; in other words, that the machinery would be procured and shipped without unreasonable delay. *Sharpe v.*

*Johnston*, 3 Lans. (N. Y.) 520; *a. c.*, 41 How. Prac. (N. Y.) 400. The contract bound the plaintiff to make for the defendants, in the case last cited, three or four models of a mowing machine "at once and without delay." It was held that the words quoted meant that the work should be done "as soon as it could reasonably be performed by the plaintiff." In *Warder v. Horne*, 110 Iowa, 285, 81 N. W. 591, a contract provided that, if a certain piece of machinery sold should not prove satisfactory, it should be returned "at once." It was held that this contract bound the purchaser, in the event that he found the machinery unsatisfactory, to return it "within a reasonable time," and that it was a question for the jury to say what was a reasonable time under all the circumstances. See, also, *Oklahoma Vinegar Co. v. Hamilton*, 132 Ala. 593, 32 South. 306; *Reg. v. Rogers*, 3 Q. B. Div. 33; *Smith v. Lunger*, 64 N. J. Law, 539, 46 Atl. 623; *Bennett v. Mutual Ins. Co.*, 67 N. Y. 274; *Scammon v. Germania Ins. Co.*, 101 Ill. 621.

Ordinarily it would be a question for the jury to say what was a reasonable time under all the circumstances, or whether delivery of the goods bought had been unreasonably delayed. But in the present case the evidence demanded a finding as a matter of law that there had been no unreasonable delay. The evidence is undisputed that immediately upon receiving the order, and on the very same day, the plaintiff took steps to get the machinery together in compliance with the order, and did in fact assemble and put together all of the parts of the machinery with all reasonable expedition, and no unnecessary delay was incurred. It is altogether probable from the evidence that, had not the defendant countermanded the order for the boiler and engine, this machinery would likewise have been delivered to the defendant within a reasonable time and in compliance with the order for it. But, without reference to this question, the evidence demanded a finding in favor of the plaintiff for the amount of the purchase price.

**Judgment reversed.**



(70 W. Va. 347)

PARDEE et al. v. JOHNSTON et al.

(Supreme Court of Appeals of West Virginia.  
Feb. 13, 1912. On Petition for Re-  
hearing, April 26, 1912.)

(Syllabus by the Court.)

**1. APPEAL AND ERROR (§ 1045\*)—REVIEW—HARMLESS ERROR—EXCLUSION OF JUROR.**

The exclusion of a juror for insufficient cause is not reversible error, if the 12 who are finally chosen to try the case are legally qualified.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4125; Dec. Dig. § 1045.\*]

**2. EVIDENCE (§ 343\*)—DOCUMENTARY EVIDENCE—ATTESTED COPY.**

An attested copy of a deed from the records of a county court clerk's office in this state is primary evidence, and has the same probative force to prove title that the original would have, if it had been introduced for that purpose.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1317; Dec. Dig. § 343.\*]

**3. EVIDENCE (§ 366\*)—DOCUMENTARY EVIDENCE—PAROL EVIDENCE AFFECTING WRITINGS.**

If such copy purports to be signed and sealed, and contains a scroll, or pen flourish, following the name, or the official designation, of the grantor, it will be presumed that it was placed there by the recorder to represent a scroll which had been placed on the original as and for a seal. Parol evidence is not admissible, in the absence of any charge of forgery, to prove that such scroll, or pen flourish, was not intended by the recorder as a copy of the original.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1521-1539; Dec. Dig. § 366.\*]

**4. EVIDENCE (§ 383\*)—DOCUMENTARY EVIDENCE—AUTHENTICATION—PRESUMPTIONS.**

A deed for land, made before the formation of this state, and recorded in the county wherein the land lies, for ten years or more before the bringing of a suit concerning the land, purporting on its face to have been made by a commissioner of delinquent and forfeited lands, under judicial proceedings in a court of Virginia, and purporting on its face to convey the title of certain persons therein, under such judicial proceedings, is by section 2, c. 76, Acts 1907 (Code Supp. 1909, c. 132, § 8a2), made prima facie proof of the grantor's authority and of the actual passing to the grantee of the title of such persons as it purports to pass.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1660-1677; Dec. Dig. § 383.\*]

**5. DEEDS (§ 110\*)—CONSTRUCTION—QUESTIONS OF LAW OR FACT.**

Whether a written instrument has the effect to pass title is a question of law for the court. It is error to submit such question to the jury for their determination.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 255, 293; Dec. Dig. § 110.\*]

**6. TRIAL (§ 412\*)—WAIVER OF OBJECTIONS TO RECEPTION OF EVIDENCE.**

If, in the trial of a case, improper testimony has gone to the jury over objection, and the court, before the jury retires, offers to strike it out, and the party who objected to its admission resists such offer and the court thereupon allows the evidence to remain in the case, such party will be held to have waived the error, if any, in admitting the evidence, and will not be heard to complain in this court.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 974-977; Dec. Dig. § 412.\*]

**7. DEEDS (§ 111\*)—CONSTRUCTION—DESCRIPTION OF PROPERTY—CONFLICTING DESCRIPTIONS.**

Where two inconsistent descriptions of land are given in a deed, one describing it as being a part of a certain larger tract, and the other describing it by metes and bounds, which carries it outside of such larger tract, the latter description, being the more specific one, will prevail.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 309-315, 334, 335; Dec. Dig. § 111.\*]

**8. EJECTMENT (§ 111\*)—PROCEEDINGS—VERDICT.**

If a plaintiff in ejectment sues for his entire tract of land, and proves title, and the defendant controverts his title to a part of it only, and does not disclaim as to the residue, a general verdict for the defendant is erroneous. In such case the verdict should be for the plaintiff for so much of his land, at least, as was not actually controverted by defendant.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. §§ 327-345; Dec. Dig. § 111.\*]

**9. ADVERSE POSSESSION (§ 100\*)—OPERATION AND EFFECT—CONSTRUCTIVE POSSESSION.**

In the absence of actual adverse possession, constructive possession follows the older and better title to the full limit of the claimant's boundaries.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 547-574; Dec. Dig. § 100.\*]

**10. ADVERSE POSSESSION (§ 113\*)—ADMISSION OF EVIDENCE.**

If a portion of the land claimed under the older and better title interlocks with a junior grant, and there has been no actual adverse possession for the statutory period within such interlock, it is error to admit evidence of the junior claimant's possession within the boundaries claimed by him, outside of the interlock.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 669-681; Dec. Dig. § 113.\*]

On Rehearing.

(Additional Syllabus by Editorial Staff.)

**11. APPEAL AND ERROR (§ 197\*)—PRESENTING INSTRUCTIONS IN LOWER COURT—VARIANCE.**

The failure to take advantage of a variance in the lower court is a waiver of the right to do so in the Supreme Court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1428-1441; Dec. Dig. § 197.\*]

Error to Circuit Court, Webster County.  
Action by Barton Pardee and another against Aaron Johnston and others. Judgment for defendants, and plaintiffs bring error. Reversed, and new trial awarded.

Haymond & Fox and Morton & Wooddell, for plaintiffs in error. W. S. Wyson, Lann & Byrne, and B. P. Hall, for defendants in error.


WILLIAMS, J. Barton Pardee and G. W. Curtin brought ejectment in the circuit court of Webster county against Aaron Johnston, Wilson Lee Camden, and the Camden Lumber Company, a corporation, which resulted in a verdict and judgment for defendants on the 23d of April, 1909, and plaintiffs have brought the case here on writ of error.

[1] The first assignment of error relates

to the court's action in rejecting G. L. Brady, and 10 other drawn jurors, when making up the panel. This is not error. If the 12 who tried the case were made up from the regularly drawn jury list, and were qualified, plaintiffs have no cause of complaint. They were not entitled to have certain jurors try the case. They were only entitled to 12 qualified men, and the record shows that the jurors who tried the case were qualified. The rejected jurors were related to one S. B. Hamrick who had granted to G. W. Curtin, one of the plaintiffs, the land in controversy, and had covenanted to warrant generally the title thereto. But, regardless of any question respecting their qualification, the court did not abuse its discretion in rejecting them.

Plaintiffs' title originates by deed from John Brown, commissioner of delinquent and forfeited lands of Nicholas county, dated October 10, 1844, to James Burne, who, as it appears from the recitals in the deed, was assignee of Levi J. Hooker, assignee of William Given, the purchaser at the commissioner's sale. A certified copy of this deed from the records of Nicholas county, containing the following fac simile of the grantor's signature, official designation, and scroll, as it appears on the record of deeds, was offered in evidence, viz.:

*John Brown Commissioner of  
D. & F. L. for said County  
of Nicholas*



The grantor concludes his deed with this sentence, "In witness thereof the said party of the first part hereunto set his hand and seal the day, and year first above written;" and the clerk before whom it was acknowledged for recordation, in his certificate of acknowledgment, designates the instrument as a "deed of bargain and sale."

[2, 3] Two objections were made to the sufficiency of this paper as evidence of title, viz.: (1) Because it did not have a seal; and (2) because it did not appear that the commissioner had authority to make the deed to James Burne, there being no proof that Given, to whom the sale was made and confirmed, had authorized him to do so. As to the first objection: True, the original deed was not produced. But section 5, c. 130, Code 1906, makes a copy from the office, attested by the clerk evidence in lieu of the original. The effect of the statute is to make the copy primary evidence, and to give it as much probative force as the original deed could have had. Robinson v. Pitzer, 3 W. Va. 335. The law presumes that the clerk performed his duty in copying the original into the record, that he omitted no essential part which appeared on the original

deed, and added no material part to the record which did not appear on the original. The scroll affixed by way of seal to a deed being essential to give effect to the instrument as a grant of land, it must not be presumed that a scroll, or flourish, appearing upon the clerk's record, which would serve as a seal, if it appeared on the original, was added by the clerk upon the record. The record speaks as a verity, and the law presumes that such essential part appearing on the record is a copy or representation of what appeared on the original. Wilson v. Braden, 56 W. Va. 372, 49 S. E. 409, 107 Am. St. Rep. 927. Consequently the scroll, or pen flourish, appearing at the end of the above fac simile of the clerk's record, must be taken as a representation of what appeared on the original paper presented for recordation, as much so as the grantor's name, or any other word in the deed. The custom of sealing written instruments originated at a time when few men could write, and when they used stamps to make impressions upon wax, technically called a seal, instead of writing their names, and, notwithstanding the reason for the custom no longer exists, the law continues the senseless custom. But, as a substitute for the old wax seal, the statute (chapter 13, § 15, Code 1906) permits a person to affix to a paper "a scroll by way of seal, or (to) adopt as his seal any scroll, written, printed or engraved, made thereon by another." One of the definitions of the word "scroll" given in Webster's Dictionary is: "A flourish, tracing, mark or design used in place of a seal." It will be observed, too, that the statute does not require the scroll to have any particular form, or to be placed at any particular point with respect to the name of the party adopting it. A scroll appearing immediately after the name of one person may be adopted by another whose name may appear on the instrument below the first name. Wilson v. Braden, 56 W. Va. 373, 49 S. E. 409, 107 Am. St. Rep. 927; Norvell v. Walker, 9 W. Va. 447. See, also, as apropos to the question here discussed, the following authorities: Smith v. Henning, 10 W. Va. 599; Carper v. McDowell, 46 Va. 212; Cosner v. McCrum, 40 W. Va. 339, 21 S. E. 739; Miller v. Holt, 47 W. Va. 10, 34 S. E. 956. Our conclusion, therefore, is that the certified copy of the deed of John Brown, commissioner, contains a scroll, and is intended to represent a scroll which was affixed to the original as a seal.

[4] The second objection to the deed might have been a fatal one had it not been for the effect of a recent statute designed to constitute deeds of commissioners, under judicial proceedings, which have been recorded for more than ten years, prima facie evidence of the passing of the title of all persons whose title such deed purports to pass. We have reference to section 2, c. 76, Acts 1907, which reads as follows: "That when any

deed has heretofore been made prior to the formation of this state for land or any interest in land therein, which purports on its face to be made under judicial proceedings of a court of the state of Virginia by a commissioner, special commissioner, guardian or other person, or when any deed has heretofore been made or shall hereafter be made for land or any interest in land in this state which purports on its face to be made by a commissioner, special commissioner, guardian or other person under the judicial proceedings of a court of this state, then in every such case it shall be presumed, in the absence of evidence to the contrary, that the person executing such deed was authorized by the court to convey the land or interest therein which is conveyed by such deed, and if any such deed was duly, or shall hereafter be duly admitted to record in any county, and not less than ten years shall have elapsed after such record thereof, it shall be presumed, in the absence of evidence to the contrary, that the title of all persons which said deed professes to convey, under such judicial proceedings, did in fact pass by such deed." The deed in question was made in 1844, and was recorded in Nicholas county on the day of its date. The statute was in effect before this suit was brought, and, there being no evidence to the contrary, it must be presumed that the commissioner had authority to pass, and did pass, not only the title of the state, but also the title of William Given, the purchaser and of his assignee, Levi J. Hooker, to the grantee, James Burne. See *Feder v. Hager*, 64 W. Va. 452, 63 S. E. 285, and *Despard v. Percy*, 65 W. Va. 140, 63 S. E. 871, wherein the effect of the statute is discussed, although held not to apply in those cases.

[5] No objection appearing to any other deed in plaintiffs' chain, their paper title, connecting with the commonwealth of Virginia, seems to have been proven. It therefore follows that the court erred in admitting testimony of witnesses in regard to the appearance on the records of Nicholas county of other deeds made by the same clerk who recorded the Brown deed for the purpose of proving that the original bore no seal. That was a question of law to be determined by the court from the appearance of the certified copy, and not a question of fact to be determined by the jury from extrinsic evidence. It follows, also, that the court erred in modifying certain ones of plaintiffs' instructions by therein describing their title as a "claim of title." This was a reflection upon their title which appears to be good. It was also error to submit the question of plaintiffs' title to the jury. Being purely a paper title, it was a question of law for the court, not one of fact for the jury.

[6] Another assignment of error relates to the admission of the testimony of Pat Griffith and J. H. Hamrick to prove a cer-

tain statement claimed to have been made by S. B. Hamrick, a witness for plaintiffs, when the survey was made in this suit, and denied by him on cross-examination, relative to an alleged admission made by one Bernard Molloyhan, who was then dead, and who had many years ago surveyed plaintiffs' land, to the effect that said Molloyhan had not by his survey properly located a certain sugar tree corner now claimed by plaintiffs as one of their corners. Without deciding whether or not this was error, but assuming that it was, plaintiffs waived it by declining to permit the court to strike it out, which it proposed to do, as appears from plaintiffs' bill of exceptions No. 1.

[7] Defendants claim title mediately from the commonwealth of Virginia by two deeds made by David Goff, commissioner of delinquent and forfeited lands for Randolph county, one to John S. Hoffman, dated April, 26, 1846 for four 1,000-acre tracts and the other to Jacob W. See, dated May 5, 1850, for one 1,000-acre tract which five tracts were laid off by said commissioner out of a 5,000-acre tract known as one of the "Pennell grants," and forfeited to the state of Virginia in the name of Benjamin Nichols, Joseph A. Nichols, and Able Hawley. Defendants' land is known as Pennell lot No. 24, and plaintiffs' land was laid off by Brown, commissioner of delinquent and forfeited lands for Nicholas county, out of an adjoining Pennell grant known as lot No. 21. But plaintiffs claim that in surveying the land Commissioner Brown encroached upon lot No. 24, and actually surveyed and granted a part of it to James Burne, notwithstanding he described it as being in lot No. 21. There is evidence in the record supporting this theory, and, if this theory was believed by the jury to be proven, they should have found for plaintiffs, because title to both tracts was then in the state by forfeiture, and there is no proof of adverse possession upon the interlock for sufficient time to ripen the claimant's possession into a good title. Plaintiffs' title, being the older, would prevail in law. Assuming that there are two inconsistent descriptions in Brown's deed, one by metes and bounds which carries it over onto Pennell lot No. 24, and the other as being a part of lot No. 21, this would not estop plaintiffs from claiming to the extent of the metes and bounds actually made on the ground, and accurately described in the deed to James Burne. In such case the general description must yield to the one by metes and bounds, the particular description. *Bowers v. Dickinson*, 30 W. Va. 709, 6 S. E. 335; *Gwynn v. Schwartz*, 32 W. Va. 487, 9 S. E. 880; *South Penn Oil Co. v. Knox*, 68 W. Va. 362, 69 S. E. 1020.

[8] The court submitted both the question of plaintiffs' title and the identity of their land to the jury, and their verdict is simply

a finding for the defendants, without more. It is therefore impossible for us to see whether they so found because they were of the opinion that plaintiffs had not proven title, or because they had failed to prove the location of their boundary lines. The jury had no right to pass upon title. This was a question of law, erroneously submitted to them by the court. But, notwithstanding the jury may have been justified in finding that plaintiffs' boundary line was located as contended for by defendants, their verdict settles nothing as to boundaries. Plaintiffs proved good title to the whole of their boundary. It remained only for them to prove the location of their boundaries. Defendants did not controvert by proof plaintiffs' claim to the greater part of their land, and filed no disclaimer. In view of these facts, the verdict is contrary to the law and the evidence, and the court erred in not sustaining plaintiffs' motion to set it aside. The verdict should have been for the plaintiffs for so much of their land as lies within their boundary lines, and should have defined those lines with sufficient accuracy for their identification. Section 25, ch. 90, Code, 1906, reads: "When the right of the plaintiff is proved to all the premises claimed, the verdict shall be for the premises generally, as specified in the declaration; but, if it be proved to only a part or share of the premises, the verdict shall specify such part particularly as the same is proved, and with the same certainty of description as is required in the declaration." Plaintiffs proved, beyond question, title to most of the land described in their declaration, and, there being no disclaimer, the verdict should have been for the plaintiffs for so much of their land, at least, as defendants did not controvert. True, the statute permits only the general issue to be pleaded in ejectment, but still, if defendants desired to eliminate a portion of the land from the controversy, they could narrow its scope by filing a disclaimer, and this they should have done; and, not having done so, issue was joined upon the whole of the land described in plaintiffs' declaration. This point seems to be settled by the following authorities: *Wilson v. Braden*, 48 W. Va. 196, 36 S. E. 367; *Warvell on Ejectment*, § 211; *Carrington v. Coddin*, 54 Va. 587; *Clay v. White*, 15 Va. 162; *Slocum v. Compton*, 93 Va. 374, 25 S. E. 3; *Norvell v. Camm*, 28 Va. 68; *Beckwith v. Thompson*, 18 W. Va. 103; *City of Quincy v. Railroad Co.*, 94 Ill. 537.

Plaintiffs did not know how much of their land defendants claimed, and, therefore, the only way in which they could safely bring their suit was for their whole tract. It thereupon became defendants' duty to ascertain their boundaries, and to disclaim what was outside of them, if they wished to avoid the effect of joining issue as to all of plaintiffs' claim. A disclaimer is necessary,

in such case, in view of the statute which allows only the plea of not guilty. A disclaimer is not, technically speaking, a plea. A plea tenders issue; a disclaimer is a refusal to join issue. A plea to the general issue, without disclaiming, makes an issue of all the land described in the declaration, and a finding for defendant, on such issue, concludes title, then vested in plaintiff, against him in any subsequent controversy over the same land between the same parties and their privies. The judgment in this case is that "plaintiffs take nothing," which evidently means that they take none of the land described in their declaration. Plaintiffs' last state, therefore, seems to be worse than their first.

[10] In view of what we have said, it was error to admit evidence as to defendants' possession of their own land outside of the interlock. Plaintiffs' title, being the older, and therefore the better, would prevail. Defendants' possession outside of the interlock cannot affect plaintiffs' title to it.

[9] Constructive possession always follows the better title, and the only possession that can defeat it is actual, adverse possession for the statutory period. *Olinger v. Shepherd*, 53 Va. 462; *Garrett v. Ramsey*, 26 W. Va. 345; *Camden v. West Branch Lumber Co.*, 59 W. Va. 148, 53 S. E. 409. According to the evidence disclosed by the record, plaintiffs' right to recover depends solely upon proof of the location of their boundary lines.

The judgment will be reversed, the verdict set aside, and a new trial awarded.

#### On Petition for Rehearing.

In their petition for a rehearing, counsel for defendants in error call our attention for the first time to a variance between plaintiffs' allegations and their proof. In the declaration *Barton Pardee and G. W. Curtin* are declared to be joint owners in fee of the land. It contains but one count, which is joint; while the proof shows title to be in one of the plaintiffs only. This was a variance of which advantage might have been taken in the court below. But the attention of the trial court seems not to have been called to it in any way; and it is too late to make the objection for the first time in this court. If the point had been raised in the lower court, plaintiffs would have had the right to amend their pleadings. Final judgment should not be rendered against them before giving them an opportunity to cure the objection by amendment. The failure to take advantage of the variance in the lower court is a waiver of the right to do so in this court. Section 8, c. 131, Code 1906; *Trump v. Tidewater*, 46 W. Va. 238, 32 S. E. 1035; *Bertha Zinc Co. v. Martin's Adm'r*, 93 Va. 791, 22 S. E. 869, 70 L. R. A. 999; *Moore Lime Co. v. Johnston's Adm'r*, 103 Va. 84, 48 S. E. 557.

No other points are discussed in the petition for rehearing that are not considered in the opinion. A rehearing is refused.

(70 W. Va. 572)

DAVIS et al. v. HALSTEAD et al.  
(Supreme Court of Appeals of West Virginia.  
April 2, 1912.)

(Syllabus by the Court.)

1. FRAUDULENT CONVEYANCES (§ 208\*)—IMPEACHMENT.

A deed which is both voluntary and fraudulent in fact is not only impeachable as to claims existing when it was made, but it is impeachable as to claims of subsequent creditors.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 631, 633; Dec. Dig. § 208.\*]

2. FRAUDULENT CONVEYANCES (§ 255\*)—ACTION TO SET ASIDE—PARTIES—JUDGMENT CREDITORS.

In a suit to set aside a fraudulent conveyance and charge the property with a judgment against the fraudulent grantor in favor of the plaintiff, the bill may properly implead other judgments against the fraudulent grantor and make the holders thereof defendants to the cause.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 741-751; Dec. Dig. § 255.\*]

3. LIMITATION OF ACTIONS (§ 118\*)—RUNNING OF STATUTE.

When a judgment claim against a fraudulent grantor is impleaded by the bill in a suit attacking the fraudulent conveyance, and the party holding the judgment is made a defendant, the statute of limitations ceases to run against the judgment, though no answer has been filed asserting it.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 527, 528; Dec. Dig. § 118.\*]

Appeal from Circuit Court, Nicholas County.

Bill by George Davis and others against J. J. Halstead and others. Decree for plaintiffs, and defendants J. J. and J. F. Halstead appeal. Affirmed.

G. G. Duff and A. W. Corley, for appellants.  
A. J. Horan, for appellees.

ROBINSON, J. [1] The finding of the court below, that the deed from father to son was voluntary and fraudulent in fact, is fully sustained by the evidence. We are not disposed to discuss uselessly this feature of the case. It is merely the same old story of attempting to put property beyond the reach of creditors. It suffices for us to say that the facts and circumstances are of such character as to lead a reasonable mind to the conclusion that the conveyance was made with intent to hinder, delay, and defraud creditors of the grantor. The evidence, tested by well known principles, proves the deed to be both voluntary and fraudulent in fact. Therefore, it is not only impeachable as to claims existing when it was made, but it is impeachable as to claims of subsequent cred-

itors. Lockhard & Ireland v. Beckley, 10 W. Va. 87.

[2] The original bill set forth judgments recovered by plaintiffs against the fraudulent debtor, and prayed that the land fraudulently conveyed be sold to satisfy the same. The amended bill brought in as defendants the holders of two other judgments against the fraudulent grantor. That amended bill specifically set forth these last named judgments and prayed that the land be sold to pay the judgments held by plaintiffs and these new defendants. Thus the judgment claims of these defendants were impleaded in the cause. There is no contention that the judgments were barred by the statute of limitations at the time these judgments were so impleaded, and process was served on the defendants holding them. But when answers were filed in the cause by the defendants claiming under the judgments, time sufficient to bar the judgments had run, unless the filing of the amended bill in relation to them stopped the running of the statute. The debtor pleaded the statute of limitations. The court held that the judgments were not barred. The decree makes them charges against the land. It is earnestly submitted that there is error in this particular.

Did the impleading of the judgments by the amended bill, with prayer therein that they be satisfied out of the land, and the making of the holders of the judgments parties defendant to the cause, stop the running of the statute? We answer the question in the affirmative. Plaintiffs recognized that the defendants brought in by the amended bill were entitled to charge the land with the liens of their judgments in case the deed should be set aside as fraudulent. Plaintiffs indeed pleaded this fact for these defendants and asked relief in their behalf. In other words, by the amended bill plaintiffs brought the suit on behalf of themselves and all other lien creditors of the fraudulent debtor. It is usual for one creditor so to implead the claim of another, in cases similar or analogous to the one under consideration. True, the case is not a general creditor's suit, nor one for the enforcement of judgment liens purely, but it is virtually the latter when the fraudulent deed has been set aside. We are advised of no reason why a plaintiff can not, if he so desires, attack a fraudulent conveyance on behalf of himself and others who would have liens on the land in case the fraud was declared, in analogy to ordinary enforcement of liens under Code 1906, c. 139, § 7. That statute provides that one lien holder may implead others. He may make them defendants and bring their claims into the suit, as has been done in this case. Thus he may submit their claims with his to the jurisdiction of the court. One so impleaded has no reason to institute an independent suit—his claim is already in litigation.

tion. Indeed, in a regular judgment lien suit he is practically prohibited by the statute from proceeding independently. *Parsons v. Snider*, 42 W. Va. 517, 26 S. E. 285. When one's claim is regularly brought into litigation where it is proper to seek its enforcement, though it be so brought in by another creditor managing the suit, the statute ceases to run against it. *Rowan v. Chenoweth*, 49 W. Va. 287, 38 S. E. 544, 87 Am. St. Rep. 796. The claim is then in suit for its collection. Though the creditor himself has not begun the suit, it has been properly begun on his behalf. His hands are tied from instituting an independent suit. Why should time run against him? The suit has been brought for him as effectually as he could have brought it in his own behalf. A suit has been instituted on his claim. The institution of that suit stops the running of the statute of limitations.

It was not essential that the judgment liens held by defendants be asserted by answers filed in the cause. Plaintiffs had asserted these liens in the amended bill. So the fact that answers in relation to these judgments were not filed within ten years from the dates of the judgments, does not make them barred. We have shown that these judgment claims were in suit. The statute had ceased to run. The answers did not originally put them in suit.

In *Forman v. Brewer*, 62 N. J. Eq. 748, 48 Atl. 1012, 90 Am. St. Rep. 475, a case very similar to the one at hand is found. There the judgments were impleaded by the plaintiff's bill within the period of the statutory limitation. It was urged that the judgments were barred when the answers in relation to them were filed. But the court held that the statute ceased to run when the bill impleaded the judgments for adjudication in relation to the land involved. Quite applicable here is the principle announced in that case: "When a claim is submitted to the jurisdiction of a court for determination, the common statute of limitations, and the analogous bars and presumptions in equity and at law, are regarded, for all purposes of the pending litigation, as having ceased to operate against the claim, so that, if it be not then barred, the subsequent lapse of time will not defeat it."

[3] That one lien creditor may by his bill implead the lien claim of another so as to stop the running of the statute is illustrated in a Virginia case, wherein it is held: "A suit by a subcontractor to enforce a mechanic's lien which has been duly recorded, to which the general contractor is made a party defendant, and his recorded lien properly set forth in the bill, stops the act of limitations from running not only on the complainant's lien, but also on the lien of the general contractor, and all claiming as contractors under him, and operates to suspend any further

suit by any one or more of them during the pendency of the suit instituted by the subcontractor." *Spiller v. Wells*, 96 Va. 598, 32 S. E. 46, 70 Am. St. Rep. 878. A remark by Judge Keith in that case fittingly applies to this suit: "While the suit is not a general creditor's bill, and did not affect the statute of limitations as to creditors not named as parties to it, there can be no doubt that as to liens claimed by parties to it, and directly involved in the suit, the statute ceased to run upon its institution."

A considerate examination and review of the whole record leads us to an affirmation of the decree.

(70 W. Va. 587)

### CROUCH v. CROUCH.

(Supreme Court of Appeals of West Virginia.  
April 2, 1912.)

(Syllabus by the Court.)

#### APPEAL AND ERROR (§ 1009\*)—REVIEW—DECREE IN EQUITY.

A decree in equity, founded upon weighty inferences arising from well-established facts and circumstances, will not be reversed for a mere preponderance against the finding in the number of witnesses testifying as to a fact in issue.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3970-3978; Dec. Dig. § 1009.\*]

Appeal from Circuit Court, Brooke County.

Suit by Mary E. Crouch against Joseph A. Crouch. Decree for defendant, and complainant appeals. Affirmed.

J. B. Sommerville and J. F. Cree, for appellant. John J. Coniff and George W. McCleary, for appellee.

POFFENBARGER, J. Deeming the plaintiff's charges of cruelty, made against her husband as ground for a divorce a mensa et thoro, unsustained by the evidence, the trial court dismissed her bill, and she complains here on appeal.

Her charges, supported by her testimony, are substantially as follows: Some time after their marriage he began a systematic course of ill treatment, inflicted secretly upon her in the absence of all other persons; compelled her to teach school and do the housework, not allowing her to employ help at her own expense, and so impaired her health; forsook her bed and refused to sleep with her; for some time made her sleep in a cold and rather dilapidated room; refused to provide clothing for her; cursed her when she requested his help in putting up a clothes line and when she offered him money to make a small purchase for her; struck her with his fist, when she endeavored to open a door for him; threatened to shoot her and to knock the top of her head off with a poker; expressed a wish that she had not been able to get out, when she informed him

she had fallen into the creek; refused ever to have sexual intercourse with her, though, in her opinion, able to do so, and cognizant of her desire for children: threatened to throw her in the creek, and also out of the window, with effects, calling them "rags"; and called her vile names, liar, bitch, and whore, on numerous occasions. All this the defendant denied emphatically, and the plaintiff is corroborated as to only one transaction, and the corroborating evidence consists of testimony of her brother and a detective, employed for the purpose of procuring evidence sufficient to justify a divorce.

This transaction is said to have occurred the evening before she left her husband's home. According to her statement, she prepared their supper, rather later than usual, and then requested him to come and eat. Instead of doing so, he went to bed in an adjoining room and refused. The invitation was repeated several times; he either refusing to answer or responding with threats and personal abuse. Finally he called her a whore, and threatened to come out and mash her head in with a poker. She says she then stepped out on a back porch, to which the kitchen opened, and found there her brother, Hugh Orum, and the detective, J. A. Kraver. These two men say they heard part of the conversation between the husband and wife, and admit they went there for the purpose of seeing or hearing something to which they could testify in favor of the latter. Orum says they went there to protect his sister, but also admits they were looking for evidence. Neither of them entered the house. Though on the outside, and near each other all the time, their testimony varies to some extent. As the character and extent of these discrepancies are not of themselves controlling, nor vitally important, it would be a waste of time, labor, and space to set them forth in detail. It suffices to say Orum does not testify to having seen or heard all that Kraver says he saw and heard, and accounts for the variance by saying he was at times some distance from Kraver.

As circumstances bearing upon the question of veracity, we note the following: Mrs. Crouch was about 40 years old, and her husband about 62 years old, when they were married. He was the owner of a farm worth about \$20,000, some tangible personal property, and money. His wife had been a school teacher for several years before her marriage, and, at the time, owned some real estate and had saved some money. She had inherited a one-fifth interest in a farm, which, with its improvements, is assessed for taxation at more than \$18,000, and has purchased another one-fifth interest in the same farm. Besides, she owns two lots in Wellsburg and a small tract of land, containing about three acres. She was teaching a country school in the neighborhood at the date of her mar-

riage, in November, 1905, and finished the term after her marriage. The next year she taught a different neighboring school, and the second year after marriage again taught the school she was teaching when married. This ended in the spring of 1908. She left her husband October 29, 1908. By her own admissions, this teaching was voluntary. She says she taught only because she knew her husband desired her to do so and procured the employment for her. She testifies to no protest on her part, nor coercion on the part of her husband. She found fault with his liberality toward a boy or young man whom he had, it seems, partially raised, and for whom he had a sort of fondness, if not affection. She expressed to neighbors anxiety and fear as to the disposition of her husband's estate, and, he says, requested him to convey his farm to her and then leave, asserting her ability to manage it. Two of these neighbors, presumptively credible persons, since no attempt was made to impeach them, say she endeavored to engage their services in an effort to obtain a divorce as a measure of protection against loss of her prospective interest in her husband's estate, offering them, or one of them, \$25 and suggesting procurement of the testimony of the boy, Ellison, in her favor. Later she employed a detective agency, through which testimony in support of her bill for divorce and alimony was procured.

Several neighbors testify to the husband's kindness of disposition, and his uniform kindness and assistance to his wife, when they were about the home. He milked, made fires, brought vegetables from the garden for meals, assisted in the kitchen, and actually cooked, sometimes preparing her breakfast, during the school term, before she got up. In bad weather he took her part of the way to the schoolhouse on a horse, and met her with a horse on her return. They were often seen together, driving along the road, and visited neighbors together. He denies the use of profanity since his boyhood, and persons who have known him well for years corroborate the statement to the extent of their knowledge, saying he was exceptional in that respect. Some of these witnesses say she admitted kind treatment by her husband until some time in the last year of her residence with him, and then suddenly declared she had never liked him and never could. In addition to her own testimony as to the grounds of her complaint, she adduced that of her brother and Detective Kraver, and no more. Kraver was a paid agent, and the brother a very close relative. Many of the defendant's witnesses were both disinterested and unrelated.

That this plain, unsophisticated old farmer could have successfully played the double role, charged by his wife and her witnesses, is almost inconceivable. The record of his life, his fixed habits, his age, his mental

slothfulness, are all inconsistent with the theory of the bill and the plaintiff's testimony. No motive for such imputed misconduct on his part is shown, other than mere personal dislike, which he denies and his outward conduct contradicts. Some of the circumstances related in the testimony for the defense, and partially admitted by the plaintiff, if true, are indicative of design on her part upon his property, in both the marriage and the suit for divorce. Her alleged effort to procure the fabrication of evidence for divorce by neighbors may have been consummated through the detective agency, and the evidence so procured tends to sustain but a single isolated incident, shown by disinterested witnesses to be wholly inconsistent with the man's nature and temperament, as well as all of his outward conduct.

In this state of the evidence, we perceive no circumstances of such weighty significance or controlling influence as to enable us to say the trial court erred in its finding. On the vital question, the witnesses numerically preponderate against the finding; but we cannot say this preponderance should prevail over conflicting inferences arising from numerous inconsistent facts.

Perceiving no error in the decree, we affirm it.

(70 W. Va. 576)

**MYLIUS v. MASSILLON ENGINE & THRESHER CO.**

(Supreme Court of Appeals of West Virginia.  
April 2, 1912.)

(Syllabus by the Court.)

**1. INJUNCTION (§ 26\*)—SUBJECTS OF RELIEF—ACTION AT LAW.**

A suit at law can not be enjoined and the litigation transferred to the equity forum merely on the assertion of defenses that are pleadable at law.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 24-49, 54-61; Dec. Dig. § 26.\*]

**2. EQUITY (§ 43\*)—JURISDICTION—STATUTORY PROVISIONS.**

Code 1906, c. 126, §§ 5 and 6, does not convert defenses cognizable at law before its enactment into matters cognizable in equity. That statute does not enlarge the jurisdiction of equity courts.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 121-140, 164-166; Dec. Dig. § 43.\*]

Appeal from Circuit Court, Randolph County.

Bill in equity by Charles E. Mylius against the Massillon Engine & Thresher Company and others. From decree for complainant, the Massillon Engine & Thresher Company appeals. Reversed, and appeal dismissed.

Talbott & Hoover, for appellant. W. B. Maxwell, for appellee.

**ROBINSON, J.** The decree is a final one perpetually enjoining an action at law. The law suit was instituted by Massillon Engine

& Thresher Company against Knutti and Mylius on notes executed to that company by them for the purchase price of a saw mill, engine and boiler. The three notes involved in this case are the last ones falling due in a series executed in that behalf. In a prior action between the same parties, judgment on the other notes was recovered and at least partially collected. But the action on these last due notes was met by an injunction based on a bill in equity alleging total failure of consideration as to them growing out of worthlessness of the machinery. The bill also maintained that Mylius signed the notes as surety only, and that the company, by exchanging engines with Knutti without the consent of Mylius, partially released the lien of a deed of trust that had been given on the property as additional security for the payment of the purchase price, so that Mylius as surety was discharged from obligation.

[1] We need not extensively consider the record that has been made in this injunction case. The demurrer to the bill should have been sustained and the bill dismissed. The matters alleged in the bill do not warrant the interference of an equity court with the law action. Both of the defenses to the notes relied on in the bill are cognizable at law. They furnish no grounds for transferring the litigation to the equity forum. Pleas of total failure of consideration and of discharge of a surety by the act of the creditor, as to unsealed instruments, are pleadable and triable as defenses to an action at law. The law court has jurisdiction to try the case presented by plaintiff's bill. The defenses to the notes on which the bill is based are legal ones. No purely equitable defense is urged. No ground justifying equity cognizance is shown.

[2] It is insisted that Code 1906, c. 126, §§ 5 and 6, justifies this attempted resort to equity, and that those sections give the right to go into equity regardless of an action or judgment at law, since failure of consideration is one of the defenses relied on. These sections do not mean that a case may be carried from the law court into equity simply because it involves one of the defenses mentioned in section 5. Section 6 only says that the plea, though pleadable at law under section 5, may be availed of in equity regardless of the law action or a judgment therein if it is a plea cognizable alone in equity but for section 5. Plainly, this is what that section means wherein it says that, though a plea authorized by section 5 is not put in at law by a defendant, "he shall not be precluded from such relief in equity as he would have been entitled to if the preceding section had not been enacted." What relief in equity on a legal defense like total failure of consideration as to simple promissory notes would Mylius have been entitled to if section 5 had not been enacted? None.



The purely equitable defenses to which a defendant was entitled prior to the enactment of this statute were reserved to him if he did not see fit to use them at law as that statute permitted him to do. But the statute did not give him right to withhold from the law action matters that were primarily legal and to avail himself of them in equity later. As to the equity court, the statute merely reserved to him matters primarily cognizable in equity. It gave him no rights additional to those he had prior to the statute, if he chose not to avail himself of the right to plead at law under the statute. It did not convert defenses cognizable at law into matters cognizable in equity. This court has so held. "The 5th and 6th sections of chapter 126 of the code of this State do not enlarge the jurisdiction of courts of equity." *Black v. Smith*, 13 W. Va. 780. The 5th section was intended to allow a defendant by plea to make defenses in a law action that were not open to him in that forum before its enactment. The 6th section was intended to reserve to him any equitable defense that was let into law by the other section, if he chose to use it in equity rather than at law as the statute permitted. Clearly, this statute was only intended to admit to law actions certain defenses that could not be made in them before the enactment, but it was never intended to admit new matters to the equity forum. Judge Snyder, in *Fisher v. Burdett*, 21 W. Va. 626, instances some of the changes brought about by it.

Without the statute Mylius is not entitled to relief in equity against these last due simple promissory notes for the purchase price of the saw mill, on the ground only of total failure of consideration as to them; for the law vouched relief to him on that ground as against these notes. Since he has no right to relief in equity without the statute, he can have none under it. We have seen that the statute does not enlarge jurisdiction in equity. It merely enlarges the right to plead at law and preserves any right to relief in equity that can be pleaded in law by that enlargement but is not there pleaded. All that Mylius seeks to have litigated in his equity suit he can completely and adequately litigate in the law action. He can not transfer the controversy at his pleasure; for he relies on nothing so particularly cognizable in equity that the legal forum does not afford him complete opportunity for redress. We have said that the defenses were primarily legal ones; but, even if the equity court had concurrent jurisdiction of the same, he could not change the forum without showing special equity grounds in the premises. *Prewett v. Bank*, 66 W. Va. 184, 66 S. E. 231, 135 Am. St. Rep. 1019.

Perhaps we should emphasize the fact that the bill relies on a total failure of consideration as to unsealed notes for a basis of equity jurisdiction. It does not set forth a mere partial failure of consideration; but it shows that beyond the purchase money already advanced the consideration for the debt represented by these last notes has wholly failed. It seems that at common law there was resort to equity for failure of consideration in part, even as to parol contracts. *Fisher v. Burdett*, supra, 21 W. Va. at page 629; *Bias v. Vickers*, 27 W. Va. 456. An adjustment of damages or set off was demanded which, as the practice then was, the law court could not adequately meet. Evidently, however, Mr. Minor did not so view it. 4 Inst. (3d Ed.) 793. But certain it is that at common law a total want or failure of consideration as to parol contracts could be shown under the general issue of non assumpsit or nil debet. 4 Minor's Inst. (3d Ed.) 770. A total failure of the consideration affords a complete bar to an action on a simple contract and can be shown at law. See the authorities cited and quoted in this particular by Judge Haymond in *Black v. Smith*, supra. Prior to the enactment of Code 1906, c. 126, §§ 5 and 6, equity had no general or peculiar jurisdiction on the ground of failure of consideration which that statute preserved to a defendant. It was necessary to appeal to equity on that ground as to sealed contracts, but it was not always so as to parol contracts. If the failure was total, it furnished a complete legal defense in bar of an action. The statute gave no additional equity powers in this or any other particular.

We observe that the decision in *Jarrett v. Goodnow*, 39 W. Va. 602, 20 S. E. 575, 32 L. R. A. 321, is not in accord with the prior holding in *Black v. Smith*, supra, to the effect that Code 1906, c. 126, §§ 5 and 6, gave equity no enlarged jurisdiction. Nor is it in accord with the recent decision in *Prewett v. Bank*, supra. A discriminating review of the subject leads to our approval of the application of this statute as made in the two last named cases.

One of the defenses asserted by Mylius—that he was discharged as surety by the act of the creditor in releasing a security for the debt—can have no relation to the statute cited and relied on as affording equity jurisdiction. As related to notes not under seal, it is clearly a defense cognizable at law. It can in no light justify a necessity of resorting to equity. *Parsons v. Harrold*, 46 W. Va. 122, 32 S. E. 1002; *Glenn v. Morgan*, 23 W. Va. 467.

The decree will be reversed, the injunction dissolved, the demurrer to the bill sustained, and the bill dismissed.

(70 W. Va. 586)

**COOK v. CHESAPEAKE & O. RY. CO.**  
(Supreme Court of Appeals of West Virginia.  
April 2, 1912.)

(Syllabus by the Court.)

**APPEAL AND ERROR (§ 1002\*)—REVIEW—CONFLICTING EVIDENCE.**

A verdict founded upon conflicting oral testimony, sufficient to sustain it, cannot be set aside, in the absence of controlling facts or circumstances, admitted or clearly established by proof.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3935-3937; Dec. Dig. § 1002.\*]

Error to Circuit Court, Raleigh County.

Action by J. Levi Cook against the Chesapeake & Ohio Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Enslow, Fitzpatrick, Alderson & Baker, for plaintiff in error. File & File, for defendant in error.

**POFFENBARGER, J.** Alleged insufficiency of the evidence to sustain the verdict is the basis of this writ of error.

Plaintiff's mare was killed by one of the defendant's trains, under the following circumstances: One Acord was conducting the mare in question and another animal belonging to another person along a highway. They seem to have been loose and he riding a third horse, driving them ahead of him. Approaching a railroad crossing, he heard a train coming and called to one Largen, who happened to be there, to stop them. Largen made an unsuccessful attempt to do so. Plaintiff's mare crossed the track and followed the county road, paralleling the track, while the other took the track ahead of the train. Strange to say, the latter escaped and the former was killed. At some distance from the crossing, about 200 yards, it ran or jumped down a path onto the track in front of the train in a cut from four to eight feet deep. Thus far the witnesses substantially agree, but there is conflict as to other material facts. According to the testimony of the train crew, the mare was struck just where she came on the track. They say she fell on the track only a few feet ahead of the train, and was struck there and pushed along the track a short distance. At least one witness for the plaintiff says her tracks show she came on the railroad about 117 feet from the point at which she was struck, and ran that distance ahead of the train and along the side of the track, and he is to some extent corroborated by other witnesses. None of plaintiff's witnesses saw the train strike her, it is true; but their lack of vision is cured by evidence one of them, at least, claims to have found upon the ground, and thus an issue of credibility for exclusive jury determination was raised, provided the train could have been stopped before it struck her.

A witness, having had considerable experience as a railroad man says it could, and the engine crew say it was running at a very low rate of speed, only 4 or 5 miles per hour, at the time the mare came on the track. Though this is denied by plaintiff's witnesses, who say the steam was cut off at the crossing and then immediately reapplied, so as to maintain a rate of 10 to 15 miles per hour, the presence of the other horse running ahead of the train likely induced some reduction of speed. However that may be, the train was going up a 2 per cent. grade at a comparatively low rate of speed, and a man of some railroad experience says it could have been stopped within the distance named, though running at the rate of 10 to 15 miles per hour.

The state of the evidence thus puts the verdict beyond court control, and the judgment must therefore be affirmed.

(70 W. Va. 580)

**WEBB v. CROUCH et al.**

(Supreme Court of Appeals of West Virginia.  
April 2, 1912.)

(Syllabus by the Court.)

**1. MORTGAGES (§ 226\*)—ABSOLUTE DEED—CONVEYANCE BY MORTGAGEE.**

A mortgagee, though his mortgage be in form an absolute deed, may by like absolute deed sell and convey his mortgage rights and interests in the property conveyed, without the consent, or acquiescence, of the mortgagor.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 611-617; Dec. Dig. § 226.\*]

**2. SUBROGATION (§ 17\*)—RIGHTS OF SECOND MORTGAGEE—PAYMENT OF FIRST MORTGAGE.**

If at the time of such mortgage the property conveyed be subject to a prior mortgage, or deed of trust, the mortgagee, by virtue of his junior mortgage, being the owner of the equity of redemption, may pay off the prior incumbrance or furnish the money or security therefor, and be subrogated to the rights of the creditor in such prior mortgage.

[Ed. Note.—For other cases, see Subrogation, Cent. Dig. §§ 44-46; Dec. Dig. § 17.\*]

**3. MORTGAGES (§ 116\*)—RIGHT OF REDEMPTION.**

Where a mortgagor subsequently to the mortgage by himself or his agent obtains from the mortgagee credit or additional loans of money, he will not be permitted, on bill filed, to redeem the property mortgaged, except on condition of repaying the debt originally secured and the debts and liabilities subsequently contracted, unless the interests of third parties have intervened so as to render it inequitable to deny such redemption.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 230-232; Dec. Dig. § 116.\*]

Appeal from Circuit Court, Raleigh County.

Bill by Amelia G. Webb against E. H. Crouch and others. Decree for defendants, and plaintiff appeals. Affirmed.

A. A. Lilly, for appellant. File & File, for appellees.

MILLER, J. The decree appealed from found as facts alleged and proven, that the deed of January 29, 1906, calling for fifty acres of land, from plaintiff, Amelia C. Webb and F. M. Webb, her husband, to defendant, A. P. Farley, though on its face an absolute deed, was in fact a mortgage given to secure to Farley the payment of \$105.00, represented by the note of Webb and wife to him; that the deed of February 10, 1906, from said Farley and wife to defendant Crouch, also absolute on its face, operated as an assignment of said mortgage to Crouch, and that the subsequent loan of \$500.00, obtained by said F. M. Webb from the Citizens Bank of Beckley, endorsed by said Crouch, as set up in his amended and supplemental answer, was authorized by plaintiff, and secured by him at her instance and request and for her benefit, and was afterwards adopted and ratified by her, and that the money was expended for her benefit; and, therefore, that she was not entitled to have said land reconveyed to her by said Crouch, except upon condition of the re-payment to him of the said sum of \$500.00, with accrued interest. And by said decree the court also proffered leave to plaintiff to amend her bill, so as to tender to said Crouch said sum, which was declined. Whereupon the court being of opinion that she was not entitled to the relief prayed for, adjudged, ordered and decreed that her bill be dismissed, but without prejudice to thereafter redeem said land upon payment of said loan, and its accrued interest. And there was also a decree against plaintiff in favor of defendants for costs.

The record shows that at the time Webb and wife conveyed the land to Farley, it was subject to a prior deed of trust, in favor of one Sarrett, to secure payment of another note executed by them for \$225.00, so that the effect of the deed to Farley was to convey to him their equity of redemption only.

The allegations and theory of the plaintiff's bill were, that the debts so secured were primarily the debts of her husband; that the deed from Farley and wife to Crouch, not authorized by her, was invalid, as against her rights under a defeasance contract, executed by Farley, and that as she was not a party to the contract by which her husband had obtained the loan of \$500.00 from the bank, through Crouch, upon the latter's endorsement, though upon the credit of the land to which he had so acquired the title, she was entitled to have the land reconveyed to her by Farley or by Farley and Crouch, free of incumbrances, and free of any claim of Crouch to be repaid the money for which he had thus become bound by his endorsement, regardless of the fact that the debt due Farley and the prior deed of trust to Sarrett had been paid off and discharged out of that loan.

Farley proves that the deed was originally made to him, to sell the land or the mineral rights, and to obtain the money with which the grantors might pay off their debts, but that failing to secure a purchaser, he had subsequently executed the defeasance contract referred to, and thereafter, for the further protection of the grantors and to secure his own debt, had conveyed the land to Crouch, taking from Crouch in favor of the plaintiff a similar defeasance contract to the one he had executed. The fact that the deed recites a consideration of \$600.00, in hand paid, tends to support Farley's testimony. It is conceded that out of the loan so obtained through Crouch the Farley debt and the Sarrett debt had been paid; that \$100.00 thereof had been placed to the credit of plaintiff's daughter in bank, to be used in an effort to secure the release of a son from imprisonment, and that the residue of the money had been used by plaintiff and her husband in paying off other debts.

While it is conceded that plaintiff was not personally present, and participating with her husband in his transaction with Crouch, both virtually admit that in consequence of their indebtedness they had previously talked the matter over, and that she had agreed to become his surety to obtain the money from some one, not distinctly mentioned, to enable her to get back the title to the land and use it as security to raise the money necessary to discharge their debts, and secure funds to pay the expenses of obtaining the release of their son from prison. Plaintiff admits that she knew of the deed from Farley to Crouch some two years before she brought her present suit, and that she had made no objection thereto, or given any notice of her claim either to Farley or Crouch, and that her husband had obtained the loan of \$500.00 through Crouch, without any complaint or notice from her to Crouch, repudiating the contract of her husband with him.

After having carefully considered all the evidence, with due regard to the issues presented by the pleadings, we are fully satisfied that the decree below is plainly right, and ought to be affirmed. Although plaintiff denies the authority of her husband to bind her for the loan obtained through Crouch, and his oral testimony to some extent tends to support her contentions, yet both admit that such a loan was contemplated, and that both were to become bound as principal and surety therefor; besides their prior and subsequent acts and conduct, and the use made by them of the money obtained on said loan are inconsistent with their theory of want of authority in the husband; and we agree with the court below, that if plaintiff's husband was not specifically authorized to contract with Crouch his general authority was ample for the purpose, and that both having accepted the benefits of the contract, the land

became bound for the loan, and that Crouch is entitled to hold the legal title thereto until he is made whole.

[1] The rights of the defendant Crouch to hold the land as security must be determined not only by reference to his contractual rights with the parties, but also with due regard to his legal status respecting the title. The deed to Farley being a mortgage in fact, Farley had the lawful right, and the effect of his deed to Crouch was to sell and convey to Crouch all his right, title and interest in the land, which was the equity of redemption invested in him, by the deed from the plaintiff and her husband, subject of course to the defeasance contracts executed by Farley and Crouch. Farley did not require the consent and acquiescence of plaintiff or her husband to sell and convey his mortgage interest to Crouch. This proposition we think fully supported by authority. *Southern Bldg. & Loan Ass'n v. Page*, 46 W. Va. 302, 33 S. E. 336.

[2] This being so Crouch was not a stranger to the title. Holding by the deed from Farley and wife he was owner of the equity of redemption, and was entitled to redeem the land from the prior mortgage or deed of trust, and to be subrogated to the rights of the creditor. The transaction between Webb and wife and Crouch, as we understand the evidence, did not actually take that form, but Crouch furnished the money, or the security or means by which the money was obtained and the debts secured by the prior deed of trust and the mortgage debt to Farley were paid. The evidence is not as clear as it ought to have been on this subject. Crouch says he gave a check upon the bank for the money; Webb says he got the money at the bank, and his evidence may imply, though he does not distinctly say so, that his note endorsed by Crouch was discounted by the bank, and the money procured in that way. The cashier of a liquidating bank testified, that the books of the Citizens Bank did not show that the note had been discounted. If, as Crouch swears, he gave a check to Webb, he probably took the note and held it for collection on the bank. We do not see, however, that the form of the transaction is material. The decree appealed from as we have seen decreed that the money was due Crouch; he was payee and endorser of the note, and there is no complaint of the decree on this score. The rule seems to be, that where one discharges the debt of another, or out of whose money such debt has been discharged, he is entitled by subrogation to the rights of the creditor. *Iron Co. v. Wilder*, 88 Va. 942, 14 S. E. 806; 27 Am. & Eng. Ency. Law, 203, 204, and notes; *McNeil v. Miller*, 29 W. Va. 480, 2 S. E. 335.

[3] Another proposition, well supported by authority, and justifying the decree appealed from, is, that where a mortgagor, subsequently

to the mortgage, obtains from the mortgagee a subsequent advance or loan of money on the faith of the mortgage, he will not be permitted on bill filed to redeem the mortgaged property, except upon condition of paying the debt originally secured, and the debts subsequently contracted, unless the interests of third parties have intervened. 20 Am. & Eng. Ency. Law, 966; 11 Id. 230, 231; *Cupp v. Lester*, 104 Va. 350, 51 S. E. 840; *Shirras v. Calg*, 7 Cranch, 35, 3 L. Ed. 260; *Lee v. Stone*, 5 Gill & J. (Md.) 1, 23 Am. Dec. 589; *McMillan & Son v. Jewett*, 85 Ala. 476, 5 South. 145. In 20 Am. & Eng. Ency. Law, supra, it is said: "Where a person entitled to redeem comes into equity seeking that relief, it is now the established rule, in the absence of statutory provisions to the contrary, that he must pay not only the mortgage debt and interest thereon, but also all other debts due from him to the mortgagee, although unsecured by the mortgage; the principle upon which the court proceeds in imposing this condition being that 'he who asks equity must do equity.'" This rule has been applied in the case of a married woman, who gave a mortgage on her separate estate to secure a debt which she had contracted, and afterwards obtained a further loan from the mortgagee. *Woodson v. Perkins*, 5 Gratt. 346. And the rule is particularly applicable where, as in this case, the mortgage has taken the form of an absolute deed. *McMillan v. Jewett*, supra; 27 Cyc. 1375. These authorities hold, in the class of cases just referred to, that no form of deed is necessary even to convey the equity of redemption to the mortgagee, "but this may be accomplished by a parol settlement and agreement of the parties, with a surrender, cancellation, or destruction of the instrument of defeasance, or may be established by any circumstances showing that it would be inequitable to allow the grantor to redeem." 27 Cyc. 1375; *Scanlan v. Scanlan*, 134 Ill. 630, 25 N. E. 652.

For these reasons we are of opinion that the decree below was right, and that it should be affirmed.

(70 W. Va. 570)

#### ROUSEY v. STILWAGON.

(Supreme Court of Appeals of West Virginia.  
April 2, 1912.)

(Syllabus by the Court.)

#### 1. EXECUTION (§ 163\*)—MOTION TO QUASH—HEARING—VALIDITY OF JUDGMENT.

On a motion to quash an execution issued upon a judgment of a justice of the peace by the clerk of a circuit court in whose office a transcript of such judgment has been filed, pursuant to section 118, c. 50, Code 1906, the court may inquire into jurisdictional matters affecting the validity of the judgment, and, if the judgment is void, may quash the execution.

[Ed. Note.—For other cases, see Execution, Cent. Dig. §§ 473-483; Dec. Dig. § 163.\*]

## 2. JUSTICES OF THE PEACE (§ 122\*)—PROCEDURE—JUDGMENT—PROCESS TO SUSTAIN JUDGMENT.

A summons issued by a justice of the peace, which names the magisterial district, but not the county, whereto the defendant is cited to appear, is defective; and a default judgment rendered thereon is void.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 382-388; Dec. Dig. § 122.\*]

Error to Circuit Court, Cabell County.

Action by Ellen Rousey against E. L. Stilwagon. Judgment for defendant, and plaintiff brings error. Affirmed.

Blackwood & Saunders, for plaintiff in error. Livezey & Hogsett, for defendant in error.

**WILLIAMS, J.** This writ of error was awarded, on the petition of Ellen Rousey, to a judgment of the circuit court of Cabell county, rendered on the 13th of April, 1910, quashing an execution issued by the clerk of said court, upon a default judgment rendered by a justice of the peace of said county in her favor against E. L. Stilwagon, a transcript of which had been filed in said clerk's office, pursuant to section 118, c. 50, Code 1906.

The record presents the question of the sufficiency of the justice's summons as a notice to defendant of the place at which he was summoned to appear. If the notice was defective, the justice did not lawfully acquire jurisdiction over defendant, and had no authority to render a default judgment. *Moore v. Holt*, 55 W. Va. 507, 47 S. E. 251.

[1] On the motion to quash the execution, due notice of which had been given, the court could inquire into the justice's jurisdiction; and, if there was lack of jurisdiction, it would render the judgment void, and the court could quash the execution issued thereon by the clerk, for an execution on a void judgment is a nullity. 17 Cyc. 1153; *Baur v. Baur*, 40 Mo. 61; *Holzhour v. Meer*, 59 Mo. 434; *Rowe v. Peckham*, 30 App. Div. 173, 51 N. Y. Supp. 889; 1 *Freeman on Executions* (3d Ed.) § 73a; *Blair v. Henderson*, 49 W. Va. 282, 38 S. E. 552; *Schultze v. State*, 43 Md. 295.

[2] The justice's summons fails to lay the venue in any county. It cited the defendant to appear before the justice at his office "in the district of Grant, in said county." But the name of the county nowhere appears on the writ, and the words "said county" are therefore unintelligible. The name of the magisterial district alone is not a sufficient designation of the place to which defendant was summoned. There may be many magisterial districts by the name of Grant in the state of West Virginia; and the failure to name the county in which the particular magisterial district named is situate makes uncertain the place intended, and renders the summons void.

A question, analogous to the one under consideration, was decided by the Supreme Court of Illinois in *Gill v. Hoblit*, 23 Ill. 473, in which it was held that a summons, issued form Logan county, directing a sheriff of Cook county to summon a defendant in his county to appear at Lincoln, "in said county," was void. The following authorities relate to similar questions, and support our conclusion: 32 Cyc. 431; 20 A. & E. E. L. (1st Ed.) 510; *Orendorff v. Stanberry*, 20 Ill. 89; *Womsley v. Cummins*, 1 Ark. 125. In *Murdy v. McOutcheon*, 95 Pa. 435, a summons, issued by a justice of the peace, was held fatally defective, because it did not name the township in which the justice's office was.

Moreover, the summons in this case is not a substantial compliance with section 26 of the Justice's Code, which prescribes the form thereof. In the form a blank space is left for the name of the county, and, by necessary implication, the blank must be properly filled in order to complete the summons, and constitute it a substantial compliance with the mandate of the statute.

The judgment will be affirmed.

(159 N. C. 74)

McLEOD v. JONES et al.

(Supreme Court of North Carolina. April 24, 1912.)

## 1. WILLS (§ 489\*) — CONSTRUCTION — EVIDENCE.

In a will making bequests to "Home Missions of the Baptist denomination," "Foreign Missions of the Baptist denomination," and "Thomasville Orphanage," instead of to "the Home Mission Board of the Southern Baptist Convention," "the Foreign Mission Board of the Southern Baptist Convention," and "the Trustees of the Thomasville Baptist Orphanage," there was latent ambiguity authorizing, in an action to construe the will, the admission of extrinsic evidence including declarations of the testator made at the time the will was executed.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1037-1046; Dec. Dig. § 489.\*]

## 2. WILLS (§ 489\*)—ACTION TO CONSTRUE—EXTRINSIC EVIDENCE—PROBATE OF EFFECT.

Where there is a latent ambiguity in a description of the legatee in a will authorizing the admission of extrinsic evidence in an action to construe the will, such evidence is admitted, not to alter or affect the construction, but to apply the description in the will to the intended legatee.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1037-1046; Dec. Dig. § 489.\*]

## 3. WILLS (§ 105\*)—VALIDITY—DESIGNATION OF BENEFICIARIES.

Where the intended beneficiaries of a will were ascertainable with certainty from its terms aided by extrinsic evidence, and the bequest was absolute, no trust being declared or contemplated, the fact that the beneficiaries were incorrectly designated did not make the bequest void.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 243; Dec. Dig. § 105.\*]

Appeal from Superior Court, Moore County; Ferguson, Judge.

Action by R. L. McLeod, executor, to obtain construction of the will of Levi S. Warner. From the judgment rendered, the heirs at law and next of kin appeal. Affirmed.

Civil action to obtain the construction of the last will and testament of Levi S. Warner, deceased, and assure the proper distribution of his estate. It appeared that the testator made the will in question and died without wife or children, leaving some sisters and children of others surviving as his next of kin and heirs at law; that the action was instituted by the executor named in the will, and for the purposes indicated, and the persons above referred and the Home Mission Board of the Southern Baptist Convention and the Foreign Mission Board of the Southern Baptist Convention and the trustees of the Baptist Church at Carthage, N. C., and the trustees of the Thomasville Baptist Orphanage were made parties defendant; that the will, after making several devises and bequests to his sisters who survived the testator, and the children of those deceased, contained the following items, which are the special subjects of controversy:

"8th. I will and bequeath one-third of all the proceeds of the balance of my real and personal property of every description and kind to Home Missions of the Baptist denomination.

"9th. I will and bequeath one-third of all the proceeds of the balance after item 7 of all real and personal property of every description and kind to Foreign Missions of the Baptist denomination.

"10th. I will and bequeath the remainder of all my real and personal property of every description and kind to the Thomasville Orphanage."

It appeared that there would be several thousand dollars affected by the items, as stated. After being charged by the court, the jury rendered, in reference to these items, the following verdict:

"(1) Did testator by the words in item 8 of his will, 'Home Missions of the Baptist denomination,' intend 'the Home Mission Board of the Southern Baptist Convention,' as alleged?" Answer: "Yes."

"(2) Did the testator by the words in the ninth item of his will, 'Foreign Missions of the Baptist denomination,' intend 'the Foreign Mission Board of the Southern Baptist Convention,' as alleged?" Answer: "Yes."

"(3) Did the testator by the words in the tenth item of his will, 'Thomasville Orphanage,' intend 'The Trustees of the Thomasville Baptist Orphanage,' as alleged?" Answer: "Yes."

Upon this verdict, and on the matters now in controversy between the parties, the court entered judgment as follows:

"(1) That the plaintiff, as executor of the last will and testament of Levi S. Warner, be and he is hereby instructed, directed, and decreed to pay the bequest and devise men-

tioned and set forth in item 8 of the last will and testament of his said testator to the defendant 'the Home Mission Board of the Southern Baptist Convention.'

"(2) That the plaintiff, as executor of the last will and testament of Levi S. Warner, be and he is hereby instructed, directed, and decreed to pay the bequest and devise mentioned and set forth in item 9 of the last will and testament of his said testator to the defendant, 'the Foreign Mission Board of the Southern Baptist Convention.'

"(3) That the plaintiff, as executor of the last will and testament of Levi S. Warner, be and he is hereby instructed, directed, and decreed to pay the bequest and devise mentioned and set forth in item 10 of the last will and testament of his said testator to the defendant 'the Trustees of the Thomasville Baptist Orphanage.' \* \* \* And from said judgment the heirs at law and next of kin appealed.

R. L. Burns and G. H. Humber, for appellants. H. F. Seawell, for appellee.

HOKE, J. (after stating the facts as above). [1, 2] Under our decision the facts in evidence present an instance of a latent ambiguity, requiring and permitting the reception of extrinsic evidence, not to alter or affect the construction, but to apply the description to the intended donee, as designated by the language appearing in the will. *Keith v. Scales*, 124 N. C. 497, 32 S. E. 809; *Tilley v. Ellis*, 119 N. C. 233, 28 S. E. 29; *Simmons v. Allison*, 118 N. C. 763, 24 S. E. 716; *Institute v. Norwood*, 45 N. C. 66. And in such case and for such purpose authority here and elsewhere is to the effect that the surrounding circumstances as well as the declarations of the testator are relevant to the inquiry and especially where, as in this case, they were made at the time the will was executed. *Herring v. Williams*, 153 N. C. 231, 69 S. E. 140, 138 Am. St. Rep. 659; *Holt v. Holt*, 114 N. C. 241, 18 S. E. 967; *Morgan v. Burrows*, 45 Wis. 211, 30 Am. Rep. 717; *Griscom v. Evens*, 40 N. J. Law, 402, 29 Am. Rep. 251; *Coulam v. Doull*, 133 U. S. 216, 10 Sup. Ct. 253, 33 L. Ed. 596; *Covert v. Sebern et al.*, 73 Iowa, 564, 35 N. W. 636; *Vernor v. Henry*, 3 Watts (Pa.) 385; *Chappell v. Missionary Society*, 3 Ind. App. 356, 29 N. E. 924, 50 Am. St. Rep. 276; *Allen v. Allen*, 40 Eng. Common Law, 92; *Chamberlain's Best on Evidence*, p. 222; 1 *Williams on Executors*, p. 424; *Jones on Evidence* (2d Ed.) § 479; *Gardner on Wills*, pp. 387, 391, 395.

[3] It appeared in evidence that Foreign Missions was a well-recognized and beneficent charity, established and administered by the Missionary Baptist Church of the South through the "Foreign Mission Board of the Southern Baptist Convention," an agency incorporated for the purpose, and that "Home Missions" was a like charity, administered by like agency, entitled "The Home Mission

Board of the Southern Baptist Convention"; that collections and donations for these charities had and made by the local churches were remitted to Mr. Walters Durham, the treasurer of the State Baptist Convention at Raleigh, and he, in turn, remitted the Home Mission money to the treasurer of the Home Mission Board at Atlanta, Ga., and the Foreign Mission money was sent to the treasurer of the Foreign Mission Board at Richmond, Va.; that the testator attended and was for a long time a member of the Baptist Church at Bethlehem, Moore county, N. C., taught in the Sunday school, and made gifts and subscriptions to its church work, including Foreign Missions, Home Missions, State Missions, Orphanage, and other causes, the witness stating "that this church at Bethlehem was the Missionary Baptist Church, and that he knew of no other Baptist Church among the white people in that section of the state." It was made to appear, further, that the Missionary Baptists of the state maintained an orphanage at Thomasville, N. C., incorporated under the style and title of "The Trustees of the Thomasville Baptist Orphanage," the only orphanage of any kind maintained at Thomasville, and, on consideration of the facts in evidence, the habits and customs of the testator, his church affiliation, and his direct declarations referred to, there is no room for doubt as to the testator's mind and will, and that the intended donees have been correctly ascertained and declared by the verdict. We were referred by counsel to several decisions in this state and elsewhere, as in *Bridges v. Pleasants*, 39 N. C. 26, 44 Am. Dec. 94; *Metho-dist Church v. Baker et al.*, 91 Md. 539, 46 Atl. 1020, to the effect that when a testator has evinced an evident desire to create or establish a trust, and the will is so indefinite in its scheme or as to the beneficiaries who are contemplated that a court is unable, either from the terms of the will or by aid of extrinsic evidence, to ascertain or enforce the mind and purpose of the testator, such a provision, so expressed, must fail. These and like cases are referred to by the present Chief Justice in the well-considered opinion of *Keith v. Scales*, as follows: "There are numerous cases where the testator does not select the object of his bounty, but attempts to leave it to his executors or trustees to select the purpose or class, and this is too indefinite, and the devise is void because no one can appoint another to make a will for him." In the present case there is no trust declared or contemplated (*St. James v. Bagley*, 138 N. C. 384, 50 S. E. 841, 70 L. R. A. 160); but it is a direct bequest in absolute ownership to a lawful, beneficent, and well-ascertained charity, established and administered by one of the great religious denominations of the country, and, as stated, the facts in evidence leave no doubt as to the intended beneficiaries of the testator's boun-

ty. The case is controlled by the authorities cited, and *Gilmer v. Stone*, 120 U. S. 586, 7 Sup. Ct. 689, 30 L. Ed. 734, is also a direct authority in approval of the decision. There is no error, and the judgment is affirmed.

No error.

(159 N. C. 68)

**TEMPLETON v. BEARD et al., County Com'rs.**

(Supreme Court of North Carolina. April 24, 1912.)

**1. HIGHWAYS (§ 198\*)—BRIDGES (§ 37\*)—TORTS—DEFECTIVE ROAD OR BRIDGE.**

A county, in the absence of statute, is not liable for personal injuries resulting from a defective road or bridge.

[Ed. Note.—For other cases, see *Highways*, Cent. Dig. §§ 504-507; Dec. Dig. § 198;\* *Bridges*, Cent. Dig. §§ 103, 105; Dec. Dig. § 37.\*]

**2. HIGHWAYS (§ 198\*)—COUNTY COMMISSIONERS—LIABILITY FOR DEFECTIVE ROAD OR BRIDGE.**

County commissioners exercising discretionary and quasi judicial powers for the public benefit, in the absence of statutory provisions, are not individually liable for personal injuries resulting from a defective road or bridge, where there is no charge that they acted or failed to act corruptly or of malice, however erroneous their judgment may be; nor is it material that they sometimes act ministerially.

[Ed. Note.—For other cases, see *Highways*, Cent. Dig. §§ 504-507; Dec. Dig. § 198.\*]

**3. BRIDGES (§ 37\*)—JUSTICES OF THE PEACE (§ 37\*)—JURISDICTION.**

An action against a county commissioner to recover the penalty of \$200 provided by Revisal 1906, § 3590, for neglect of duty, is an action ex contractu, within the jurisdiction of a justice of the peace.

[Ed. Note.—For other cases, see *Bridges*, Cent. Dig. §§ 103-105; Dec. Dig. § 37;\* *Justices of the Peace*, Cent. Dig. §§ 98-115; Dec. Dig. § 37.\*]

Appeal from Superior Court, Iredell County; Ferguson, Judge.

Action by Vennie Templeton against P. B. Beard and others, commissioners of Rowan county. Demurrer to complaint sustained, and plaintiff appeals. Affirmed.

Z. V. Turlington, for appellant. L. C. Caldwell, for appellees.

**HOKE, J.** The plaintiff instituted suit against P. B. Beard and four others, and for her cause of action alleged that during the period referred to defendants were the duly qualified and acting commissioners of Rowan county, N. C.; that on the ——— day of May, 1909, the public road leading east from Mt. Ulla, in Rowan county, was, and had been for several months past, in a dangerous and unsafe condition at the point where it crosses Back creek, and was a menace to the public passing along over said road, because of the great need of a bridge across said creek, which fact was well known to defendants, above named, and was negligently, care-

lessly, and wantonly, without due regard to the safety of the public, allowed by them to remain in said dangerous condition; that the defendants, above named, well knew the dangerous condition of the road and the need of a bridge at that place, and had assumed the responsibility therefor, and had agreed to build a bridge at that place, and had let the contract for the building of said bridge, but carelessly, negligently, and recklessly failed to have said bridge built for a long period of time after the contract for same had been let, to wit, for the period of about six months, well knowing that the safety of the public was imperiled by this long delay; that on or about the — day of May, 1909, Miss Vennie Templeton, while attempting to cross the said creek at the point above named, drove her horse into the said ford, when her horse, on account of the dangerous condition of the aforesaid ford, lost his life, and the said plaintiff in this action was greatly damaged, to wit, in the sum of \$300.

[1, 2] On these facts, alleged in the complaint and made the basis of plaintiff's demand, the county of Rowan is not liable on the principle declared and approved in the well-considered case of *White v. Commissioners*, 90 N. C. 437, 47 Am. Rep. 534, and many others of like purport. Nor will the action lie against the members of the board as individuals, because there is no averment that defendants acted or failed to act "corruptly or of malice." The case presented is one involving the exercise of discretionary powers conferred upon the board for the public benefit; and it is very generally recognized in such case that, in the absence of statutory provision, even ministerial officers, acting on questions arising properly within their jurisdiction, are not liable to suit by individuals, without an averment of that kind. In such cases, the officers are sometimes termed "quasi judicial," and the general principle applicable is stated by Mechem on Public Officers as follows: "The same reasons of private interest and public policy which operate to render the judicial officer exempt from civil liability for his judicial acts within his jurisdiction apply to the quasi judicial officer as well; and it is well settled that the quasi judicial officer cannot be called upon to respond in damages to the private individual for the honest exercise of his judgment within his jurisdiction, however erroneous or misguided his judgment may be. The name applied to the office or the officer is immaterial. The question depends, in each case, upon the character of the act. If it be judicial or quasi judicial in its nature, the officer acts judicially, and is exempt. Neither is it material that the officer usually or often acts ministerially; in those cases in which he does act judicially he is nevertheless exempt." A statement approved in numerous

decisions here and elsewhere. *Hudson v. McArthur*, 152 N. C. 445, 67 S. E. 995, 28 L. R. A. (N. S.) 115; *Raynsford v. Phelps*, 43 Mich. 342, 5 N. W. 403, 38 Am. Rep. 189; *Baker and Others v. State*, 27 Ind. 485; 28 Cyc. p. 466.

[3] Section 3590 of the Revisal enacts: "If any county commissioner shall neglect to perform any duty required of him by law as a member of the board, he shall be guilty of a misdemeanor, and shall also be liable to a penalty of two hundred dollars for each offense, to be paid to any person who shall sue for the same." And it may be that, unless barred by the statute of limitation, the plaintiff, on the facts stated in the complaint, might be allowed to recover against each commissioner the penalty of \$200, as provided by the statute. *Staton v. Wimberly*, 122 N. C. 107, 29 S. E. 63; *Bray v. Barnard*, 109 N. C. 44, 13 S. E. 729; *Bray v. Creekmore*, 109 N. C. 49, 13 S. E. 723. But, under our authorities, an action of this character is held to be one *ex contractu*, and original jurisdiction for such a claim is within the jurisdiction of a justice of the peace; and the position is therefore not open to plaintiff on this record. *Katzenstein v. Railroad*, 84 N. C. 688. There is no error, and the judgment sustaining the demurrer must be affirmed.

**Affirmed.**

(159 N. C. 230)

**STEWART et ux. v. SALISBURY REALTY & INS. CO. et al.**

(Supreme Court of North Carolina. April 24, 1912.)

**1. VENDOR AND PURCHASER (§ 37\*)—FRAUD—CAVEAT EMPTOR.**

While the doctrine of caveat emptor applies even to sales of land where the buyer and seller have equal opportunity and knowledge, the rule does not apply where the vendor, who was an expert on land values, falsely stated as a fact the price at which he purchased the property intending to trick the purchaser into trade.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. §§ 54-60; Dec. Dig. § 37.\*]

**2. PRINCIPAL AND AGENT (§ 99\*)—ACTS OF AGENT—BINDING EFFECT.**

An act of an agent within the scope of his authority is binding on his principal.

[Ed. Note.—For other cases, see *Principal and Agent*, Cent. Dig. §§ 254-261; Dec. Dig. § 99.\*]

**3. FRAUD (§ 59\*)—REMEDY.**

Where a vendor of real property, who was an expert in values, falsely represented to the purchaser, who was unfamiliar with the values in that locality, that he paid a greater sum for the land in question than was actually paid, the purchaser, who bought at a price figured on a certain advance on that paid by the vendor, may, without proving the actual value of the property, affirm the sale and recover the difference between the price which the vendor claimed to have paid and that which he actually paid.

[Ed. Note.—For other cases, see *Fraud*, Cent. Dig. §§ 60-62, 64; Dec. Dig. § 59.\*]



**4. VENDOR AND PURCHASER (§ 36\*)—FRAUD—REMEDIES.**

Or he may at his option rescind the sale.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 40, 52, 53; Dec. Dig. § 36.\*]

**5. VENDOR AND PURCHASER (§ 125\*)—RESCISSI—EFFECT.**

Where the purchaser of real estate rescinded the contract because of fraudulent representations of the vendor, the act of rescission prevents him from recovering any damages for breach of contract, except special damages which have been sustained, notwithstanding the rescission.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 228, 232, 233; Dec. Dig. § 125.\*]

**6. VENDOR AND PURCHASER (§ 125\*)—CONTRACTS—RESCISSI—BINDING EFFECT.**

Where the vendor of real estate made false representations, and the purchaser elected to rescind, the rescission is binding, and cannot be retracted by the purchaser so as to allow him to affirm the contract and sue for damages.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 228, 232, 233; Dec. Dig. § 125.\*]

Appeal from Superior Court, Rowan County; Justice, Judge.

Action by John J. Stewart and wife against the Salisbury Realty & Insurance Company and another. From a judgment of nonsuit, plaintiffs appeal. Reversed and remanded.

Theo. F. Klutts and R. Lee Wright, for appellants. Stahle Linn and T. C. Linn, for appellees.

**BROWN, J.** The plaintiff alleges in his complaint, and offers evidence tending to prove, that about October 13, 1910, he contracted to purchase from the defendant company, through its salesman and agent, the defendant Hamilton, certain real estate in Salisbury, N. C., called the "Trexler property"; that after much negotiating the defendant agreed to sell the property to the plaintiffs at an advance of \$300 above the cash price, which offer the plaintiffs accepted. Plaintiff further states that the agent, Hamilton, told him that the company had recently paid \$3,500 cash for the property to Trexler; that the plaintiff was ignorant of real estate values in Salisbury, and, relying upon the statements and representations of Hamilton, closed the trade; that a deed was executed to plaintiff Grace M. Stewart, wife of John J. Stewart, and they executed note and mortgage to the company for the \$3,800 on the Trexler property and additional landed security.

[1] Plaintiff avers, and offers evidence to prove, that defendants paid only \$2,750 for the Trexler property, and that its agent intentionally and falsely misrepresented the cost price of said property for the purpose of cheating and defrauding plaintiff. The defendants contend that the evidence of fraud is insufficient to carry the case to the jury, and that the doctrine of caveat emptor ap-

plies. We recognize the general doctrine that the rule of caveat emptor is applied by the courts, even in respect to sales of land when the buyer and seller have equal opportunity of knowledge, and where the buyer makes examination, and when the representations concern the value of land, its condition, or adaptation to particular uses, which are largely matters of opinion, and estimates as to which men may differ. Coolcy on Torts, § 487; Smith on Frauds, p. 191. The evidence offered, we think, is potent enough to take this case out of this rule. Taken in its most favorable light for the plaintiffs, it shows that the purchaser was ignorant of real estate values in Salisbury; that he was dealing with an expert; that he relied upon the representations of such expert as to the actual price recently paid for the property; that such price was falsely and fraudulently represented to be \$750 more than the true cost, and it is fairly to be inferred that such false representations were made with intent to deceive plaintiff, and induce him to believe he was making a good trade. It is true that a purchaser will not be allowed to rescind his trade, or recover damages, simply because he has not made a good one, but, where he has been tricked into making a trade he otherwise would not have made, the law generally affords some measure of relief. We think the evidence in this case tends to prove that the misrepresentations were made by Hamilton, the agent of defendant company; that they were false and made with a fraudulent purpose; that they were calculated to, and did, deceive; and that they were relied on, and acted upon, by the plaintiff. May v. Loomis, 140 N. C. 352, 52 S. E. 728; Terault v. Seip, 74 S. E. 3; Whitehurst v. Insurance Co., 140 N. C. 276, 62 S. E. 1067.

[2] The evidence, furthermore, tends to prove that Hamilton was the agent of the codefendant, that he was acting within the scope of his agency, and that his principal reaped the benefit of, and therefore should be bound by, his acts. Brite v. Penny, 72 S. E. 964; Bowers v. Lumber Co., 152 N. C. 607, 68 S. E. 19. If the facts be found by a jury under appropriate issues in favor of the plaintiffs, what remedy have they?

[3, 4] The learned counsel for the plaintiffs argued with much force that the plaintiffs can recover in this action the sum of \$750, the difference between the actual cost of the property, and the \$3,500, its fictitious cost, and that this is true, notwithstanding the fact that the plaintiffs have offered no evidence tending to prove that the actual value of the property was less than \$3,800, the price which the plaintiffs were induced to pay. This position finds strong support in a case decided by the Supreme Court of Maryland, which appears to be on all fours with the one at bar. Pendergast v. Reed, 29 Md. 398, 96 Am. Dec. 539. In that case A. fraudu-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes 74 S.E.—47

lently represented the cost price of a vessel to have been \$34,000, and sold a part of the vessel to B. upon that basis. B. subsequently learned that the cost price of the vessel was much less than that which A. represented it to have been. There was no evidence of the actual value of the vessel. B. retained his interest, and sued for damages. The court unanimously held that B. was entitled to recover from A. for the overpayment, even if the actual value of the share purchased equaled, or exceeded, what it would have been had the representation been true. In the opinion it is said: "It is not simply the case of a false affirmation by a vendor, concerning the value of the thing sold, where information on the subject was easily within the reach of the vendee, and where the law would regard it the folly of the latter to credit the assertion, but of a false representation of a material fact known to the defendant, and by means of which the plaintiff was induced to part with his money. The very essence of the contract here stated was a purchase for certain considerations of one-eighth of the vessel at its cost price to the defendant, and a false representation of this price, inducing the plaintiff to buy, worked an injury to him, for which he is entitled to recover, even if the actual value of the share purchased equaled or exceeded what it would have been, had the representation been true. He had the right to all the profits of his purchase and contract as he made it, and it is no answer to his action to say, though the representation was false, yet the actual value of the thing sold is equal to what such false representation induced him to pay for it." This case is cited with approval in notes in 18 Am. St. Rep. 555; also, *Walker v. Pike County*, 139 Fed. 609, 71 C. C. A. 593; *Garrett v. Wannfried*, 67 Mo. App. 437. The same principle is recognized in *Teachout v. Van Hoosen*, 76 Iowa, 113, 40 N. W. 96, 1 L. R. A. 664, 14 Am. St. Rep. 206, and notes; *Felt v. Bell*, 205 Ill. 213, 68 N. E. 794; *Thompson v. Newell*, 118 Mo. App. 405, 94 S. W. 557. See, also, 20 Cyc. p. 55, B, and notes; also case almost identical with the one at bar. *Mason v. Thornton*, 74 Ark. 46, 84 S. W. 1048. It would seem upon the authorities that the plaintiffs, if the facts be as appear in the evidence introduced by them, are entitled to recover the \$750, unless they have elected to rescind the contract of sale. There is no doubt in our minds that upon such facts the plaintiffs would have the right to rescind the contract, have the note and mortgage canceled, and restore the property to the defendant.

[5] But we find it averred in the complaint that immediately upon discovering the alleged fraud the plaintiffs made demand upon the defendant for rescission and cancellation of the contract, and the surrender of their note and mortgage, and also tendered to the defendant company a deed for the premises, executed by the plaintiffs. At the same time

the plaintiff served upon the defendants the following notice: "Salisbury, N. C., October 24, 1910. To the Salisbury Realty and Insurance Company: Take notice, that I hereby demand a rescission and cancellation of the house and lot contract—a cancellation of the note and mortgage I gave you, and that you accept a deed from me and wife for the house and lot you deeded us—or a reduction of the amount of the note and mortgage to the correct sum of \$3,050.00, as per agreement with your agent, as heretofore made. The grounds for above are misrepresentation and deception. I hereby tender you deed in accordance with the above. John J. Stewart." It is elementary learning that, if the plaintiffs rescind the contract upon their part, they could only have the note and mortgage canceled, and recover any money actually paid upon it. They could not recover damages for the breach of the contract which they themselves rescinded. They could not recover damages for a breach of contract, as an action for damages proceeds upon an affirmation of the contract. Rescission will bar an action for damages when the only damage sustained is in not getting what was bargained for, and no special damages have been proven. 14 Am. & E. p. 170. But where special damages have been sustained so that the party defrauded is damaged, notwithstanding the rescission, his rescission of the contract will not bar a recovery of such special damages. *Railroad Co. v. Hodnett*, 29 Ga. 461; *Nash v. Title Insurance Co.*, 163 Mass. 574, 40 N. E. 1039, 28 L. R. A. 753, 47 Am. St. Rep. 489; *Warren v. Cole*, 15 Mich. 265.

[6] The record shows both from the allegations of the plaintiff and the notice of October 24th that the plaintiffs have made a binding election; that is to say, election with full knowledge of all the facts from which the coexisting, inconsistent, remedial rights arise. *Railway Co. v. Bernheim*, 113 Ala. 489, 21 South. 405. It seems to be well settled that an election once made, with knowledge of the facts, between coexisting, remedial rights, which are inconsistent, is irrevocable and conclusive, irrespective of intent, and constitutes an absolute bar to any action, suit, or proceeding, based upon any remedial right inconsistent with that asserted by the election. 15 Cyc. p. 262; *Moller v. Tuska*, 87 N. Y. 166; *Clausen v. Head*, 110 Wis. 405, 85 N. W. 1028, 84 Am. St. Rep. 933. From the authorities it is plain that upon the plaintiffs' own showing they are not entitled to recover the \$750, as they have elected to rescind and set aside the contract of sale.

We are of opinion that his honor erred in sustaining the motion for nonsuit, as upon the plaintiffs' evidence the cause should have been submitted to a jury upon appropriate issues of fraud and deceit raised by the pleadings.

Reversed.

(159 N. C. 81)

**SPRINKLE v. SPRINKLE**

(Supreme Court of North Carolina. April 24, 1912.)

**1. LIMITATION OF ACTIONS (§ 195\*)—BURDEN OF PROOF.**

Defendant having pleaded the statute of limitations, plaintiff has the burden of proving the cause of action accrued within the time limited for bringing action; and so, the action being an award of arbitrators, he, if relying on the fact that the submission was under seal, or on the fact that the other arbitrators adopted the seal following the name of one of the arbitrators on the award, must give evidence of such facts.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 711-716; Dec. Dig. § 195.\*]

**2. LIMITATION OF ACTIONS (§ 21\*)—AWARD OF ARBITRATORS.**

Action on an award on a submission to arbitration is one on an obligation arising out of contract, so that the contract, the submission, not being under seal, the three years limitation prescribed by Revisal 1908, § 395, subsec. 1, applies.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 90-99; Dec. Dig. § 21.\*]

Appeal from Superior Court, Forsyth County; Lyon, Judge.

Action by W. T. Sprinkle against J. H. Sprinkle. Judgment for defendant. Plaintiff appeals. Affirmed.

See, also, 74 S. E. 740.

This is an action to recover the sum of \$1,407.37, with interest from January 28, 1898; said indebtedness being evidenced by an award. The matters giving rise to the arbitration were the result of mutual dealings and transactions between the parties who had been engaged in various kinds of business as partners. The award was introduced in evidence, and is as follows: "Award. Arbitration between W. T. Sprinkle and J. H. Sprinkle has this day been settled as follows: That J. H. Sprinkle shall pay W. T. Sprinkle the sum of \$3,000 as his part of the business, and \$750 as his part of undivided profits to July 15, 1897, subject to a credit of \$2,342.63, as agreed upon. This January 28, 1898. P. T. Lehman. W. S. Martin. J. F. Griffith. [Seal.]" The following indorsement is on the award: "From settlement with J. H. Sprinkle on the 10th day of March, 1903, page No. 180, I am due J. H. Sprinkle \$261.89, which I place on this arbitration as credit."

Among other defenses the defendant pleaded the three and ten year statutes of limitation. The plaintiff, to repel the application of the ten-year statute, pleaded a payment, and introduced evidence tending to prove that the indorsement on the award was made with the consent of the defendant. No evidence was introduced as to the character of the submission to arbitration, and, so far as appears, it was in parol. Nor was there any evidence that the arbitrators, Lehman

and Martin, adopted the seal following the name of the arbitrator, Griffith, and there is no finding to this effect. The summons was issued January 20, 1911.

The jury returned the following verdict:

"(1) Did the defendant agree that the credit of \$261.89 should go as a credit on the award, as alleged, of the date March 10, 1903?" Answer: "Yes."

"(2) In what amount, if any, is defendant indebted to plaintiff?" Answer: "\$2,110.61."

His honor held upon the admitted facts that the cause of action was barred by the statute of limitations, and the plaintiff excepted and appealed.

Jones & Patterson, for appellant. Manly, Hendren & Womble, for appellee.

ALLEN, J. [1] The defendant having pleaded the statute of limitations, the burden was on the plaintiff to prove that the cause of action accrued within the time limited for bringing it. *Hussey v. Kirkman*, 95 N. C. 66; *House v. Arnold*, 122 N. C. 222, 29 S. E. 334. If he relied on the fact that the submission to arbitration was under seal, or that the arbitrators Lehman and Martin adopted the seal, following the name of the arbitrator Griffith, it was incumbent on him to offer evidence of these facts, and having failed to do so, we must consider the case as upon a submission and an award, not under seal, and in so considering it the nature of the obligation imposed on the defendant will aid in determining whether the statute of limitations of three years or of ten years applies.

[2] If it is a liability established by contract, or is an obligation arising out of contract, express or implied, the contract not being under seal, it would seem to follow that the limitation of three years prescribed by Rev. 1908, § 395, subsec. 1, would be applicable, which is as follows: "An action upon a contract, obligation or liability, arising out of a contract, express or implied." In *District of Columbia v. Bailey*, 171 U. S. 170, 18 Sup. Ct. 868, 43 L. Ed. 118, Mr. Justice White quotes with approval from *Morse on Arbitration and Award* that "a submission is a contract," and that "the submission is the agreement of the parties to refer. It is therefore a contract, and will in general be governed by the law concerning contracts"—and from *Whitcher v. Whitcher*, 49 N. H. 176, 6 Am. Rep. 486, that "a submission is a contract between two or more parties, whereby they agree to refer the subject in dispute to others, and be bound by their award, and the submission itself implies an agreement to abide the result, even if no such agreement were expressed." The question is discussed in *Tullis v. Sewell*, 3 Ohio, 513, and the court says: "The liability of the defendant originates in the contract of submission that necessarily must precede the

award. It is from this contract that the arbitrators derive their authority as judges whose decision is to bind the parties. \* \* \* It is the submission, therefore, that is the foundation of the right claimed by the plaintiff, and it is only in virtue of the submission that the subsequent proceedings have a binding force. The action originates in the submission, and ought to correspond in character with it. If it is by deed, the remedy should be by debt or covenant. If by parol, or writing not under seal, it may be by assumpsit."

We conclude, therefore, that the cause of action by the plaintiff is one arising out of a contract, not under seal, and, as more than three years elapsed after the date of the alleged payment before the commencement of this action, that the right of recovery is barred.

The case of *Rank v. Hill*, 2 Watts & S. (Pa.) 56, 37 Am. Dec. 483, principally relied on by the plaintiff, seems to be in point, but the decision was upon the authority of *Hodsdon v. Harridge*, 2 Saund. 64b, which was an action upon an award under seal, and in which it was held that the action was not barred under the Statute of 21 Jac. 1, c. 16, providing that "all actions of debt grounded upon any lending or contract without specialty shall be sued within six years," and this statute was in force in Pennsylvania. *Wickersham v. Lee*, 83 Pa. 422. The English case was based on the language of the statute, and, as the award was under seal and it did not appear that the cause of action was "grounded upon any lending or contract without specialty," the plea of the six-year statute of limitations was not sustained, and the Pennsylvania case first referred to depended upon a construction of the same language.

In our opinion his honor decided correctly that, upon the facts in this record, the limitation of three years is applicable, and that recovery on the cause of action is barred.

No error.

(159 N. C. 84)

#### SPRINKLE v. SPRINKLE.

(Supreme Court of North Carolina. April 24, 1912.)

#### APPEAL AND ERROR (§ 843\*)—REVIEW—MATTERS CONSIDERED.

Judgment having been for defendant, and having been affirmed on plaintiff's appeal, defendant's appeal from an adverse ruling in admission of evidence will not be considered; it being unnecessary to do so.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3331-3341; Dec. Dig. § 843.\*]

Appeal from Superior Court, Forsyth County; Lyon, Judge.

Action by W. T. Sprinkle against J. H.

Sprinkle. From an adverse ruling, defendant appeals. Dismissed.

See, also, 74 S. E. 739.

Manly, Hendren & Womble, for appellant. Jones & Patterson, for appellee.

ALLEN, J. The judgment of the superior court was in favor of the defendant, and he appeals from an adverse ruling in the admission of evidence, which it is not necessary for us to consider, as the judgment is affirmed on the plaintiff's appeal.

Appeal dismissed.

(159 N. C. 265)

#### WILKERSON v. WILKERSON.

(Supreme Court of North Carolina. April 24, 1912.)

#### 1. MALICIOUS PROSECUTION (§ 37\*)—TERMINATION OF PROSECUTION—NOLLE PROSEQUI.

A nolle prosequi, with leave, as well as when general or unqualified, is a sufficient determination of a prosecution to authorize an action for malicious prosecution; the suit being terminated in both cases.

[Ed. Note.—For other cases, see Malicious Prosecution, Cent. Dig. §§ 72-77; Dec. Dig. § 37.\*]

#### 2. CRIMINAL LAW (§ 302\*)—WORDS AND PHRASES—"NOLLE PROSEQUI."

A nolle prosequi in criminal proceedings is merely a declaration on the part of the solicitor that he will not then prosecute the suit farther, and is not an acquittal, although its effect is to discharge the defendant without day.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 688-697; Dec. Dig. § 302.\*]

For other definitions, see Words and Phrases, vol. 5, p. 4814.]

#### 3. MALICIOUS PROSECUTION (§ 72\*)—INSTRUCTION—PROBABLE CAUSE.

In an action for malicious prosecution, the court improperly charged that there was not probable cause for the prosecution, if the jury found that the defendant procured the arrest of the plaintiff on the charge of stealing tickets, and the facts and circumstances were not such as would lead a man of ordinary caution and prudence to believe that such offense had been committed, but did not state what facts, if found by the jury, would show that there was or was not probable cause.

[Ed. Note.—For other cases, see Malicious Prosecution, Cent. Dig. §§ 168-173; Dec. Dig. § 72.\*]

Appeal from Superior Court, Durham County; Cooke, Judge.

Action by Cecil G. Wilkerson against O. F. Wilkerson. From a judgment for plaintiff, defendant appeals. New trial.

J. Crawford Biggs and Bramham & Brawley, for appellant. Manning & Everett and Bryant & Brogden, for appellee.

WALKER, J. This is an action for malicious prosecution. The defendant had caused the arrest and prosecution of the plaintiff, who was not related to him, upon the charge of having feloniously stolen certain admission tickets belonging to him as proprietor of the Arcade Theater in Durham.

[1] The criminal proceedings were brought before the recorder, and when the solicitor stated that he had not been able to examine the case, and the defendant insisted upon an immediate trial, a nol. pros., with leave, was entered at the suggestion of the recorder, in order to preserve the rights of the state, but the prosecution of the case was never renewed. It is now contended that this was not a sufficient determination of the proceeding to authorize the bringing of this suit. It was held, though, in *Hatch v. Cohen*, 84 N. C. 602, 37 Am. Rep. 630, and *Marcus v. Bernstein*, 117 N. C. 31, 23 S. E. 38, that a nolle prosequi is a legal determination of the original suit within the meaning of the law concerning malicious prosecution. But defendant contends that this rule does not apply to a nol. pros. with leave, as in the latter case the prosecution is kept on foot, or, in other words, is not ended. This, we think, is a misapprehension of the true reason upon which those cases were decided.

[2] A nol. pros. in criminal proceedings is nothing but a declaration on the part of the solicitor that he will not at that time prosecute the suit farther. Its effect is to put the defendant without day; that is, he is discharged and permitted to go whithersoever he will, without entering into a recognizance to appear at any other time. It is not an acquittal, it is true, for he may afterwards be again indicted for the same offense, or fresh process may be issued against him upon the same indictment, and he be tried upon it. To prevent abuse the power of the solicitor to issue new process upon the same bill is checked and restrained by the fact that a capias, after a nol. pros., does not issue as a matter of course upon the mere will and pleasure of the officer, but only upon permission of the court, which will always see that its process is not abused to the oppression of the citizen. This was laid down as fully as we have stated it in *State v. Thornton*, 35 N. C. 258, and ever since has been considered to be the settled practice. The only difference between a general or unqualified nol. pros. and one "with leave" is that in the latter case the leave to issue a capias upon the same bill is given by the court in advance, instead of upon a special application made afterwards. *State v. Smith*, 129 N. C. 546, 40 S. E. 1. Referring to this kind of nol. pros., the court in *State v. Smith*, supra, said: "While we recognize the fact that the courts should control its process, and see that it is not used to the oppression of the citizens of the state, it is also necessary to so use it as to bring offenders to trial and justice. If the court thinks proper to grant such leave at the time the nol. pros. is entered, we do not see why it may not do so; and we do not feel like reversing a practice so universally adopted in the state." The suit is terminated as much by one form of entry as by the other, because in both the prisoner is discharged

without day, and that seems to be the true test. In both he can be taken upon a fresh capias, in one by special order, and in the other under the general leave to issue. Our opinion is therefore against the defendant on this point.

[3] But we think there is error in the charge of the court upon the question of probable cause. The court charged the jury as follows: "If you find from the evidence in this case, and by the greater weight thereof, that the defendant procured the arrest of the plaintiff on a charge of stealing tickets, and at the time the facts and circumstances were not such as would lead a man of ordinary caution and prudence reasonably to believe that such offense had been committed, and that the plaintiff was guilty of committing the offense, then there was not probable cause for the prosecution." The decisions of this and many other courts are to the effect that the judge must instruct the jury as to what facts, if found by them, will show that there was or was not probable cause. We have followed the ruling in the celebrated case of *Johnstone v. Sutton*, 9 T. R. (1 Dumf. & East) 510, 545, where it was held that the question of probable cause is a mixed proposition of law and fact. Whether the circumstances alleged to show the cause to be probable or not probable are true and existed is a matter of fact; but whether, supposing them to be true, they amount to a probable cause, is a question of law, and upon this distinction, Lord Mansfield said, proceeded the case of *Reynolds v. Kennedy*, 1 Wilson, 232. This case was approved in *Stewart v. Sonneborn*, 98 U. S. 187, 25 L. Ed. 116.

Following the rule of *Johnstone v. Sutton*, supra, this court decided, in *Plummer v. Gheen*, 10 N. C. 66, 14 Am. Dec. 572, that the parties are entitled to the opinion of the court upon the facts as they may be found by the jury, as to whether there was probable cause or not; and Chief Justice Taylor said: "As the question of probable cause is compounded of law and fact, the defendant had a right to the opinion of the court distinctly on the law, on the supposition that he had established, to the satisfaction of the jury, certain facts. Whether the circumstances were true was a question for the jury. Whether, being true, they amounted to probable cause, is a question of law." In the later case of *Beale v. Roberson*, 29 N. C. 280, the court said: "This case brings up again the question whether probable cause is matter of law, so as to make it the duty of the court to direct the jury that if they find certain facts upon the evidence, or draw from them certain other inferences of fact, there is or is not probable cause; thus leaving the questions of fact to the jury, and keeping their effect, in point of reason, for the decision of the court, as a matter of law. Upon that question, the opinion of the court is in the affirmative, and therefore this judg-

ment must be reversed." The court then reviewed the authorities, and thus commented upon them, and established the rule as we have stated it: "Such a series of decisions in our own courts the same way would protect the doctrine laid down in them from being drawn into debate now, even if we entertained doubts of its correctness originally. But, independent of authority, our reflections satisfy us that the principle is perfectly sound. It is a question of reason whether certain ascertained facts and circumstances constitute a probable and rational ground for charging a particular person with crime." And after remarking that it is not the prosecutor's belief of the other's guilt which will excuse him, for he must take care that he acts only on a reasonable belief, a just suspicion, the court further said: "Now our inquiry is whether for the determination of the question as to the sufficiency or the insufficiency of the grounds of suspicion, supposing them to exist in fact, the court or the jury be the more competent; and we think, very clearly, that the court is, because it is a question of general and legal reasoning, and can best be performed by those, whose professional province and habit it is to discuss, weigh, and decide on legal presumptions. The only argument against that is the difficulty in cases of many and complicated facts, and contradictory evidence, as in *Plummer v. Gheen*, of properly separating, to the comprehension of the jury and to the satisfaction of the judge, the matters of law and fact. But that only proves the difficulty of deciding such cases, whether by the court or jury, and does not at all help us in saying whether this or that point should be decided by the one or the other." The court, therefore, held upon the added authority of *Panton v. Williams*, 2 Ad. & El. (N. S.) 169, that "in an action of this sort the judge must determine whether the facts, if proved, or any of them, constitute such cause, leaving it to the jury to decide only whether the facts or those inferred from them exist; and, as that is so, when the facts are few and the case simple, it cannot be otherwise when the facts are numerous and complicated. It would seem, then, that making a question on this subject must be regarded as an attempt to move fixed things, and cannot be successful either in England or here. As the case goes back to another trial, on which the facts may appear differently, we think it unnecessary to consider those that came out on the former trial, in reference to the question of probable cause, further than to remark that few cases perhaps could better illustrate the danger of leaving that question to the discretion of a jury, whose decision of it is not susceptible of review in another court." This has been considered as the leading case upon the subject, and has been followed in all subsequent cases, as stating the law correctly. The instruction in *Beale v. Roberson*

was substantially like that given in this case, and was held to be erroneous.

The following more recent cases assert the same doctrine, and approve *Beale v. Roberson*: *Swaim v. Stafford*, 26 N. C. 392, *Vickers v. Logan*, 44 N. C. 393, *Bradley v. Morris*, 44 N. C. 395, and *Jones v. Railroad*, 125 N. C. 227, 34 S. E. 398, which is directly in point. In *Smith v. Deaver*, 49 N. C. 514, Judge Battle thus sums up the matter: "What is probable cause is a question of law, to be decided by the court upon the facts, as they may be found by the jury. *Beale v. Roberson*, 29 N. C. 280; *Vickers v. Logan*, 44 N. C. 393. As a guide to the court, it is defined to be 'the existence of circumstances and facts sufficiently strong to excite, in a reasonable mind, suspicion that the person charged with having been guilty was guilty.' It is a case of apparent guilt as contradistinguished from real guilt. It is not essential that there should be positive evidence at the time the action is commenced, but the guilt should be so apparent at the time as would be sufficient ground to induce a rational and prudent man who duly regards the rights of others, as well as his own to institute a prosecution; not that he knows the fact necessary to insure a conviction, but that there are known to him sufficient grounds to suspect that the person he charges was guilty of the offense." The cases of *Brooks v. Jones*, 33 N. C. 261; *Kelly v. Traction Co.*, 132 N. C. 372, 43 S. E. 923, and *Downing v. Stone*, 152 N. C. 527, 68 S. E. 9, 136 Am. St. Rep. 841, 21 Ann. Cas. 753, cited by plaintiff's counsel, do not sustain the instruction. The court in those cases was dealing with a question of malice. In *Downing v. Stone*, supra, Justice Hoke applies the rule as we have stated it when he says: "Where it is proven that legal advice was taken by a prosecutor, this, too, is a relevant circumstance in connection with other facts, admitted or established, to be considered by the court in determining the question of probable cause. *Morgan v. Stewart*, 144 N. C. 424, [57 S. E. 149]; *Railroad v. Hardware Co.*, 143 N. C. 58 [55 S. E. 422]." He expressly adopts the rule in *Morgan v. Stewart*, supra, in the following words, citing the cases: "It is accepted doctrine with us that on facts admitted or established the question of probable cause is one of law for the court. *Jones v. Railroad*, 125 N. C. 229 [34 S. E. 398]; *Bradley v. Morris*, 44 N. C. 395; *Swaim v. Stafford*, 26 N. C. 392." See, also, *Newell on Malicious Prosecution*, §§ 276, 277; 16 Am. & Eng. Enc. (2d Ed.) p. 669. Unless we overrule the many cases which have been decided by us and have settled the rule, we must hold that the judge's instruction was insufficient, and left to the jury to decide what he should have decided for them; that is, whether upon any given state of facts, which may have been found by the jury, there was or was not probable cause. As it is, the jury were only required to apply a definition of

probable cause to the facts, without any opinion of the court to guide them, as to how the law considered the different phases of the evidence. This was a clear violation of the rule, if we are to adhere to it. We think there was evidence for the jury to consider as to whether there was probable cause or not. The facts are not complicated, but simple, and it should not be difficult to arrange them so as to inform the jury clearly upon the law. This error of the court requires us to remand the case for a new trial. We will add that, in our opinion, there was no positive error in the charge upon the question of damages, although it was not as full and explicit as it might have been. We do not understand the charge to mean that plaintiff can recover punitive damages upon proof of general malice, such as would be sufficient to establish liability, but only upon proof of particular or actual malice, as defined in the cases. See *Stanford v. Grocery Co.*, 143 N. C. 419, 55 S. E. 815, where this question is discussed.

New trial.

(159 N. C. 66)

MOCKSVILLE LODGE NO. 134, A. F. & A. M., v. GIBBS et al.

(Supreme Court of North Carolina. April 24, 1912.)

1. INJUNCTION (§ 231\*)—VIOLATION—REVIEW—FINDINGS.

Facts found by the trial court and incorporated in an order adjudging defendants guilty of contempt in violating an injunction are not reviewable if supported by evidence.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 517; Dec. Dig. § 231.\*]

2. INJUNCTION (§ 221\*)—CIVIL CONTEMPT—VIOLATION OF INJUNCTION.

An injunction becomes operative from the time the order is made and not from the date of the writ itself, and so a defendant against whom an injunction is issued is guilty of contempt in violating the order of which he has notice, though no service has been made on him.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 445-447; Dec. Dig. § 221.\*]

3. INJUNCTION (§ 230\*)—VIOLATION—NOTICE—EVIDENCE.

In a prosecution for contempt in violating an injunction, evidence held to warrant a finding that defendants knew that the restraining order had been made.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 502-516; Dec. Dig. § 230.\*]

4. INJUNCTION (§ 226\*)—VIOLATION—PURGING CONTEMPT.

One who violates a restraining order cannot purge himself of the contempt by claiming that he did not intend to disregard the order of the court, for a party is not at liberty, by a strained construction of words, to attempt to escape the scope of an injunction by indirection.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 478; Dec. Dig. § 226.\*]

Appeal from Superior Court, Davie County; Daniels, Judge.

Action by the Mocksville Lodge No. 134, A. F. & A. M., against G. R. Gibbs and others. From an order adjudging defendants guilty of contempt in violating an order restraining them from certain acts, defendants appeal. Affirmed.

The summons in this action was issued on the 7th day of August, 1911, and on the same day an order was signed by the judge holding the courts of the Tenth district, restraining the defendant G. R. Gibbs, his agents and employes, from operating a merry-go-round or other device upon the grounds described in the affidavit, on the 10th and 12th days of August, 1911, and from doing or permitting to be done by himself, his agents or employes, anything tending to the annoyance or disturbance of the picnics to be held on those grounds on those days. The restraining order was filed in the clerk's office at Mocksville on the 9th day of August, 1911, and was issued on that day. The merry-go-round referred to in said order was operated on the 10th day of August, but the respondents Gibbs and Emington claim that on the 9th day of August, 1911, before notice of the restraining order, the said Gibbs sold said merry-go-round to said Emington in good faith and for value, and that it was operated on the 10th by Emington as his own property, while the plaintiff claims that both Gibbs and Emington knew that the restraining order had been issued before said sale, that the sale was fictitious, and that Emington was acting as the agent of Gibbs on August 10, 1911.

On the 17th day of August, 1911, a notice was issued to the respondents to appear and show cause why they should not be attached for contempt, and upon the hearing of the same the following order was made: "This cause coming on to be heard before his honor, F. A. Daniels, Judge, at chambers in Salisbury, N. C., on August 29, 1911, upon a rule issued by his honor against A. T. Grant, Jr., G. R. Gibbs, and Thomas Emington to show cause why they should not be attached as for contempt in disobeying the restraining order issued by this court in the above action at chambers in Statesville, N. C., on the 7th day of August, 1911, and the writ of injunction issued thereunder on the 10th day of August, 1911, by the clerk of the superior court of Davie county, N. C., and the rule now being heard upon affidavits and other proofs offered in evidence, and it appearing that an order was made by his honor at chambers in Statesville, N. C., on the 7th day of August, 1911, restraining the defendant G. R. Gibbs, his agents and employes, from operating a merry-go-round or other device on the grounds described in the affidavits filed on the 10th and 12th days of August, 1911, and from doing or permitting to be done by himself, his agents or employes, anything tending to the annoyance or dis-

turbance of the picnics to be held on those grounds on those days, and it further appearing that the respondents had full knowledge of the filing of said order, the same having been served on them, and a rule to show cause why they should not be attached for contempt for disobeying said order having been issued by his honor at chambers in Lexington, N. C., on the 15th day of August, 1911, and returnable before his honor, F. A. Daniels, in chambers in Salisbury, N. C., on the 20th day of August, 1911, when and where said respondents appeared and made answer. The court finds the following facts: That respondent A. T. Grant, Jr., is not guilty of any contempt of this court or of any willful disobedience of any order or process issued by the court in this cause; and it is further ordered and adjudged that said rule be discharged as to the said A. T. Grant, Jr., and that he recover his costs. The court finds the further facts, to wit: That the respondents G. R. Gibbs and Thomas Emington had notice of said restraining order so issued by the court as aforesaid, copies of the same having been duly served on them, and that respondents G. R. Gibbs and Thomas Emington, whom the court finds was the agent of the said Gibbs, after said notice, did operate said merry-go-round on the lands described in the petition on the said 10th day of August, 1911, in willful disobedience of said restraining order of the court, and that after said Gibbs and Emington had notice of the granting of the restraining order in this cause, but before it had been served on either of said respondents, the said Gibbs made a pretended sale of his merry-go-round to said Emington with intent to violate and evade said restraining order. It is further considered, ordered, and adjudged by the court that respondents G. R. Gibbs and Thomas Emington are guilty and in contempt of this court, and that respondents G. R. Gibbs and Thomas Emington each pay a fine of \$50, and that they pay all the costs of this proceeding, to be taxed by the clerk of the superior court of Davie county. The said G. R. Gibbs and Thomas Emington are committed to the custody of the sheriff of Rowan county until this judgment is complied with. F. A. Daniels, Judge Presiding, Tenth Judicial District."

The respondents excepted and appealed, and assigned the following as errors: (1) That his honor held that respondents should pay all costs, including that incurred by T. A. Grant, Jr. (2) That there was no sufficient evidence to support the findings of fact as made by his honor. (3) That his honor held that respondents had not purged themselves of the contempt alleged to have been committed. (4) That his honor held that respondents were guilty of contempt, and adjudged that they should pay a fine of \$50 each.

Graham & Devin and D. G. Brummitt, for appellants. T. B. Bailey and E. L. Gaither, for appellee.

ALLEN, J. [1] The facts found by his honor and incorporated in his order are ample to support the conclusion he reached, and they are not reviewable, if supported by evidence. *Young v. Rollins*, 90 N. C. 125; *In re Denton*, 105 N. C. 59, 11 S. E. 244; *Green v. Green*, 130 N. C. 578, 41 S. E. 784. The respondents do not contest the correctness of this rule, but, admitting it, they say there is no evidence to support the findings that they had notice of the restraining order before August 10, 1911, on which day it is alleged it was violated, or that the respondent Emington was the agent of the respondent Gibbs, or that the sale to Emington was not made in good faith and for value.

[2] We must then consider the evidence, not for the purpose of reviewing the findings of his honor, but to see if there is any evidence to support them, and, in doing so, will be guided by the principle that it is not necessary to show legal service of the restraining order before August 10, 1911, and that it is sufficient to prove circumstances from which it can be reasonably inferred that the respondents had knowledge of the fact that the order had been issued, in accordance with the rule stated in *High on Injunctions*, § 1421: "In considering the question of a defendant's liability for a breach of injunction, it is to be borne in mind that the injunction becomes operative from the time of the order being made, and not from the date of the writ itself, or from the time of its being drawn up. The mandate of the court being effectual upon all parties having notice thereof from the time it is given, to fix defendant's liability for a violation, it is only necessary to show that he was actually apprised of the existence of the order at the time of committing the acts constituting the violation." And, again, in section 1422: "Any means of information whereby notice of the order is actually brought to the knowledge of the parties enjoined would seem sufficient to meet the requirements of the rule above laid down. And the courts have uniformly held that it is not requisite that a defendant against whom an injunction has been issued should be officially apprised of its existence, or be served with process in the cause to render him liable in contempt in committing a breach of the injunction. If defendant is informed of the existence of the order, although not yet served with process, it becomes operative upon him, and he will not be allowed to disregard or violate it. It is enough to show that he has had actual notice of the existence of the writ, or of the order of the court that it should issue."

[3] What, then, are the circumstances established by the evidence, if the plaintiff's



affidavits are believed? (1) The summons was issued on the 7th day of August, 1911, and was served on the respondent Gibbs on the 8th day of August, 1911, and on the night of that day he (Gibbs) said, in the presence of J. H. Bruce, "that the plaintiffs thought they had fixed to stop him from running his merry-go-round, and that he intended to run his machine anyway," and that "he had a lawyer to do his fighting." (2) The restraining order was signed on the 7th day of August, 1911, and was filed in the office of the clerk of the superior court in Mocksville about 9 o'clock of the morning of August 9, 1911, in the presence of A. T. Grant, attorney for the respondents. (3) The said attorney went from the clerk's office to his law office, and in a few minutes the respondent Gibbs was in the law office in conference with his attorney; and the bill of sale from Gibbs to Emington was signed about 10 o'clock of the morning of the same day. (4) The restraining order was executed by reading and delivering a copy thereof to A. T. Grant, Jr., Esq., as attorney for G. R. Gibbs and wife, August 9, 1911; by reading to Mrs. G. R. Gibbs and offering to leave a copy with her which she refused to receive, not being able to find her husband, he being gone, August 9, 1911; by reading to T. Emington and leaving a copy of same with him August 9, 1911; by defendant Gibbs accepting service of order without reading, as he had read the copy served on his wife, Mrs. G. R. Gibbs, and by leaving a copy with him. This August 10, 1911, 9 p. m. (5) The merry-go-round was shipped to Mocksville in the name of the "Gibbs Amusement Company," and was shipped from Mocksville to Graham on August 12, 1911, in the same name; and, when it was shipped to Graham, 10 tickets were bought for the Amusement Company, on one of which the respondent Gibbs traveled. (6) The respondent Emington went to Mocksville as a member of the Amusement Company and left as such. (7) The respondent Gibbs continued to exercise control over the merry-go-round after he claims he made the sale to Emington, and on August 11, 1911, boasted in the presence of Emington, and without contradiction on his part, that some kind of legal papers had been executed against him for the purpose of prohibiting the operation of the merry-go-round on the previous day at Mocksville, but that he had very cleverly transferred the ownership of this property and had shown the masons of Mocksville that they could not bluff him, and that when another year came around he would have a new outfit and would put it over them again.

There was much evidence on the part of the respondents, which, if accepted by the court, would have exonerated them from all blame, but the circumstances we have enumerated are supported by evidence, and from them it was not unreasonable to infer and find that the respondents knew of the

restraining order on the 9th day of August, 1911, and that the pretended sale to Emington was not in good faith, and was for the purpose of evading and defeating the restraining order, and, the court having so found, we cannot disturb the judgment.

[4] Again, the respondents contend that having disavowed any intention to disregard the order of the court, having "purged themselves of the contempt," they must go free. If this position can be maintained, the force and effect of a restraining order will be measured by the conscience of the party against whom it issues, and, if that is sufficiently elastic, he can always violate the order, and then escape liability by swearing he did not intend to show disrespect for the order of the court. Such a conclusion would practically destroy the efficiency of this important branch of equity jurisdiction, and is not, we think, supported by reason or authority.

The question was considered in *Baker v. Cordon*, 86 N. C. 121, 41 Am. Rep. 448, and, in answer to the contention that the disavowal of the intent purges the contempt and exonerates the party, the court there says: "This objection rests upon a misapplication of the rule laid down and acted on in the *Matter of Moore and Others*, 63 N. C. 397. That rule is confined to the 'class of cases,' in the language of the Chief Justice who delivers the opinion, 'where the intention to injure constitutes the gravamen' of the offense. The violation of a judicial mandate stands upon different ground, and the only inquiry is whether its requirements have been willfully disregarded. If the act is intentional, and violates the order, the penalty is incurred whether an indignity to the court, or contempt of its authority, was or was not the motive for doing it. A party is not at liberty, by a strained and narrow construction of the words, and a disregard of the obvious and essential requirements of the order, to evade the responsibility which attaches to his conduct. In an honest desire to know the meaning and to conform to its directions a mistaken interpretation of doubtful language would be a defense to the charge, but, when its language is plain and the attempt is made to escape the force and defeat the manifest purposes of the order by indirection, the penalty must be enforced, or the court would be unable to perform many of its most important functions."

This case has been approved at this term in *Weston v. Lamber Co.*, 73 S. E. 800, in which Justice Walker, speaking for the court, says: "We have high authority for saying that a party enjoined must not do the prohibited thing, nor permit it to be done by his connivance, nor effect it by trick or evasion. He must do nothing, directly or indirectly, that will render the order ineffectual, either wholly or partially so. The order of the court must be obeyed implicitly, according to its spirit and in good faith.

Rapalje on Contempt, § 40. The motive for violating the order is not considered in passing upon the question of contempt, and the respondent cannot purge himself by a disavowal of any wrong intent. It is the fact of his obedience that alone will be considered. Section 42; *Baker v. Cordon*, 86 N. C. 116, 41 Am. Rep. 448."

Upon a review of the whole record, we are of opinion there is no error.

Affirmed.

(159 N. C. 99)

**REID v. CHARLOTTE NAT. BANK et al.**

(Supreme Court of North Carolina. May 1, 1912.)

**1. BANKS AND BANKING (§ 119\*)—GENERAL DEPOSIT CUSTOMERS—NATURE OF RELATION.**

The ordinary relation subsisting at common law between a bank and its general deposit customers is that of debtor and creditor; it being presumed in adjusting the account that the first money paid in is the first paid out.

[Ed. Note.—For other cases, see *Banks and Banking*, Cent. Dig. §§ 289-292; Dec. Dig. § 119.\*]

**2. MORTGAGES (§ 305\*)—DEED OF TRUST—SECURING BANK INDEBTEDNESS—PAYMENT OF DEBT.**

Complainant, who was a member of a commission company, executed a deed of trust to secure advances by defendant bank for a year from June 8, 1901, to an amount not exceeding \$5,000. At the end of the 12 months, the commission company's total indebtedness to the bank was \$27,000, amply secured by collateral. After June 8, 1902, the commission company continued to do business with the bank for two years, to the amount of several millions of dollars. On that date there was an outstanding note of \$30,000, which had been executed by the commission company, and \$3,000 on deposit, and the cashier testified that on January 5, 1904, such note, together with two other later notes, was marked "Paid," and three notes aggregating \$75,000 were executed, \$40,000 of which was afterwards paid. *Held*, that the indebtedness for which the deed of trust was executed was paid, and that complainant was entitled to a decree for cancellation thereof.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. §§ 889-894, 898; Dec. Dig. § 305.\*]

Appeal from Superior Court, Mecklenburg County; Lyon, Judge.

Suit by E. S. Reid against the Charlotte National Bank and another. Judgment for defendants, and complainant appeals. Reversed.

Clarkson & Duls and Morrison & McLain, for appellant. Pharr & Bell and Stewart & McRae, for appellees.

**CLARK, C. J.** This is an action to enjoin the foreclosure of a deed in trust executed by the plaintiff to E. J. Heath, trustee, to secure loans and advances to be made by the Charlotte National Bank to the Heath-Reid Jobbing & Commission Company during 12 months from June 8, 1901, to an amount not exceeding \$5,000. The exact language of the mortgage is: "The said Reid has agreed

that, if the said Heath-Reid Jobbing & Commission Co. shall fail to pay the said bank within 12 months from this date all amounts for which it is in any manner liable, then the said Reid will pay the balance that may remain due at the end of the 12 months aforesaid, not exceeding the sum of \$5,000, however"—with the further provision that if the Commission Company failed to pay said bank the balance due, and if said Reid failed to pay said \$5,000, then it should be the duty of said Heath, trustee, to advertise and sell. The final clause of the mortgage is: "It being the intention of the said Reid to secure the ultimate payment to said bank of the sum of \$5,000 or so much thereof as may remain unpaid at the end of 12 months." At the end of 12 months, the total indebtedness of the Commission Company to the bank was \$27,000, but the bank had ample collateral of the company to protect such indebtedness. After June 8, 1902, the Commission Company continued to do business with the bank two years longer, depositing and taking out money to the amount of several millions of dollars. On June 8, 1902, there was an outstanding note of \$30,000, which had then been executed to the bank by the Commission Company and a credit of \$3,000 cash on deposit with the bank. The cashier of the bank testified that on January 5, 1904, the said \$30,000 note, together with two other later notes, were marked paid and canceled, and delivered up to the Commission Company. Three new notes aggregating \$75,000 were executed, and \$40,000, being two of these notes, were afterwards paid. The bank kept a running account with the commission house, all deposits being treated as payments, and the indebtedness being reduced as deposits were made, and increased as the checks exceeded the deposits. There was no application of any deposits as payments to any specified part of the indebtedness by either party. No note was given by the plaintiff for the \$5,000 mentioned in the mortgage, but the mortgage was merely to secure any balance that might be due on June 8, 1902, not to exceed \$5,000.

[1] There was no extension or renewal asked or assented to by the plaintiff. In *Boyd v. Bank*, 65 N. C. 13, it is said: "The ordinary relation subsisting at common law between a bank and its customers on a general deposit account is simply that of debtor and creditor. A deposit by a customer, in the absence of any special agreement to the contrary, creates a debt, and the payment by the bank of the customer's checks discharges such debt pro tanto. The bank or customer may at any time discontinue their dealings, and the balance of the account between them can be easily ascertained by a simple calculation. The general rule in adjusting a running account between a bank and its customer is 'the first money

paid in is the first money paid out." This case has been often cited and followed since. See Anno. Ed.

[2] At the end of the 12 months, on June 8, 1902, when this \$5,000 liability on the party of the plaintiff by its terms became due, the Commission Company was indebted to the bank far more than the \$5,000, and held the note of the Commission Company for \$30,000. This \$30,000 note was canceled and surrendered in January, 1904. This is evidence that the said \$5,000 had been paid, which is further shown by the fact that during the two years succeeding June 8, 1902, the dealings between the Commission Company and the bank amounted to millions. It follows that very soon after June 8, 1902, the deposits paid in (which, in the absence of any agreement to the contrary, were applied by the law to the oldest indebtedness) paid off the \$5,000 for which the plaintiff was responsible on June 8, 1902, and, there being no agreement on his part to a renewal, the amount for which the plaintiff was liable was paid off. The indebtedness which the Commission Company now owes the bank cannot possibly include the \$5,000 which was discharged by the deposits first made after June 8, 1902, whenever such deposits amount to \$27,000. It is in evidence without contradiction that the deposits amounted to several millions. The cancellation of the \$30,000 note January, 1904, without any agreement or evidence tending to show a novation on the part of the plaintiff, is conclusive that said indebtedness of \$5,000 was paid when the note was canceled. The mortgage on the part of the plaintiff was not a continuing guarantee, but by its terms was to secure not to exceed \$5,000, if so much should be due "at the end of the 12 months"; i. e., on June 8, 1902. On the principle of "the first money paid in is the first money paid out," said indebtedness must have been paid even long before the \$30,000 note was canceled. The injunction should have been made perpetual, or, rather, upon the uncontradicted testimony, it should have been adjudged that the liability of the plaintiff had been discharged, and the mortgage should have been ordered to be canceled and surrendered to plaintiff.

Error.

(159 N. C. 85)

**BANK OF MOUNT AIRY v. GREENSBORO LOAN & TRUST CO.**

(Supreme Court of North Carolina. May 1, 1912.)

**BANKS AND BANKING (§ 171\*)—COLLECTIONS—FAILURE TO COLLECT—ADVANCE PAYMENT—ACTION TO RECOVER.**

A trust company sent to a bank a certificate of deposit, with instructions to collect thereon and to return promptly, if not honored. The bank on the next day remitted the amount of the certificate, less exchange, but did not present it for collection until 36 days after

receiving it, when payment was refused. *Held*, in the bank's action to recover the amount remitted, that its failure to present for payment made the certificate its own, and it liable for the amount thereof, so that it could not recover.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 597-618; Dec. Dig. § 171.\*]

Appeal from Superior Court, Surry County; Lyon, Judge.

Action by the Bank of Mount Airy against the Greensboro Loan & Trust Company. From a judgment of nonsuit, plaintiff appeals. Affirmed.

S. P. Graves and Folger & Folger, for appellant. Douglas & Douglas, for appellee.

CLARK, C. J. On November 23, 1910, the First National Bank of Mount Airy issued a certificate of deposit to J. T. Cook for \$500, and bearing 4 per cent. interest, if held three months. The same was indorsed: "Pay any bank or banker or order. Prior indorsements guaranteed. Jan. 17, 1911. Greensboro Loan & Trust Co., Greensboro, N. C. W. B. Allen, Cashier." Above this indorsement was written the name of J. T. Cook, duly witnessed, and D. Marks. This certificate, with the above indorsements, was sent to the plaintiff Bank of Mount Airy by the defendant, the Greensboro Loan & Trust Co., January 17, 1911, "for collection," with instructions to "return promptly, if not honored." On the next day, the plaintiff remitted the defendant the amount of the certificate, \$500, less \$1.25, exchange, to wit, \$498.75. The plaintiff did not present the certificate to the First National Bank of Mount Airy, which had issued the certificate, till February 23. It refused acceptance and payment thereupon. The plaintiff notified the defendant that it would look to the defendant for payment.

The evidence in the case is that the indorsement of J. T. Cook was genuine, but that he was insolvent, and, prior to January 18, had drawn out all of his deposit, except \$170. The defendant relies upon the fact that it sent the certificate of deposit to the plaintiff for collection, and with instruction to report immediately, that the indorser, D. Marks, was solvent, and that if the plaintiff had promptly presented this certificate, and it had not been paid, it would have looked to Marks for payment. The defendant contends that the plaintiff did not make prompt presentation for payment and took the risk, because it desired to receive the accruing interest for three months, which became due on February 23.

The defendant sent the certificate of deposit to the plaintiff for collection, and it guaranteed the signatures of the indorsers merely to satisfy the bank issuing the certificate; and the evidence is that those signatures are genuine. The plaintiff could not make itself the creditor of the defendant

without the latter's consent. There was no laches on the part of the defendant; and there was negligence on the part of the plaintiff in not presenting the certificate at once for payment, and also in remitting to the defendant, when it had not collected the sum due on the certificate which had been sent to it, not as purchaser, but merely for collection. In *Bank v. Kenan*, 76 N. C. 340, it was held that, when commercial paper is sent to a bank for collection, it is the duty of the bank to make presentment for payment at maturity. If it is not then paid, the bank must fix the liability of the drawer by protest and notice of dishonor; and if it fails in any of these duties it becomes liable in damages. It was held in that case that it was no excuse that if the check had been presented for payment it would not have been paid. The failure of the bank to present for acceptance and payment made the check its own; and it was liable for the amount thereof.

Here the plaintiff received this paper for collection on January 18, and did not present it for payment till February 23, a delay of 36 days. This would have made it liable, if it had not remitted the amount to the defendant, and, having remitted, it certainly cannot recover back.

The judgment directing a nonsuit must be affirmed.

(159 N. C. 332)

#### OVENS v. CITY OF CHARLOTTE.

(Supreme Court of North Carolina. May 1, 1912.)

#### MUNICIPAL CORPORATIONS (§ 807\*)—DEFECTIVE STREETS—OBSTRUCTIONS—CONTRIBUTORY NEGLIGENCE.

Plaintiff was injured by driving his carriage against the stump of a tree, near the edge of a driveway 68 feet wide. Plaintiff had often seen the stump before, and testified that if he had been thinking of the stump he could easily have avoided it, and if he had driven in or near the middle of the street, and not at the extreme side, he would not have struck the stump. *Held*, that plaintiff was negligent as a matter of law, and could not recover.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1679-1681; Dec. Dig. § 807.\*]

Appeal from Superior Court, Mecklenburg County; Lyon, Judge.

Action by David Ovens against the City of Charlotte. Judgment for defendant, and plaintiff appeals. Affirmed.

W. F. Harding and McCall & Smith, for appellant. Maxwell & Keerans, for appellee.

**WALKER, J.** Plaintiff brought this action to recover damages for injuries received while driving along a street or avenue in the city of Charlotte, known as Ransom place, and striking a stump, which overturned his buggy and threw him to the ground. He alleges that the city had cut down a

tree which stood in one of the small parks or places in the avenue, leaving a stump which projected a little in the driveway, though plenty of space was left for the safe and convenient passage of vehicles. Ransom place was about 68 feet wide and 400 feet long, and extended from Morehead street to Vance street. The parks were not part of the driveway, but well defined in their boundaries, and were curbed. The evidence introduced by the plaintiff tended to show that he had often seen the stump, as he lived in Ransom place very near it, and "there was no trouble about seeing it." Plaintiff admitted that if he had been thinking of the stump he could easily have avoided it. He was not looking for the stump, and was driving along and not thinking about it, although he knew that it was there. He was not looking out for anything ahead of him, but thinking of something else. If he had driven in or near the middle of the street, and not to the extreme right side, he would not have struck the stump. There was an electric light burning at the intersection of Ransom place and Vance street, about 200 feet distant. It would seem clear that plaintiff's injuries were caused by his negligent indifference to his own safety. He was evidently driving carelessly, if not recklessly, and not thinking about what he was then doing.

*Walker v. Town of Reidsville*, 96 N. C. 382, 2 S. E. 74, is a case which closely resembles this one in its facts, and with reference thereto, the court said: "A reasonably prudent and careful man would not forget the presence of such danger in his immediate neighborhood—one that he had seen and observed every day for more than a fortnight, and but a few hours before he received the hurt. He was bound to act upon his information, and use ordinary care and prudence in shielding and protecting himself from what he knew to be a menacing danger to every one who passed near it. He forgot, and failed to be careful at his peril, and in his own wrong. *Parker v. Railroad*, 86 N. C. 221; *Railroad v. Houston*, 95 U. S. 697 [24 L. Ed. 542]; *Dillon, Mun. Corp.* § 789; *Beach on Cont. Neg.* 40. In *Brucker v. Covington*, 60 Ind. 33 [35 Am. Rep. 202], it was held that, when a party knows of the existence of an open cellarway in a sidewalk, and attempts to pass the place in the night, he will be considered as taking the risk upon himself, even if he had forgotten the existence of the obstruction; and, if he receive injuries from falling into such cellarway, he is chargeable with contributory negligence, and cannot recover damages. There are many cases to the like effect. *Gribble v. Sioux City*, 38 Iowa, 390; *Wilson v. Charlestown*, 8 Allen [Mass.] 137 [85 Am. Dec. 693]; *Gilman v. Deerfield*, 15 Gray [Mass.] 577; *Moore v. Abbot*, 32 Me. 46."

But the case of *Neal v. Town of Marion*, 126 N. C. 412, 35 S. E. 812, is more to the point, and seems to be decisive of this case. The court there said that "the plaintiff had been long a resident of Marion, and had been thoroughly familiar with the walk, having traveled it hundreds of times, as she testified. Now, if she knew that the hole was in the path, and at night walked along it, and through forgetfulness carelessly walked into it, she negligently contributed to her own injury. It was not reasonable care on her part to forget such a menace to her safety; and even if it should be conceded that the town was negligent, if she, through the want of proper care and prudence contributed to her own injury, both parties being negligent, she cannot recover."

The cases of *Walker v. Reidsville*, supra, and *Bruker v. Covington*, supra, are cited with approval by the court, and it distinguishes *Russell v. Monroe*, 116 N. C. 720, 21 S. E. 550, 47 Am. St. Rep. 823, and other cases, because it appeared in them that the plaintiff had no knowledge of the defect in the street, and therefore might well assume that the town had performed its duty and kept its street in proper repair.

In this case, it appears that the plaintiff was grossly inattentive to his surroundings, not thinking at all about what he was doing, when, if he had exercised any, even the least, care to avoid the stump, he could have done so with the greatest ease. The injuries he received when he was thrown from the buggy were directly traceable to his own negligence, and about this no two reasonable minds could differ. There was consequently no error in dismissing the action upon the evidence.

No error.

(91 S. C. 325)

# MURCHISON v. ATLANTIC COAST LINE R. CO.

## FASS v. SAME.

(Supreme Court of South Carolina. April 23, 1912.)

### 1. PLEADING (§ 279\*)—SUPPLEMENTAL COMPLAINT—LEAVE TO FILE—COMPLIANCE.

An order made on the call of a cause for trial, dismissing it with leave to a substituted plaintiff to file and serve a supplemental complaint within 20 days, and making a failure to do so a bar to the action, was substantially complied with by the timely service of a supplemental complaint, even if it was not filed with the clerk within the 20 days.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 836-841; Dec. Dig. § 279.\*]

### 2. DISMISSAL AND NONSUIT (§ 50\*)—FAILURE TO FILE SUPPLEMENTAL COMPLAINT—WAIVER.

On the calling of a cause for trial, it was dismissed, and the substituted plaintiff was given leave to file and serve a supplemental complaint within 20 days on condition that a failure to do so would bar the action, and such complaint was served on defendant, but not filed within the time prescribed, and defendant

duly filed its answer and served a notice to strike out certain parts of the complaint, and nearly 5 months after the case was docketed defendant moved to dismiss for plaintiff's failure to file complaint within the time directed. *Held*, that defendant had waived its right to move to dismiss on that ground.

[Ed. Note.—For other cases, see Dismissal and Nonsuit, Cent. Dig. §§ 100-102; Dec. Dig. § 50.\*]

Appeal from Common Pleas Circuit Court of Marion County; S. W. G. Shipp, Judge.

"To be officially reported."

Action by I. I. Fass, Jr., against the Atlantic Coast Line Railroad Company, in which Emma B. Murchison, purchaser of the claim in bankruptcy proceedings against Fass, before trial, was substituted for plaintiff. From an order dismissing the action, the substituted plaintiff appeals. Reversed.

Sellers & Moore, of Dillon, for appellant. Henry Buck, of Marion, for respondent.

WATTS, J. This action was originally commenced between I. I. Fass, Jr., plaintiff, against the Atlantic Coast Line Railroad Company by service of summons and complaint on June 23, 1905. After issue joined, the case was docketed on calendar 1 for trial. Before the cause came up for trial, the plaintiff was adjudged a bankrupt, and a trustee was duly appointed, who took charge of all of the assets of bankrupt's estate, including this claim, and under an order of bankrupt court this claim which was to recover for negligent loss of goods and penalty was sold to plaintiff, Emma B. Murchison. When the cause was called for trial at the regular term of court in November, 1908, after Murchison became the purchaser, Mr. Sellers, attorney for Fass, the original plaintiff, asked his honor, Judge Dantzler, the presiding judge, for an order substituting Murchison, as the purchaser of said claim, as plaintiff in the action, instead of Fass, the bankrupt. Judge Dantzler granted an order of November 16, 1908, dismissing the complaint, and striking the case from the calendar, without prejudice to Murchison to file and serve a supplemental complaint within 20 days from that date, and, upon her failure to do so, the said suit to be forthwith discontinued, and the right of action on the claim set out in the complaint be forever barred, with leave to the defendant to answer such supplemental complaint within 20 days from the service. The supplemental complaint was served on the defendant on December 2, 1908, within the 20 days allowed by the order of Judge Dantzler, but the supplemental complaint was not filed in the clerk's office for Marion county within the 20 days allowed by Judge Dantzler's order. The defendant duly served an answer to the supplemental complaint within 20 days, and also within that time served a notice to strike out certain parts of the complaint as irrelevant and redundant, and to make complaint more definite, and to state

separately the two causes of action alleged against the defendant. The case was docketed on October 25, 1909, on calendar 1. On April 11, 1910, defendant's counsel served notice that he would move on April 15, 1910, for an order striking the case from the calendar, on the ground the case had been dismissed by order of Judge Dantzler; plaintiff having failed to serve and file her supplemental complaint within the time therein directed. On May 24, 1911, at a regular term upon call of case to trial, Judge Shipp passed an order dismissing the action and striking the case from the calendar. Plaintiff appeals, and questions the correctness of his order. We think Judge Shipp's order should be reversed.

[1, 2] The serving of the supplemental complaint within the time allowed by the order of Judge Dantzler upon the defendant was a substantial compliance of the terms of the order, even if plaintiff failed to file it in clerk's office within the time prescribed, but, if it were not a compliance, the defendant neglected to insist on it and made no move at that time to dismiss on that ground, but answered the cause on its merits, and gave notice of the motion in reference to the pleadings in the cause. Nearly nine months passed before the cause was docketed for trial, and no motion made by defendant to dismiss. We find defendant answering on merits about December 18, 1908, and a motion to dismiss served April 11, 1910. To deprive the plaintiff of the right to have her cause heard on its merits under such circumstances, and to turn her out of court upon such a strained technical construction of Judge Dantzler's order, would be violating the liberal spirit of the Code and result in injustice. The defendant appeared and answered on the merits. The defendant is not taken by surprise. The defendant did not at the time it filed its answer make any effort to ascertain whether supplemental complaint had been filed in clerk's office, but by appearing and answering on merits it submitted itself to the jurisdiction of the court for trial on merits, and waived its rights to make motion to dismiss. *Ex parte Perry Stove Co.*, 43 S. C. 186, 20 S. E. 980; *Smith v. Walke*, 43 S. C. 381, 21 S. E. 249; *Ruberg v. Brown*, 50 S. C. 400, 27 S. E. 873.

Order appealed from reversed.

GARY, C. J., and WOODS, HYDRICK, and FRASER, JJ., concur.

(91 S. C. 332)

LAWTON et al. v. CHARLESTON & W. C. RY. CO.

(Supreme Court of South Carolina. April 24, 1912.)

RELEASE (§ 16\*)—INVALIDITY OF RELEASE—MISTAKE.

A release executed by a passenger injured on defendant's train, though given upon the

advice of the railroad company's surgeon who was acting also as physician of the passenger, can be set aside only because of fraud or misrepresentation on the part of the surgeon, and not because based on his mistaken opinion as to the severity of the injuries.

[Ed. Note.—For other cases, see *Release*, Cent. Dig. § 31; Dec. Dig. § 16.\*]

Appeal from Common Pleas Circuit Court of Abbeville County; G. W. Gage, Judge.

Action by Sallie R. Lawton and another against the Charleston & Western Carolina Railway Company. From a judgment for plaintiffs, defendant appeals. Reversed and remanded.

F. Barron Grier, of Greenwood, and Wm. P. Greene, of Abbeville, for appellant. J. Moore Mars and Gary & Hill, for respondents.

WATTS, J. This action was for damages by plaintiff Sallie R. Lawton and her husband against defendant for alleged injuries sustained by Sallie R. Lawton in an accident on one of defendant's trains on March 31, 1911, the plaintiff being a passenger, and alleges her hurt or injuries were through the negligence of defendant. Defendant's answer, among other defenses, pleaded a release on account of the cause of action sued on. Upon an order of the court, the plaintiffs replied to so much of the answer as set up the release, and alleged that the same was procured from the plaintiffs through the misrepresentation made by Dr. Black, their family physician, and who was acting as surgeon for the railroad company, to the effect that her injuries were trivial, and that she would be well in a few weeks, and by his insistence that she would not get any more in case of suit. They allege that her injuries were much more serious than had been represented to them by Dr. Black, that her injuries were permanent, and the amount paid was inadequate, and that they had been overreached by the defendant through its surgeon, who was acting in a dual capacity. The case came on for trial before Judge Gage and a jury, and at the close of plaintiff's testimony defendant moved the court to direct a verdict upon the grounds stated in brief in the case, which motion was refused. Both plaintiffs and defendant at close of the case requested his honor to charge certain propositions of law. The jury found for the plaintiffs for \$500. A motion for a new trial was made. This was refused by the circuit judge, and defendant appeals on 13 grounds, alleging error in not directing a verdict for defendant, error in charge to jury, and not granting new trial. We deem it unnecessary to take up the exceptions seriatim.

Complaint is made that his honor erred in charging the jury the plaintiff's first request and refusing to charge defendant's first request. Plaintiff's first request was "that

if the jury find from the evidence that the plaintiff was injured by the railroad company, that the release of liability of such injury was executed by the plaintiff, Mrs. Lawton, to the defendant railroad, but that the release was made in reliance upon untrue or misleading statements of facts as to the extent and probable duration of plaintiff's injury, and such statements were made by the attending physician, and that such physician was the family physician of plaintiff, in whom she had absolute confidence and he was also in the employ of the defendant railroad, the jury would be justified in disregarding the said release if the plaintiff had in good faith offered to refund to the railroad such consideration as might have been paid by the railroad company for said release." The defendant's first request was "that in this case there can be no recovery unless the jury are satisfied by the preponderance of the testimony that the release in this case was procured by fraud or misrepresentation." His honor modified this by adding the words "or mistake." We think this was erroneous on the part of the trial judge. The mistake on account of which the plaintiff asked to be relieved from the contract is that she made it on the faith of the opinion and advice of Dr. Black, the physician selected by her, as to the extent of her injuries, and the probability of her recovery against the defendant. In such settlements resting necessarily on opinion, both parties know that they are taking the risk of error and mistake, and a release in such case can only be set aside on the grounds of fraud or bad faith in the transaction, and not on the ground of mistake or error of judgment or misleading statements when honestly made in good faith. It was error on the part of his honor to instruct the jury that the release could be set aside on the ground of mistake. If a mistake was innocently made, no fraud practised, no false intentional misrepresentation made, no bad faith, no overreaching, a release cannot be set aside. Where a party makes a representation in good faith, honestly believing the facts as stated by him to be true, with no intent to deceive, no intent to induce any one to act upon a false representation, but simply is mistaken in his opinion or his judgment is erroneous as to the result of injuries or the probability of recovering damages therefor, a party acting upon such is not to be relieved upon the ground of mistake. Judge Gage in his order refusing a new trial says: "I think it is fair to say the testimony does not convict Dr. Black of a fraudulent intent in what he did and said. The plaintiff's counsel so admitted to the jury." Where there is no fraud, but a bona fide mistake is made in opinion, that is not sufficient to relieve on

the ground of mistake. We think his honor was in error in instructing the jury they could disregard the release, if plaintiff made a mistake as to her condition when she executed it.

Our court says in *Kennerty v. Etiwan*, 17 S. C. 419, 48 Am. Rep. 607: "It would not be enough to invalidate the covenant if it was executed upon erroneous advice or at the suggestion of defendant, or that plaintiff was mistaken in his judgment as to the effect of the changes required to be made in the works or from all these considerations combined." Mr. Justice McIver in *Banker v. Hendricks*, 24 S. C. 12, quoting from *Story*, Eq. Jur. 221: "Passing from general notice of cases of fraud, arising from a misrepresentation or concealment of material facts, it is said we may now pass to the consideration of some others which in a moral, as well as legal, view, seem to fall under the same predicament, that of being deemed cases of actual intentional fraud as contra distinguished from constructive or legal fraud, \* \* \* and in especial manner all unconscientious advantages or bargains obtained over persons disabled by weakness, infirmity, age, lunacy, idiocy, drunkenness, coverture, and other incapacity from taking care or protecting their own rights or interests." Again in section 325: "If a weak man give a bond and there is no fraud or breach of trust in obtaining it, equity will not set aside the bond only for the weakness of the obligor if he be compos mentis, but, whatever weight there may be in the remark in a general sense, it is obvious that weakness of understanding must constitute a most material ingredient in examining whether a bond or other contract has been obtained by fraud or imposition or undue influence, for, although a contract made by a man of sound mind and fair understanding may not be set aside merely from its being a rash, improvident, or harsh bargain, yet, if the same contract be made with a person of weak understanding, there does arise a natural inference that it was obtained by fraud or circumvention or undue influence." In section 238 it is said: "The doctrine, therefore, may be laid down as generally true that the acts and contracts of persons who are of weak understanding, and who are thereby liable to impositions, will be held void in courts of equity, if the nature of the act or contract justify the conclusion that the party has not exercised a deliberate judgment, but that he had been imposed upon, circumvented, or overcome by cunning, artifice, or undue influence."

Judgment reversed, and new trial granted.

GARY, C. J., and WOODS, HYDRICK, and FRASER, JJ., concur.

(91 S. O. 338)

**HINSON et al. v. WESTERN UNION TELEGRAPH CO.**

(Supreme Court of South Carolina. April 24, 1912.)

**1. TELEGRAPHS AND TELEPHONES (§ 38\*)—FAILURE TO DELIVER—DELAY.**

A direction by a sender that a telegram be mailed to the addressee who lived on a rural route constituted the post office his agent to receive and transmit, and, where the agent of the telegraph company promptly mailed the message on its receipt, the company is not liable for injuries resulting from a failure to promptly deliver.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Cent. Dig. § 33; Dec. Dig. § 38.\*]

**2. TELEGRAPHS AND TELEPHONES (§ 66\*)—DELIVERY OF MESSAGES—INJURY FROM DELAY.**

In an action for mental anguish resulting from a failure to promptly deliver a telegram, evidence held to show that it was promptly delivered to the post office at the point of delivery, as required by its terms and as directed by the sender.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Cent. Dig. §§ 61-63; Dec. Dig. § 66.\*]

**3. TELEGRAPHS AND TELEPHONES (§ 65\*)—INJURIES FROM DELAY—ACTIONS—PLEADING.**

Where a telegram indicated on its face that it was to be sent into the country and was in the possession of the plaintiff, the telegraph company sued for a failure to promptly deliver may show that it delivered the telegram to the post office according to the direction expressly given by the sender under a general denial, without specially pleading the direction of the sender as a special contract.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Cent. Dig. §§ 54-60; Dec. Dig. § 65.\*]

—Appeal from Common Pleas Circuit Court of Lancaster County; Ernest Moore, Special Judge.

Action by Blanch Hinson and another against the Western Union Telegraph Company. From a judgment for defendant, plaintiffs appeal. Affirmed.

J. Harry Foster, of Yorkville, for appellants. Geo. H. Fearons, of New York City, Nelson, Nelson & Gettys, of Columbia, and Williams & Williams, of Lancaster, for respondent.

**WOODS, J.** In this action the plaintiff claimed damages for the mental anguish of being deprived of the privilege of looking on the face of her dead sister, Mrs. Yarborough, and attending her funeral; her allegation being that she would have been able to reach Charlotte where her sister was buried from her home near Lancaster in time for the funeral but for the negligence and willfulness of the defendant in failing to transmit promptly a telegram announcing her sister's death. The principal defense was a general denial of the charge that the defendant had failed in its duty to transmit and deliver the telegram promptly. The circuit

judge directed a verdict in favor of the defendant.

C. P. Deal, a friend of plaintiff's family, delivered to the defendant's agent in Charlotte, N. C., between 9 and 10 o'clock in the evening of May 16, 1909, the telegram in these words: "Charlotte, N. C., 16 May, 1909. Blanch Hinson, Lancaster, S. C. Route No. 1 Care Bill Vick.—Mrs. Yarbor died at 8.30 p. m. C. P. Deal." The agent informed Deal that, as it was Sunday, the office at Lancaster would not be open until the beginning of office hours at 8 o'clock on Monday morning, and that the message could not be sent until that time. Deal directed the agent to have the message mailed from Lancaster, if Mrs. Hinson did not live in the town. Cloyd, defendant's agent at Lancaster, received the message at 8 o'clock Monday morning, May 18th, and he testified that he immediately mailed it properly stamped and addressed, as indicated on its face. Tillman, the R. F. D. carrier, testified that on the same day he received the telegram duly addressed and stamped from the post office at Lancaster, and in his regular course promptly placed it in Bill Vick's box on R. F. D. route No. 1, about 11 o'clock.

The plaintiff insists that, notwithstanding this evidence, the jury would have been at liberty to infer from the evidence offered by her that the defendant's agent did not mail the telegram promptly. On this point the plaintiff testified that she went to the box on Monday after the delivery of the mail, and the telegram was not there, and that she got it out of the box on Tuesday morning, too late to attend the funeral. She testified, further, that the envelope containing the message which would have shown the date of the mailing was given to her child to play with, and lost.

[1] We think the evidence shows conclusively that the defendant discharged its duty. Negligence of a telegraph company may be inferred from its long delay in transmitting a message, but not from the delay which may be imputed to an agency selected by the sender to receive the message. When the sender of the message directed it to be mailed at Lancaster, he constituted the post office, the postal officials at Lancaster, his agents to receive and transmit the message, and delivery by the defendant to the postal officials by mailing was a fulfillment of its duty. *Lyles v. Tel. Co.*, 84 S. C. 1, 65 S. E. 832, 137 Am. St. Rep. 829; *Jones on Telegraphs and Telephones*, § 290; *Joyce on Electric Law*, § 751; *Leifer v. Western U. Tel. Co.*, 131 N. C. 355, 47 S. E. 819, 59 L. R. A. 477; *Western U. Tel. Co. v. Shaw*, 40 Tex. Civ. App. 277, 90 S. W. 53.

[2] Not only did the carrier, the agent so appointed, admit receiving the message, but he testified on the trial that he received and undertook to deliver it. This admission by



the carrier was binding on the parties to the message just as if the telegraph company had taken a formal receipt from him or from the postmaster. There was not a particle of evidence of collusion between the defendant and the carrier, nor was there a single circumstance indicating that the acknowledgment of the agent appointed to receive the message from the defendant was untrue. Thus not only was there a complete failure to show any delay by the defendant, but there was positive proof from the agency selected by the parties that the telegram was promptly delivered as required by its terms to the post office.

[3] There is nothing whatever in the point that the evidence as to the direction of the sender to mail the telegram was not set up in the answer as a special contract, and therefore not available to the defendant. The telegram was in the possession of the plaintiff, and indicated on its face that it was to be sent into the country. Under its denial of negligence in the delivery of the telegram, the defendant had a right to show that it delivered the telegram according to the direction indicated on the face of the telegram and expressly given by the sender.

It is the judgment of this court that the judgment of the circuit court be affirmed.

(91 S. C. 337)

**McKNIGHT v. DYSON et al.**

(Supreme Court of South Carolina. April 24, 1912.)

**1. APPEAL AND ERROR (§ 120\*)—APPEALABLE ORDERS—NEW TRIAL.**

An order of the circuit court granting a new trial in a case in which a magistrate had rendered judgment, and in which the Supreme Court cannot render absolute judgment, is not appealable.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 840-865; Dec. Dig. § 120.\*]

**2. JUSTICES OF THE PEACE (§ 190\*)—REVIEW—DIRECTIONS FOR ANOTHER TRIAL.**

The action of a circuit judge in ordering that upon any future trial of the case it would be the duty of the magistrate trying the case to call a designated witness for examination and cross-examination before the plaintiff closed in chief was reversible error.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. § 734; Dec. Dig. § 190.\*]

Appeal from Common Pleas Circuit Court of Sumter County; J. W. De Vose, Judge.

"To be officially reported."

Action by H. D. McKnight against W. J. Dyson and another. Judgment for defendants, and plaintiff appeals. Modified.

L. D. Jennings, of Sumter, for appellant. J. H. Clifton, of Sumter, for respondents.

**GARY, C. J.** [1] This is an appeal from an order of the circuit court, granting a new trial in a case, in which a magistrate had rendered judgment. This is not a case in which this court can render judgment ab-

solute, and therefore the order is not appealable. *Lampley v. A. C. L. Ry.*, 77 S. C. 319, 57 S. E. 1104; *Pace & Co. v. A. C. L. Ry.*, 83 S. C. 33, 64 S. E. 915; *Des Champs v. A. C. L. Ry.*, 83 S. C. 192, 65 S. E. 176; *Dixon v. S. A. L. Ry.*, 83 S. C. 393, 65 S. E. 351; *Jones v. Woodside Cotton Mills*, 83 S. C. 565, 65 S. E. 819; *Barker v. Thomas*, 85 S. C. 82, 67 S. E. 1.

[2] There are exceptions assigning error also on the part of his honor, the circuit judge, in ordering "that, upon any future trial of this case, it is the duty of the magistrate trying the case to call the witness Abraham Davis for examination and cross-examination before the plaintiff closes in chief." It was error for the circuit judge to undertake to direct the manner in which the plaintiff should conduct his case and examine his witnesses. The exceptions raising this question are therefore sustained.

The judgment of the circuit court is modified.

**WOODS, HYDRICK, WATTS, and FRASER, JJ., concur.**

(91 S. C. 350)

**LOWRY v. ATLANTIC COAST LINE R. CO. GEDDINGS v. SAME. LOWRENCE v. SAME.**

(Supreme Court of South Carolina. April 30, 1912.)

**APPEAL AND ERROR (§ 807\*)—DISMISSAL—REINSTATEMENT—ILLNESS OF COUNSEL.**

Where a failure to comply with rule 7, Supreme Court of South Carolina, providing for the service of the printed cases, was caused by the sudden illness of a counsel at a time when absent attorneys were relying upon him to apply for an extension of time by motion before one of the judges, the appeals dismissed for the failure will be reinstated.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 8177-8188; Dec. Dig. § 807.\*]

Appeal from Common Pleas Circuit Court of Sumter County.

Actions by Mrs. E. A. Lowry and others against the Atlantic Coast Line Railroad Company. On motion to reinstate appeals. Granted.

See, also, 88 S. C. 310, 70 S. E. 806.

L. W. McLemore, of Florence, and Mark Reynolds, of Sumter, for appellant. L. D. Jennings, J. H. Clifton, and Ralph Epps, all of Sumter, for respondents.

**GARY, C. J.** The appeals in the three cases above stated were dismissed by the clerk under rule 7 of this court for failure to serve the printed cases. The appellants now move to reinstate the appeals on affidavits alleging that the failure to print and serve the cases was due to excusable neglect; the specific excuse set out being the illness of Mr. Reynolds, one of defendant's coun-

sel. The court is unanimous in the opinion that great indulgence was extended by counsel for plaintiffs, and that counsel for defendant other than Mr. Reynolds ought to have acted with more diligence. The pressure of other business is not a satisfactory excuse for the failure to have appeals ready for a hearing, for it is the duty of litigants to employ as many counsel as may be necessary to comply with the rules of court in preparing their appeals.

The excuse that one of the counsel was ill would not be received if the illness had not come with suddenness at a time when counsel absent from Sumter was relying on Mr. Reynolds to apply for an extension of time by motion before one of the judges. By a bare majority the court has concluded to reinstate the appeals on the conditions that the defendant pay in each of the cases to counsel for respondents the sum of \$25 for costs and expenses within 10 days from this date, that the defendant serve on plaintiff's counsel the printed cases and exceptions within 10 days, and that the cause be docketed for hearing at this term at the foot of any calendar that the plaintiffs' counsel may select. And it is so ordered.

(91 S. C. 348)

**WINDHAM et al. v. HOWELL et al.**

(Supreme Court of South Carolina. April 29, 1912.)

**PARTITION (§ 86\*)—RENTS—PERSONS CHARGEABLE.**

If defendant and his wife entered and held the entire tract sought to be partitioned under a deed to his wife or under a claim of cotenancy with the other cotenant, their occupancy should be referred to the wife's claim, so as to charge her with rents in partition between her and the cotenant.

[Ed. Note.—For other cases, see Partition, Cent. Dig. §§ 247-252; Dec. Dig. § 86.\*]

Appeal from Common Pleas Circuit Court of Darlington County; J. W. De Vore, Judge. "To be officially reported."

Partition action by A. H. Windham and others against George C. Howell and others. From a judgment of partition, plaintiffs appeal. Affirmed.

Geo. W. Brown, of Darlington, and R. W. Shand, of Columbia, for appellants. E. O. Woods, of Darlington, for respondents.

**WOODS, J.** In this action, which has resulted in a partition of the land described in the complaint between Lula Windham and Louisiana Howell as life tenants, the sole question now before the court is whether the rents fixed by the master shall be charged against Louisiana Howell or her husband, George C. Howell. The master and the circuit judge concurred in finding that George C. Howell, and not his wife, had held the possession, and was responsible for the rents and profits. The complaint alleged: "That the said G. C. Howell and Louisi-

ana Howell, his wife, are now in possession of said tract of land, pretensively claiming the same under deed from Eliza J. Windham, and receiving the rents and profits since the death of Eliza J. Windham, which are reasonably worth \$300 per annum." The answer denied this allegation along with several other averments of the complaint, but alleged that Louisiana Howell was the owner in fee of the land under a conveyance from Eliza J. Windham.

If the proof had shown that George C. Howell and his wife, Louisiana Howell, entered and held the entire tract under the deed from Eliza Windham to Louisiana Howell, or under the claim of cotenancy with Lula Windham, then it would have followed under the authority of *Sibley v. Sibley*, 88 S. C. 184, 70 S. E. 615, that the occupancy should be referred to the wife's claim and she would be responsible for rents; and, subject to the mortgages given by her, the court should have provided for an adjustment of the rents with her cotenant before allowing her to have her portion of the land. *Vaughan v. Langford*, 81 S. C. 282, 62 S. E. 316, 128 Am. St. Rep. 912, 16 Ann. Cas. 91. But the answer does not admit possession of either George O. Howell or Louisiana Howell; and the evidence adduced was that George C. Howell himself was in possession, and had taken the benefit of the rents and profits. It may be that the witnesses in speaking of the possession of George C. Howell meant a possession taken by him as the agent of his wife under her claim of ownership, but we have tried in vain to find anything in the evidence which would warrant us in saying so. To say the least of it, the evidence does not preponderate against the conclusions of the master and the circuit judge.

It is the judgment of this court that the judgment of the circuit court be affirmed.

**GARY, C. J., and HYDRICK, WATTS, and FRASER, JJ., concur.**

(91 S. C. 377)

**BROWN v. ATLANTIC COAST LINE R. CO.**  
(Supreme Court of South Carolina. May 3, 1912.)

**1. CARRIERS (§ 20\*)—FREIGHT—PENALTIES—ACTIONS—"AGGRIEVED."**

The seller of goods consigned them to his own order at the town in which plaintiff did business, upon a bill of lading reading "order notify" plaintiff, and plaintiff paid for the goods, obtained the bill of lading, and presented it to the railroad company's agent and demanded the goods, which were not delivered to him. *Held*, that plaintiff was the "consignee aggrieved," within a statute giving such party a right to recover a penalty for failure to adjust, within the statutory period, a claim for nondelivery of goods.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 33-49, 133, 927; Dec. Dig. § 20.\*]

For other definitions, see Words and Phrases, vol. 1, pp. 271-273; vol. 8, p. 7569.]

2. CARRIERS (§ 57\*)—FREIGHT—BILL OF LADING.

The transfer of a bill of lading makes the transferee the consignee of the goods for all lawful purposes.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 169-178; Dec. Dig. § 57.\*]

3. CARRIERS (§ 20\*)—FREIGHT—CONSIGNEE—"ORDER NOTIFY" SHIPMENTS.

As a rule, where goods are shipped to the consignor at destination, under a bill of lading providing "order notify," the person presenting the bill of lading is deemed the consignee.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 33-49, 133, 927; Dec. Dig. § 20.\*]

4. CARRIERS (§ 2\*) — DELAY IN DELIVERY—PENALTY—STATUTES—STRICT CONSTRUCTION.

The statute entitling the consignee to recover a penalty for failure of a common carrier to adjust a claim, within a certain time, for nondelivery of goods is penal, and should be strictly construed.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 4, 5; Dec. Dig. § 2.\*]

Appeal from Common Pleas Circuit Court of Sumter County; S. W. G. Shipp, Judge.

"To be officially reported."

Action by W. T. Brown against the Atlantic Coast Line Railroad Company. From a judgment for defendant, plaintiff appeals. Reversed.

L. D. Jennings, for appellant. Mark Reynolds, for respondent.

HYDRICK, J. Young & Metzner, of New York, consigned to their own order, at Wedgefield, S. C., a bundle of bagging in a bill of lading which contained the words, "order notify W. T. Brown." Brown paid for the bagging and obtained the bill of lading, which he presented to defendant's agent at Wedgefield and demanded the bagging, which was not delivered to him, because it had been lost by defendant. Having waited some time for defendant to find and deliver the bagging, and it having failed to do so, plaintiff filed a claim for its value, which defendant failed to pay within the time required by statute, although it afterwards admitted liability therefor. Plaintiff brought this action to recover the value of the bagging, together with \$50, the penalty which the statute allows the "consignee aggrieved" to recover for the failure of the carrier to pay such claims within the time prescribed.

[1] Under the facts stated, was the plaintiff the "consignee aggrieved," within the meaning of the statute? That is the sole question raised by the appeal. He was recognized and dealt with, both by the shippers and by the defendant, as the consignee. To be sure, he had no legal right to the goods until he possessed himself of the bill of lading. But, as soon as he did that, he became, in contemplation of law, the consignee of the goods. It is a well-known custom of trade for goods to be shipped to the order of the consignors, with directions to notify the

person for whom they are really intended. The custom is well established and well understood by both consignors and consignees, and also by the carriers, who, in such cases, know that the goods have been shipped with a draft for the purchase money attached to the bill of lading, and that, until the draft is paid and the possession of the bill of lading obtained by the person to be notified, he is not entitled to the goods; but that the moment he does procure and present the bill of lading he is as much entitled to the goods as if they had been unconditionally consigned to him in the first instance. What are called "order notify" shipments are made for other reasons, which need not be mentioned here.

[2, 3] It is well known, even by laymen, that the transfer of a bill of lading carries with it the right to goods, and makes the transferee, for all lawful purposes, the consignee. It is equally well known that under certain circumstances the original consignee may be charged; but in every such instance, and when goods are shipped "order notify," unless there is some peculiar feature or circumstance affecting the case, the person who presents the bill of lading is deemed to be the consignee. This court has invariably so treated him. *Bank v. Railway Co.*, 25 S. C. 216, in which the party to be notified was spoken of as the consignee. In the later case of *Layton v. Railway*, 90 S. C. 323, 72 S. E. 988, the party to be notified was not only spoken of by this court throughout the opinion as the consignee, but he was allowed to recover the penalty provided for by the same statute under which the plaintiff in this action seeks to recover, and under circumstances similar to those of this case.

[4] We are not unmindful of the fact that the statute, being penal, should be strictly construed, but a strict construction does not mean an unreasonable one; nor does it warrant the court in denying to litigants, by construction, a remedy which the Legislature evidently intended they should have for the enforcement and protection of their rights against the indifference or negligence of carriers in the settlement of such claims.

Judgment reversed.

GARY, C. J., and WOODS and WATTS, JJ., concur. FRASER, J., concurs in the result.

(138 Ga. 54)

BROWN v. JOHNSON.

(Supreme Court of Georgia. April 10, 1912.)

(Syllabus by the Court.)

REFUSAL OF NEW TRIAL.

There being no complaint that any error of law was committed upon the trial, and the verdict not being without evidence to support

it, the court did not err in refusing to grant a new trial.

Error from Superior Court, Dodge County; J. H. Martin, Judge.

Action between W. J. Brown and A. R. Johnson. From the judgment, Brown brings error. Affirmed.

W. L. & Warren Grice and H. L. Grice, all of Hawkinsville, and Chas. W. Griffin, of Eastman, for plaintiff in error. Roberts & Smith and J. A. Neese, all of Eastman, for defendant in error.

ATKINSON, J. Judgment affirmed. All the Justices concur.

(138 Ga. 95)

GEORGE et al. v. W. H. HOWARD PIANO CO.

(Supreme Court of Georgia. April 12, 1912.)

(Syllabus by the Court.)

#### REFUSAL OF NEW TRIAL.

The court did not err in failing to instruct the jury in the respect indicated in the motion for a new trial, the assignments of error upon the instructions given were not meritorious, there was evidence to authorize the verdict, and the court did not err in refusing a new trial.

Error from Superior Court, Morgan County; Jas. B. Park, Judge.

Action between Millard George and others and the W. H. Howard Piano Company. From the judgment, George and others bring error. Affirmed.

M. C. Few and Percy Middlebrooks, both of Madison, for plaintiffs in error. C. B. Rosser, Jr., of Atlanta, and Williford & Lambert, of Madison, for defendant in error.

FISH, C. J. Judgment affirmed. All the Justices concur.

(138 Ga. 95)

HADAWAY v. CULPEPPER.

(Supreme Court of Georgia. April 12, 1912.)

(Syllabus by the Court.)

#### REVIEW ON APPEAL.

The court did not err in giving the instructions to which exceptions were taken, nor in the admission of evidence, nor in failing to instruct the jury in certain respects of which complaint was made. The evidence authorized the verdict, and it was not error to refuse a new trial.

Error from Superior Court, Meriwether County; R. W. Freeman, Judge.

Action between T. J. Hadaway and S. F. Culpepper. From the judgment, Hadaway brings error. Affirmed.

N. F. Culpepper, of Greenville, for plaintiff in error. McLaughlin, Jones & Jones, of Greenville, for defendant in error.

FISH, C. J. Judgment affirmed. All the Justices concur.

(138 Ga. 95)

WEAVER MERCHANDISE CO. v. FERGUSON.

(Supreme Court of Georgia. April 12, 1912.)

(Syllabus by the Court.)

#### REVIEW ON APPEAL.

The only error alleged to have been committed upon the trial was the admission of certain evidence. Such evidence was not inadmissible because of any objection made thereto. The verdict was not without evidence to support it, and there was no abuse of discretion in refusing to grant a new trial.

Error from Superior Court, Upson County; E. J. Reagan, Judge.

Action between the Weaver Merchandise Company and W. G. H. Ferguson. From the judgment, the Merchandise Company brings error. Affirmed.

Claude Worrell, of Thomaston, for plaintiff in error. Tisinger & Davis, of Thomaston, and Bloodworth & Bloodworth, of Forsyth, for defendant in error.

FISH, C. J. Judgment affirmed. All the Justices concur.

(138 Ga. 30)

WALLACE v. BODDIE et al.

(Supreme Court of Georgia. April 10, 1912.)

(Syllabus by the Court.)

#### 1. BILLS AND NOTES (§ 120\*)—CONSTRUCTION—PARTIES.

Where several persons gave a promissory note, by which they jointly and severally promised to pay to the payee or order a stated amount of money, and this was signed by each of the promisors separately, on its face this was not a note of a partnership, but of the individuals who signed it.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 257; Dec. Dig. § 120.\*]

#### 2. EXECUTION (§ 348\*)—GROUNDS—PAYMENT OF JOINT OBLIGATION.

Where three notes of the character indicated in the preceding headnote were given, and certain payments were made upon one of them, and thereafter transferees of the notes brought suit thereon against the makers, and obtained judgments, upon which executions were issued, if two of such makers paid the amount of the executions in full, and had an entry made on each of them, stating such fact and transferring it, the defendants to whom the transfers were made could enforce the executions against the other defendants therein for contribution, in the manner pointed out by section 5971 of the Code of 1910.

(a) This is true, although the notes may have been given for the purchase price of a stallion, with a view to using him for stud purposes, and thereafter the parties may have so acted as to create a partnership relatively to third persons, if not among themselves.

[Ed. Note.—For other cases, see Execution, Cent. Dig. §§ 1064-1067, 1071-1074, 1086-1088; Dec. Dig. § 348.\*]

#### 3. EXECUTION (§ 348\*)—CONTRIBUTION—PROCEEDINGS TO ENFORCE—INDORSEMENT ON EXECUTION.

Where suit was brought upon a joint and several promissory note against the makers thereof, and a judgment was rendered against them, and execution issued thereon, if two of such makers paid off the amount of the execution, and had made thereon an entry, signed by

the attorney for the plaintiff, reciting that, the two defendants "having paid this execution, the same, with the judgment, is transferred to them without recourse," such entry imported on its face that the two named defendants had paid the execution in full, and was a sufficient compliance with Civil Code 1910, § 5971, to authorize them to proceed as in that section provided.

(a) Such an entry was more certain than that involved in *Miller v. Perkerson*, 128 Ga. 465, 57 S. E. 787, *Warthen v. Melton*, 132 Ga. 115, 63 S. E. 832, 131 Am. St. Rep. 184, or *Borders v. Vance*, 134 Ga. 85, 67 S. E. 543.

[Ed. Note.—For other cases, see *Execution*, Cent. Dig. §§ 1064-1067, 1071-1074, 1086-1088; Dec. Dig. § 348.\*]

#### 4. INJUNCTION (§ 28\*)—SUBJECTS OF RELIEF—PROCEEDINGS TO ENFORCE CONTRIBUTION.

Under the evidence there was no abuse of discretion in refusing to wholly enjoin the defendants in *fi. fa.*, to whom the executions had been transferred, from enforcing them for contribution. The partial interlocutory injunction which was granted is not made the subject of complaint.

[Ed. Note.—For other cases, see *Injunction*, Cent. Dig. §§ 62-65; Dec. Dig. § 28.\*]

#### 5. INJUNCTION (§ 152\*)—TEMPORARY INJUNCTION—FINDINGS.

While the statement of the presiding judge, in his order granting an injunction, that he found certain facts, was doubtless intended to mean that he only determined them sufficiently to furnish a basis for the interlocutory injunction which he granted, and while such might be construed to be its effect, it is not best, on an interlocutory hearing, to declare or adjudge that certain facts are true, lest it might seem to be a final adjudication on that subject. Direction is accordingly given that the order be so modified as to show that such is not the case. *Bleyer v. Blum & Co.*, 70 Ga. 558; *Fla. Central R. Co. v. Cherokee Sawmill Co.* (March 1, 1912) 74 S. E. 523.

[Ed. Note.—For other cases, see *Injunction*, Cent. Dig. § 337; Dec. Dig. § 152.\*]

Error from Superior Court, Troup County; R. W. Freeman, Judge.

Action by W. C. Wallace against George B. Boddie and others. Judgment for defendants, and plaintiff brings error. Affirmed, with direction.

A. H. Thompson, of La Grange, for plaintiff in error. S. Holderness, of Carrollton, for defendants in error.

LUMPKIN, J. Judgment affirmed, with direction. All the Justices concur.

(138 Ga. 64)

#### NORRELL v. NORRELL.

(Supreme Court of Georgia. April 10, 1912.)

(Syllabus by the Court.)

#### 1. DIVORCE (§ 213\*)—TEMPORARY ALIMONY—RELEASE—OPERATION AND EFFECT.

While the husband and wife were living in a bona fide state of separation, she instituted proceedings against him for temporary and permanent alimony for herself and their minor child. Pending the proceedings, she executed and delivered to him a receipt which, after a statement of the case she had brought against him and the court in which it was pending, was as follows: "Received of [her husband a described check and several promissory notes, all aggregating a given amount], the same be-

ing in full settlement and complete discharge of all claims against [her husband] for temporary or permanent alimony of any kind, character, or description, and particularly in discharge of the suit now pending in [a named superior court and assigned for trial on a stated date], in which [the wife] appears as petitioner; the intention of this receipt being to release [her husband] from claims of any kind, character, or description for temporary or permanent alimony, support, or any other obligation, legal or moral, due by [her husband] to [the wife]." Held, that inasmuch as the settlement between the husband and wife, evidenced by the receipt, made no provision for the support of their minor child, dependent upon her father, such settlement did not operate as a bar to an action afterwards brought against the husband by the wife for temporary alimony or support for the child alone, pending a suit for divorce instituted by the husband against the wife subsequently to such settlement. See Civil Code, § 2980; *Johnson v. Johnson*, 131 Ga. 606 (3), 62 S. E. 1044.

[Ed. Note.—For other cases, see *Divorce*, Cent. Dig. §§ 619-624; Dec. Dig. § 213.\*]

#### 2. TEMPORARY ALIMONY—ATTORNEY'S FEES—CUSTODY OF CHILD.

The judge did not err in granting temporary alimony or support to the minor child, and awarding her custody to her mother, nor in requiring the husband to pay attorney's fees.

Error from Superior Court, Richmond County; H. C. Hammond, Judge.

Action by William E. Norrell against S. H. Norrell. Judgment for defendant, and plaintiff brings error. Affirmed.

Henry S. Jones, of Augusta, for plaintiff in error. E. G. Kalbfleisch and Pierce Bros., all of Augusta, for defendant in error.

FISH, C. J. Judgment affirmed. All the Justices concur.

(128 Ga. 69)

#### PRIESTER v. BRAY.

(Supreme Court of Georgia. April 11, 1912.)

(Syllabus by the Court.)

#### APPEAL AND ERROR (§ 663\*)—DISMISSAL—BILL OF EXCEPTIONS.

Where, in the certificate to a bill of exceptions, the judge certifies that the bill of exceptions, "as modified by the note attached and made a part thereof, is true," and such note shows that the bill of exceptions is in large part not true, the writ of error must be dismissed. *Jarriel v. Jarriel*, 115 Ga. 23, 41 S. E. 262, and cases cited.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 2853-2855; Dec. Dig. § 663.\*]

Error from Superior Court, Lowndes County; W. E. Thomas, Judge.

Action between Sophia Priester and J. M. Bray. From the judgment, Priester brings error. Dismissed.

C. S. Morgan, of Reidsville, for plaintiff in error. Denmark & Griffin, of Valdosta, for defendant in error.

ATKINSON, J. Writ of error dismissed. All the Justices concur.

(138 Ga. 93)

**EDGE et al. v. GARRETT et al.**  
(Supreme Court of Georgia. April 11, 1912.)

(*Syllabus by the Court.*)

**SCHOOLS AND SCHOOL DISTRICTS (§ 68\*)—LOCATION OF SCHOOL BUILDING—REMEDIES.**

A controversy arising as to the location of the site of a school building, in a school district in which an election has been held and the result thereof declared in favor of local taxation for public schools, must be determined by the county board of education, with a right of appeal to the state school commissioner and the state board of education; and a court of equity will not entertain jurisdiction of the subject, but will remand the parties to their legal remedy. *Meadows v. Board of Education*, 136 Ga. 153 (1), 71 S. E. 146; *Jarrell v. Davis*, 137 Ga. 55, 72 S. E. 417.

(a) Accordingly, where a county board of education had selected a site for a public school building in such a district at a place which, in the judgment of the board, was the most advantageous place for the location of the site and as near as practicable to the center of the district, and where the board subsequently, upon the advice of the state school commissioner that the board had the power so to do, agreed, upon the application of certain citizens and taxpayers of the district, to reopen the matter as to the location of the site, but took no action revoking the selection of the site previously made, and appointed a time when all persons interested might appear before the board and be heard upon the subject, and where by reason of the illness of the president of the board such meeting was not held, and the board thereafter refused to grant a hearing as to the relocation of the site, and the trustees of the district were proceeding to have a school building erected upon the site designated by the board, *held*, under such facts, the judge of the superior court did not err in refusing to grant an interlocutory injunction restraining the county board of education, the trustees of the school district, and the county school commissioner from erecting with funds raised by taxation in the district for such purpose a public school building upon the site selected by the board.

[Ed. Note.—For other cases, see *Schools and School Districts*, Cent. Dig. §§ 170-173; Dec. Dig. § 68.\*]

Error from Superior Court, Douglas County; Price Edwards, Judge.

Action by W. B. Edge and others against C. C. Garrett and others. Judgment for defendants, and plaintiffs bring error. Affirmed.

J. S. James, of Atlanta, for plaintiffs in error. W. T. Roberts, of Douglasville, for defendants in error.

FISH, C. J. Judgment affirmed. All the Justices concur.

(138 Ga. 94)

**AWBREY v. FOSTER.**  
(Supreme Court of Georgia. April 12, 1912.)

(*Syllabus by the Court.*)

**NEW TRIAL (§ 6\*)—DISCRETION OF COURT.**

"The first grant of a new trial will not be disturbed by the Supreme Court, unless the plaintiff in error shows that the judge abused

his discretion in granting it, and that the law and facts require the verdict notwithstanding the judgment of the presiding judge." Civil Code 1910, § 6204.

(a) The law and the facts in this case did not require the verdict rendered, and the trial judge did not abuse his discretion in the first grant of a new trial.

[Ed. Note.—For other cases, see *New Trial*, Cent. Dig. §§ 6, 10; Dec. Dig. § 6.\*]

Error from Superior Court, Heard County; R. W. Freeman, Judge.

Action between J. G. Awbrey and S. W. Foster. From an order granting a new trial, Awbrey brings error. Affirmed.

Frank S. Loftin and D. B. Whitaker, both of Franklin, for plaintiff in error. R. B. Blackburn, of Atlanta, for defendant in error.

FISH, C. J. Judgment affirmed. All the Justices concur.

(138 Ga. 94)

**FRYER v. BANK OF BULLOCHVILLE.**  
(Supreme Court of Georgia. April 12, 1912.)

(*Syllabus by the Court.*)

**1. APPEAL AND ERROR (§ 1078\*)—REVIEW—ABANDONMENT OF OBJECTIONS.**

The only assignment of error in the bill of exceptions is upon the judgment overruling the motion for a new trial. In the brief of counsel for plaintiff in error no reference is made to any of the points raised in the amendment to the motion for a new trial, and they will therefore be considered as abandoned.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4256-4261; Dec. Dig. § 1078.\*]

**2. REVIEW ON APPEAL.**

The verdict was not without evidence to support it, and the court did not err in refusing a new trial.

Error from Superior Court, Meriwether County; R. W. Freeman, Judge.

Action between M. O. Fryer and the Bank of Bullochville. From the judgment, Fryer brings error. Affirmed.

J. J. Bull, of Oglethorpe, Hatton Lovejoy, of La Grange, and McLaughlin, Jones & Jones, of Greenville, for plaintiff in error. N. F. Culpepper, of Greenville, for defendant in error.

FISH, C. J. Judgment affirmed. All the Justices concur.

(138 Ga. 88)

**SMITH v. RANDALL et al.**  
(Supreme Court of Georgia. April 11, 1912.)

(*Syllabus by the Court.*)

**EXCLUSION OF EVIDENCE—REFUSAL OF INTERLOCUTORY INJUNCTION.**

No error was committed in the exclusion of evidence, and the judge did not abuse his discretion in refusing to grant an interlocutory injunction.

Error from Superior Court, Fulton County; J. T. Pendleton, Judge.

Action between Charles Smith against Edmond Randall and others. From the judgment, Smith brings error. Affirmed.

Robt. L. Rodgers, of Atlanta, for plaintiff in error. Moore & Pomeroy and Daley & Chambers, all of Atlanta, for defendants in error.

FISH, C. J. Judgment affirmed. All the Justices concur.

(133 Ga. 65)

**POWERS v. POWERS.**

(Supreme Court of Georgia. April 10, 1912.)

*(Syllabus by the Court.)*

**1. MARRIAGE (§ 37\*)—VALIDITY—CONFIRMATION.**

The marriage of a boy in his sixteenth year, although declared by the Code to be void, in the sense of being absolutely void, may nevertheless be ratified and confirmed by continuing, after arriving at the age of 17 years, to cohabit with his wife as such. Smith v. Smith, 84 Ga. 440, 11 S. E. 496, 8 L. R. A. 362; Luke v. Hill, 137 Ga. 159 (1), 73 S. E. 345.

[Ed. Note.—For other cases, see Marriage, Cent. Dig. § 108; Dec. Dig. § 37.\*]

**2. MARRIAGE (§ 37\*)—VALIDITY—CONFIRMATION.**

The evidence in the present case was sufficient to authorize a finding that the defendant below was only in his sixteenth year at the time of the marriage ceremony between him and the plaintiff, duly performed by a justice of the peace in pursuance of a marriage license, but that he continued to cohabit with the plaintiff as his wife for several months after he had arrived at the age of 17 years. Accordingly the judge did not err in holding that the inchoate and imperfect marriage between the plaintiff and the defendant had been completed and confirmed by such cohabitation by them as man and wife, and that the defendant was the lawful husband of the plaintiff.

[Ed. Note.—For other cases, see Marriage, Cent. Dig. § 108; Dec. Dig. § 37.\*]

**3. HUSBAND AND WIFE (§ 295\*)—SEPARATION—TEMPORARY ALIMONY AND ATTORNEY'S FEES.**

The foregoing rulings deal with the only assignments of error made in the bill of exceptions. It follows that the judge did not err in awarding temporary alimony and attorney's fees to the plaintiff below; it appearing that she and the defendant were living in a bona fide state of separation at the time of the application for alimony and at the time of the judgment excepted to.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 1084-1088; Dec. Dig. § 295.\*]

Error from Superior Court, Bibb County; W. H. Felton, Judge.

Action by W. A. F. Powers against F. H. Powers. Judgment for plaintiff, and defendant brings error. Affirmed.

Claud Estes and Walter Defore, both of Macon, for plaintiff in error. O. H. Hall, Jr., of Macon, for defendant in error.

ATKINSON, J. Judgment affirmed. All the Justices concur.

(133 Ga. 96)

**HORNE et al. v. RICKS BROS.**

(Supreme Court of Georgia. April 12, 1912.)

*(Syllabus by the Court.)*

**COSTS (§ 260\*)—ON APPEAL—DAMAGES.**

Plaintiffs in error ask leave to withdraw the bill of exceptions. Defendant in error moved to open the record and to have damages assessed against the plaintiffs in error for bringing the case to this court for delay only. It does not so clearly appear that the writ of error was sued out for delay only as to require an award of damages against the plaintiffs in error. Plaintiffs in error are therefore allowed to withdraw the bill of exceptions, without damages against them.

[Ed. Note.—For other cases, see Costs, Cent. Dig. §§ 983-996, 1002, 1003; Dec. Dig. § 260.\*]

Error from Superior Court, Marion County; S. P. Gilbert, Judge.

Action between J. N. Horne, Jr., and others, and Ricks Bros. From the judgment, Horne and others bring error. Bill of exceptions withdrawn.

W. D. Crawford, of Buena Vista, for plaintiffs in error. Jule Felton, of Montezuma, for defendant in error.

FISH, C. J. Leave to withdraw bill of exceptions. All the Justices concur.

(133 Ga. 96)

**WILLIAMS v. EDWARDS.**

(Supreme Court of Georgia. April 12, 1912.)

*(Syllabus by the Court.)*

**NEW TRIAL (§ 140\*)—GROUNDS.**

There was no contention that any error of law was committed upon the trial. There was evidence to authorize the verdict. Neither the alleged newly discovered evidence, nor the alleged misconduct of certain jurors, relatively to both of which there was conflicting evidence on the hearing of the motion, required the grant of a new trial.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 284-289, 302, 306; Dec. Dig. § 140.\*]

Error from Superior Court, Taylor County; S. P. Gilbert, Judge.

Action between G. W. Williams and W. W. Edwards. From the judgment, G. W. Williams brings error. Affirmed.

R. S. Foy, of Sylvester, and C. W. Foy, of Butler, for plaintiff in error. Carson & McCutchen, of Columbus, for defendant in error.

FISH, C. J. Judgment affirmed. All the Justices concur.

(137 Ga. 842)

**NORTON v. STATE.**

(Supreme Court of Georgia. March 14, 1912.)

*(Syllabus by the Court.)*

**1. JURY (§ 131\*)—CHALLENGES—BIAS—EXAMINATION OF JUROR.**

After a juror had answered on his voir dire the prescribed questions, counsel for the

accused was permitted to question him further. He was asked: "Is your mind perfectly impartial between the state and the accused? Do you think you are strictly impartial? To this he answered: "Well, I don't know that I am." On further examination, he stated that he was in a position to pass fairly upon the guilt or innocence of the accused; that he believed he could give a fair and impartial verdict, after hearing the evidence; that he had no opinion so fixed and unalterable as not to yield to the evidence; that he had not seen the crime committed, or heard any of the evidence; that he had no prejudice or bias for or against the accused, and had no feeling against him. When asked in regard to his answer to a previous question, that he did not know that he was strictly impartial, he explained it by saying that he did not think he so answered; that he did not hear very well, and might have misunderstood the question. *Held*, that there was no error in ruling that the juror was competent. *Cato v. State*, 72 Ga. 747.

[Ed. Note.—For other cases, see *Jury*, Cent. Dig. §§ 561-582; Dec. Dig. § 131.\*]

## 2. CRIMINAL LAW (§ 823\*)—TRIAL—INSTRUCTIONS—CONSTRUCTION AS A WHOLE.

It was not accurate to charge: "If you should believe to a reasonable and moral certainty, from all the circumstances and facts, in connection with the defendant's statement, that the defendant was acting in self-defense, or in defense of his person against one who manifestly intended by violence or surprise to commit a felony on his person, then under the law he would be justifiable." But, when considered in connection with the general charge on the subject of the presumption in favor of the accused and the necessity to prove him guilty beyond a reasonable doubt, the charge quoted does not require a reversal.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 1992-1995, 3158; Dec. Dig. § 823.\*]

## 3. HOMICIDE (§ 111\*)—JUSTIFICATION—SELF-DEFENSE.

One upon whom an arrest unlawfully and without a warrant is attempted to be made has a right to resist force with force proportionate to that being used in detaining him. The mere fact of an unlawful arrest will not alone authorize the killing of the officer making it. But if, in the progress of the transaction, the officer is about to commit a felony upon the other party, or so acts and makes such a show of violence as to excite in the person sought to be arrested the fears of a reasonable man that a felony is about to be committed upon him, and such person acts under the influence of those fears, and not in a spirit of revenge, he may protect himself, although it may be necessary to slay the officer for that purpose. In some cases, where the circumstances are not such as to justify the killing of the officer, they may be sufficient to reduce the homicide from murder to manslaughter. *Franklin v. Amerson*, 118 Ga. 860, 863, 45 S. E. 698; *Thomas v. State*, 91 Ga. 204, 18 S. E. 305; *Perdue v. State*, 135 Ga. 277, 284, 69 S. E. 184; *Porter v. State*, 124 Ga. 297, 52 S. E. 283, 2 L. R. A. (N. S.) 730.

(a) In the light of the evidence, showing an unlawful killing by a deputy sheriff, who did not even inform the person whom he shot of his official position, or of any purpose to make an arrest, before shooting, and in view of the general charge, the charge touching resisting an illegal arrest, of which complaint is made, while not altogether accurate, does not require a new trial.

[Ed. Note.—For other cases, see *Homicide*, Cent. Dig. §§ 143, 144; Dec. Dig. § 111.\*]

## 4. HOMICIDE (§ 37\*)—INVOLUNTARY MANSLAUGHTER—INTENT.

If one intentionally shoots another with a pistol, and the person shot dies from the wound, this presents no theory of involuntary manslaughter, because the slayer, in his unsworn statement upon the trial, asserts that he intended to wound the decedent, but not to kill him. *Stovall v. State*, 106 Ga. 443, 32 S. E. 586; *Scott v. State*, 132 Ga. 357, 64 S. E. 272; *Perdue v. State*, 135 Ga. 277, 69 S. E. 184.

[Ed. Note.—For other cases, see *Homicide*, Cent. Dig. § 58; Dec. Dig. § 37.\*]

## 5. SUFFICIENCY OF EVIDENCE—VOLUNTARY OR INVOLUNTARY MANSLAUGHTER—JUSTIFICATION—REQUEST TO CHARGE.

The evidence in this case did not raise any issue of fact requiring a charge on the subject of either voluntary or involuntary manslaughter.

(a) The statement of the accused set up justification. Had it furnished any basis to charge on the subject of voluntary manslaughter, no request was made for such a charge.

## 6. CRIMINAL LAW (§ 864\*)—TRIAL—CUSTODY AND CONDUCT OF JURY.

Where, after the judge had completed his charge to the jury, counsel for the accused moved the court to declare a mistrial on the ground that one of the jurors was not impartial, and offered to introduce evidence to that effect, there was no error in calling the juror from the jury room and allowing him to be sworn by the state as to his impartiality; the court sending by the bailiff an instruction to the jury not to consider the case until the juror returned, and the juror, after being examined, having been sent back to the jury room, with direction not to disclose to the jury what had transpired.

(a) It appears from a note of the presiding judge that no objection was made to the temporary withdrawal from the jury of the juror whose impartiality was attacked.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 2068; Dec. Dig. § 864.\*]

## 7. GROUND FOR NEW TRIAL—PREJUDICE OF JUROR.

Under the evidence introduced, there was no error in refusing to grant a new trial on the ground that one of the jurors was prejudiced against the accused and had made statements indicating such partiality.

## 8. GROUNDS FOR NEW TRIAL—REVERSAL NOT REQUIRED—SUFFICIENCY OF EVIDENCE.

In the light of the entire charge of the court and of the evidence, none of the other grounds of the motion for a new trial were such as to require a reversal. The verdict was fully supported by the evidence.

Error from Superior Court, Jones County; *Jas. B. Park*, Judge.

W. B. Norton was convicted of murder, and brings error. Affirmed.

Robt. L. Berner, of Macon, J. B. Jackson, of Gray, W. A. McClellan, of Macon, Jack Barron, of Gray, and J. P. Knight, of Nashville, for plaintiff in error. Jos. E. Pottle, Sol. Gen., of Milledgeville, Johnson & Johnson, of Gray, T. S. Felder, Atty. Gen., and Dumas & Henderson, for the State.

LUMPKIN, J. W. B. Norton was indicted for the murder of R. V. Smith. There was evidence tending to show the following, among other, facts: On November 10, 1910, the sher-



iff of Bibb county received a telephone message from a man who lived in the country, stating that some negroes had shot at his child or children, and requesting that officers be sent to arrest them. The person making the request also provided an automobile in order to overtake the negroes, who were in a wagon. Norton was a deputy sheriff. He was high-tempered. On that day he had been drinking, and was under the influence of liquor. One witness testified that the accused told him that he had drunk half a pint of liquor. Another witness testified that the accused had taken eight drinks of whisky that day. The sheriff directed the accused and two other deputies to go to the place whence the complaint came, and, if they ascertained that one of the boys had been shot (at another time he testified that he said "shot at"), to keep on until they caught the negro, but if they ascertained that nobody had been shot, and the negroes were only shooting on the highway, to stop when they got to the Bibb county line and get a warrant. After taking the boy and his father into the automobile with them, they went in the direction taken by the wagon. They passed several wagons before the boy could identify any of the occupants. Finally he identified a wagon as the one from which the shooting had been done. The officers arrested the negroes who were in it. The accused fired his pistol into the body of the wagon, and hit one of the negroes in the foot or leg. It was then dark. Another wagon had stopped temporarily a short distance ahead, in which was Smith. Either on his own motion or on the suggestion of another member of the party, the accused left the other officers, and in company with the boy and the chauffeur got into the automobile for the purpose of pursuing the other wagon. It started, and went over a hill. Accused gave chase, and fired his pistol twice in the air. One of the negroes, who had been arrested, testified that he told the accused that Mr. Smith was in the wagon in front. On this subject the evidence was conflicting. After being chased for some distance by the automobile, outside the limits of Bibb county, and in Jones county, Smith turned out of the main road into a smaller road. The chauffeur stated that it was too rough to follow in the automobile. The accused leaped from it and pursued the wagon on foot, overtaking it a short distance away. When he was not far from it, Smith stopped. The accused called to him to throw up his hands, and again to take his hands from his hip or pocket, and to hold them up. Smith said that he had not done anything, and was not going to hold up his hands. Thereupon the accused shot him, wounding him in the thigh, as a result of which death ensued. After

Smith had been carried to the place where the other officers were, there was some testimony that the accused said he had shot another negro; but another member of the party threw a flashlight upon the wounded man and stated that he was a white man. There was no evidence that the accused informed Smith of his official character, or that he was seeking to arrest him for any offense, or claimed him to be a violator of law. He introduced evidence tending to show that it was so dark that it could not be told whether the man in the wagon which he pursued was a white man or a negro.

In his statement the accused claimed that, when the wagon stopped, the occupant threw his hand to his hip pocket; that the accused told him to come up there and they would talk it over, which was refused; that the accused told the man in the wagon to move his hand, and that the accused would go down there and talk it over, which was refused; that the man in the wagon brought his hand forward with something in it, which the accused could not distinguish in the dark, and he shot at the man's hand, not intending to kill him, but to disable him; and that he picked up a pistol where the man had dropped it. A witness for the defense testified that he heard the conversation as stated by the accused. There was evidence to the effect that Smith was unarmed. After the homicide, the accused left the state and remained away for several months, when he returned voluntarily and surrendered. He explained this on the ground of bad health, and that he did not want to lie in jail. There was much other evidence which need not be stated. It was ample to authorize the conviction. A good deal of testimony on behalf of the defendant was to the purport that it was too dark to tell whether the man in the wagon was a white man or a negro, and in his statement the accused said that he did not know that it was a white man he had shot until so informed by another deputy. But the homicide was unlawful, regardless of the color of the person slain.

The headnotes sufficiently explain the rulings made. Grounds of the motion not specifically mentioned were of such a character as to require neither the grant of a new trial nor an extended discussion. In one or two of the charges complained of, there may have been some slight inaccuracy. On the subject of the right to resist an unlawful arrest, and to kill the person seeking to make it, if necessary, the language of the court was not entirely free from criticism. But, under the facts above stated, and in the light of the entire charge, we do not think that this should furnish any ground for reversal.

Judgment affirmed. All the Justices concur.

(133 Ga. 47)

**FAMBROUGH v. De VANE et al.**

(Supreme Court of Georgia. April 10, 1912.)

*(Syllabus by the Court.)***1. REFORMATION OF INSTRUMENTS (§ 33\*)—BILL OF SALE—MISTAKE—PARTIES.**

Where personal property is sold, and a bill of sale with warranty of title is executed by the vendor, and the property is again sold with warranty of title, the last vendee and his vendor may join in an equitable petition against the original vendor, having for its purpose the reformation of the original bill of sale by including certain items of property omitted therefrom by mutual mistake.

[Ed. Note.—For other cases, see Reformation of Instruments, Cent. Dig. §§ 122-139; Dec. Dig. § 33.\*]

**2. RULING ON DEMURRER.**

The substantial merits of the petition were passed on when the judgment on demurrer thereto was reviewed in 133 Ga. 471, 68 S. E. 245.

**3. SET-OFF AND COUNTERCLAIM (§ 31\*)—INDEPENDENT TORTS.**

In a suit to reform a contract, a plea by the defendant, praying judgment for damages for independent torts against one of the plaintiffs, alleged to be a nonresident, is properly stricken on demurrer.

[Ed. Note.—For other cases, see Set-Off and Counterclaim, Cent. Dig. § 52; Dec. Dig. § 31.\*]

**4. AMENDMENT OF PLEADING.**

Other special demurrers were met by appropriate amendments.

Error from Superior Court, Berrien County; W. E. Thomas, Judge.

Action by W. G. De Vane and others against A. C. Fambrough. Judgment for plaintiffs, and defendant brings error. Affirmed.

See, also, 133 Ga. 471, 68 S. E. 245.

Hendricks & Christian, of Nashville, for plaintiff in error. W. D. Bule, of Nashville, and R. D. Smith, of Tifton, for defendants in error.

EVANS, P. J. Judgment affirmed. All the Justices concur.

(127 Ga. 848)

**DONALSON v. THOMASON.**

(Supreme Court of Georgia. April 9, 1912.)

*(Syllabus by the Court.)***1. MORTGAGES (§ 171\*)—RECORD—SUFFICIENCY OF EXECUTION—ATTESTATION.**

A mortgage on real estate, attested by one witness, who is not an officer authorized by law to attest a mortgage, so as to authorize its registry, is not entitled to be recorded.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 392-409; Dec. Dig. § 171.\*]

**2. VENDOR AND PURCHASER (§ 227\*)—RIGHTS OF PARTIES—EXISTENCE OF PRIOR MORTGAGE—NOTICE.**

A mortgage on land attested by one witness is not void, and if a subsequent purchaser buys with actual notice of the prior mortgage he takes subject to it.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 474; Dec. Dig. § 227.\*]

**3. VENDOR AND PURCHASER (§ 231\*)—BONA FIDE PURCHASERS—NOTICE—RECORD.**

The record of a mortgage made without due attestation or probate will not be held to be constructive notice to a subsequent bona fide purchaser.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 513-539; Dec. Dig. § 231.\*]

**4. VENDOR AND PURCHASER (§ 226\*)—BONA FIDE PURCHASERS—PAYMENT OF CONSIDERATION.**

Actual payment of the purchase money, or what is equivalent thereto, before notice of a defectively recorded mortgage, is necessary to the protection of a subsequent purchaser.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 475, 476, 495-501; Dec. Dig. § 226.\*]

**5. VENDOR AND PURCHASER (§ 226\*)—BONA FIDE PURCHASERS—PAYMENT OF CONSIDERATION.**

Where a purchaser buys land without notice of any mortgage thereon, and gives his negotiable notes therefor, which are negotiated by the payee, so as to cut off any defense, before the purchaser receives notice of the prior lien, and the price paid is a full and fair consideration, such person will be deemed to be a bona fide purchaser, and as such entitled to protection.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 475, 476, 495-501; Dec. Dig. § 226.\*]

**6. VENDOR AND PURCHASER (§ 226\*)—BONA FIDE PURCHASERS—PAYMENT OF CONSIDERATION.**

If there has been a partial payment (or what is equivalent) of the purchase money before notice, the purchaser will be entitled to protection to that extent; but appropriate equitable pleadings are necessary for this purpose.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 475, 476, 495-501; Dec. Dig. § 226.\*]

**7. VENDOR AND PURCHASER (§ 231\*)—BONA FIDE PURCHASERS—RECORD.**

The record of a mortgage defectively attested or probated amounts to no record of it. If the mortgage afterwards be attested, so as to entitle it to record, it must be recorded anew, in order for it to be constructive notice. The entry of the name of the new attesting official upon the old record is improper, and will not suffice.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 513-539; Dec. Dig. § 231.\*]

**8. MORTGAGES (§ 196\*)—RIGHTS OF PARTIES—STIPULATIONS IN MORTGAGE.**

The clause in the mortgage, "the purchase money for the sale of any timber on said land, or any use of same, to be applied as a credit on said note" (even if construed as a power reserved to the mortgagor to sell the timber, free of the mortgage lien), would not authorize a sale on credit.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 503-507; Dec. Dig. § 196.\*]

Error from Superior Court, Decatur County; Frank Park, Judge.

Action by John E. Donalson against T. I. Thomason. Judgment for defendant, and plaintiff brings error. Reversed.

Erle M. Donalson, of Bainbridge, for plaintiff in error. R. G. Hartsfield and T. S. Hawes, both of Bainbridge, for defendant in error.

EVANS, P. J. The action is in trespass for cutting timber by John E. Donalson against T. I. Thomason. The plaintiff claimed title to the land and timber, and the defendant claimed title only to the timber on the land. The plaintiff was nonsuited, and error is assigned on the judgment of nonsuit. It was admitted that F. R. and C. R. Graham owned the land, and that both parties deraigned their respective titles from them. On April 6, 1906, F. R. and C. R. Graham executed a mortgage on the land to the Decatur County Bank to secure a debt of \$2,500. The mortgage was recorded the next day. The Decatur County Bank foreclosed its mortgage, and also obtained a common-law judgment; and the land was sold by virtue of executions based on these judgments for the sum of \$2,100 to the Decatur County Bank, and a deed made to it by the sheriff on October 8, 1908. On February 8, 1909, the Decatur County Bank executed a quitclaim deed to the plaintiff. The common grantor, F. R. and C. R. Graham, on February 9, 1907, conveyed the timber on the land to Smith and Howell, who conveyed it to the defendants. The timber was cut and removed from the land after the plaintiff obtained his deed, and its value was proved. In moving for a nonsuit, the defendant insisted that the evidence disclosed that the mortgage from the Grahams to the Decatur County Bank was defectively executed, and illegally recorded, and that he and his vendors were bona fide purchasers for value, without notice of the lien of the mortgage.

[1] 1. It appeared that the mortgage was drawn by the plaintiff, who was a director of and attorney for the mortgagee, and signed by the mortgagors in his office, and attested by him; that the mortgagors left his office, taking the mortgage with them, for the purpose of acknowledging their signatures before a notary public. It is clear from the evidence that at the time the mortgage was recorded, and when the sale of the timber was made by the Grahams to Smith and Howell, the mortgage had not been attested by a notary public, but that subsequently the mortgagors acknowledged their signatures before a notary public, and the notary's name was entered on the record as an attesting witness. Before a mortgage on real estate executed in this state can be admitted to record, it must be executed in the presence of, and attested by or proved before, a notary public or justice of any court in this state, or a clerk of the superior court, and one other witness. Civil Code 1910, § 3257; *Gardner v. Moore*, 51 Ga. 268. As the mortgage was not attested in the manner required by law to authorize its registry, its record was not constructive notice of its existence.

[2, 3] 2-6. At the time of the sale of the timber by the Grahams to Smith and Howell, the evidence discloses that they had

neither actual nor constructive notice of their vendors' prior mortgage to the bank. Neither of the Grahams were introduced as witnesses. It appears from the testimony that the Grahams sold and conveyed this timber to Smith and Howell, and received in payment their two notes for \$600 each, due at six and nine months, which were negotiated by the Grahams. It affirmatively appears that one of them had been negotiated by the Grahams prior to the time Smith and Howell had actual notice of the bank's mortgage; but the evidence fails to disclose when the other note was negotiated. Both notes have been paid. A mortgage of real estate, attested by but one witness, is not void; and if a subsequent purchaser buys with actual notice of the prior mortgage, he takes subject to it, even though it has but one witness. *Gardner v. Moore*, 51 Ga. 268. But if the subsequent purchase be bona fide and without notice, his title will be superior to the mortgage. Civil Code 1910, § 3262.

[4] It is urged that, inasmuch as Smith and Howell had not actually paid for the timber in money, but had only given their notes when they received notice of the bank's mortgage, they are not to be regarded as bona fide purchasers. It is a rule in equity that a bona fide purchaser without notice, to be entitled to protection, must be so, not only at the time of the contract or conveyance, but until the purchase money is actually paid. *Phinlzy v. Few*, 19 Ga. 66; *Mackey v. Bowles*, 98 Ga. 733, 25 S. E. 834. This results "from the doctrine that, when the only feature of the transaction is the transfer of title from one party to another, all the equities which attended it in the hands of the grantor follow it into those of the grantee, and he cannot claim exemption therefrom, unless there has been some payment or expenditure on his part, without notice of their existence, which would render it inequitable to enforce them against him" *Kitteridge v. Chapman*, 36 Iowa, 348.

[5, 6] Actual payment may be made in money or its equivalent. 2 *Warvelle on Vendors*, § 611. Where the purchaser has executed negotiable notes, which have been actually negotiated, so as to render him liable thereon to the holder before receiving notice of a prior lien or equity, he will be treated as a bona fide purchaser and entitled to protection as such. *Partridge v. Chapman*, 81 Ill. 137; *Digby v. Jones*, 67 Mo. 104. A partial payment of the purchase money before notice, although not sufficient to invest the vendee with the character of a bona fide purchaser as regards the entire estate purchased, yet such partial payment will entitle him to invoke the aid of the equitable principle that he who asks equity must do equity and reimburse the amount actually paid. *Carter v. Pinckard*, 68 Ga. 817. The case last cited was an ejectment cause. The plaintiff acquired his title from a grantee of the defendant, who pleaded that her deed to the

plaintiff's grantor was procured by fraud, and that the plaintiff had notice of the fraud at the time of his purchase. It appeared that the plaintiff paid for the land partly in cash and partly with a note, which did not appear to have been negotiated, and the court ruled in that case that, in order "to raise the question of protecting him to the extent of a portion of the purchase money which he has paid before notice, there must be appropriate pleadings."

In the case at bar the purchaser gave two notes. It affirmatively appears that one of them had been negotiated before the purchaser had notice of the prior mortgage, and to the extent of this note there was clearly a payment equivalent to money. As to the other note, there is no evidence as to the time it was negotiated. So that in the present state of the record Smith and Howell cannot be regarded as bona fide purchasers of the entire estate in the timber. The defendant purchased the timber from Smith and Howell, and took an assignment of their lease on May 11, 1909. The evidence discloses that he paid \$725 in cash and gave his note for \$100, which was subsequently paid. It does not appear when the \$100 note was paid. At the time of his purchase the defendant had no knowledge of the prior mortgage of the bank. He was afterwards informed of its existence, but it does not appear whether he had paid the \$100 purchase money note at the time. So that the evidence does not disclose that he was a bona fide purchaser for value of the entire interest, and there is no equitable pleading praying that he be protected to the extent of the actual cash which he paid.

Allusion is made in the oral testimony to the record of the conveyance of the timber from the Grahams to Smith and Howell. The date of its record, and whether it was properly attested for record, is not made to appear. Hence the question is not presented as to whether, under our registry laws, a subsequent purchaser of land under a recorded deed, who has made a partial payment, without notice actual or constructive of a prior mortgage acquires title free of such mortgage.

[7] 7. The record of a mortgage, improperly made for lack of due attestation, cannot be amended by the mortgagors subsequently acknowledging their signatures before a notary public, who attests the mortgage, and the addition of the notary's name to the original record. If the mortgage was improperly recorded for lack of due attestation, and the same is afterwards properly attested, the mortgage must be recorded anew, because its registration would date from the time of its original improper record.

[8] 8. The mortgage from the Grahams to the Decatur County Bank contained this clause: "Provided, however, that this conveyance shall be void when the following de-

scribed debts are fully paid off and discharged, to wit: One note of even date with these presents, due 12 months from date, for \$2,500, signed by said grantors and payable to said grantee, and given in part purchase money of said land described in this mortgage; the purchase money for the sale of any timber on said land, or any use of same, to be applied as a credit on said note." It is contended that the proviso of the mortgage operates as a power of sale to the mortgagors to sell the timber upon the land, and that the sale thereof to Smith and Howell was a proper exercise of this power. We hardly think that this clause of the mortgage can be construed as reserving to the mortgagors a power to sell the timber; but, even if it be construed as the reservation of a power to sell, it is manifest that the parties did not contemplate a sale on credit. As a general rule, where power to sell is given, and no terms of sale are stated in the power, it will be construed to mean a sale for cash. 31 Cyc. 1117. As the sale to Smith and Howell was not for cash, they could not hold the timber under this contention.

Under the evidence, the plaintiff was entitled to go to the jury. We have discussed the various aspects of the case as presented by the evidence, so that on the next trial the case may be more fully developed, and tried under the principles of law herein expressed.

Judgment reversed. All the Justices concur.

(133 Ga. 96)

**CAIN v. SEABOARD AIR LINE RY.**  
(Supreme Court of Georgia. April 12, 1912.)

*(Syllabus by the Court.)*

**LIMITATION OF ACTIONS (§ 109\*)—RUNNING OF STATUTE—APPOINTMENT OF RECEIVER.**

The general rule is that the mere appointment of a receiver does not in any way affect the running of the statute of limitations.

(a) The facts presented by the petition here bring the case within the general rule, and show that the cause of action was barred by the statute of limitations, and that therefore the petition was properly dismissed on demurrer.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 519; Dec. Dig. § 109.\*]

Error from Superior Court, Terrell County; W. C. Worrill, Judge.

Action by Tobe Cain against the Seaboard Air Line Railway. Judgment for defendant, and plaintiff brings error. Affirmed.

Calhoun & Rambo, of Arlington, and W. H. Gurr, of Dawson, for plaintiff in error. E. A. Hawkins, of Americus, and M. J. Yeomans, of Dawson, for defendant in error.

FISH, C. J. The only question presented for adjudication in this case is whether the trial judge properly sustained the demur-

rer to the petition, upon the ground that it appeared therefrom that the action was barred when the petition was filed. The petition showed the following facts: The defendant company, the Seaboard Air Line Railway, was a foreign corporation, chartered under the laws of the state of Virginia. Defendant transacted business and had an office and agent in the county in this state wherein the action was brought on and from March 25, 1907, to January 2, 1908. On March 25, 1907, plaintiff, while a passenger on defendant's line of road, received serious bodily injuries at a designated place in the state of Florida, as set forth, by the alleged negligence of the defendant in the operation of its train, upon which plaintiff was a passenger. On January 2, 1908, "in a suit wherein the said defendant brought its complaint against the Continental Trust Company, as trustee under the first mortgage made by the Seaboard Air Line Railway," in the "United States Court for the Eastern District of Virginia," the defendant corporation was placed in the hands of two receivers; one resident in Baltimore, Md., the other in Richmond, Va. The petition alleged: "That as a result of said complaint brought by the said defendant against the said Continental Trust Company, trustee as aforesaid, the aforesaid receivers were appointed to take charge of all the property and business of the Seaboard Air Line Railway, including all the property and business of defendant in both the states of Georgia and Florida, and as a result of the order of the United States Court for the Eastern District of Virginia, wherein the said receivers were appointed by said court, all the agents of defendants ceased to represent the defendant any longer, and all of the property and business of defendant were placed in charge of said receivers, so that there was no person in the state of Georgia, nor in the state of Florida, upon whom service of this suit could be perfected, and there was no property of defendant against which attachment proceedings could be enforced against defendant, either in the state of Georgia or in the state of Florida." The receivers continued in the possession of all the property belonging to the defendant corporation and operated its business until on or about November 15, 1909. The particulars of the suit in which the receivers were appointed were not set forth; nor did it appear from the petition whether persons holding claims against the corporation were enjoined; nor was it alleged how the receivership was terminated; nor what disposition was made by the receivers of the property of the corporation that went into their hands; nor how or under what conditions the corporation resumed possession of its property and the operation of its line of road. This action was brought in the superior court of Terrell county, April 29, 1910.

Under Civil Code, § 4497, actions for bodily

injuries must be brought within two years after the right of action accrues. More than two years had expired from the time the plaintiff was injured by the alleged negligence of the defendant corporation before he instituted his action. His cause of action was therefore barred, unless the statute of limitations was suspended during the time the assets and business of the corporation were in the hands of the receivers; that is, from January 2, 1908, to November 15, 1909. In passing upon the question as to whether the statute of limitations was suspended during the receivership, Civil Code, § 2788, is not to be considered, as that section, providing for suits against receivers, is confined to actions for injuries and damages to persons in their employ, and to injuries and damages to personal property occurring during the receivership. Nor did the case fall within the provisions of the act of Congress allowing receivers appointed by federal courts to be sued without an order from the court appointing them, for the acts of such receivers during receivership. The general rule seems to be well settled that the mere appointment of a receiver does not in any way affect the running of the statute of limitations. 25 Cyc. 1282; High on Receivers (4th Ed.) § 184; Kerr on Receivers, pp. 160, 161; Harrison v. Dignan, 1 Connor & Lawson, 376; Beach on Receivers, § 234; White v. Meadowcroft, 91 Ill. App. 293; Williams v. Taylor, 99 Md. 306, 57 Atl. 641. There are exceptions to this general rule, as, where an equitable suit is filed by one or more creditors and others who may come in, the statute of limitations will not run against any of the creditors who may come in. Sterndale v. Hankinson, 1 Simon's Rep. 393. So "creditors are never barred by lapse of time, whilst the law itself hinders them from proceeding." Hart v. Evans, 80 Ga. 330, 5 S. E. 99. And "a disability [to sue] 'happening by an invincible necessity' constitutes an exception from a statute of limitations, and is to be taken to have the same effect as those disabilities which are expressly excepted from the statute." Hill v. Phillips, 14 R. I. 93; 19 A. & E. Enc. Law, 215.

The case in hand is not shown by the petition to come within any of such exceptions. In Verdery v. Savannah, etc., Ry. Co., 82 Ga. 675, 9 S. E. 1133, it was held: "Whilst realty of which a debtor has had adverse and continuous possession under written color of title is in the hands of a receiver appointed by a court of equity at the instance of creditors, the statute of prescription continues to run in favor of such debtor's title against strangers to the pending litigation. The possession of the receiver may be tacked to that of the debtor, and to that of the purchaser of the premises at a sale made under a decree in the cause, to make out the full period of the prescriptive term." In the opinion delivered by Chief Justice Bleckley, beginning on 82 Ga. 683, 9 S. E. 1134, it is

said: "It may safely be affirmed that the property of a debtor in the hands of a receiver, for the purpose of being appropriated for the mutual benefit of the debtor and his creditors, is held by the receiver as a successor of the debtor, if not as a quasi agent for him. As against strangers to the suit, such holding is no breach of continuity. The statute of limitations (or of prescription) in favor of the debtor's inchoate prescriptive title is not suspended, but continues to run pending the receiver's possession. Kerr on Receivers, 160, 161; Beach on Receivers, §§ 1, 219, 220; High on Receivers, §§ 135, 184, 556. There is nothing in our statutes indicative of a purpose by the Legislature to stop the running of prescription because a court has possession by its receiver; and certainly there is no necessity for treating the period of such possession as an implied exception, for a stranger who claims the property is not without a remedy. On the contrary, he has two remedies, one of which is discretionary with the court whose receiver has possession. The other is matter of right in all cases. By petition pro interesse suo, the claimant to the property held by a receiver is entitled always to a hearing, should the court in its discretion think proper to deny him leave to bring a separate action in his own behalf. 2 Story, Eq. 833a; 3 Daniell, Chan. Pr. \*1744; Beach on Receivers, § 654; High on Receivers, § 139. The reluctance of courts to ingraft exceptions upon statutes of limitations is everywhere apparent." In this connection, see *Weaver v. Davis*, 2 Ga. App. 455, 58 S. E. 786. As it was held in *Verdery v. Savannah, etc., Co.*, supra, that the statute of limitations (or of prescription) in favor of the debtor's inchoate prescriptive title was not suspended, but continued to run pending the receiver's possession, as against strangers to the pending litigation, we think it should follow that in the case at bar the statute of limitations was not suspended, but continued to run in favor of the defendant railroad company, and against the plaintiff, who, in so far as the petition shows to the contrary, was a stranger to the suit in which the receivers were appointed.

Counsel for plaintiff in error, who was the plaintiff below, contends that the allegations of the petition show that the defendant railway company was forced to leave this state by reason of the appointment of foreign receivers by the federal court in the state of Virginia for all of the property of the defendant company, and that such receivers removed the agents of the railway company in Georgia and Florida, and placed their own agents in charge of the company's business, and that therefore the case comes within the provisions of Civil Code, § 4378, relating to an exception to the running of the statute of limitations, viz.: "If the defendant, in any of the cases herein named, shall

remove from this state, the time of his absence from the state, and until he returns to reside, shall not be counted or estimated in his favor." We cannot, however, concede the soundness of such contention. The Seaboard Air Line Railway was a foreign corporation, and, though made subject to be sued in this state by our statute, its legal domicile was never here, and therefore it never removed, either voluntarily or involuntarily, from this state, and returned to reside here in the meaning of the section quoted. In *Edwards v. Ross*, 58 Ga. 147, it was held: "In the limitation laws of Georgia, there is no saving in favor of a creditor because of the absence or nonresidence of his debtor, if the debtor never resided here. [*Bishop v. Sanford*] 15 Ga. 1; [*Pare v. Mahone*] 32 Ga. 253; [*Moore v. Carroll*] 54 Ga. 126." These decisions relate to the provisions of our statute now embodied in the section of the Code above cited. A body corporate is not extinguished by a mere appointment of a receiver. *Hollifield v. Wrightsville & Tennille R. Co.*, 99 Ga. 365, 27 S. E. 715. And no reason occurs to us why the plaintiff in this case could not have brought his action against the railway company in the proper court of its domicile pending the receivership; nor is any reason shown why he may not have been allowed to intervene in the action under which the receivers were appointed.

From what we have said, we have confidently reached the conclusion that the mere appointment of foreign receivers for the railway company for the property of such company, by a foreign court, did not suspend the running of the statute of limitations in favor of the defendant, and that therefore the trial judge properly dismissed the petition on demurrer.

Judgment affirmed. All the Justices concur.

(123 Ga. 89)

#### KNOWLES v. CHURCHILL.

(Supreme Court of Georgia. April 11, 1912.)

(Syllabus by the Court.)

#### 1. MASTER AND SERVANT (§ 185\*)—INJURY TO SERVANT—FELLOW SERVANTS.

Where a master provided safe machinery and appliances for lowering cotton into the hold of a vessel, and stations a hatch tender at the hatchway, and the hatch tender neglects to warn a fellow servant in the hold of the vessel of impending danger, whereby the latter receives personal injuries, for which he sues the master for damages, such negligence of the hatch tender is the negligence of a fellow servant, and the injured servant cannot recover damages from the master for the injury received unless the master has called the hatch tender away.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 385-421; Dec. Dig. § 185.\*]

#### 2. NEGLIGENCE OF FELLOW SERVANT.

The decision in the case of *Ocean Steamship Co. v. Cheeney*, 86 Ga. 278, 12 S. E. 351,

and subsequent decisions of this court holding to the same effect are reviewed and reaffirmed.

Error from Superior Court, Chatham County; W. G. Charlton, Judge.

Action by Robert Knowles against A. F. Churchill. Judgment for defendant, and plaintiff brings error. Affirmed.

Robert Knowles brought suit against A. F. Churchill, and alleged substantially as follows: That on the 12th day of January, 1911, he was employed by the defendant as a laborer on the steamship *St. Bede*. The vessel was being loaded with cotton, and Knowles was working in the hold of the ship, where he caught the bales as they were lowered, and placed them in the proper place in the hold for storage. The method employed was to hoist the cotton two bales at a time from the lighter by means of a swinging beam or derrick, and then lower the cotton into the hold of the vessel, where it was stored. The cotton was hoisted by means of a winch engine, and the cotton was grabbed by a pair of hooks, which should be imbedded into the cotton in order to make a firm hold and prevent it from slipping from the hooks while being hoisted and lowered. There was a platform or staging erected at the coaming of the hatch, upon which the cotton is permitted to rest, after being brought from the lighter, and it should be inspected to see that the hooks are properly caught before the cotton is lowered into the hold of the vessel. It was necessary and customary for a hatch tender or other person to be stationed at the hatch opening, whose duty it was to signal the men in the hold below to stand clear, which means to get out of the way when the cotton is being lowered from above. On January 13, 1911, while plaintiff was working in the lower hold of the steamship, his duties required him to be beneath the opening for the purpose of seizing bales of cotton to be stored, and while thus engaged, there being no signal or warning from above to stand clear, or any notice whatever that bales of cotton were about to be lowered, a bale of cotton fell from above and struck the plaintiff on his left shoulder, breaking the shoulder blade and otherwise severely injuring, bruising, and spraining plaintiff's back, neck, chest, and arms. The bale which struck plaintiff was one of two being lowered into the hold, and was not securely and substantially held by the hooks, and by reason thereof fell and injured plaintiff as above stated. Knowles alleges negligence against the defendant as follows: (a) In not properly fastening the hooks in the cotton. (b) In not properly inspecting the hooks, before the cotton was lowered, to determine if they were properly imbedded. (c) In not giving the signal or warning that cotton was being lowered. To the petition alleging the above facts the defendant filed his general and special demurrers. The court passed an order sustaining the general demurrer, and over-

ruling some and sustaining some of the grounds of special demurrer. To the order sustaining the general demurrer, the plaintiff excepts and assigns the same as error.

Twiggs & Gazan, of Savannah, for plaintiff in error. Osborne & Lawrence, of Savannah, for defendant in error.

HILL, J. (after stating the facts as above). [1, 2] The court did not err in sustaining the general demurrer in this case. Under the former rulings of this court upon the general question here involved, where the master provides a hatch tender, and stations him at the hatchway, and provides safe machinery and appliances for the lowering of cotton into the hold of a vessel, his duty has been fulfilled. And if, under these circumstances, the hatch tender neglects to give the warnings in order to prevent injury to a fellow servant in the hold of the vessel, such negligence is the negligence of a fellow servant, and the injured servant cannot recover damages unless the master had called the hatch tender away. In the case of *Ocean Steamship Co. v. Cheeney*, 86 Ga. 278, 12 S. E. 351, this court held that: "A steamship company is not liable in damages for an injury to its laborer, employed in stowing cotton in the hold of its vessel, by a bale of cotton thrown down the hatchway, where the injury is caused by the failure of the hatch tender (who is usually the engine driver, or is taken indifferently from the laborers employed in loading the vessel) to give warning of the approach of the falling bale, whether it be thrown when the hatch tender is present and fails to give the warning, or, while he is absent, it be thrown without notice by another servant engaged in the same business. In either case the injury is occasioned by the negligence of a fellow servant." *Fraser v. Smith & Kelly Co.*, 136 Ga. 18, 70 S. E. 792. See note to case of *Tedford v. Los Angeles Electric Co.* and numerous cases there cited sustaining the above rule. 54 L. R. A. 120, 121 (1902); *Hermann v. Port Blakely Mill Co.* (D. C.) 71 Fed. 853; *Kennedy v. Allentown Foundry & Machine Works*, 49 App. Div. 78, 63 N. Y. Supp. 195. See, also, *Cheeney v. Ocean Steamship Co.*, 92 Ga. 726, 19 S. E. 33, 44 Am. St. Rep. 113. Our court seems to have adopted the common-law rule, which is to the effect that a master was not liable for injuries to a servant by the negligence of a fellow servant employed in the same general business, and where the master furnished proper means for carrying on the work, and has used due care in the selection of servants. 26 Cyc. pp. 1276, 1293, and Georgia cases therein cited. See, in this connection, the case of *Riverside Mills v. Jones*, 121 Ga. 33, 48 S. E. 700.

But it is insisted by counsel for plaintiff in error that the decisions of this court holding to the above effect are unsound in principle, and they ask us to review and overrule

them, in so far as they hold that the hatch tender is the fellow servant of the servant in the hold of the vessel, when injury results because the hatch tender, in the discharge of a personal duty of the master, voluntarily absents himself or neglects to perform his duty. It is further contended that if the master selects a servant to take his place, and that servant neglects the duty imposed, the consequences of such neglect are attributable to the failure on the part of the master to perform a personal duty, which is a condition precedent to making the place of work safe. To this contention and the deductions sought to be drawn from it we cannot agree. The real question to be considered is: What is the duty of the master? Plaintiff in error says: Stand there and warn the servants in the hold below. But this cannot be the true rule. Whenever the master has provided safe machinery and appliances, and placed a competent hatch tender at the hatchway, the measure of his duty has been fulfilled. In the very nature of things the master cannot always be there in person. His duty is to provide the servant a safe place to work, and safe machinery and appliances, and a hatch tender. If there is danger incident to the work, and the danger is not patent, it is the duty of the master to warn the servant. But there is no contention here that the danger was not patent; that if the servant did not get out of the way of insecurely fastened cotton he would be hurt. Nor is there any contention that the appliances furnished by the master were not safe. The nondelegable duty of the master is to provide a hatch tender, and, relative to the plaintiff, must provide safe appliances; but it is not the duty of the master to stand there in person and see that there is no negligence. If he provides a competent man as hatch tender, and all the necessary and safe appliances for carrying on the work, that is all that can reasonably be expected of him. It would be unreasonable indeed to either require him to remain there in person, or to hold him responsible for the acts of negligence of one whom he has exercised reasonable care in selecting as a competent workman to labor with the plaintiff. There is no evidence that the master failed in any of these obligations. Some of the reasons which support the rule here adhered to are that servants take the risk of the employment upon which they enter, and that public policy requires that fellow servants should each be the observer of the conduct of the others. The underlying principle of the duty of the master to provide a competent hatch tender is upheld by our own courts and by outside authority. There is no insistence that the master in this case did not do this. From what has been said it follows that the negligence in this case is the negligence of a fellow servant, and not of the master; and, this being so, the court below correctly held that there

could be no recovery on the case as made by the pleadings.

We have reviewed the decisions of this court, as requested by counsel for plaintiff in error, and decline to overrule, but reaffirm, them.

Judgment affirmed. All the Justices concur.

(128 Ga. 85.)

#### ZACHERY v. HUDSON.

(Supreme Court of Georgia. April 11, 1912.)

(Syllabus by the Court.)

#### ERRORS OF LAW—SUFFICIENCY OF EVIDENCE.

No errors of law appear to have been committed by the trial court, and the evidence authorized the verdict.

Error from Superior Court, Fulton County; Geo. L. Bell, Judge.

Action by Mrs. F. M. Hudson against Mrs. O. P. Zachery. Judgment for plaintiff, and defendant brings error. Affirmed.

This was a complaint for land brought by Mrs. Fannie M. Hudson against Mrs. O. P. Zachery to recover the possession of a strip of land fronting 16 inches on the south side of Baker street, in the city of Atlanta, and running back with the same width 76 feet. The defendant in the case owns the lot of land immediately east of the lot owned by Mrs. Hudson, both lots being bounded on the north by Baker street. The plaintiff and defendant are coterminous owners, and the strip of land in controversy was the property of one or the other accordingly as the line between their lots might be located 16 inches further east or west. The line in dispute between them begins at a point 125 feet west of the southwest corner of Baker and Williams streets. It appears from the evidence that in the year 1896 there was a wooden fence extending from Baker street back (south) for a distance of 76 feet, which it is claimed by the plaintiff in the action was the dividing line between the lands now owned by herself and the defendant. In the spring of 1899 one Baker, the predecessor in title of the defendant, replaced the wooden fence with a stone fence or wall for a distance of 40 feet back from Baker street, and this stone fence or wall remained until 1906, that is, more than seven years, when the defendant, who had bought the property from Baker in 1903, constructed or began to construct a fence 16 inches further west than the stone fence and the old wooden fence had formerly been, thus taking possession of the strip of land in controversy. The undisputed evidence in the case shows that Baker, the predecessor in title of Mrs. Zachery, built the stone fence between his lot and that of the plaintiff. When the defendant, the present owner, under a purchase from Baker went into possession of the lot formerly owned by Baker, she found the stone fence or wall 40 feet long built



along the line occupied by a previously existing wooden fence between her lot and that of Mrs. Hudson, and it remained undisturbed until September, 1906. Mrs. Hudson, the plaintiff, testified that the stone wall was placed there by Mr. Baker after he had made inquiry of her as to whether the wooden fence was on the true dividing line, and after she had informed him that it was. This evidence in regard to Baker's building the fence and when it was built was not controverted. Nor does it appear from the evidence that the defendant raised any question as to the proper location of the stone wall before September, 1906. In the description of the lots, Mrs. Hudson's lot began on Baker street at 125 feet west of the corner of Williams and Baker streets, and Mrs. Zachery's lot, facing on Baker street, extended to the beginning of Mrs. Hudson's lot on Baker street. The difference of 16 inches resulted from making a survey upon a horizontal plane from Williams street, or along the surface of Baker street.

On the trial of the case the court charged the jury as follows: "The plaintiff says that a certain fence was the line, that the fence has been established by the predecessors in title of both the plaintiff and the defendant, and had been acquiesced in for a period of seven years and more, which established it as the true line between the parties. Acquiescence for a period of seven years, by act or declaration by adjoining landowners, shall establish a dividing line. If the plaintiff and defendant, or those under whom they claim, established this fence in question as the line between the plaintiff's and defendant's two pieces of property, and it had been acquiesced in by the parties for seven years, then it would be the dividing line, regardless of recitals in a deed with regard to the number of feet. If that is not true, then the parties would be governed by the number of feet mentioned in the deed. Whether there was acquiescence, what amounted to acquiescence, are all matters for you to determine under the rules of law and the facts of the case. What the parties did, you get from the evidence. Acquiescence is to be distinguished from avowed consent on the one hand, and from open discontent or opposition on the other. It amounts to a consent which is impliedly given as to one or both parties to a proposition, or any act whatever. Acquiescence by act or declaration must be continuous for seven years by all the owners of the land on both sides of the line during a continuous period of that seven years. Where actual possession has been had under a claim of right for more than seven years, such claim shall be respected, and the lines so marked as not to interfere with such possession. Actual possession of land is evidenced by inclosure, cultivation, or any use or occupation thereof which is so notorious as to attract the attention of every adverse claim-

ant, and so exclusive as to prevent actual possession by another. Acquiescence for the period required by the statute—and I have read you the statute—would be conclusive evidence of a previous agreement, though there may in fact have been none. If you believe that the testimony shows there was a recognized line between Mrs. Hudson and Mrs. Zachery, although the same may not have been the true line, if it was recognized as the line between them, and it remained in the same place more than seven years, then that became the line and both parties would be bound thereby. Adjoining landowners may agree upon the dividing line between them, and each will own up to the agreed line as fully as if it were a natural boundary, or as if their respective deeds or grants called for it. Such an agreement may be implied, as well as expressed, and in either case the definite settlement of a boundary not previously defined is a good and sufficient consideration to uphold the agreement. Where an agreement establishing a dividing line between adjoining properties is followed by acquiescence and possession, the parties are concluded by their agreement; and when the acquiescence and possession have continued for the period of time prescribed by the statute of limitations a perfect title by adverse possession is acquired. If adjoining proprietors deliberately erect monuments or fences, or make improvements on a line between their lands, upon the understanding that it is the true line, it will amount to a practical location. You take this case, gentlemen, in all of its phases, and apply the rules of law I have given you in charge to the facts adduced on the witness stand and to the documentary evidence, and say which, under these rules, is the true line. If you find this fence was established by the predecessors in title of these two parties, and that the fence was on a line agreed upon—and as to that the court expresses no opinion, you determine that from the facts—and that the fence had been acquiesced in by both parties for a period of seven years or more, it would become the line. If there has been any break in it, if that has not been done, then the line called for by the deed would be the line."

The jury returned a verdict for the plaintiff, and, the court overruling a motion for a new trial, the defendant excepted.

Candler, Thomson & Hirsch, of Atlanta, for plaintiff in error. Jesse M. Wood and Napier, Wright & Cox, all of Atlanta, for defendant in error.

BECK, J. (after stating the facts as above). The statement of facts sets forth the entire charge of the court below, covering the question of the effect of agreement between coterminous landowners upon a dividing line, and of acquiescence for a period

of seven years in a line between the owners of contiguous lots. Several portions of this charge were excepted to in the motion for a new trial. But, considered as a whole, the charge fully and fairly submitted the issues to the jury, and correctly stated the principles of law applicable thereto. It is unnecessary to discuss the exceptions made. The principles of law involved in the case are fully and elaborately discussed in the cases of *Osteen v. Wynn*, 131 Ga. 209, 62 S. E. 37, 127 Am. St. Rep. 212, and *Farr v. Woolfolk*, 118 Ga. 277, 45 S. E. 230. The evidence authorized the verdict, and the court did not err in refusing to grant a new trial.

Judgment affirmed. All the Justices concur.

(138 Ga. 73)

**JOHN N. SIMS & SONS v. BOLTON.**

(Supreme Court of Georgia. April 11, 1912.)

*(Syllabus by the Court.)*

**1. PAYMENT (§ 21\*)—SALES (§§ 124, 202, 328\*)  
—PAYMENT BY CHECK—TRANSFER OF TITLE  
—TENDER OF PROPERTY.**

A bank check tendered in payment is not such until paid.

(a) A certain mule was sold at a given price for cash, and a bill of sale executed thereto and delivered to the purchaser warranting its soundness. In payment for the mule, a check on a bank was delivered to the vendor for the amount of the purchase price. The vendee on the same day of the trade attempted to work the mule, and found it to be diseased, and immediately notified the bank on which the check was drawn not to pay it when presented, and payment was accordingly refused. The vendee by letter to the vendor, who lived in a different town, offered to turn the mule back to the vendor, but, failing to hear from him, traded it. The vendor demanded possession of the mule from the vendee soon after it had been traded by him. The unpaid check was not formally tendered to the drawer before suit, but was produced on the trial of the case and offered in evidence. On the failure of the vendee to deliver the mule, the vendor brought an action of trover for its recovery and hire. *Held* that, the transaction of purchase and sale being a cash one, the title to the mule did not pass from the vendor to the vendee on the failure of the bank to cash the check.

(b) An offer of a vendee, in a letter sent by mail, to tender back personal property to a vendor, living in a different town from the vendor of such property, but which letter was never received by the vendor, is not a lawful and valid tender.

(c) Under the evidence in this case, the failure of the court to charge the jury that, before the plaintiff could recover, he would have to tender to the defendants the check that he received for the mule, before a conversion would be proven, was not error.

[Ed. Note.—For other cases, see *Payment*, Cent. Dig. § 86; Dec. Dig. § 21; \**Sales*, Cent. Dig. §§ 303-312, 542-551, 909; Dec. Dig. §§ 124, 202, 328.\*]

**2. NEW TRIAL (§ 39\*)—RECOVERY OF GOODS  
—PROCEEDINGS—INSTRUCTIONS.**

In an action for the recovery of personal property, where the plaintiff elected to take a money verdict, and the only evidence as to the value of the property related to the time of

the conversion, and no evidence as to the value at other times was introduced, it will not require a new trial that the presiding judge charged: "If you find for the plaintiff, gentlemen of the jury, you would be authorized to find the amount of the proven value of this property. If you find for the plaintiff, you can find the highest or lowest amount—that is a matter for you to say—with interest from the date of the conversion or the date when the defendants took possession of this property."

[Ed. Note.—For other cases, see *New Trial*, Cent. Dig. §§ 57-61; Dec. Dig. § 39.\*]

Error from Superior Court, Fulton County; Geo. L. Bell, Judge.

Action by W. I. Bolton against John N. Sims & Sons. Judgment for plaintiff, and defendant brings error. Affirmed.

On March 14, 1910, W. I. Bolton sold to John N. Sims & Sons one mule, of the alleged value of \$60, and executed a bill of sale thereto. A check for the above sum, drawn by Sims & Sons on the American National Bank of Atlanta, was given to Bolton in payment for the mule. The bill of sale guaranteed the mule "to be sound and in good condition." On the delivery of the mule to Sims & Sons, the check for the purchase price was turned over to Bolton. This check was deposited by him a few days later with the Norcross Bank, and he was informed by the cashier of the bank later that the check had been "turned down." The check had the words "Payment stopped by drawer" stamped across the face of it, and was produced on the trial of the case. Receiving no word or information directly from Sims & Sons as to why payment of the check had been stopped Bolton sought Sims & Sons to know why the check had not been paid. The latter admitted that they had stopped payment of the check because "the mule was no account." It was averred in the defendants' answer that the mule was not sound as represented by the plaintiff, but that it was what is commonly known as a "kidney dropper" or "choker," and that it was "of no market value, was absolutely worthless, and not able to do a day's work, and worth nothing for hire." The evidence showed that, soon after the trade, the mule was hitched to a dray and an attempt made to work it; that after the mule had pulled for a short distance, about a hundred yards or less, it fell in the road and had to be helped up; that the mule was driven a short distance further, when it fell again to the ground, trembling, breathing hard, and could not get up, nor perform labor, etc.; that as soon as defendants discovered the condition of the mule they telephoned the bank and stopped the payment of the check given as the purchase price of the mule; that they wrote to Bolton, telling him to come and get the mule, or he would be sold for his feed, but Bolton denied getting the letter; that defendants kept the mule for a week or ten days, and, as the plaintiff did not call for it.

they traded the mule. The day after the mule was traded by Sims & Sons, Bolton called and demanded it, but did not offer to surrender the check. He was informed that the mule had been traded. Whereupon an action of bail trover was brought by Bolton to recover the mule, alleging its value at \$80; and on the trial he elected to take a money verdict. The jury found a verdict for the plaintiff for \$63.50. A motion for a new trial was made by the defendants, which was overruled, and they except.

Walter A. Sims, of Atlanta, for plaintiff in error. J. E. & L. F. McClelland, both of Atlanta, for defendant in error.

HILL, J. (after stating the facts as above). [1] 1. The question raised by the record is: Did the title to the mule pass from Bolton to Sims & Sons on its delivery to them and on the acceptance of their check therefor by Bolton? Under the evidence, this was a cash transaction. There is no hint or suggestion that credit was to be extended. The mule was sold, and the check was given in payment. Was this a cash payment? The check seems to have been treated as cash, but not accepted as such in terms, and before it was presented to the bank on which it was drawn the drawer ordered its payment stopped. This being a cash transaction, and the check given for the purchase price of the mule not being paid by reason of the instructions of the drawer of the check to the bank, the title to the mule remained in the vendor, and never passed to the vendee. Merely giving the check was not a payment in cash, and there is no evidence that it was to be accepted by the vendor as cash, and therefore it cannot be so considered until paid. Civil Code 1910, § 4314. This is a contest between the vendor and vendee. No third person is involved in the transaction. The offer of the vendee by letter to tender the mule back to the vendor, even if the letter was received by him (and no evidence of this appears), was not a good tender. Nor was the mere possession of the unpaid check such an acceptance by the vendor as amounted to a cash transaction, in the absence of an express agreement that it should be treated and accepted as cash. The trade being a cash transaction, and no cash being paid for the mule, by reason of the express direction and action of the defendants themselves in stopping payment of the check, the title to the mule did not pass from the vendor to the vendee. The check, with the entries thereon, was produced and offered in evidence at the trial of the case, and the jury was authorized, under the evidence and the charge of the court, to find a verdict in favor of the plaintiff for the proven value of the mule at the time of the conversion, with interest from that date. The production of the protested check at the trial, with the en-

tries thereon, showed that a formal tender was unnecessary, and the failure of the court to charge on the subject of tender of the check was not error.

[2] Error is assigned on the following charge of the court to the jury: "If you find for the plaintiff, you can find the highest or lowest amount—that is a matter for you to say—with interest from the date of the conversion, or the date when the defendants took possession of the property." The plaintiff elected to take a money verdict. This charge of the court was not harmful under the facts of the case. The judge was instructing the jury as to the value of the mule on the date of the conversion, on the highest and lowest estimate of the value on that date, and not on the highest and lowest value on different dates between the conversion and the time of the trial. The question being tried was the value of the mule on the date of conversion. And on this question the judge was instructing the jury that they were not bound by the estimate of any one witness; that they might take the highest or lowest estimate of value, with interest from the date of conversion. There is no evidence of any higher or lower value at any other date than on the date of conversion. If the plaintiff had elected to take the highest proven value of the property at any time between the dates of the conversion and the trial, and offered proof of its value from the date of conversion to the time of trial, he would not be entitled to interest or hire. See *Jaques v. Stewart*, 81 Ga. 83 (2), 6 S. E. 815. But such is not the present case. There was no highest and lowest value proven in this case subsequent to the date of the conversion. Had there been, the charge of the court might have been confusing to the jury and erroneous. But there is no evidence showing any higher or lower value subsequent to the date of conversion to which the charge might apply. We do not see, therefore, how the charge was harmful to the defendant. The court was charging the jury as to the value of the mule on the day of the conversion—the highest or lowest estimate of value on that date, and not on different dates. The jury was not bound by the estimate of any one witness. They could take the highest estimate, or the lowest, and find that as the value of the property, with interest from the date of the conversion. The real question therefore is: What was the value of the mule on the day of conversion? In arriving at the true value, the jury could accept the highest or lowest estimate of the value on that date. Construing the charge of the court in the light of the evidence, and in accordance with the ruling here made, we do not think that the charge of the court could have injured the defendant.

Judgment affirmed. All the Justices concur.

(138 Ga. 77)

**KINNEY v. SCARBROUGH CO.**

(Supreme Court of Georgia. April 11, 1912.)

*(Syllabus by the Court.)***1. CONTRACTS (§ 117\*) — VALIDITY — RESTRAINT OF TRADE.**

Where a selling agent of a company engaged in the manufacture and sale of maps, who had as his territory a certain state, except a few counties thereof, contracted that he would not, "without the consent of the company in writing, within six months after the termination of this contract, directly or indirectly, or in any capacity, whether upon his own account or in connection with any other person or persons as salesman or agent of any character, for any other person, company, or corporation, engage in any business of a character similar to that conducted by the company, which might in any manner be injurious to its interests," such a contract, without territorial limitation, was in general restraint of trade, and not enforceable.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 554-569; Dec. Dig. § 117.\*]

**2. INJUNCTION (§ 60\*) — BREACH OF CONTRACT.**

If a salesman and local manager in a state for a nonresident corporation, by virtue of his position, became familiar with the business of the company and its customers, and took orders for the delivery of maps by such company, and if he subsequently, during the term for which he had contracted to serve such company, broke his contract with it, entered the service of another rival company in the same territory, failed to deliver to his former employer orders taken for its maps, and, being insolvent, intended to deliver maps of the second company on such orders, he could be enjoined from so doing.

[Ed. Note.—For other cases, see *Injunction*, Cent. Dig. §§ 117-118; Dec. Dig. § 60.\*]

**3. INJUNCTION (§ 63\*) — INDUCING BREACH OF CONTRACT.**

If such an employé, after having broken his contract of employment, and being insolvent, was seeking to induce other employés of his former employer to breach their contracts of employment and to enter with him upon the service of the other company, he could be enjoined from so doing.

[Ed. Note.—For other cases, see *Injunction*, Dec. Dig. § 63.\*]

**4. MODIFICATION OF CONTRACT.**

Direction is given that the injunction be modified in accordance with this decision.

Error from Superior Court, Fulton County; J. T. Pendleton, Judge.

Action by the Scarbrough Company against C. L. Kinney. Judgment for plaintiff, and defendant brings error. Affirmed in part and reversed in part, with directions.

The Scarbrough Company, a corporation of the state of Maine, filed an equitable petition against C. L. Kinney, alleging in substance as follows: The defendant is indebted to the plaintiff in the sum of \$727.96 on an itemized bill. He was employed by the plaintiff as salesman and local manager for the sale of maps, under a written contract, for a territory to be assigned to him. On or about January 1, 1911, the plaintiff assigned to him the territory of the state of Georgia, except nine counties thereof, which

were attached to the Alabama territory, with the consent of the defendant. The contract contained the following clause: "It is further expressly agreed by and between the parties hereto that, inasmuch as the company must, in the nature of the case, instruct the salesman as to its particular system and method of doing business, and communicate facts to him in confidence, said salesman shall not, without the consent of the company in writing, within six months after the termination of this contract, directly or indirectly, or in any capacity, whether upon his own account or in connection with any other person or persons as salesman or agent of any character for any other person, company, or corporation, engage in any business of a character similar to that conducted by the company, which might in any manner be injurious to its interests." Under the terms of the contract, as amended by the agreement of the parties, the defendant was obligated to continue in the service of the plaintiff for at least one year from October 28, 1910. In order to equip the defendant for the discharge of his duties as salesman and manager for the plaintiff, it was necessary to impart to him information as to the confidential details of the plaintiff's business, which he expressly agreed to keep in confidence, and the possession of such information by the defendant in the service of a competing concern making and selling maps renders it impossible for the defendant to comply with his obligation to keep such information confidential. On February 13, 1911, the defendant wrote to the plaintiff, stating that he had 175 orders in Atlanta, and that thereafter he would report weekly. At the time this letter was written the defendant was either negotiating with a rival map company having its principal office in Atlanta to enter its employment, or had already agreed to enter its employment. The defendant had not complied with his duties as to sending in reports, etc., and plaintiff's treasurer determined to make a personal visit to Atlanta to investigate the situation. On February 18th the defendant wrote to the treasurer, advising him not to come, that he had quit selling the plaintiff's maps, and it would be useless for the treasurer to make the trip. The treasurer, nevertheless, went to Atlanta, and advised the defendant of the irreparable injury that would follow to the plaintiff if the defendant insisted on taking employment with a rival or competitor, and endeavored to induce the defendant not to do so, but to continue in the service of the plaintiff. The defendant declined to do so, and entered the service of the rival company as an agent. The defendant failed and refused to report to the plaintiff the names and addresses of the persons from whom he secured the 175 orders. Such orders were procured by the defendant while

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

actually in the service of the plaintiff. Upon information and belief the plaintiff charges that the defendant intends to fill such orders with the maps of the Hudgins Company, the rival company with which he has taken service, instead of furnishing the plaintiff with information with which it can fill such orders. New maps based on the census of 1910 will probably be delivered very shortly, and it is necessary to enjoin the defendant from delivering the maps of the Hudgins Company upon the orders taken for the plaintiff. The defendant is constantly endeavoring to "buy off" the salesmen and other agents and representatives of plaintiff in the territory of Georgia, and to induce them to breach their contracts with the plaintiff. The prayers were that the plaintiff have judgment for the amount of its account against the defendant; that the defendant be enjoined from delivering any maps of the Hudgins Company on any orders taken by the defendant while in the employment of the plaintiff; that the defendant be enjoined from taking orders or engaging in the map business with the Hudgins Company or with any other company making and selling maps in the territory of the state of Georgia, for a period of at least six months from the legal termination of the contract between the parties; that the defendant be enjoined from persuading or endeavoring to persuade the agents and salesmen of the plaintiff from leaving its service, or from in any wise interfering with plaintiff's field officers or organization for the conduct of its business, and for process and general relief. By amendment it was alleged that on May 16th the defendant filed his petition in voluntary bankruptcy, and was duly adjudged a voluntary bankrupt. It was also alleged that the plaintiff was engaged in the business of selling maps throughout the United States and Canada, with offices also in London and Paris.

The defendant denied breaking his contract, or that he had taken orders for the plaintiff which he intended to fill with maps of the Hudgins Company. He alleged that on or about December 20, 1910, he ceased to work for the plaintiff, and since that date has not worked for them or taken orders for them; that about February 23d the treasurer of the plaintiff expressly agreed with defendant that the contract set out by the plaintiff was no longer binding upon either party, and expressly relieved the defendant of all responsibility or obligation under it; and that the treasurer offered to make an entirely new contract with the defendant, but after consideration the latter declined it. He denied that he had received any confidential or peculiar information or instructions from the plaintiff, and alleged that the nature of the services which he agreed to render were of an ordinary and not of an expert or peculiar nature. He set up that the

only negative covenant contained in the contract, preventing his entering the service of another company after termination of his contract with the plaintiff, was in general restraint of trade and not enforceable.

On the hearing conflicting evidence was introduced. The presiding judge granted the injunction prayed for by the plaintiff upon its filing a damage bond in the sum of \$1,000, if exception should be taken and the judgment reversed. Defendant excepted.

Dorsey & Shelton, of Atlanta, for plaintiff in error. Smith, Hammond & Smith, of Atlanta, for defendant in error.

LUMPKIN, J. (after stating the facts as above). [1] 1. Two divergent lines of decisions have arisen in regard to the territorial limitation necessary for the upholding of contracts in restraint of trade, in connection with a sale of a business and good will, the retiring of a partner, or the like. Two points of view affect this: First, looking at the matter with a special consideration of the parties immediately concerned and their protection; and, second, viewing it from the standpoint of the public, and the interest which it has in the freedom of trade and in not having parties cut off from a means of livelihood, thus tending to diminish the resources, wealth, and useful population of the state or country. In the earlier English cases the rule was quite stringently declared against contracts in restraint of trade, and it was thought to have been fully adjudicated that contracts in restraint of trade without territorial limitation would not be upheld, as being against public policy. Year Book 2 Henry V, pl. 26; Claygate v. Batchelor, Owen, 143; Price v. Green, 16 Mess. & W. 346. Contracts in restraint of trade within a limited area, and reasonable in their nature, came to be recognized and enforced as not being in general restraint. In later English cases the older ones have been explained as being cases in which the territory over which the restraint operated was greater than was necessary to protect the business of the contracting party. The earlier decisions had been followed in numerous jurisdictions before this explanation, and a number of courts adhered to the rule. It is considered in such jurisdictions that, where the area within which the limitation operates is so large as to cause the public interest to suffer, the contract cannot be upheld, although the business sought to be protected may extend over the entire area. On the other hand, some of the state and federal courts have followed the modern English view, and hold that, if the area over which the restraint is to operate is not greater than that covered by the business to be protected, it is not against public policy, although it may include the entire country. 1 Page, Contracts, §§ 376-379.

Without undertaking to discuss how large

an area may be embraced in a contract in restraint of trade, if reasonably necessary for the protection of the good will of a business transferred, it is settled in this state that a contract in restraint of trade without territorial limitation is contrary to public policy and unenforceable. Civil Code 1910, § 4253; *Seay v. Spratling*, 133 Ga. 27, 65 S. E. 137. We are not now dealing with contracts of monopoly strictly so called, or contracts merely agreeing not to do business, without being ancillary to a sale of business or good will. They may involve another feature.

The jurisdiction of equity to enjoin a person from doing business or performing service of a certain character has generally been invoked under one of four heads: (1) Where there has been a sale of a business and good will, with an ancillary agreement by the seller not to engage in the business in a certain territory. (2) Contracts by which an employé agrees to give his entire service to the employer, which sometimes include an express negative covenant not to serve any other person within a fixed time and territory. In such cases the negative covenant will not be enforced by injunction, unless the services are of a peculiar merit or character, and cannot be performed by others. *Hammond v. Georgian Co.*, 133 Ga. 1 (3), 65 S. E. 124. Contracts binding one to desist from the practice of a learned profession. (4) A contract by an employé, ancillary to his contract of employment, not to engage in a competing business, for himself or as an employé of another. In the present case the effort to obtain an injunction is made under the last head mentioned. The general principles as to territorial limitation upon restraint of trade above mentioned are applicable to all of the subdivisions of that topic, though each may have some differentiating features. Indeed, the courts have shown greater reluctance in reference to enjoining a man from performing personal service or labor than from conducting a business.

It was contended in behalf of the defendant in error that in *Rakestraw v. Lanier*, 104 Ga. 188, 201, 30 S. E. 735, 741 (69 Am. St. Rep. 154), a distinction was made between a contract binding one to desist from the practice of a learned profession and a contract binding a person who has sold out a mercantile or other kind of business, and the good will connected therewith, not to again engage in that business. This is true, but the distinction was not that in the former contract no limitation as to space was necessary, but that a reasonable limitation as to time was also necessary. After referring to contracts in general and partial restraint of trade, Mr. Justice Little said: "We test this contract by the rules before referred to, and find it supported by a legal consideration. Being limited as to space, although unlimited as to time, we find that it may properly be classed among contracts in partial restraint of trade.

When we seek its terms to ascertain whether it is reasonable, made to protect the promisee, and not oppressive on the promisor, we find "that the facts were such as to render the limitation arbitrary and unreasonable. Thus it was held that in such a case, not only must the restraint of trade be partial, and not general, but it must also be proportioned to the legitimate object to be subserved, and not unreasonable in character. If the doctrine of that case be applied to the present one, it will not help the plaintiff. We are aware that there are a number of cases which have sustained agreements, ancillary to employment, that the employé would not enter into the service of a competitor or rival of the employer for a specified time after leaving his service. In some of them there was a limitation as to space. In some, courts which follow the modern English rule above mentioned looked at the matter from the standpoint of reasonable protection entirely. But we are of the opinion that our decisions require a limitation as to space, and that this rule applies to the present case as well as to one in which there has been a sale of property and good will. We therefore hold that the provision of the contract here involved, which was unlimited as to space, was not enforceable.

[2] 2. It does not appear that any secret formula or technical trade secrets were involved. But there was evidence tending to show that the defendant, by virtue of his position, had acquired knowledge of the customers of the plaintiff; that, while pretending to be acting in their interest, informing them that he had taken a number of orders, and promising to make reports, he had actually contracted to represent a rival company; that he pursued a policy of double dealing for some time; that, when he finally left the employment of the plaintiff, and notified them of the fact, he failed to deliver to them the orders which he previously reported that he had taken; and that he intended to fill such orders with maps furnished by his new employer. This can be prevented by injunction; and on the interlocutory hearing the questions of fact involved were for the consideration of the presiding judge.

[3] 3. Furthermore, there was evidence tending to show that the defendant had sought to induce his successor in the employment of the plaintiff to violate the contract of employment with the plaintiff and to join him in the new employment, and that he boasted that he had induced some of the plaintiff's employés to leave its service and take positions with the new employer. As if to emphasize the fact that the plaintiff had no adequate remedy at law for the injuries thus done, the defendant proceeded to go into voluntary bankruptcy. Aside from the question of restraint of trade involved in the preceding discussion, such conduct on the part of a trusted employé furnished suffi-

cient basis to authorize a temporary injunction as to this matter. It is true that the defendant denied most of the allegations of the plaintiff, and claimed that he had been voluntarily released from its service. But the presiding judge was not compelled to accept his theory of the transaction, and there was sufficient evidence on which to base an injunction touching the matters last mentioned.

It was argued on behalf of the defendant that injunction should not be granted to protect the contracts of the plaintiff with its other employes against interference by this insolvent employe; and in support of this position were cited the cases of *Stein v. National Life Association*, 105 Ga. 821, 32 S. E. 615, 46 L. R. A. 150, and *Jones v. Van Winkle Gin & Machinery Co.*, 131 Ga. 336, 62 S. E. 236, 17 L. R. A. (N. S.) 848, 127 Am. St. Rep. 235. But in each of those cases it was distinctly declared that no question of inducing violation of contracts was involved. On the general subject, see *Beekman v. Marsters*, 195 Mass. 205, 80 N. E. 817, 11 L. R. A. (N. S.) 201, and note, 122 Am. St. Rep. 232, 11 Ann. Cas. 332; *Employing Printers' Club v. Doctor Bosser Co.*, 122 Ga. 509 (2), 50 S. E. 353, 69 L. R. A. 90, 106 Am. St. Rep. 137, 2 Ann. Cas. 69.

[4] 4. In so far as the injunction restrained the defendant from taking orders or engaging in the map business with the second company for six months from the termination of the contract existing between him and the plaintiff, it must be reversed. In so far as it was sought to enjoin the defendant from delivering maps of the new company on orders taken by the defendant while in the employment of the plaintiff, and from inducing or endeavoring to induce the agents and salesmen of the plaintiff to violate their contracts with the plaintiff, and leave its service in violation thereof, the injunction was authorized. Direction is given that the injunctive order be modified so as to accord with this decision.

The plaintiff in error, having obtained a material modification of the judgment, is entitled to costs of the exception.

Judgment affirmed in part and reversed in part, with direction. All the Justices concur.

(138 Ga. 54)

SEABOARD AIR LINE RY. v. JACKSON.  
(Supreme Court of Georgia. April 10, 1912.)

(Syllabus by the Court.)

1. APPEAL AND ERROR (§ 1040\*)—REVIEW—HARMLESS ERROR—RULING ON DEMURRER.

Where a suit was brought against two railway companies to recover damages for the alleged negligent and tortious killing of petitioner's husband, and the same was demurred to upon the ground that it was multifarious, that there was a misjoinder of parties, and that the acts of negligence charged against

each of the defendants were separate and distinct acts of negligence chargeable against each of them separately and not jointly, and the demurrer was overruled, but subsequently and before the trial one of the parties defendant was stricken from the case and the cause dismissed as to that party, and the allegations of negligence against the party thus stricken from the case were eliminated by an amendment to the petition, the overruling of the demurrer would not be ground for the reversal of the judgment of the court below, even though the action as stated in the original petition could not be jointly brought against both defendants, and there was therefore a misjoinder of parties defendant.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4089-4105; Dec. Dig. § 1040.\*]

2. PLEADING (§ 248\*)—AMENDMENT—NEW CAUSE OF ACTION.

Where, in such original petition, it was alleged that the decedent, being in the employ of one of the railway companies as a brakeman and switchman, was upon the top of a box car while the same was attached to an engine which was in motion, and that by the too sudden, violent, and unusual stopping of the car the decedent was hurled from his position to the ground and upon an adjacent track, where he lay in a helpless and unconscious condition, and while lying there was run over and killed by the train of the other railway company which was being operated negligently and without due caution, in that it was running at too high a rate of speed, and without giving proper signals of its approach, and without having some one on the lookout, it was competent to amend such petition by striking therefrom one of the parties defendant and the acts of negligence alleged against the party so stricken, and to add allegations showing that the decedent while in the discharge of his duty had taken a position on the track upon which it had been alleged that he had been lying, and that he was standing there for the purpose of signaling an approaching train so as to protect the train upon which he was employed as a brakeman and switchman, and that while so standing upon the track, in the discharge of his duty, he was struck and killed by a train operated by the employes of the other defendant company which was using the track on which he was standing, and that the train which struck and killed him was being operated negligently as alleged in the original declaration, and such an amendment did not add a new cause of action, although it stated other facts showing why the train which ran over and killed the decedent was being operated negligently. *Harris v. Central R. R.*, 78 Ga. 525, 3 S. E. 355; *City of Columbus v. Anglin*, 120 Ga. 785, 48 S. E. 318.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 686-709; Dec. Dig. § 248.\*]

3. RAILROADS (§ 394\*)—OPERATION—INJURIES TO PERSON ON TRACK—PLEADING.

The petition set forth a cause of action good as against a general demurrer.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1331-1338; Dec. Dig. § 394.\*]

4. PLEADING (§ 362\*)—MOTIONS—STRIKING OUT MATTER.

The petition setting forth distinctly what were the duties of the decedent at the time when he was killed, and the alleged acts of negligence on the part of the defendant, the court did not err in refusing to strike, upon demurrer, the allegation of the petition that "at the time plaintiff's husband was killed he was at his post of duty."

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1147-1155; Dec. Dig. § 362.\*]

**5. RAILROADS (§ 400\*)—OPERATION—INJURIES TO PERSON ON TRACK—NONSUIT.**

The court did not err in refusing to grant a nonsuit at the conclusion of the evidence offered by the plaintiff.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1365-1381; Dec. Dig. § 400.\*]

Error from Superior Court, Fulton County; W. D. Ellis, Judge.

Action by Ruth A. Jackson, by next friend, against the Seaboard Air Line Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Ruth A. Jackson, by her next friend, brought suit against the Western & Atlantic Railroad Company and the Seaboard Air Line Railway Company to recover damages for the tortious homicide of her husband. In the original petition it was alleged that on the 8th day of May, 1910, plaintiff's husband was in the employ of the Western & Atlantic Railroad Company as a brakeman and switchman, and was a member of a switching crew on the morning of the homicide, and that being at his post of duty on the top of a freight train of the Western & Atlantic Railroad Company, and in the discharge of his duties, in consequence of a sudden and violent stopping of the train, he was thrown from the top of the car, and in the fall was stunned and rendered unconscious, and in that position he lay upon the south main line of defendant's track, and, being unable to move, a train of the Seaboard Air Line Railway Company ran over him, cut off both feet, and in consequence of these injuries he died the next morning. Defects in the brakes and negligence causing the sudden and unusual stopping of the car upon which decedent was riding were set forth in the original petition as a part of the narrative of the causes by which the decedent was thrown onto the south main line. It was charged that the train of the Seaboard Air Line Railway Company which ran over the plaintiff's husband was running at a high and reckless rate of speed, some 30 miles an hour, in the railroad yards where railroad hands were at work almost constantly, and across Bellwood crossing, just before it struck the decedent, the engine being at the rear of the train pushing the cars back, without any one on the car to watch out for persons that might be on the track, and that the body of decedent and the dangerous position in which he was lying was in plain view of the agents and employees of the defendant Seaboard Air Line Railway Company for a distance of 100 yards, and the agents of the Seaboard Air Line Railway could have seen or ought to have seen decedent that distance before reaching him, which was in ample time for them to stop the train before it ran over him. The petition was demurred to by the Seaboard Air Line Railway Company on the ground that the declaration was multifari-

ous, and contained a misjoinder of causes of action and a misjoinder of parties defendant, that the alleged acts of negligence charged in the declaration were separate and not joint; and it demurred specially to the allegation that the defendant failed to blow the whistle or ring the bell, on the ground that there was no law requiring the defendant to blow the whistle or ring the bell at the place in question. The demurrer was overruled on each and all the grounds, and the defendant excepted pendente lite. Subsequently plaintiff amended her petition by striking the paragraphs which contained a narrative of the manner in which the decedent was hurled to the ground from the top of his train, due to an alleged defective "triple valve," and the sudden stopping of the car on which he was riding, and which described the position in which the decedent was lying on the track in an unconscious condition when he was struck, and substituted therefor other paragraphs, which, in substance, alleged that on the day first alleged it became necessary for the plaintiff's husband, in the discharge of his duty, to leave the train on which he was working as brakeman and switchman for the purpose of flagging an approaching train to keep it from running into the rear of his train, as the latter train was going to stop at or near Bellwood crossing to do some switching, and it was necessary to protect it by flagging the train which was following it, and that, as there was a curve in the tracks, he could be better seen by his crew and could better flag the train by standing on or near the south main line, on which he was standing when he was injured, and that while in that position, with his back toward Bellwood crossing, a train of the defendant Seaboard Air Line Railway came upon him from behind, without giving any warning by whistle, ringing the bell, or otherwise, struck him, and ran over him, inflicting the injuries above referred to. By this amendment the Western & Atlantic Railroad Company was stricken as a party defendant, and the cause dismissed as to it. It was further alleged in the amendment that the defendant violated an ordinance of the city of Atlanta prescribing a speed limit for the running of engines and trains within the city limits and at the place of the homicide.

The defendant objected orally to the allowance of this amendment, on the ground that it set forth a new cause of action, and to the court's order allowing the amendment filed the defendant excepted pendente lite. The defendant then renewed its demurrer to the petition as amended, on the ground that it set forth no cause of action which would entitle the plaintiff to recover against defendant; also demurred specially to the allegation of the petition "that at the time plaintiff's husband was killed he was at his



post of duty," on the ground that this was the mere conclusion of the pleader. The demurrers were overruled, and defendant excepted pendente lite.

The defendant answered, denying all liability and all of the acts of negligence charged against it; denied, also, the applicability of the ordinance as fixing the speed limit of trains at the place where the decedent was killed.

At the conclusion of the evidence for the plaintiff a motion for a nonsuit was made by the defendant, and was overruled, to which ruling the defendant excepted. The defendant then introduced evidence, and, after the close of the evidence, argument of counsel, and the charge of the court, a verdict was rendered by the jury in favor of the plaintiff. The defendant excepted to the verdict and final judgment of the court by direct bill of exceptions, assigning the final judgment as error, and also excepting to the order overruling the motion for a nonsuit, and brought the case to this court for review.

Brown & Randolph, W. G. Loving, Moore & Pomeroy, and Robt. S. Parker, all of Atlanta, for plaintiff in error. Westmoreland Bros. and Tye, Peoples & Jordan, all of Atlanta, for defendant in error.

BECK, J. (after stating the facts as above). [1-4] 1-4. The rulings made in the first four headnotes do not require elaboration.

[5] 5. The remaining question for determination, and the one principally argued, is whether the court erred in refusing to grant a nonsuit at the conclusion of the evidence introduced in chief by the plaintiff; and, under the ruling frequently announced by this court, that question must be answered in the negative if there was any evidence whatever authorizing a finding in favor of the plaintiff. While the evidence to support the petitioner's case is of doubtful sufficiency, it cannot be said that the court erred as a matter of law in holding that a nonsuit was not authorized. Taking the evidence most favorable to the plaintiff's cause as true, which must be done in passing upon this motion for a nonsuit, it appears that the plaintiff's husband, who was a flagman and switchman, had taken a position upon the south main line over which a train coming into the city would run. He was facing towards the city for the purpose of watching out for any train that might be approaching on the north main line; that being the line upon which the switching engine to which he was attached as an employé was then being operated in placing cars upon certain industrial tracks and elsewhere. There is evidence showing that the position on the south main line, on account of a curve in the tracks, was the most feasible position for the flagman to take in order both to keep in sight of his own crew and to signal an approaching engine on the north main line.

His back was turned in the direction from whence a train would come on the south main line—that is, the line upon which he was standing—and from that direction a train did come, which was being pushed with a freight car in advance. This came swiftly—30 miles an hour—without any signals whatever of its approach. The spot at which the decedent was killed was about 200 yards from a crossing known as Bellwood crossing, and in the railroad yards. The jury would have been authorized to find under the evidence that no signal was given as the train of the defendant company passed over the crossing or approached it. Whether or not under these circumstances the operation of the train which ran over and killed petitioner's husband was being operated negligently and in disregard of the safety of its own employés and employes of other railways using these yards is a question of fact. No mere rule of law can be applied to the situation so as to enable the court to determine the question of negligence or not upon the part of the defendant company as a question of law, unless we flatly hold that because of the fact that the train was being operated in the railroad yards the employes of the defendant could operate a train there at any rate of speed which the locomotive was capable of attaining. Both the south and the north main lines were tracks belonging to the Western & Atlantic Railroad Company, but were used, under an arrangement between the two companies, by the defendant company. The decedent was not an employé of the plaintiff in error, but he was not, it is conceded in the brief of counsel for plaintiff in error, a trespasser upon that track. Counsel for plaintiff in error concede that he was a licensee. And, if one switchman could be upon a track as a licensee, other licensees sustaining similar relations to other switching crews might, under the exigencies of varying situations, be there, and it cannot be said that as a matter of law a train could be run just any rate of speed along that track and not be guilty of negligence in so doing. We cannot, of course, say that the train which killed the decedent was actually running, even though going at the rate of 30 miles an hour, at such a rate of speed as to render the operation of the train negligence, but we do say that whether the movement of the train at this rate of speed was negligence was a question of fact, and that question could not be determined on a motion for a nonsuit. We are equally unable to say as a matter of law that the decedent could have, by the exercise of ordinary care, avoided the consequences of the defendant's negligence. That, too, was a question of fact for the jury, and the judge properly refused to determine that point on a motion for nonsuit.

It will be observed that we have held that whether the defendant was guilty of negligence or not in running the train at a high rate of speed was a question of fact for de-

cision by the jury, without reference to the ordinance of the city of Atlanta introduced at the hearing, fixing a maximum rate of speed at which trains might be operated within the city limits. And, if that was true, then the judge did not, merely by refusing a nonsuit, necessarily pass upon the question of the reasonableness or unreasonableness of that ordinance, and of its applicability to the place at which the homicide occurred. Save by the motion for a nonsuit, the refusal of which we have pointed out might have been based upon other grounds than the violation of the ordinance, the plaintiff in error did not invoke a direct ruling by the court upon the reasonableness or unreasonableness of the ordinance. They did not challenge it when offered in evidence on the ground that the facts show that it was not applicable to that particular place, or that, if it was, it was unreasonable. And they do not appear to have invoked any charge of the court construing the ordinance. Therefore, as it does not appear that the court passed upon that question, this court will not undertake to do so.

It follows from what we have said above that the court properly refused to grant the nonsuit.

Judgment affirmed. All the Justices concur.

(138 Ga. 31)

**SOUTHERN RY. CO. v. NAPIER.**

(Supreme Court of Georgia. April 10, 1912.)

*(Syllabus by the Court.)*

**1. DEMURRER OVERRULED—NO ERROR.**

There was no error in overruling the demurrer to the petition as amended.

**2. CARRIERS (§§ 290, 320\*)—CARRIAGE OF PASSENGERS—CARE REQUIRED—QUESTION FOR JURY.**

It is the general duty of a railroad company to furnish sufficient room within its cars for all passengers whom it receives for transportation. Whether or not on a particular occasion the company was excused from performance of this duty by reason of some sudden emergency or unusual situation, which it could not have reasonably anticipated, and against which it could not have provided by the use of due care, or whether it was negligent in failing to provide a passenger with proper accommodation inside a car, so that he was compelled to ride on the platform, and was thereby injured, was a question for the jury.

(a) The presiding judge submitted this question to the jury. Some of the requests to charge were not accurate statements of the law as applicable to the evidence, and others were substantially covered by the charge given.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1118, 1126, 1149, 1153, 1160, 1167, 1168, 1179, 1190, 1217, 1233, 1244, 1248, 1315-1325; Dec. Dig. §§ 290, 320.\*]

**3. CARRIERS (§ 347\*)—CARRIAGE OF PASSENGERS—INJURIES—CONTRIBUTORY NEGLIGENCE.**

If a carrier furnishes a passenger with a safe and sufficient place to ride in its cars, generally such place is the proper one for the

passenger to occupy. If by reason of the crowded condition of the car, or other justifying cause, he is upon the platform, instead of within the car, the question of his diligence or negligence is ordinarily one for the jury.

(a) In some cases the conduct of a passenger in leaving his seat in a car and going upon an open platform, while the train was running at high speed, without legitimate reason therefor, has been so palpably negligent as to be dealt with as a matter of law.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1346-1397, 1402; Dec. Dig. § 347.\*]

**4. CARRIERS (§ 321\*)—INJURIES TO PASSENGERS—ACTIONS—INSTRUCTIONS.**

Where suit was brought for an injury resulting to a passenger on a railroad train by being thrown therefrom while riding upon a platform of a car because it was claimed that the car was so crowded that he could not obtain entrance to it, and where it was contended that the company was negligent in not providing room for the passenger, thus causing the injury, there was no error in giving in charge the principle embodied in Civil Code 1910, § 2780, as to the presumption of negligence arising against a railroad company if it is shown that a person is injured by the running of a train, or by acts of the employees of the company in connection therewith.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1247, 1326-1337, 1343; Dec. Dig. § 321.\*]

**5. CARRIERS (§§ 321, 319\*)—INJURIES TO PASSENGERS—ACTIONS—PUNITIVE DAMAGES.**

Where, in a suit for a personal injury to a passenger on a railroad train, resulting from his falling or being thrown from the platform of a car on which the passenger was riding, the only act of negligence alleged was the failure to provide him with suitable accommodations inside the car, thus compelling him to ride on the platform, there was no evidence of willful misconduct, malice, fraud, wantonness, or oppression, or of such entire want of care as would raise a presumption of conscious indifference to consequences, it was error to charge: "In every tort there may be aggravating circumstances, either in the act or in the intention, and, in that event, the jury may give additional damages, either to deter the wrongdoer from repeating the trespass, or as compensation for the wounded feelings of the plaintiff."

(a) In a case of the character indicated in the preceding headnote, the mere fact that a ticket taker, in passing from car to car, said with an oath, "Give me your tickets," was not sufficient to authorize such a charge.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1247, 1326-1337, 1343, 1338-1345; Dec. Dig. §§ 321, 319.\*]

**6. DAMAGES (§ 210\*)—ASSESSMENT—INSTRUCTIONS.**

Where, in a suit on account of a personal injury, damages were claimed for physician's bills, permanent injury resulting in loss of money, and pain and suffering, it was error to charge broadly: "In some torts the entire injury is to the peace, happiness, or feelings of the plaintiff. In such cases no measure of damages can be prescribed, except the enlightened conscience of impartial jurors."

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 537, 538; Dec. Dig. § 210.\*]

**7. CARRIERS (§ 315\*)—INJURIES TO PASSENGERS—ACTIONS—ISSUES AND PROOF.**

Where the plaintiff alleged that at the time his ticket was taken up by the conductor, he requested the latter to furnish him with a place in the car, and the evidence showed no

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

request of any agent for that purpose, the fact that the evidence disclosed that the tickets of passengers were taken up by an auditor or ticket agent did not alone constitute such a material variance as to prevent a recovery, if the plaintiff was otherwise entitled thereto.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1270, 1281, 1282; Dec. Dig. § 315.\*]

#### 8. CARRIERS (§ 321\*)—INJURIES TO PASSENGERS—ACTIONS—INSTRUCTIONS.

Where the sole act of negligence alleged was a failure to provide a proper place for a passenger to ride in a car, thus causing him to ride on the platform, from which he was thrown by the swaying or motion of the train, and there was no allegation that such swaying or motion was in itself negligent, the presiding judge should have so instructed the jury on request.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1247, 1326-1337, 1343; Dec. Dig. § 321.\*]

#### 9. WITNESSES (§ 268\*)—CROSS-EXAMINATION—SCOPE AND EXTENT.

After the conductor, as a witness for the defendant, had testified that he did not go out on the platform of the car and take up the tickets from the plaintiff or others, and in fact did not take up any tickets on that train, there was no error in allowing him to testify on cross-examination that the auditor took up the tickets.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 931-948; Dec. Dig. § 268.\*]

#### 10. SUFFICIENCY OF CHARGE—NO ERROR.

While in one or two other minor respects portions of the charge may have been subject to criticism, they were of such a character as to require no detailed discussion, and they are not likely to occur again.

Error from Superior Court, Butts County; R. T. Daniel, Judge.

Action by Jesse I. Napier against the Southern Railway Company. Judgment for plaintiff, and defendant brings error. Reversed.

Jesse I. Napier brought suit for damages against the Southern Railway Company, alleging, in substance, as follows: On November 22, 1909, he was in the city of Jackson, Ga. He purchased from the agent of the defendant at that place a ticket for the town of Jenkinsburg, a station on the line of the defendant. He entered safely upon the train of the defendant as far as the platform, and attempted to get on the inside of the car to a seat. While he was doing this, the train moved off on its regular schedule. He observed every precaution in riding on the outside of the passenger coach, and tried to gain admission thereto, but could not get inside the car, on account of the crowd of people therein. The distance from the point where he boarded the train to the point of his destination was about five miles. While he was thus standing on the platform of the car, the conductor came to the plaintiff and others, and asked for their tickets. When plaintiff delivered his ticket to the conductor, he at the same time demanded entrance to the car. The conductor accepted the ticket, but "made no ef-

fort to get or allow petitioner to get inside the car to a seat and greater place of safety." While standing on the platform and endeavoring to take care of himself as best he could, and when within about a mile of the station where he expected to leave the train, he was violently thrown from the car by reason of his inability to longer hold on to the supports which he had grasped. By reason of the violent swaying and rocking of the car, and its crowded condition, he lost his hold, and fell to the ground, causing him serious injury. He has endured much pain and suffering and has been put to the expense of a physician's bill of \$200. He was a healthy and vigorous man, 28 years of age at the time of the injury, and was earning \$35 to \$40 per month. He has been permanently injured, and his earning capacity destroyed. The allegation as to the respect in which the defendant was negligent was as follows: "Your petitioner alleges that said railway company was careless, negligent, and failed to perform its duty to your petitioner, in that it, by and through its agents, the conductor of said train, its auditors, porters, and other employes of said company, failed, neglected, and absolutely refused to provide a place of safety on the inside of said car for your petitioner, after accepting the ticket for his passage to the point of destination, which acts, neglect of duty are here charged as cause of petitioner's injury." The defendant demurred to the petition. An amendment was made amplifying an allegation in regard to the failure to furnish sufficient room in its cars. The demurrer was overruled, and exceptions pendente lite were filed.

The defendant denied the substantial allegations of the petition, and alleged that it exercised all due care and diligence, that the plaintiff himself was negligent, and that, if the defendant was negligent the plaintiff could have avoided the consequences thereof by the exercise of ordinary care and diligence.

On the trial the jury found for the plaintiff \$1,000. Defendant moved for a new trial. The motion was overruled, and it excepted.

Harris & Harris, of Macon, for plaintiff in error. Y. A. Wright and J. T. Moore, both of Jackson, and Moore & Branch, of Atlanta, for defendant in error.

LUMPKIN, J. (after stating the facts as above). [1] 1. There was no error in overruling the demurrer to the petition as amended.

[2] 2. It is the general duty of a railroad company to furnish sufficient room within its cars for all passengers whom it receives for transportation. 2 Hutchinson on Carriers (3d Ed.) § 1113. Similar to this is the rule that the carrier by the customary conveyances used in land travel is usually bound

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

to furnish a passenger with a seat. This is sometimes declared by statute; sometimes held to arise from the contract of carriage. Civ. Code 1910, § 2723; 1 Fetter, Carriers of Passengers, § 251. It has been declared that railroad companies cannot refuse to carry those who apply to be carried or those who entitle themselves to be carried by procuring tickets, because of the want of room. It is said that this is so because the trains may have additional coaches attached to them for the accommodation and carriage of as many as may apply. But it has also been said that this rule should not be enforced if the refusal to receive and carry was bona fide on account of some unexpected or extraordinary circumstances occasioning the necessity for taking on an unusual number of passengers, by which its coaches were filled before the person desiring to be carried had applied, under circumstances which made it impossible, by the use of due care, to remedy the inconvenience; as where the carrier had made arrangements at starting to accommodate as many travelers as might be reasonably expected to apply, and at a way station, where additional coaches could not be procured, an unusual and unexpected number of persons sought to board the train. 2 Hutchinson on Carriers (3d Ed.) § 1114.

The present case does not involve a refusal to accept or carry the passengers, but a contention that the company received the plaintiff as a passenger and carried him, but did not provide for him room within the car. While the general rule of duty is as above stated, there may be circumstances which would excuse the carrier for a failure fully to comply therewith. Whether one who bought a ticket and applied for passage would be entitled to a suit for breach of contract, if he were delayed by reason of a failure to furnish proper accommodation, is not now under consideration. He cannot insist on riding free because the accommodations are not such as they should be. Generally the question of whether a railroad company is negligent under the circumstances of the particular case in not furnishing sufficient accommodations is one for the jury. In this case the court submitted that question to the jury. Several of the grounds of the motion for a new trial complained of the charges on the subject and refusals to charge requests. While there may have been some ground for verbal criticism as to one or two of the charges, in the main the court submitted the question of diligence or negligence on the part of the defendant in the manner above indicated. Some of the requests to charge on this subject were themselves not perfectly correct statements of law, in connection with the evidence, and others were substantially covered by the charge given. The evidence on which the request contained in the nineteenth ground of the motion was based seems to have been only that the conductor on that train did not know that there

was a crowd at Jackson; nor was there anything to show whether additional accommodations could have been provided. His evidence tended to show that all passengers were in fact in the car. If the request were accurately stated as a principle of law, it was not adjusted to the evidence. So, too, there was no error in refusing to give the request contained in the twenty-second ground of the motion. It ignored the general rule of duty on the part of the carrier to furnish accommodations, and sought to have it declared that a failure to provide a seat for a passenger was not of itself proof of negligence, and to require superadded proof from the plaintiff. The court more correctly recognized the general rule, and left to the jury the question whether, under the peculiar facts of the case, in view of the situation, the number of persons applying for passage, and all the circumstances, the railroad company was negligent in this regard. Apparently speaking of cases not controlled by statute, it is said in 2 Hutchinson on Carriers, § 1113: "But it is not negligence per se for a carrier to fail to furnish a passenger with a seat. Such a failure is only evidence of negligence, to be weighed by the jury. There are circumstances under which a passenger might prefer to enter a car and stand up, rather than not to make the journey. In such a case it cannot be said as a matter of law that the carrier is negligent in permitting him to exercise such privilege." See in this connection *Lyndon v. Georgia Ry. & Electric Co.*, 3 Ga. App. 535, 60 S. E. 278.

[3] 3. Thus far we have dealt with the question of negligence on the part of the carrier. Another question which arises in such case is as to whether the injured party is guilty of such negligence as to prevent a recovery. If a carrier furnishes a passenger with a safe and sufficient place in its cars, ordinarily such place is the proper one for the passenger to occupy. There have been cases in which the facts were so plain that it was held to be a lack of ordinary care as matter of law for a passenger to leave his seat in a car on an ordinary commercial railroad, and voluntarily and needlessly go out upon the platform or steps, while the car was running at high speed, and thereby receive an injury. *Paterson v. Central Railroad & Banking Co.*, 85 Ga. 653, 11 S. E. 872; *Blodgett v. Bartlett*, 50 Ga. 353. But there are other cases in which there was not room for a passenger inside of the car, or in which he went upon the platform under the direction of the conductor, or for some legitimate purpose. Save in cases of the character first above mentioned, especially if there is evidence tending to show a legitimate reason for the passenger to be on the platform, the question of his diligence or negligence is one for the jury. Here the plaintiff testified that he got upon the platform without knowing that the car was crowded, or that he could not enter it, and that the train was

under way before he discovered the fact. After stating that the interior of the car is ordinarily the place provided for passengers to ride, in 3 *Hutchinson on Carriers* (3d Ed.) § 1198, it is said: "He is not required, however, to disregard the usual courtesies of life in order to get an advantage over other passengers in securing a place within the car. If, therefore, the car should be so crowded that the passenger in the exercise of reasonable prudence would be justified in concluding that he could not get inside without unreasonably pushing or crowding his way, he would be under no duty to attempt to enter, and it would not be negligence for him, under such circumstances, to ride upon the platform." In this case the court properly left it to the jury to determine whether, under the circumstances, the plaintiff was guilty of negligence which precluded a recovery.

[4] 4. Complaint was made that the court gave in charge the principle of Civil Code 1910, § 2780, as to the presumption of negligence arising against a railroad company, if it is shown that a person is injured by the running of the train, or by acts of the employees of the company in running the train. It was contended that the plaintiff was not injured by the officers or agents of the defendant in running its train, but that the injury was due to his own negligence. There was evidence tending to show that he was injured by being thrown from the train while it was in motion. The principle of the section of the Code above cited was applicable. Whether or not this presumption was rebutted or overcome was a different question. It was subject to be rebutted by evidence introduced by the plaintiff or by the defendant. So likewise the negligence of the plaintiff might be shown by testimony introduced by him or by that introduced by the defendant. The court charged on the subject of the negligence of the defendant and also that of the plaintiff. There was no merit in any of the criticisms made upon the charges on this subject.

[5] 5. The court charged: "In every tort there may be aggravating circumstances, either in the act or in the intention, and in that event the jury may give additional damages, either to deter the wrongdoer from repeating the trespass, or as compensation for the wounded feelings of the plaintiff." While this is a sound rule of law in cases to which it applies (Civil Code 1910, § 4503), it has been held that a charge in regard to punitive or exemplary damages is not ordinarily applicable to a case of a mere negligent tort. In *Southern Ry. Co. v. O'Bryan*, 119 Ga. 147, 45 S. E. 1000, it was held that, "to justify the imposition of punitive or exemplary damages, there must be evidence of willful misconduct, malice, fraud, wantonness, or oppression, or that entire want of care which would raise a presumption of a conscious indifference to consequences." See, also, *Southern Ry. Co. v. Davis*, 132 Ga. 812, 65 S. E.

131. The case before us involves a negligent tort. The negligence alleged consisted in failing and refusing to provide a place of safety on the inside of the car for the plaintiff. It was alleged that, on boarding the train, he attempted to enter the car, but was unable to do so, on account of the crowded condition; that while he was doing this the train moved off, and he exercised all due precaution in riding on the platform; but by reason of the swaying and rocking of the car he was thrown to the ground. It was also alleged that he demanded entrance to the car of the conductor who took his ticket, but failed to obtain admission. There was no evidence of willfulness or wantonness in excluding him from the car. There was no evidence that the plaintiff requested the conductor to procure an entrance for him into the car, or that the conductor refused to do so, or that the remark quoted below was made in connection with such refusal, so as to be an aggravation of the tort by reason of the manner in which it was committed. The sole evidence on which any claim for punitive or exemplary damages could be asserted to rest was that the agent of the company taking up tickets came through the cars, and called out: "Give me your ticket. God damn it, give me your tickets." This remark was apparently not made to the plaintiff directly, but generally to the crowd. The case is not based on any insult by the company's agent to the passenger; nor was the language of the agent an aggravating circumstance of the negligence alleged—failing to furnish room in the car. Though profanity is neither commendable nor proper, this remark of the ticket taker was not sufficient to authorize a charge on the subject of exemplary or punitive damages in a case resting upon the question of whether a railroad company was negligent in not supplying sufficient room in its cars, and such charge was erroneous.

[6] 6. The court charged: "In some torts the entire injury is to the peace, happiness, or feelings of the plaintiff. In such cases no measure of damages can be prescribed, except the enlightened conscience of impartial jurors." The plaintiff sued for physician's bills, permanent injury to his earning capacity, and pain and suffering. The damages thus claimed are in part susceptible of proof, and the rule given in charge by the court was inapplicable, when applied to them as a whole. Of course, damages for pain and suffering can only be measured by the enlightened conscience of impartial jurors. In another excerpt from the charge, to which exception was taken, the court again used the expression, "in accordance with their enlightened conscience, as fair and impartial jurors." In connection with its context, the presiding judge in this instance may have intended rather a warning to the jury to act fairly and impartially than to make the enlightened conscience of impartial jurors the measure of special damages.

[7] 7. A request was made to charge to the effect that the plaintiff alleged that the conductor took up his ticket, that if the jury believed that the conductor did not take up the ticket of the plaintiff and do the acts alleged in the petition, but the ticket collector did them, if they were done at all, there would be a fatal variance between the allegata and the probata, and the plaintiff could not recover on account thereof. There was no error in refusing this request. The only thing which the ticket collector or auditor was shown to have done was the taking of the ticket. The evidence did not show that he was asked to furnish a seat, and failed and refused to do so. Had it appeared that there were two distinct agents of the defendant, with different powers and duties, and that a demand was made by a passenger upon one of them, who had no authority to act upon it, when it was alleged that the demand was made upon the other, who did have authority to act in such matters, there might have been a material variance. But the mere fact that the plaintiff alleged the request to the conductor to furnish him a safe place in the car at the time the latter took his ticket, and the evidence showed no such demand, and showed that an agent of the company, whom it designated as an auditor or ticket collector, took the plaintiff's ticket, would not constitute a fatal variance, on the ground that an agent of a different designation from that alleged received the ticket, so as to preclude a recovery, if the plaintiff was entitled thereto otherwise. Besides, if a railroad company, on a particular occasion, intrusts some of the ordinary functions of a conductor to another agent, it will not necessarily be a material variance that he is called the conductor in the pleading relatively to the discharge of such functions. *Atlanta & West Point R. Co. v. Haralson*, 133 Ga. 231, 65 S. E. 437.

[8] 8. The court charged in general terms that, if the plaintiff should recover, he must do so on the negligence alleged in his petition, and not on any other ground of negligence, if any should appear. There was no allegation of any unusual or negligent speed or jerk occurring in the operation of the train. The suit was based on the idea that the ordinary and normal swaying of the train, coupled with the negligence of compelling the plaintiff to ride on the platform, by reason of failing to furnish a safe place inside the car, caused him to fall or be thrown from the train. We think the court, on request, should have instructed the jury that there was no allegation of negligence as to the manner in which the train was run other than in failing and refusing to furnish the plaintiff a place to ride inside of the car, and causing him to occupy a position of danger on the platform. As there was an allegation and evidence in support of it that

the train swayed or rocked, the defendant was entitled, on request, to have a charge to the effect that such swaying or rocking was not alleged to be negligence in itself. The request was itself subject to criticism on the ground that it began with the statement: "I charge you that there is no allegation that there was any negligence in the running of the train." The words "the running of the train" might be broad enough to cover the entire operation of the train, thus including the question of whether sufficient cars were furnished, or whether the plaintiff was compelled to occupy a dangerous position, and might have been so understood by the jury, rather than as having the narrower meaning of the motion of the train. It also used "contended," when it probably meant alleged. But the court, on request, should charge the jury as to what was the negligence alleged, and to which they were confined. As the request was not free from possible criticism, perhaps its refusal would not require a reversal.

[9] 9. Where the conductor, as a witness for the defendant, testified that he did not go out on the platform and take up tickets from the plaintiff or others, and did not take up any tickets, there was no error in allowing him to testify, on cross-examination, that the auditor took up the tickets.

[10] 10. In one or two other respects of a minor character the charge was subject to criticism. In one or two places the language was subject to the construction that if the defendant was negligent as alleged, and the plaintiff was not negligent, he could recover, without adding provided the defendant's negligence was the proximate cause of the injury. In view of the argument which it appears was made to the jury as to a delay in taking up the tickets, it would have been better, on request, to have charged that there was no allegation that such delay was a substantive act of negligence. But these mere matters of detail will probably not occur again. Otherwise than as indicated above, the grounds of the motion for a new trial are not such as to cause a reversal, in the light of the evidence and the entire charge.

Judgment reversed. All the Justices concur.

(133 Ga. 120)

LANE v. IVY.

(Supreme Court of Georgia. April 13, 1912.)

(Syllabus by the Court.)

1. APPEAL AND ERROR (§ 977\*)—REVIEW—GRANT OF NEW TRIAL.

"The first grant of a new trial will not be disturbed by the Supreme Court, unless the plaintiff in error shows that the judge abused his discretion in granting it, and that the law and facts require the verdict, notwith-

standing the judgment of the presiding judge." Civ. Code 1910, § 6204.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3860-3865; Dec. Dig. § 977.\*]

## 2. GRANT OF NEW TRIAL.

In this case it does not appear that the law and facts required the verdict, nor that the judge abused his discretion in granting a new trial.

Error from Superior Court, Fulton County; Geo. L. Bell, Judge.

Action between J. L. Lane and S. L. Ivy. From the judgment, Lane brings error. Affirmed.

Walter A. Sims, of Atlanta, for plaintiff in error. Dodd & Dodd and Slaton & Phillips, all of Atlanta, for defendant in error.

FISH, C. J. Judgment affirmed. All the Justices concur.

(128 Ga. 119)

## FIRST NAT. BANK OF FORSYTH v. TAYLOR et al.

(Supreme Court of Georgia. April 12, 1912.)

(Syllabus by the Court.)

### 1. EXCEPTIONS, BILL OF (§ 39\*)—TIME OF TENDERING.

The law embodied in Civil Code, § 6152, does not in any case authorize delay in tendering to a trial judge a bill of exceptions, alleging error in a judgment rendered during a given term, for more than 30 days after the final adjournment of the court for that term. Forsyth v. Preer, 64 Ga. 281; Huff v. Brantley, 66 Ga. 599; Diets v. Fahy, 107 Ga. 325, 33 S. E. 51; Carter v. Johnson, 112 Ga. 494 (2), 37 S. E. 736; Heery v. Burkhalter, 113 Ga. 1043 (1), 39 S. E. 406; Crawford v. Goodwin, 128 Ga. 134 (2), 57 S. E. 240; Brandon v. Akers, 134 Ga. 78 (3), 67 S. E. 540.

[Ed. Note.—For other cases, see Exceptions, Bill of, Cent. Dig. §§ 54-56; Dec. Dig. § 39.\*]

### 2. BILL OF EXCEPTIONS.

The motion to review and overrule the first three cases above cited, and the one cited from 128 Ga. 134, 57 S. E. 240, is denied.

### 3. EXCEPTIONS, BILL OF (§ 39\*)—TIME OF TENDERING.

The verdict and decree upon which error was assigned in a direct bill of exceptions were rendered on March 31, 1911, during the February term of the court for that year, which term adjourned March 31, 1911. The bill of exceptions was presented, signed, and certified May 18th next thereafter, this being within 60 days from the rendition of the verdict and decree and the adjournment of the term, but not within 30 days from such adjournment. Applying the ruling announced in the cases above cited, the writ of error must be dismissed.

[Ed. Note.—For other cases, see Exceptions, Bill of, Cent. Dig. §§ 54-56; Dec. Dig. § 39.\*]

Error from Superior Court, Bibb County; Geo. L. Bell, Judge.

Action between the First National Bank of Forsyth against R. J. Taylor and others, receivers. From the judgment, the Bank brings error. Dismissed.

Minter Wimberly and Jesse Harris, both of Macon, for plaintiff in error. Hardeman, Jones, Callaway & Johnston, of Macon, for defendants in error.

FISH, C. J. Writ of error dismissed. All the Justices concur.

(133 Ga. 106)

## SELF, Constable, v. TURNER.

(Supreme Court of Georgia. April 12, 1912.)

(Syllabus by the Court.)

### 1. MUNICIPAL CORPORATIONS (§ 13\*)—CREATION—DE JURE CORPORATION.

From the record in this case it appears that all the provisions of Pol. Code 1895, §§ 685-688, inclusive, were complied with for the purpose of obtaining a charter for the town of Constitution, in De Kalb county, and that at a special term of the superior court of that county, called for the purpose, a charter was granted incorporating the town of Constitution on October 25, 1910. Subsequently, in the same month of that year, a mayor, recorder, and aldermen were elected for the town. It follows that the municipality became a de jure corporation.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 33; Dec. Dig. § 13.\*]

### 2. MUNICIPAL CORPORATIONS (§ 50\*)—FORFEITURE OF CHARTER—FAILURE TO EXERCISE CORPORATE POWERS.

The facts that the corporate authorities of such municipality passed only two ordinances, and that the mayor, recorder, and aldermen voluntarily ceased to perform their official duties, did not operate to terminate the corporate existence of the town. Under the statute above referred to, for the incorporation of towns and villages, "the officers first elected in such town or village shall hold their offices until their successors are elected and qualified." Pol. Code 1895, § 690.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 138-140; Dec. Dig. § 50.\*]

### 3. CEMETERIES (§ 9\*)—ASSOCIATIONS—STATUTORY PROVISIONS.

According to the undisputed evidence in the record the grounds of the Chestnut Hill Cemetery Association were located within the corporate limits of the town of Constitution.

(a) It follows that the provisions of the act of August 21, 1911 (Acts 1911, p. 200), relating to the establishment of cemeteries in the rural territory of certain counties therein specified, are not applicable to the establishment of a cemetery by such association in the town of Constitution.

[Ed. Note.—For other cases, see Cemeteries, Cent. Dig. § 11; Dec. Dig. § 9.\*]

### 4. HABEAS CORPUS (§ 27\*)—GROUNDS OF RELIEF—ARREST IN CRIMINAL PROSECUTION.

In view of the rulings above announced, which control the case, the judge of the superior court did not err in discharging from custody upon habeas corpus one who had been arrested and held under a warrant charging him with a violation of the act of 1911, to which reference has been made.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. § 22; Dec. Dig. § 27.\*]

Error from Superior Court, De Kalb County; L. S. Roan, Judge.

Habeas proceedings by Willis Turner

against L. G. Self, Constable. From a judgment discharging the petitioner from custody, Self brings error. Affirmed.

Geo. Westmoreland and Mark Boldning, both of Atlanta, for plaintiff in error. H. M. Patty and L. W. Thomas, both of Atlanta, for defendant in error.

FISH, C. J. Judgment affirmed. All the Justices concur.

(138 Ga. 119)

**PINKSTON v. CARTER & PATTERSON.**  
(Supreme Court of Georgia. April 18, 1912.)

*(Syllabus by the Court.)*

**REVIEW ON APPEAL.**

There being no contention that any error of law was committed upon the trial, and the evidence being sufficient to support the verdict, the judge did not err in refusing to grant a new trial.

Error from Superior Court, Stewart County; Z. A. Littlejohn, Judge.

Action between L. L. Pinkston and Carter & Patterson. From the judgment, Pinkston brings error. Affirmed.

Hatcher & Hatcher, of Columbus, for plaintiff in error. E. T. Hickey and T. Fort, both of Lumpkin, for defendant in error.

FISH, C. J. Judgment affirmed. All the Justices concur.

(138 Ga. 69)

**TIMMONS et al. v. BUTLER, STEVENS & CO.**

(Supreme Court of Georgia. April 11, 1912.)

*(Syllabus by the Court.)*

**1. PRINCIPAL AND SURETY (§ 126\*)—NOTICE BY SURETY—ACTION BY CREDITOR.**

The notice to a creditor by a surety to proceed against the principal debtor, required by the statute, is written notice. An oral request will not suffice.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. §§ 329-351; Dec. Dig. § 126.\*]

**2. PRINCIPAL AND SURETY (§ 169\*)—RELEASE OF SURETY.**

The right of a payee of a note to resort to the sureties thereon is not lost because of his failure to sell personal property held as collateral immediately on the maturity of the note.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. §§ 474-489; Dec. Dig. § 169.\*]

Error from Superior Court, Tift County; W. E. Thomas, Judge.

Action by Butler, Stevens & Co. against W. W. Timmons and others. Judgment for plaintiffs, and defendants bring error. Affirmed.

The Farmers' Supply Company, a corporation, gave its note to Butler, Stevens & Co., dated February 15, 1909, due November 15,

1909, for \$2,629.37, with seven sureties. In addition to the promise to pay the principal debt, with interest and attorney's fees, the note contained this stipulation: "We further agree that all the shipments made to Butler, Stevens & Company and the proceeds thereof and all property and money that may come into their hands may be retained and applied, at their option, to this note or any other debt due them until the same have all been fully paid." The principal debtor was adjudged a bankrupt, and the payee brought suit against the sureties. Two of them pleaded (1) that at and subsequent to the maturity of the note the plaintiffs held, as collateral security for the payment of the note, a quantity of cotton belonging to the principal debtor; that the price of cotton was subject to violent fluctuations, and it was the duty of the plaintiffs to have immediately sold and exhausted the cotton as collateral, which, if it had been done at the prices then ruling, a sum sufficient would have been realized from such sale to have fully paid off the debt, and the omission of the plaintiffs to sell the cotton resulted in discharging them as sureties; and (2) that they are discharged from liability, for that, subsequent to the maturity of the note, they requested the plaintiffs to sell the cotton, which request was disregarded; and that cotton thereafter declined in price, and not enough could be realized when the same was actually sold to pay off the note. These special pleas were stricken on demurrer, and a verdict returned for the plaintiffs, and the defendants excepted.

L. P. Skeen and Fulwood & Murray, all of Tifton, for plaintiffs in error. Adams & Adams, of Savannah, for defendants in error.

EVANS, P. J. (after stating the facts as above). [2] Broadly stated, the point for decision is whether the right of a payee of a note to resort to the sureties is lost because of his failure to immediately sell personal property held as collateral on oral request of some of the sureties, and by reason thereof the proceeds of the collateral proved insufficient to pay the debt, on account of the fluctuations of the market price of the property. That the sureties are not discharged is the plain import of the adjudicated cases. The general rule on the subject of the release of sureties by act of the creditor is thus summed up in Civil Code, § 3544: "Any act of the creditor, either before or after judgment against the principal, which injures the surety or increases his risk, or exposes him to greater liability, will discharge him; a mere failure by the creditor to sue as soon as the law allows, or negligence to prosecute with vigor his legal remedies, unless for a consideration, will not release the surety."



[1] A surety is given ample protection against the inaction of his creditor. If he desires to expedite payment, he may pay the debt and subrogate himself to all the rights of the creditor. Or he may give notice, in writing, to the creditor to proceed to collect the debt; and the creditor's failure to commence an action within three months (if the principal is within the jurisdiction of the state) will discharge the surety. Civil Code, § 3546. Or he may invoke the aid of a court of equity, in cases presenting equitable features, to require prompt action by the creditor. In *Souter v. Bank of Southwestern Ga.*, 94 Ga. 713, 20 S. E. 111, the notes sued on were signed by three persons. Two of them pleaded that they were sureties, and that when they signed it was agreed that the plaintiff should take from the principal a mortgage on live stock as security for the note, which was done; that after the notes and mortgage became due they insisted that the plaintiff should foreclose the mortgage, which the plaintiff refused to do, and kept the mortgage an unreasonable length of time, until the principal had either disposed of the mortgaged property, or lost it by death or destruction, thereby increasing the risk of the sureties. The plea was held bad because of the failure to allege that any written notice was given to the plaintiff to foreclose the mortgage. "The act of the creditor," says Warner, C. J., "which injures the surety or increases his risk or exposes him to greater liability, must be some act which the law does not authorize, or the omission to do some act specially enjoined by the law." *Stewart v. Barrow*, 55 Ga. 664.

The complaint of these two sureties is that they orally demanded of the plaintiffs that they sell the cotton collateral, and this request was disregarded; and thereafter cotton declined in price, and not enough could be realized when the same was actually sold to pay off the note. They gained nothing by their oral request, because the statute requires that the notice must be in writing. Their further contention is that it was the duty of the plaintiffs to have immediately sold and exhausted the cotton held as collateral, which, if it had been done, at the prices then ruling, a sum sufficient would have been realized to have fully paid off the debt. We do not understand that the payee of a note owes a duty to the surety to immediately sell the collateral property on maturity of the note. See 32 Cyc. 224. He is bound to use reasonable diligence in collecting collateral securities. *Gibson v. Connor*, 3 Ga. 47, 53. But it does not follow that he is bound to immediately sell a chattel collateral on penalty of releasing his surety. Counsel for the sureties cite in support of their contention this quotation from the opinion of Mr. Justice Jackson in *Lumsden v. Leonard*, 55 Ga. 374: "Some act must be

done by the creditor, either before or after judgment, which injures the surety in some way; mere failure or negligence on the part of the creditors will not relieve the surety. And exceptions to this general rule will be found to be when the creditor omits to do something by which some collateral security in his hands is made unproductive, or where he is notified under the statute to proceed and he fails or refuses," etc. The case for decision came under the rule, and not under the exception; and the statement of the exception to the rule is expressed in language capable of being misunderstood. What the learned justice meant is illustrated in the case of *Toomer v. Dickerson*, 37 Ga. 428, cited in support of his statement of the rule and exception. There the creditor failed to record a mortgage, and by his failure the surety lost the benefit of the collateral. It will appear from the opinion that the decision was rested on the registry statutes, as creating a duty relatively to the surety to record the mortgage; and hence the creditor's omission was as to an act specially enjoined by law. That such was the meaning intended is further illustrated by the quotation from *Stewart v. Barrow*, supra, a case reported in the same volume, and in which Mr. Justice Jackson participated. There was no error in striking the plea on demurrer.

Judgment affirmed. All the Justices concur.

(128 Ga. 72)

**FARMER v. BUTLER, STEVENS & CO.**  
(Supreme Court of Georgia. April 11, 1912.)

(Syllabus by the Court.)

REVIEW ON APPEAL.

This case is controlled by the case of *Timmons v. Butler, Stevens & Co.*, 74 S. E. 784, this day decided.

Error from Superior Court, Tift County; W. E. Thomas, Judge.

Action between W. E. Farmer and Butler, Stevens & Co. From the judgment, Farmer brings error. Affirmed.

Ridgill & Griner, of Tifton, for plaintiff in error. Adams & Adams, of Savannah, for defendants in error.

EVANS, P. J. Judgment affirmed. All the Justices concur.

(128 Ga. 1)

**CARNES v. CARNES.**

(Supreme Court of Georgia. April 9, 1912.)

(Syllabus by the Court.)

1. HUSBAND AND WIFE (§ 295\*)—TEMPORARY ALIMONY—COUNSEL FEES.

There was no abuse of discretion in granting temporary alimony and attorney's fees, under the facts in this case.

(a) The mere fact that the defendant files

a plea to the jurisdiction, and the evidence on that subject is conflicting, does not prevent the presiding judge from granting temporary alimony and attorney's fees until the final trial.

(b) On the hearing of an application for temporary alimony, the presiding judge may award reasonable attorney's fees, in view of the nature and character of the case, although there may be no direct evidence introduced as to the value of the services rendered, or to be rendered.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 1084-1088; Dec. Dig. § 295.\*]

#### 2. HUSBAND AND WIFE (§ 291\*)—ALIMONY—NE EXEAT.

On an application for the writ of ne exeat, filed by a wife who is seeking to obtain alimony from her husband, where no removal of property is involved, but only the prevention of the husband from going beyond the limits of the state, it is error to order the writ to issue and the defendant to be imprisoned, unless he shall give bond "not to remove beyond the jurisdictional limits of the state of Georgia and conditioned to pay any judgment that may be found against him in favor of the plaintiff."

[Ed. Note.—For other cases, see Husband and Wife, Dec. Dig. § 291.\*]

#### 3. HUSBAND AND WIFE (§ 291\*)—OATH (§ 3\*)—ALIMONY—NE EXEAT.

If a wife, who is seeking alimony against her husband, and who has embodied in the petition therefor an application for the writ of ne exeat against him, telephoned to a notary public that she was swearing to a petition for alimony, and that her attorney would carry it to the notary for his signature, and he answered, "All right," and if subsequently the paper was presented by the attorney to the notary public, and he signed the jurat, this did not constitute the making of an affidavit or the verification of the application for ne exeat required by law.

(a) Where, upon a proceeding thus sought to be verified, the judge ordered the writ of ne exeat to issue, and the defendant was arrested and gave bond, he could move for a revocation of the order, based on such attempted verification.

(b) If the verification or order could be amended, no motion was made for that purpose.

[Ed. Note.—For other cases, see Husband and Wife, Dec. Dig. § 291; \* Oath, Cent. Dig. § 11; Dec. Dig. § 3.\*]

#### 4. HUSBAND AND WIFE (§ 295\*)—SUIT FOR ALIMONY—ADMISSIBILITY OF EVIDENCE.

Where a wife, in a suit for alimony against her husband, alleged abandonment by him, but did not charge adultery, and he denied the allegations of the petition and alleged that she went to her father's home, and after a time refused to answer his letters or to communicate with him, though he had frequently written to her, and that his conduct had been exemplary, on an interlocutory hearing of the application for temporary alimony, there was no error in admitting in evidence letters found by her in his pocket, written by another woman, and very affectionate in character, over objection on the ground that they were of a licentious character, that they were offered and were intended to show that the defendant had been guilty of adultery, and that they could not be admitted in evidence on the affidavit of the wife as to their finding.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 1084-1088; Dec. Dig. § 295.\*]

#### 5. HUSBAND AND WIFE (§ 291\*)—DECISIONS REVIEWABLE—REFUSAL TO REVOKE NE EXEAT.

Where the presiding judge heard the application for temporary alimony and the motion to revoke the order for the writ of ne exeat together, and announced that he would hear the evidence at once as a matter of timesaving, and at the close entered an order granting alimony, but not revoking the grant of the writ of ne exeat, and there was nothing to indicate that he intended to consider that subject further, or to withhold judgment in regard to it, this amounted to a refusal to grant the motion, and authorized an exception based thereon.

[Ed. Note.—For other cases, see Husband and Wife, Dec. Dig. § 291.\*]

Error from Superior Court, Carroll County; R. W. Freeman, Judge.

Action by Mrs. Bernice Carnes against Cleve Carnes. Judgment for plaintiff, and defendant brings error. Affirmed in part, and reversed in part.

Mrs. Bernice Carnes filed her petition to the superior court of Carroll county, alleging that her husband was of said county, and that he had abandoned her, and was residing apart from her, and failing and refusing to contribute anything toward the support of her and their two children, born before the separation. She also alleged that since the separation he had concealed himself from her, for the purpose of avoiding contributing to the support of herself and children; that he was a professional baseball player, earning a good salary; that she had only recently located him in the state of Michigan; and that he was temporarily in Carroll county, but threatening to go beyond the limits of the state. She prayed for permanent and temporary alimony and attorney's fees, and that the writ of ne exeat issue.

Upon presentation of the petition, which appeared to be regularly verified, the presiding judge ordered that the defendant should give bond and security in the sum of \$2,000 not to remove beyond the limits of the state, "and conditioned to pay any judgment that may be found against him in favor of plaintiff," and that, in default thereof, the sheriff should arrest the defendant and confine him in jail. The clerk was directed to issue a writ to conform to the order. A rule nisi was also granted, requiring the defendant to show cause why the prayer for temporary alimony and attorney's fees should not be granted. The clerk issued the writ of ne exeat, following the terms of the order. The defendant gave a bond conditioned that, "if the said Cleve Carnes, defendant, shall be forthcoming to answer the complainant's complaint, or shall abide by the order and decree of the court, then this bond to be void."

The defendant denied the substantial allegations of the plaintiff's petition. He also filed a motion to set aside the order granting the writ of ne exeat. He alleged that the

bond was excessive; that it appeared from the petition that the defendant was a professional baseball player, and that it was necessary for him, in order to make money, to be out of the state; that the requirement that he should give a bond not to remove beyond the jurisdiction, and also conditioned to pay any judgment that might be found against him, was unlawful; and that the petition was not sworn to by the applicant. He also filed a plea to the jurisdiction.

Upon the call of the case for a hearing under the rule nisi, the defendant presented his motion. The court announced that he would hear the evidence in support of the motion and on the main case at the same time, in the interest of time. Evidence was introduced by both parties. The presiding judge passed an order awarding to the plaintiff \$37.50 per month as temporary alimony, and \$100 on account of attorney's fees. He provided the time and manner in which the payments should be made, but said nothing expressly in regard to the motion of the defendant. The defendant excepted, and assigned error upon the grant of alimony to the plaintiff, upon the overruling of his motion to set aside the order providing for the *ne exeat*, which resulted, as he contended, from the order which was granted, and upon not sustaining such motion on each ground thereof and dismissing the writ of *ne exeat* and dissolving the bond.

S. Holderness, of Carrollton, and J. M. Moore, for plaintiff in error. J. O. Newell and C. E. Roop, both of Carrollton, for defendant in error.

LUMPKIN, J. (after stating the facts as above). [1] 1. Temporary alimony, pending a suit for permanent alimony, was granted to the wife, and the husband excepted. The evidence was sufficient to sustain the judgment. The husband filed a plea to the jurisdiction, but the evidence on that subject, as on others, was in conflict; and his mere insistence that the court was without jurisdiction did not prevent the presiding judge from granting temporary alimony to the wife until, on final trial, the question could be ultimately tested. The awarding of a reasonable attorney's fee to the plaintiff was also proper. She needed counsel for the very purpose of contesting this plea and the contentions of the defendant. This is so, although there may have been no direct evidence as to the value of the services rendered, or to be rendered. *Sweat v. Sweat*, 123 Ga. 801, 51 S. E. 716.

[2] 2. The defendant made a motion to set aside the order granting the writ of *ne exeat*. One ground of the motion was that the order required the defendant to give a bond with a condition different from that required by law, or in default thereof to be imprisoned. Civil Code 1910, § 5461, declares that "the defendant may, in all cases, relieve

himself or his property, or the specific property, from the restraint imposed, by giving bond in double the value of plaintiff's claim with good security, to the officer serving the process, for the forthcoming of each or either (according to the tenor of the writ), to answer to complainant's claim, or abide by the order and decree of the court. The judge granting the writ may, in his discretion, require a larger bond." Sometimes the writ is issued only to restrain a person from leaving the jurisdiction of the state; sometimes it is issued against a person who is removing, or attempting to remove, property beyond the jurisdiction. The bond which may be required is to be shaped in accordance with the nature of the proceeding. If the application for the issuance of the writ of *ne exeat* is made in connection with an application for alimony, and no removal of property is involved, but merely an intended leaving of the state by the defendant, the judge ought not to require a bond conditioned both that the defendant will not remove beyond the jurisdictional limits of the state, and also that he will pay any judgment that may be found against him in favor of the plaintiff. This would not only require the husband to give security that he would remain in the jurisdiction, but also that he would be solvent and pay the money judgment. *McGee v. McGee*, 8 Ga. 295, 52 Am. Dec. 407; *Lamar v. Lamar*, 123 Ga. 827, 51 S. E. 763, 107 Am. St. Rep. 169, 3 Ann. Cas. 294. In the present case, upon presentation of the petition, the presiding judge passed an order requiring the defendant to give bond "not to remove beyond the jurisdictional limits of the state of Georgia and conditioned to pay any judgment that may be found against him in favor of the plaintiff," or in default thereof to be imprisoned. The writ issued by the clerk followed the terms of the order.

In the brief of counsel for defendant in error, it was conceded that the order should not have been in the conjunctive; but it was urged that the bond which was actually given and accepted by the sheriff was conditioned to be void if the defendant "shall be forthcoming to answer the complainant's claim, or shall abide by the order and decree of the court," and that this relieved the error or inadvertence in the terms of the order and of the writ. Upon a motion to set aside an erroneous order for the writ, the fact that the bond did not strictly follow the order or the writ did not serve to correct the order as it stood. Nor was there any motion to correct it.

[3] 3. A writ of *ne exeat* is a summary proceeding. It issues *ex parte*, and the person of the defendant is seized, and he is incarcerated, unless he gives the bond required. "In every application for a writ of *ne exeat*, the allegations of the bill must be verified by one or more of the complainants." Civil

Code 1910, § 5463. The law does not provide for a preliminary hearing before the writ issues. The defendant's only method of relieving himself from custody is by complying with the requirement as to bond, or by moving the judge for a revocation or modification of the order, or, perhaps, by demurrer to the petition, embodying this prayer with others. It is therefore of importance that the petition should be verified before the order is granted. *Wallace v. Duncan*, 13 Ga. 41; *Moore v. Gleaton*, 23 Ga. 142; *Holliday v. Riodan*, 25 Ga. 629. The point that there is a lack of proper verification can be made by the principal. If he fails to do so, the sureties cannot set up want of verification in a suit on the bond. *Blue v. Sheppard*, 28 Ga. 566; *Bryan v. Ponder*, 23 Ga. 480.

In the present case the petition had annexed to it what purported to be an affidavit of the plaintiff, with a jurat, signed by a notary public and ex officio justice of the peace. But the uncontradicted evidence showed that, in fact, the affidavit had not been sworn to as required by law. The plaintiff and one of her attorneys made oath that she called up the notary over the telephone and told him she was swearing to a petition for alimony against her husband, and that the attorney would bring it to the notary for his signature, and that he said, "All right." The attorney further made affidavit that he carried the paper to the notary and told him that it was such, and the notary answered: "Yes, she called me and told she was swearing to same." The notary made affidavit that the plaintiff called him up by telephone and said she had just "signed a paper" in the case of herself against her husband for alimony, *ne exeat*, etc., and wanted him "to sign the same as a witness for her," and that her attorney would bring it to him to sign, and that the attorney brought the paper, and the notary signed it, without ever seeing the plaintiff about the matter. If the evidence of the notary be taken as correct, there was not the slightest effort to administer an oath, but a mere statement over a telephone wire that the plaintiff had signed a paper, and desired the notary to sign as a witness. If the testimony of the plaintiff and her attorney be taken as correct, there was still no legal making of an affidavit. In order to make an affidavit, there must be present the officer and affiant and the paper, and there must be something done which amounts to the administration of an oath. There must be some solemnity, not mere telephone talk. Long-distance swearing is not permissible. Telephonic affidavits are unknown to the law. A moment's thought will show a sound reason for this. An officer hears a voice coming through the receiver of a telephone. For identification, he must rely on recognition of the voice (if he knows it) and the statement of the party as to who he or she is. Reference is made to some paper, more or less fully described. Later a

third party presents to the notary a paper as being one sworn to. How does the notary know, except by hearsay, that the paper presented is the identical paper mentioned? If this is an oath, when is it taken—when the telephone message is sent, or when the paper is later presented by a third party? Where is it taken—at the place where the affiant is, or that where the officer is? Suppose they should be in different counties, where would be the jurisdiction of a prosecution for perjury, if the oath were untrue? It will be seen that great confusion might easily arise from such a system. *Britt v. Davis*, 130 Ga. 74, 60 S. E. 180; *Mitchell v. Masury*, 132 Ga. 360 (8), 64 S. E. 275.

It was contended that, if there was a defect in the verification, it was curable by amendment. On the hearing of the motion and of the application for temporary alimony, the plaintiff testified by affidavit, among other things, that "she now swears that the allegations then made are true." But, if the absence of verification was curable, testifying at the hearing of the alimony proceedings that certain facts were true did not amount to an amendment of the affidavit on which the writ of *ne exeat* was based.

[4] 4. The plaintiff charged abandonment by her husband. There was no charge of adultery. He alleged exemplary conduct on his part, and that she went to her father's home, and after a time refused to answer his letters. She testified that she found in his pocket certain letters. They were from another woman, and were of a very affectionate character. They were not inadmissible on the ground that they were licentious in character and intended to show that the defendant was guilty of adultery, and that they could not be admitted in evidence on the affidavit of the wife as to the finding of them.

[5] 5. It was suggested in the brief of counsel for defendant in error that the order of the court affirmatively passed on the application for alimony, but did not in terms deny the motion to revoke the order granting the writ of *ne exeat*. But both were heard together. The court announced that he would hear evidence in support of the motion and on the main case at the same time, "in the interest of time." After hearing evidence as to both, he granted one and did not grant the other. In signing the bill of exceptions, he gave no indication that he intended to withhold judgment on the motion, or consider it further. The bill of exceptions contained various assignments of error, based on the fact that the court erred in not dismissing the writ, and the judge certified such bill of exceptions. We think it evident that he did intentionally decline to pass the order for which the motion was made, and that the exception thereto can be properly considered. Further than as above declared, there is no merit in any of the assignments of error. Having obtained a reversal in

part, the plaintiff in error is entitled to costs of the exception.

Judgment affirmed in part and reversed in part. All the Justices concur.

(138 Ga. 66)

FIRST NAT. BANK OF CHARLESTON v. DUKES et al.

(Supreme Court of Georgia. April 10, 1912.)

(Syllabus by the Court.)

1. PROCESS (§ 62\*)—SERVICE—SUFFICIENCY.

Where suit was brought against two defendants in a named county, it being alleged in the petition that the defendants were residents thereof, and where before the appearance term the sheriff returned the writ with an entry showing that neither of the defendants could be found in the county, and subsequently the judge of the court passed an order directing the clerk to issue second originals of the petition and process, and this was done, the process being directed to the sheriff of the county to which the defendants had removed after the filing of the petition, and before service was perfected upon them, service by the sheriff of the latter county of a copy of the second original and process was not valid and legal service, and could not relate back, so as to make the case a pending case from the date of the filing of the petition.

[Ed. Note.—For other cases, see Process, Cent. Dig. § 70; Dec. Dig. § 62.\*]

2. DISMISSAL OF CAUSE—NO ERROR.

Under the facts, the court did not err in dismissing the case.

Error from Superior Court, Liberty County; W. W. Sheppard, Judge.

Action, by the First National Bank of Charleston against M. E. Dukes and another. Judgment for defendants, and plaintiff brings error. Affirmed.

The First National Bank of Charleston brought suit in the superior court of Liberty county against J. L. Dukes, as maker, and M. E. Dukes, as indorser, on a promissory note. The suit was filed on September 29, 1909, and was returnable to the February term, 1910. The petition alleged that the parties defendant were residents of Liberty county. On December 14, 1909, the sheriff of Liberty county made a return of non est inventus as to both defendants, and on July 2, 1910, Judge Seabrook, the judge of the superior court, passed an order to perfect service upon said defendants. In his order to perfect service, his honor, Judge Seabrook, recited, after stating the case, that the suit was filed on the 29th day of September, 1909, and on the same date process was issued by the clerk of the superior court, and that it appeared to the court that the defendants were living in Liberty county in September, 1909, but thereafter moved out of said county and into the county of Bryan, and that no service had been made of the suit upon the defendants in time for the February term, 1909, of said court; and, it further appearing that the sheriff of Liberty county had made a return of non est

inventus as to both of the defendants on the 14th day of December, 1909, the clerk of the court was required to issue new process, "directed to the defendants J. L. Dukes and M. E. Dukes, requiring them, personally or by attorney, to be and appear at the next term of the superior court to be held in and for Liberty county on the 4th Monday in October, 1910, and that this new process shall have all the force and authority as if duly issued heretofore."

And the clerk of said court was further, in said order, required to issue second originals and copies and forward the same to the sheriff of Bryan county, and to the sheriff of any other county where the defendants may be found. Second originals and copies were thereupon issued, process being directed to the sheriff of Bryan county and his lawful deputies; and on the 18th day of July, 1910, the sheriff of Bryan county served a copy of the petition and process, making the following entry: "I have this day served the within defendants, J. L. Dukes and M. E. Dukes, with a copy of the within petition in person, this the 18th day of July, 1910." At the February term, 1911, of said superior court, the case having been called for trial and having been previously marked in default, his honor, Judge Sheppard, the successor of Judge Seabrook, dismissed the case, upon the ground "that it appeared from the record that the court was without jurisdiction, the return of the officer showing that the defendants were not in the county." To the judgment of the court dismissing the case, the plaintiff excepted.

W. W. Gordon, Jr., and P. W. Meldrim, both of Savannah, for plaintiff in error.

BECK, J. (after stating the facts as above). [1, 2] We are of the opinion that the court properly held that the case should be dismissed, as jurisdiction of the defendants had never been obtained by valid service. There is no provision in our law for the issuance of second originals and of process, directed to the sheriff of another county than that in which the suit was brought, under the facts shown in this record. It is true that the filing of the petition is the commencement of the suit, where service is afterwards duly perfected; the service then relating back to the time of the filing of the petition. But in the present case service was never properly effected. If, before the time of the service, the defendants removed from the county of Liberty to Bryan county, under circumstances which made this removal to Bryan county a change of their domicile to that county, then the suit could not proceed against them in Liberty county, for, in order to give the court of Liberty county jurisdiction, there should have been a suit pending against the defendants before their removal from the county; and in order

to constitute a pending suit at law there must be the filing of a petition and service in pursuance thereof. "The filing of the petition is treated as the commencement of the suit only when it is followed by due and legal service." *Cox v. Strickland*, 120 Ga. 104, 47 S. E. 912, 1 Ann. Cas. 870; *Stallings v. Stallings*, 127 Ga. 464, 58 S. E. 469, 9 L. R. A. (N. S.) 593. See, in this connection, the case of *Vam v. Chapman*, 73 S. E. 507. In the present case, the filing of the suit was not followed by due and legal service. The only service effected upon the defendants was the service of a copy of a second original and process attached thereto, directed to the sheriff of Bryan county. There is no provision in law for the issuance of a second original under the facts which we have recited above. If the defendants' removal to Bryan county was only temporary, and did not effect a change of residence, then they continued to be residents of Liberty county; and service could have been perfected by the sheriff of Liberty county under the first original by leaving a copy of the petition and process at the defendants' most notorious place of abode. If the defendants actually became domiciled in Bryan county before there was a pending suit—which is the case only where a petition is filed, and that is followed by service—then the only remedy for the plaintiff was to bring its suit in Bryan county. We know of no authority for the issuance of second originals, except where there are two or more defendants joined in the same action, and where one or more resides in the county where the suit is brought, and one or more of the defendants resides in another county.

It follows from what we have said above that the defendants in the case had never been properly served; and the court did not err in dismissing the cause, as it does not appear that any motion was made for a continuance, in order to have service properly perfected.

Judgment affirmed. All the Justices concur.

(138 Ga. 60)

**CULVER et al. v. J. S. WOOD & BRO.**  
(Supreme Court of Georgia. April 10, 1912.)

(Syllabus by the Court.)

1. **USURY (§ 111\*)—PLEADING—SUFFICIENCY.**  
A plea of usury which does not set forth the sum upon which the alleged usury was paid, or to be paid, the time when the contract was made, when payable, and the amount of usury agreed upon, taken, or reserved, may be stricken on oral motion.

[Ed. Note.—For other cases, see *Usury*, Cent. Dig. §§ 272-306; Dec. Dig. § 111.\*]

2. **TRIAL (§ 25\*)—CONDUCT IN GENERAL—RIGHT TO OPEN AND CLOSE.**

As a general rule, a defendant is not entitled to the opening and conclusion of argument, unless he admits enough in his pleadings,

before the plaintiff begins to introduce his testimony, to make out a prima facie case for the plaintiff.

(a) Especially is this true where the court directs a verdict for the plaintiff, and there is no opening and conclusion of argument.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 44-75; Dec. Dig. § 25.\*]

3. **SET-OFF AND COUNTERCLAIM (§ 14\*)—FORECLOSURE PROCEEDINGS.**

A plea of set-off is not an available defense in an affidavit of illegality filed to the foreclosure of a chattel mortgage; but a plea of recoupment may be set up in such a proceeding.

[Ed. Note.—For other cases, see *Set-Off and Counterclaim*, Cent. Dig. § 16; Dec. Dig. § 14.\*]

4. **TRIAL (§ 139\*)—TAKING CASE FROM JURY—DIRECTION OF VERDICT.**

It is error for the court to direct a verdict, where there is a conflict in the evidence between the plaintiff and defendant upon a material point in the case, and where the evidence introduced, with all reasonable deductions or inferences therefrom, does not demand a particular verdict.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 332, 333, 338-341, 365; Dec. Dig. § 139.\*]

Error from Superior Court, Johnson County; B. T. Rawlings, Judge.

Proceedings by J. S. Wood & Bro. to foreclose chattel mortgages against Mrs. D. P. Culver and another. Judgment for plaintiffs, and defendants bring error. Reversed.

J. S. Wood & Bro. foreclosed certain chattel mortgages against Mrs. D. P. Culver and her husband, W. L. Culver. To this foreclosure, an affidavit of illegality was filed, setting up the following defenses: That the debt sued for was that of the husband, W. L. Culver, and that his wife, D. P. Culver, was merely his security for said debt; that she was not the tenant, but that W. L. Culver was the tenant of the plaintiffs, and all supplies were furnished to the husband, and not to the wife. Also a plea was filed, alleging that each mortgage sought to be foreclosed contained usury. The plea of usury as to each mortgage was substantially the same in form and substance as to the first mortgage, and was as follows: "Each of said mortgages is tainted with usury in the following form and manner, to wit: That each mortgage, and the notes and the amounts thereof, as set out in each mortgage, has 8 per cent. interest worked in its face and added therein before its execution, also each mortgage has liquidated damages added therein before its execution (that is to say, that the mortgage, dated February 28, 1902, was given to secure a debt of W. L. Culver, as above set out, which was to cover a balance due by said W. L. Culver for 1901 supplies, as above set out, also to secure supplies to be furnished said W. L. Culver for year 1902); that 8 per cent. interest was added in the face of said mortgage to its maturity, also \$45 for liquidated damages for failure of W. L. Culver to ship

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.

30 bales of cotton, also \$—— difference in interest in favor of plaintiff."

A plea of set-off was also filed by the defendant W. L. Culver, in which he alleged that the plaintiffs were indebted to him in the sum of \$580, for the following reasons: For building one barn on the land described in said mortgages, worth \$200; for building three-room tenant house, \$200; for building sheds to two tenant houses, \$50; for building three brick chimneys, \$50; for ceiling two rooms and dwelling house, \$50; for covering dwelling house, \$15; for digging well, \$15; that all of said improvements were made on the place in 1906 and 1907 by defendant W. L. Culver upon the express promise and agreement of plaintiffs that they would pay defendants for all of said improvements; that if defendants are indebted to plaintiffs in any amount on the mortgages foreclosed the said \$580 be set off against said plaintiffs for the difference, etc.

When the case was called for trial, plaintiffs' counsel moved to strike the plea of usury, because the same did not "sufficiently comply with the law relative to the allegations necessary to support a plea of usury." This motion was sustained by the court, and the plea of usury was stricken.

Defendants also insisted on the right to the opening and conclusion of argument, upon the following admission in their plea: "Defendants admit the execution of said mortgages, and title to them as being in plaintiffs, which admission is made for the purpose of obtaining opening and conclusion in argument." In addition to the above, before any evidence had been offered or introduced, defendants' counsel announced to the court that he would and did admit plaintiffs a prima facie case; that defendants would and did admit the execution of all the mortgages foreclosed; that ownership, title, and possession and right to sue and foreclose was in the plaintiffs; and that said admissions were made for the purpose of enabling the defendants to obtain the right to open and conclude the argument. The court held that such admission did not, under the pleadings as they stood at the opening of the case make out a prima facie case for the plaintiffs, and held that under such admissions defendants were not entitled to the opening and conclusion. At the conclusion of the evidence, the court directed a verdict for the plaintiffs. A motion for new trial being made, and, the same being overruled by the court, the defendants excepted.

E. L. Stephens, of Wrightsville, for plaintiffs in error. Daley & Daley, of Wrightsville, for defendants in error.

HILL, J. (after stating the facts as above). [1] 1. The court did not commit error in striking the plea of usury. As filed, the jury could not find what amount was or was not usury. Our Code declares that "the plea of usury must set forth the sum

upon which it was paid, or to be paid, the time when the contract was made, when payable, and the amount of usury agreed upon, taken or reserved." Civil Code 1910, § 5674. This plain requirement was not met by defendants' plea, and was therefore properly stricken on motion. *Burnett v. Davis & Co.*, 124 Ga. 541, 52 S. E. 927.

[2] 2. In order for a defendant to be entitled to the opening and conclusion of argument, he must admit enough in his pleadings, before the plaintiff begins to introduce testimony, to make out a prima facie case for the plaintiff. *Reid et al. v. Sewell et al.*, 111 Ga. 880 (2), 36 S. E. 937; *Mitchem v. Allen & Barrow*, 128 Ga. 407 (1), 57 S. E. 721. The defendant's pleadings in this case did not admit enough to make out a prima facie case for the plaintiffs. He merely admitted in his pleadings "the execution of said mortgages, and title to them as being in plaintiffs." Under the decisions cited above, oral admissions are not sufficient. The mortgage notes foreclosed were not given for any definite amount which could be admitted, as appearing upon their face, but were given to secure the payment of several prior unpaid notes, "and any other indebtedness to J. S. Wood & Brother," and also "to secure any other indebtedness existing, or hereafter created, whether on open accounts or notes (or joint notes with others), as well as security debts, as debts of my own, and any renewal of any indebtedness hereby secured, et cetera." These mortgages were given, it seems, not only to secure past indebtedness, but to secure advances and supplies furnished during the current year in which they were made, to enable defendants to make a crop for that year, and the amount of the supplies were evidenced by "open account," for which the mortgages were given in part to secure. In order to make out his case, plaintiff testified that "I know that they [defendants] owe me \$750, because it is made up in this statement: 18 tons of guano," etc. It will be seen, therefore, that defendant did not admit enough to entitle him to the opening and conclusion of the argument, because the admission that he executed the mortgages, and that the title to them was in the plaintiffs, would not, without more, entitle the plaintiffs to a verdict for \$750, principal sued for, or any other specific amount. The court did not err in not allowing defendant, under his pleadings, to open and conclude. Besides, as the court directed a verdict for the plaintiffs, there was no opening and conclusion. The defendant did not admit owing any definite sum, nor did he admit a complete case by his pleadings, and he could not mend this by his oral admission.

[3] 3. The defendant W. L. Culver, in his affidavit of illegality filed to the foreclosure proceedings, pleads a set-off against plaintiffs' demands for certain improvements alleged to have been made on the rented land

by express direction of the plaintiffs, with the promise to pay him for the same, and which consisted of the building of one barn, building two sheds to tenant houses, three brick chimneys, ceiling two rooms in the dwelling house, covering the dwelling house, digging one well, etc., all of the value of \$580.

In the case of *Arnold v. Carter*, 125 Ga. 319, 54 S. E. 177, this court held that: "In an affidavit of illegality to the foreclosure of a mortgage on personalty, the mortgagor may avail himself of the defense of recoupment; but he cannot plead set-off in such a proceeding." For a full discussion of what defenses can be filed to affidavits of illegality, see the case of *Arnold v. Carter*, supra, pages 321-325 of 125 Ga., 54 S. E. 177. In view of the exhaustive discussion of this question in the case just cited, a further elaboration of this point is unnecessary.

[4] 4. Complaint is made that the court erred in directing a verdict for the plaintiffs. Section 5926 of Civil Code of 1910 provides that: "Where there is no conflict in the evidence, and that introduced with all reasonable deductions or inferences therefrom demands a particular verdict, the court may direct the jury to find for the party entitled thereto." *Green v. Scurry*, 134 Ga. 482 (3), 68 S. E. 77.

While the evidence in the case was abundant to support a verdict in favor of the plaintiffs, there is some conflict in the evidence, and we think the court erred in directing a verdict for the plaintiffs. J. S. Wood, one of the plaintiffs, testified that the debt due was that of the wife, Mrs. D. P. Culver, who was the tenant of J. S. Wood & Bro., while W. L. Culver, the husband of D. P. Culver, testified that the debt sued for was contracted by him individually, and was not the debt of his wife, and that his wife did not sign the notes, and that the contract of rental was with him, and all the goods furnished to him. There was other conflicting testimony, which we think was sufficient to carry the case to the jury.

5. As the questions here decided are controlling, the other grounds of the motion need not be considered.

Judgment reversed. All the Justices concur.

(138 Ga. 72)

#### ROZAR v. McALLISTER.

(Supreme Court of Georgia. April 11, 1912.)

(Syllabus by the Court.)

CRIMINAL LAW (§ 995\*)—MANDAMUS (§ 61\*)—STENOGRAPHIC NOTES OF EVIDENCE—ENTRY ON MINUTES—DUTY OF OFFICIAL REPORTER.

"On the trial of all felonies the presiding judge shall have the testimony taken down, and, when directed by the judge, the court reporter shall exactly and truly record, or take stenographic notes of, the testimony and pro-

ceedings in the case, except the argument of counsel. In the event of the jury returning a verdict of guilty, the testimony shall be entered upon the minutes of the court, or in a book to be kept for that purpose." Penal Code, § 1007. It is only "in the event of the jury returning a verdict of guilty"—that is, guilty of a felony—that a transcript of the stenographic notes of the evidence is required to be entered on the minutes of the court, or in a book to be kept for that purpose.

(a) Accordingly, where one, on trial under an indictment for a felony, was convicted of a misdemeanor—which amounted to a final acquittal of the felony, in the absence of a new trial granted at the defendant's instance—the reporter, who took stenographic notes of the evidence and proceedings on the trial, was under no official duty to transcribe, upon the demand of the defendant, the notes of the evidence, in order that the transcript might be recorded in the clerk's office, where the defendant made no offer to pay the reporter for such service.

(b) It follows that the judge of the superior court did not, under the circumstances as above stated, err in refusing to grant a mandamus compelling the reporter to transcribe his stenographic notes of the evidence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2513, 2521, 2523-2526, 2528½, 2536-2543; Dec. Dig. § 985.\* Mandamus, Cent. Dig. §§ 122-126; Dec. Dig. § 61.\*]

Atkinson, J., dissenting.

Error from Superior Court, Pulaski County; J. H. Martin, Judge.

Application by Jim Rozar for writ of mandamus against W. O. McAllister. Judgment for defendant, and plaintiff brings error. Affirmed.

Wooten & Griffin, of Eastman, for plaintiff in error.

FISH, C. J. Judgment affirmed. All the Justices concur, except

ATKINSON, J. (dissenting). The indictment being for a felony, and the jury having returned a verdict of "guilty" of some offense covered by the indictment, it was the duty of the stenographer to transcribe his notes of the evidence. *Williams v. Cooley*, 127 Ga. 21, 55 S. E. 917.

(138 Ga. 48)

#### SHAW v. FENDER et al.

FENDER et al. v. SHAW.

(Supreme Court of Georgia. April 10, 1912.)

(Syllabus by the Court.)

1. LOGS AND LOGGING (§ 3\*)—CONVEYANCES OF STANDING TIMBER—OPERATION AND EFFECT.

Where a landowner conveys the standing timber, of a specified size, without limitations as to the use to which it is to be appropriated, the grantee may use it for any lawful and ordinary purpose.

(a) A conveyance of standing timber of a specified size, without restriction as to its use upon the land, authorizes the grantee to box the trees for the purpose of producing turpentine.

[Ed. Note.—For other cases, see Logs and Logging, Cent. Dig. §§ 6-12; Dec. Dig. § 3.\*]



**2. INJUNCTION (§ 26\*)—SUBJECTS OF RELIEF—ENFORCEMENT OF CONTRACT.**

Equity will not enjoin the enforcement of an unambiguous contract on the ground that, by mistake of the scribe, it was not made to express the real agreement between the parties, without first reforming the instrument under appropriate pleadings.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 24-49, 54-61; Dec. Dig. § 26.\*]

**3. INJUNCTION (§ 129\*)—ACTIONS FOR INJUNCTION—PLEADING—DISMISSAL.**

As the petitioner alleged that the defendants were cutting and boxing trees of less size than that which was conveyed in the timber lease, it was error to dismiss the petition.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 270-287; Dec. Dig. § 129.\*]

**4. INJUNCTION (§ 52\*)—SUBJECTS OF RELIEF—TRESPASS.**

Pen. Code 1910, § 226, denouncing as a misdemeanor the cutting of timber on uninclosed land, without a recorded deed or written contract from the grantee of a recorded deed, does not deprive a defendant in possession, with full purchase money paid, but without written contract, from showing that the plaintiff conveyed the timber upon which the alleged trespass was made to his vendor, and that by reason of his grant to the defendant's grantor the plaintiff has no interest in the timber to protect.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 105; Dec. Dig. § 52.\*]

Error from Superior Court, Berrien County; W. E. Thomas, Judge.

Action by F. M. Shaw, Sr., against W. L. Fender and another. From the judgment, both parties bring error. Reversed on both bills of exceptions.

F. M. Shaw brought his equitable petition against W. L. Fender and L. D. Carter, alleging that he was the owner of a described tract of land, and that the defendants were cutting into the timber for the purpose of producing turpentine, and prayed for an accounting of past operations and an injunction against further trespass. He alleged that on February 19, 1903, he conveyed the timber to the Massee & Felton Lumber Company under an instrument, the material parts of which are as follows: This indenture between F. M. Shaw, Sr., of the first part, and the Massee & Felton Lumber Company, of the second part, witnesseth: That the party of the first part, in consideration of \$700, "has granted, bargained, sold, remised and leased, and by these presents does grant, bargain, sell, remise and lease to the said Massee & Felton Lumber Company, its successors and assigns, all and singular, the timber on the following described lots and parcels of land. \* \* \* This lease grants exclusive privileges, but timber is not to be cut down less than 14 inches at the stump. The timber hereby leased and conveyed being 350 acres of timber more or less. To have and to hold the said described [timber] with all the rights, members and appurtenances thereunto appertaining or belonging, to the only proper use, benefit and behoof of the said Massee & Felton Lumber Company,

its successors and assigns. It is hereby covenanted by and between the parties hereto that the said Massee & Felton Lumber Company, its successors and assigns, are to have free, full and undisturbed use and enjoyment of the said timber, including the right to cut and remove the said timber from said lands within ten years from date. And the said Massee & Felton Lumber Company, its successors and assigns, shall have the right to construct, occupy and operate all necessary tram roads, roads, tenant houses, sawmill and other temporary structures during the period aforesaid, with the right to remove the same at any time before the expiration of said term. And the said party of the second part shall have the right of way over said lands, and the right and privilege of entering upon and occupying the same so far as may be necessary in the cutting and removing of said timber. And the said party of the first part, for his heirs, executors and administrators, the right and title to the said timber and the free and uninterrupted use and enjoyment of said timber, including the use of the land for timber purposes, during the term aforesaid, unto the said Massee & Felton Lumber Company, its successors and assigns, against the party of the first part, his heirs, executors, administrators and all other person or persons whatsoever, will warrant and defend by virtue of these presents."

It was alleged that the description of the height of the timber at the stump is ambiguous, and was intended to mean, "but timber is not to be cut down less than 14 inches at the stump, two feet from the ground, for sawmill purposes only," and that this ambiguity was the result of accident and mistake in drafting the deed. It was alleged that the timber lease did not authorize the Massee & Felton Lumber Company, or their assigns, to conduct turpentine operations; that the defendants had entered upon the land and cut into a large portion of the trees about 3,850 turpentine boxes, 40 per cent. of which were cut into trees under the gauge of 14 inches at the usual and customary stump height; that the defendants, in cutting the turpentine boxes, did not cut all the timber growing upon the land suitable for turpentine and sawmill purposes, and by reason of this fact, when the sawmill timber has been removed from the land, that portion of the turpentine timber left will be so scattered as to render it unsalable for turpentine purposes, whereas, had it been permitted to remain upon the land without any portion of it being cut for turpentine purposes, plaintiff could have easily marketed it for \$600, the reasonable value thereof; that the cutting of the timber and farming of the same for turpentine purposes frequently breeds disease in the timber, which spreads, not only to the timber cut for tur-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

pentine, but into the smaller timber left standing upon the land; that if the defendants are permitted to continue to farm the timber upon the land for turpentine purposes, which they manifest that they intend to do, it will cause petitioner irreparable damages, for the reason that the several injuries arising therefrom cannot be estimated in damages, and a multiplicity of actions will result upon the constantly recurring acts of trespass being committed by the defendants in farming the timber for turpentine purposes.

The defendants filed their answer. Demurrers were filed to both the petition and answers, which were sustained by the court, and both parties except.

Hendricks & Christian, of Nashville, for plaintiff in error. E. K. Wilcox, of Valdosta, for defendants in error.

EVANS, P. J. (after stating the facts as above). [1] An owner of land may grant an estate in trees growing upon his land. He may by apt words create an absolute estate in them (*North Georgia Co. v. Bebee*, 128 Ga. 563, 57 S. E. 873), or he may grant an estate terminable upon the grantee's failure to cut and remove the timber within a limited time. *Morgan v. Perkins*, 94 Ga. 353, 21 S. E. 574; *Shippen v. Gates*, 136 Ga. 37, 70 S. E. 672. But whether the grant may be of an absolute or a defeasible estate in growing timber, the estate conveyed is an interest in realty, and includes all the appurtenances of the grant. The title to the timber passes by the grant; and the grantee may put the timber to any use he sees proper. Even in the case of a grant of "all and singular the timber for turpentine and sawmill purposes, growing on" described land, it was held that the purchaser could use it for cross-ties or firewood, or for any other purpose which he saw proper. *Gray Lumber Co. v. Gaskins*, 122 Ga. 342, 50 S. E. 164. The right of an owner of property to put it to any lawful use is one of the incidents of the ownership of it. A vendor of timber in the sale of it may limit the use to which the vendee may put it while it is on his land; in such a case the limitation is upon the estate granted. With these principles in mind, we will examine the deed sub judice with a view to ascertaining whether the grantees were restricted in using the pine timber conveyed for only sawmill purposes.

In the first place, the deed conveys "all and singular the timber" on described land, except that "timber is not to be cut down less than 14 inches at stump," to the grantees and their assigns. We think it clear, both from the phraseology of the exception and its insertion in the part of the deed descriptive of the property conveyed, between the granting and tenendum clauses, that the exception operates only to define the property sold, and is neither a limitation on the es-

tate conveyed, nor a restriction upon the use to which the timber was to be put by the grantees. The grantor sold and conveyed all the timber of the size of 14 inches and upwards at the stump. The deed contains several covenants by the grantor. One is to the effect that the grantees and their assigns are to have the free, full, and undisturbed use and enjoyment of the timber, including the right to cut and remove the timber from the land within 10 years, with the right to construct tramways, roads, tenant houses, sawmill, and other temporary structures, subject to removal by the grantees before the expiration of the time stipulated. In this covenant, the grantor recognizes that his grant does not limit the use of the timber for sawmill purposes, but is more extensive; for he expressly covenants that the grantees and their assigns shall have the full and undisturbed use and enjoyment of the timber, including the right to cut and remove, etc. The timber was granted, and this covenant relates to the specification of certain rights conferred upon the grantees in putting it to a particular use. And the covenant following also relates to the same particular use. The warranty of title, which is "to the said timber and the free and uninterrupted use and enjoyment of said timber, including the use of the land for timber purposes during the time aforesaid," indicates that the sale was of the timber, without any restrictions upon the use of it by the grantee or his assigns. We are therefore of the opinion that the grantees took an estate in the timber of the specified dimension, determinable upon their failure to cut and remove it within 10 years; and during that time the grantee had the right to cut and box the pine trees, with the object of extracting the gum, to be manufactured into turpentine.

[2] 2. It is alleged in the petition that the expression in the deed, "but timber is not to be cut down less than 14 inches at stump," is ambiguous, and that the true intention and purpose of the expression was to mean "but timber is not to be cut down less than 14 inches at the stump, two feet from the ground, for sawmill purposes only," and that the ambiguity exists by reason of an accident or mistake in the drafting of the deed. The defendants demurred specially to this paragraph of the petition and moved to strike it, because it was an attempt to ingraft by parol a restriction upon the estate granted. The grantee of the deed is not a party to the cause, and there is no prayer for the reformation of the deed. It may be shown by parol testimony what is the usual stump height for cutting timber. When the parties omitted to state the stumpage height in the deed, it is to be understood that they contracted with reference to the usual and customary rule in that particular. But an attempt to limit the use of the property conveyed by parol proof involves an entirely

distinct proposition. As the deed is written, it is unambiguous; and equity will not enjoin the enforcement of an unambiguous contract on the ground that, by mistake of the scrivener, it was not made to express the real agreement between the parties, without first reforming the instrument under appropriate pleadings. *Perkins Lumber Co. v. Wilkinson*, 117 Ga. 394, 43 S. E. 696. The special demurrer to this paragraph was well taken.

[3] 3. But it was error to strike the petition on general demurrer, as it was distinctly alleged that the defendants had cut for turpentine use many trees of less size than 14 inches at the usual stump height; that they were "working" these undersized trees; and that the acts of the defendants in this respect, for the reasons stated, would result in irreparable injury, and were recurring trespasses. The plaintiff is entitled to recover of the defendants damages for the injury occasioned by the cutting of the undersized trees, and to enjoin them from repeating the trespass upon them. *Gray Lumber Co. v. Gaskins*, *supra*.

[4] 4. In their answer, the defendants averred that they claim title to the turpentine privileges in the timber 14 inches in diameter and upwards at the stump, and the right to use and work the boxes therein under the deed from the plaintiff to the Massee & Felton Lumber Company, and under and by virtue of a contract of sale between the Massee & Felton Lumber Company and the defendant, Fender; that, while the Massee & Felton Lumber Company never in fact executed and delivered to Fender a written lease in accordance with their contract, they accepted the purchase price for the turpentine privileges, and, having received the same, consented for the defendant, Fender, to take possession of the timber for the purpose of boxing and using the same for turpentine purposes, and as a result thereof a perfect and complete equitable title to the timber for turpentine purposes, with the right to use and work the same, was vested in him. Other defensive matter was pleaded. The plaintiff demurred specially and generally to the answer, and the court sustained the demurrer, "upon the ground that the answer of the defendants shows that the defendants had no recorded lease to their interest involved, and has no written contract from any one who does hold such lease, authorizing defendants to use the timber." The cross-bill complains of this ruling. The court predicated his ruling upon Penal Code, § 226, which declares it shall be a misdemeanor for any person to enter or cut or remove from any uninclosed land any timber, unless such person shall, before so doing, have on record in the county where the land lies a deed of conveyance to the same, *prima facie* showing title to such lands, or

shall have a written contract from such person, who has a recorded deed, *prima facie* showing title in him. This Code section has no application to the present case. It simply denounces as a misdemeanor the act declared in the statute. It confers no right of action upon one who has no title to the timber to recover from a violator of the statute the value of the timber cut or removed. Indeed, the statute relates to the cutting and removal of timber, and is of doubtful application to turpentine operations. But, even if turpentine operations be comprehended, the plaintiff must show title to the timber, before he can recover for any trespass to the same or its appurtenances. As the title to the timber passed out of the plaintiff by virtue of his deed to the Massee & Felton Lumber Company, he has no interest in the timber to protect. The defendant cut and boxed the timber with the consent of its owner, and was not a trespasser. *Gaston v. G. & D. Ry. Co.*, 120 Ga. 516, 48 S. E. 188. Besides, the defendant has a perfect equitable title as against the Massee & Felton Lumber Company, so far as the right to work the timber for turpentine is concerned. Civ. Code 1910, § 4634. And, as the plaintiff is estopped by his grant from claiming the timber from his grantee, likewise he is estopped from asserting title to the timber, or its appurtenances, against his grantee's vendee in possession, with full purchase price paid. It was error for the court to sustain the demurrer on the ground stated in his judgment.

Reversed on both bills of exceptions. All the Justices concur.

(133 Ga. 38)

COOK et al. v. COOK.

(Supreme Court of Georgia. April 11, 1912.)

(Syllabus by the Court.)

1. HOMESTEAD (§ 143\*)—RIGHTS OF WIDOW.

If a man takes a homestead for the benefit of his wife and children, and after the death of his wife he remarries during the minority of some of the children, his second wife becomes a beneficiary of the homestead. *Torrance v. Boyd*, 63 Ga. 22; *Dismuke v. Eady & Co.*, 82 Ga. 289, 5 S. E. 494.

[Ed. Note.—For other cases, see *Homestead*, Cent. Dig. §§ 253, 270; Dec. Dig. § 143.\*]

2. EXECUTORS AND ADMINISTRATORS (§ 181\*)—DOWER (§ 10\*)—YEAR'S SUPPORT—PROPERTY SUBJECT TO DOWER—HOMESTEAD.

Where a man took a homestead, and his children became of age, upon his death, leaving his wife as the only beneficiary of the homestead estate, she could take a year's support out of the homestead property; and if the amount thereof did not include the entire homestead, she could also take dower out of the remainder of the real estate. Page v. Page, 50 Ga. 597; *Lowe v. Webb*, 85 Ga. 731, 11 S. E. 845; *Miller v. Crozier*, 105 Ga. 54, 31 S. E. 122; *Green v. Hambrick*, 118 Ga. 569, 45 S. E. 420.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 681-685; Dec. Dig. § 181.\* *Dower*, Cent. Dig. §§ 20-35; Dec. Dig. § 10.\*]

### 3. DOWER (§ 59\*)—EXECUTORS AND ADMINISTRATORS (§ 187\*) — RIGHTS OF WIDOW — YEAR'S SUPPORT.

A widow, who is the sole beneficiary of a homestead which was taken by her husband during his lifetime, after his death is not entitled to hold the homestead and at the same time take a year's support and dower in the same land. Under former rulings of this court, by applying for and obtaining a year's support and dower, she destroyed the homestead estate, which was for her benefit. *Roff, Sims & Co. v. Johnson*, 40 Ga. 555; *Donaldson v. Anderson*, 104 Ga. 673, 30 S. E. 883.

(a) Whether, if there are minor children in life, the widow can take dower as against them in property which has been set apart as a homestead, is not now for consideration.

[Ed. Note.—For other cases, see *Dower*, Cent. Dig. § 207; Dec. Dig. § 59.\* *Executors and Administrators*, Cent. Dig. § 697; Dec. Dig. § 187.\*]

### 4. DOWER (§ 108\*) — ASSIGNMENT—PROCEEDINGS.

Where notice was given of an application for dower, and of the time and place of hearing same, which was in a county adjoining that to which the return of the commissioners would be made, and at such time and place the judge at chambers appointed commissioners, who assigned dower and made return to the proper court, and judgment was duly entered thereon, it will not be declared a nullity on the ground that the judge was sitting at chambers outside his circuit when the appointment was made, or on the ground that the record did not show that the commissioners made the affidavit provided by law before assigning dower. *Civil Code of 1910*, § 5257; *Early & Lane v. Oliver & Norton*, 63 Ga. 12, 22.

[Ed. Note.—For other cases, see *Dower*, Cent. Dig. § 357; Dec. Dig. § 108.\*]

### 5. INJUNCTION (§ 128\*) — DISCRETION OF COURT—CONFLICTING EVIDENCE.

As to material matters in the case the evidence was in conflict, and there was no abuse of discretion in denying the injunction prayed.

[Ed. Note.—For other cases, see *Injunction*, Cent. Dig. § 278; Dec. Dig. § 128.\*]

Error from Superior Court, Campbell County; L. S. Roan, Judge.

Action between W. S. Cook and others and M. A. Cook, administratrix. From the judgment, W. S. Cook and others bring error. Affirmed.

J. S. James, of Atlanta, for plaintiffs in error. T. O. Hathcock, of Atlanta, for defendant in error.

LUMPKIN, J. Judgment affirmed. All the Justices concur.

(137 Ga. 846)

### DAWSON CONSOL. GROCERY CO. v. HUDSON.

(Supreme Court of Georgia. April 9, 1912.)

(Syllabus by the Court.)

### 1. EVIDENCE (§ 471\*)—OPINION EVIDENCE—MATTERS DIRECTLY IN ISSUE.

Upon the issue of whether certain property is purchased with the proceeds of property exempted as a homestead, the facts should be stated, and the jury left to draw the inference, without the aid of a witness' conclusion from those facts that the consideration of the

purchase of the property was the proceeds of the homestead.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 2149-2185; Dec. Dig. § 471.\*]

### 2. HOMESTEAD (§ 214\*)—ENFORCEMENT OF RIGHT—BURDEN OF PROOF.

Where the record title to land is in the defendant, who is in possession of it, and credit is extended to him on the faith of his ostensible ownership, in a proceeding to subject the land to the lien of the judgment of such creditor, where the defendant, as head of his family, files a claim, and contends that the proceeds of certain personalty exempted as a homestead was used in the purchase of the land, the burden is on the claimant to show, not only that the land was purchased with the proceeds of the homestead, but also that the creditor had notice of it at the time he extended credit.

(a) The evidence is insufficient to affect the creditor with notice that the land was purchased with the proceeds of homestead property.

[Ed. Note.—For other cases, see *Homestead*, Cent. Dig. §§ 897-899; Dec. Dig. § 214.\*]

Error from Superior Court, Baker County; Frank Park, Judge.

Pl. fa. in favor of the Dawson Consolidated Grocery Company against E. L. Hudson. From a judgment for defendant on his claim of exemption, plaintiff brings error. Reversed.

W. I. Geer, of Colquitt, for plaintiff in error. A. S. Johnson and Benton Odom, both of Newton, for defendant in error.

EVANS, P. J. A fl. fa. in favor of the Dawson Consolidated Grocery Company against E. L. Hudson was levied on a one-half undivided interest in a lot of land, and a homestead claim was filed by the defendant as the head of his family. A verdict was returned in favor of the claimant, a motion for new trial was made and refused, and the plaintiff excepts. The levy recited that the defendant was in possession of the land at the time of the levy. The claimant introduced in evidence the original homestead, granted April 14, 1887, setting apart to him, as head of a family consisting of himself and wife, 2 mules and a horse, 2 cows and a calf, 19 hogs, 100 bushels of corn, 1,000 pounds of fodder, 400 pounds of bacon, a rent note, a cotton gin and press, and household and kitchen furniture, of the aggregate value of \$752. The claimant testified that the rent note proved worthless, the cotton gin was worn out, and that the other property was used by him in farming on land owned by his wife, and that in 1893 he purchased the land levied on, and paid for the same from the proceeds of this farm; that he had mortgaged the land as his own to another creditor; that he conducted a mercantile business, purchasing goods from the plaintiff, and during this time he owned the land levied on, as well as another lot; that he never told any one he claimed the land as homestead land, nor put any one on notice

that it was such. The plaintiff introduced a deed to the defendant and another person to the lot of land in controversy, dated February 27, 1898, and the tax returns of these grantees for several years after their purchase, wherein the land was returned as their property. The salesman and vice president of the plaintiff company testified that he knew of the defendant's ownership of the land, and the defendant pointed it out to him before the goods were sold. The defendant denied pointing out the land to the plaintiff's salesman.

[1] 1. After testifying that he used the horses, cows, corn, etc., set apart as a homestead, in making a crop on his wife's land, and that from the crop raised thereon by his labor with the use of the homestead property he paid for the land levied on, the claimant was allowed to testify, over objection, that no part of the homestead property was used in paying for the land, its proceeds were so used. Where it is contended that homestead property has been converted into another form, and that the substituted property is protected by the homestead, as being the proceeds of the property originally exempted, the facts should be given to sustain the contention, and their sufficiency is for the jury. Still, where the facts are related by a witness as the basis of his conclusion, it would not in every case be ground for a new trial that the court allowed him to state his conclusion based on such facts.

[2] 2. The levy recited that the defendant was in possession of the land at the time it was made. The burden of proof, therefore, was upon the claimant. There was no controversy that legal title to the land was in the defendant at the time the debt was contracted and the levy was made. The claimant admitted that he gave no notice that he used any of the proceeds of the property in the purchase of the land, and there was nothing in the evidence to impute such notice. Under these circumstances it was error to charge: "In order to find a verdict for the plaintiff in the case, it must appear to you that the plaintiff in *fi. fa.* acted without any knowledge whatever that this was homestead property, and that he had no notice, he was put upon no actual notice, of anything by which, if he had followed it out, he could have ascertained with reasonable diligence that it was homestead property. The plaintiff is bound to exercise the diligence of an ordinarily prudent business man in his transactions with others, and with the defendant; and if you find in this case that the property is homestead property, the proceeds of homestead property, and if the plaintiff in this case had notice that it was such, or he had notice of anything that would lead him to make investigation to ascertain that it was homestead property, and by which he could have ascertained it, then you would find in favor of the claimant in the

case." This charge is open to the criticism that it was not warranted by the evidence, and as imposing upon the plaintiff the burden of showing that it had no notice that the proceeds of homestead property was used in the purchase of the land, upon the faith of the defendant's ownership of which credit was extended. The burden of proof was upon the claimant to show that the property, the legal title to which was in the defendant, was not subject to levy and sale, because it was purchased with the proceeds of homestead property, and that the plaintiff had notice of this fact when it extended credit to the ostensible owner.

Other exceptions to the charge and rulings of the court are without merit.

Judgment reversed. All the Justices concur.

(11 Ga. App. 88)

SASSER v. MCGOVERN. (No. 3,988.)

(Court of Appeals of Georgia. April 16, 1912.)

(Syllabus by the Court.)

EVIDENCE (§ 441\*)—PAROL EVIDENCE—ACTION ON NOTE.

An unconditional promissory note cannot be defeated by proof of an oral contemporaneous agreement that the promisee would never attempt to enforce the promise.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2030-2047; Dec. Dig. § 441.\*]

Error from City Court of Douglas; W. D. Buie, Judge.

Action by J. A. Sasser, assignee, against Thomas McGovern. Judgment for defendant, and plaintiff brings error. Reversed.

J. J. Bull, of Oglethorpe, and F. W. Dart, of Douglas, for plaintiff in error. Rogers & Heath and J. W. Quincey, all of Douglas, for defendant in error.

POTTLE, J. The suit was upon an unconditional promissory note under seal. The defendant pleaded that the note was without consideration. From his testimony it appears that the note was given for a share of stock in the bank to which the note was payable, and was in renewal of one previously given for the same purpose. At the time the original note was given, there was an oral agreement and understanding between the defendant and the cashier of the bank to the effect that the defendant would never be called on to pay the note. The cashier stated to the defendant that the bank wanted his influence and the use of his name, and desired the note for the purpose of borrowing money on it and making a proper showing when the bank examiner came around. The defendant never agreed to take the stock, never got it, and did not understand that any stock was to be delivered to him. The bank was to hold the stock, which was never in fact delivered to the defendant, nor did he ever call on the bank for the stock. The agreement was that

the defendant was never to pay anything on the note. It is undisputed that a certificate for one share of stock in the bank was issued to the defendant and retained by the bank for him.

Counsel seek to uphold the verdict in the defendant's favor upon the authority of *Lacey v. Hutchinson*, 5 Ga. App. 865, 64 S. E. 105. That decision sustains the contention that want of consideration is a good defense to a promissory note, even though it be under seal; but it does not support the proposition that an unconditional promise in writing to pay may be defeated by proof of an oral contemporaneous agreement that the promisee would never attempt to enforce the promise. Reduced to its last analysis, the effort of the defendant in this case is to defeat a plain, unconditional promise to pay by proof of an oral contemporaneous agreement to the effect that he had really never made any promise to pay. If, at the time the note was executed, the bank had entered into a written stipulation agreeing not to sue the defendant upon the note, in effect releasing him from liability thereon, such an agreement would have been valid and binding. *Martin v. Monroe*, 107 Ga. 330, 33 S. E. 62. But we know of no principle, nor has any decision been called to our attention, which supports the proposition that a written promise may be defeated by proof of an oral agreement not to enforce it. The decisions are directly to the contrary. See *Mansfield v. Barber*, 59 Ga. 851; *Johnson v. Cobb*, 100 Ga. 139, 28 S. E. 72.

It is plain from the defendant's own testimony that the note was originally given for a share of stock in the bank, and it is undisputed that a certificate of stock was issued to the defendant and retained by the bank for him. While it does not directly appear from the evidence, it is inferential that the stock was being held by the bank to be delivered to the defendant when his note should be paid. To permit the defense set up by the defendant in this case would be to violate plain, elementary principles of law. A verdict in the plaintiff's favor was demanded by the evidence, and it is unnecessary to notice the special assignments of error in the motion for a new trial.

Judgment reversed.

(11 Ga. App. 69)

**TIMMONS et al. v. CITIZENS' BANK OF WAYNESBORO.** (No. 3,927.)

(Court of Appeals of Georgia. April 16, 1912.)

(Syllabus by the Court.)

**1. ASSIGNMENTS (§ 20\*)—ACTION BY ASSIGNEE—NATURE AND FORM.**

A contract made with a building contractor stipulated that he should be paid a specified sum for the work, payable in monthly installments in such sums as the architects might in writing certify to be due. The owner reserved

the right to withhold the payment of any installment when necessary to protect himself against any outstanding claims or liens for either labor or material. *Held*, when the architects issued a certificate that a specified sum was due under the terms of the contract, the certificate was assignable, and the assignee could enforce it in a court of law, as a legal assignment of a particular fund.

[Ed. Note.—For other cases, see Assignments, Cent. Dig. §§ 32-34; Dec. Dig. § 20.\*]

**2. CONTRACTS (§ 332\*)—ACTION—PETITION—NEGATIVE DEFENSES.**

In such a suit by the assignee, it was not necessary that the petition should negative the existence of liens for labor or material. This was matter of defense.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1615-1639; Dec. Dig. § 332.\*]

(Additional Syllabus by Editorial Staff.)

**3. ASSIGNMENTS (§ 58\*)—ACTION BY ASSIGNEE—NATURE AND FORM.**

Only a court of equity can enforce a partial assignment of a fund, when the debtor has not assented to the assignment.

[Ed. Note.—For other cases, see Assignments, Cent. Dig. §§ 121-123; Dec. Dig. § 58.\*]

Error from City Court of Tifton; R. Eve, Judge.

Action by the Citizens' Bank of Waynesboro against W. W. Timmons and others, as trustees of the Baptist Church of Tifton. Judgment for plaintiff, and defendants bring error. Affirmed.

J. H. Price, J. B. Murrow, and J. J. Murray, all of Tifton, for plaintiffs in error. Perry, Foy & Monk, of Sylvester, for defendant in error.

**POTTLE, J.** The Citizens' Bank of Waynesboro sued certain named persons as trustees of the Baptist Church of Tifton; the allegations of the petition being substantially as follows: The church is an unincorporated voluntary association of persons for the purpose of divine worship. The association is composed of a congregation of members of this church, and owns certain real estate situated in the city of Tifton, consisting of a lot of land together with the church edifice thereon, which constitutes the only property owned by the assemblage of persons. The property is held and controlled for the use of the congregation by certain persons, designated as trustees of the church. The plaintiff holds a claim in the principal sum of \$1,200 against the trust estate in the control of the defendant trustees, which claim arose as follows: A written contract was entered into between a committee representing the church and Wagener, a contractor, for the building of the church edifice situated on the lot above referred to. This contract provided that the work of construction should be done under the direction and superintendence of certain named architects, and that the contractor should provide all materials and labor for all the work mentioned in the specifications and drawings prepared by the architects. There are other

details in the contract which are not material to the questions presented for decision. The contract further provided, in substance, that if for any reason, during the progress of the work, the contractor refused or neglected to carry on the work in accordance with the plans and specifications, the owner should have a right to terminate the employment and complete the building, and that in that event the contractor should not be entitled to receive any of the payments until the work was wholly finished, at which time final settlement should be had. The contract contained this provision: "It is hereby mutually agreed that the sum to be paid by the owners to the contractor for the said work and materials shall be \$25,400, subject to additions and deductions as hereinbefore mentioned. Payments are to be made on the 1st of each month for not more than 85 per cent. of the amount of the materials and labor furnished, and shall be made on written certificates of the architects to the effect that such payments have become due. Final payment is to be made when the work is completed and accepted by the architects and owners. If at any time there shall be evidence of any lien or claim for which, if established, the owners of the said premises might become liable, and which is chargeable to the contractor, the owners shall have the right to retain from any payments then due, or thereafter to become due, an amount to sufficiently indemnify them against such lien or claim." It was further stipulated that "no certificate given or payment made under this contract, except the final certificate or final payment, shall be conclusive evidence of the performance of this contract, either wholly or in part, and that no payment shall be construed to be an acceptance of defective work or improper materials." On February 20, 1908, while the contractor was actually engaged in the erection of the church building, and "while actually entitled to the amount designated in the certificate hereinafter mentioned, as part payment for work done and material furnished in the erection of said building," the architects issued to the contractor a certificate reciting that he was entitled to \$1,200, "as seventh payment as per terms of contract dated July 6, 1906, with 15 per cent. reserve." This certificate was assigned to the plaintiff for a valuable consideration. The plaintiff has presented said certificate to the defendants for payment, notifying them of the assignment, and payment has been refused.

Numerous grounds of demurrer were filed to this petition as finally amended, but the only question raised by them which is really insisted upon in this court is that, the contract with the contractor being an entire one, and the assignment to the plaintiff being of a part of a general fund, the city court of Tifton was without jurisdiction to entertain the suit, but the assignment, being an equi-

table one, could be enforced only in a court of equity, where all the parties were before the court and the interests of all could be fixed and determined in one decree.

[3] 1. It is not contended that the church lot and edifice could not be made subject to the debt due the contractor. Civ. Code 1910, § 2834; *Josey v. Union Loan Co.*, 108 Ga. 608, 32 S. E. 628; *Kelsey v. Jackson*, 123 Ga. 113, 50 S. E. 951. Nor is it contended that the claim of Wagener against the trustees was not assignable. See Civ. Code 1910, §§ 3653-4274; *National Bank v. Leonard*, 91 Ga. 805, 18 S. E. 32. We will not discuss the question whether under Civil Code 1910, § 3786, the plaintiff's claim could be enforced in a court of law, against the trust estate represented by the defendants, even though it might not be enforceable in such a court against a debtor other than a trust estate. The rule is well settled that only a court of equity can enforce a partial assignment of a fund when the debtor has not assented to the assignment. This rule is founded upon the theory that, where a debtor has contracted in one obligation to pay a sum of money, the cause of action which may arise against him by reason of his default in failing to make payment according to the terms and tenor of his obligation cannot be split up and divided, so as to annoy and harass him with more than one suit. *Central of Georgia Ry. Co. v. Dover*, 1 Ga. App. 240, 57 S. E. 1002; *Rivers v. Wright*, 117 Ga. 81, 43 S. E. 499; *W. & A. R. Co. v. Union Investment Co.*, 128 Ga. 74, 57 S. E. 100; *King v. Central of Georgia Ry. Co.*, 135 Ga. 225, 69 S. E. 113; *South Printing Co. v. Potter*, 72 S. E. 427. In *Central Ry. Co. v. Dover*, supra, the assignment was of "the sum of \$20 out of whatever money may now be due, or may become due" to the assignor as wages, on or before a specified date. It was held by this court that the assignment was not of a particular fund, and that only a court of equity would enforce it.

[1] An illustration of a legal assignment enforceable in a court of law is found in the case of *Central of Georgia Ry. Co. v. King*, 73 S. E. 632. There the assignor transferred his "account for salary or wages already earned during the month of May, which amounted to \$27.75 and due" him by the railway company. It was held that the legal title to the particular fund described in the assignment was transferred to the assignee, and that the instrument of transfer was not a partial assignment of a general fund belonging to the assignor in the hands of the railway company. The present case, in our opinion, falls within the principle of the decision last referred to, and is not controlled by the decisions first cited, dealing with equitable assignments. It will be observed that the contract in the present case stipulated that the agreed price should become due in installments, each installment

to be paid on the 1st day of each month, upon a certificate by the architects that the sum claimed was due and payable to the contractor. When such certificate was issued, the church authorities became indebted to the contractor for the particular amount specified in the certificate, unless they had a right under other provisions of the contract to retain all or a part of this sum to protect themselves against liens, or claims for labor or material which had not been paid for by the contractor.

It is immaterial whether we treat the contract as an entire or a divisible one (*Hunnicott v. Van Hoose*, 111 Ga. 518, 36 S. E. 669; *Spalding County v. Chamberlin*, 130 Ga. 649, 61 S. E. 533); for "if the breaches occur at successive periods in an entire contract (as where money is to be paid by installments), an action will lie for each breach." Civ. Code 1910, § 4389. The particular fund described in the certificate of the architects became *prima facie* due upon the issuance and presentation of the certificate. It is immaterial that this fund was to be paid out of the general building fund in the hands of the church authorities, because theoretically the amounts of the installments specified in the certificates of the architects from time to time were to be segregated from the general fund, and a separate and independent indebtedness arise for the amount of each installment. The situation is substantially the same as if one should give to another a promissory note for \$10,000, payable in monthly installments of \$1,000, becoming due at different times. In such a case it could not be denied that a separate action might be brought, either by the original creditor or by his transferee, to recover each installment as it became due.

Of course, under the terms of the Code section, the suit would have to embrace all indebtedness due and payable at the time the suit was instituted; but this provision of the statute is not applicable to the present case. The case does not differ in principle from the decision of the Supreme Court in the *King Case* cited above. In that case it was immaterial that the railway company may have employed the debtor for a year or more, or may have been under a contract with him to pay him a certain sum per year as wages; if the wages were to be paid in monthly installments, then manifestly the employe, or his assignee, would have had a right to sue to recover each month's wages as they fell due.

[2] 2. Another point stressed in the argument is that the petition is defective because it fails to allege that the contractor was not indebted for labor and material, and had discharged all claims which might become liens on the property. The contract gave the owners the right to retain an amount sufficient to protect them against any lien or claim for which they were or might become liable. If any such liens or claims exist, this would be matter of defense. Under the contract, a *prima facie* right to recover is shown by proof of a certificate of indebtedness, issued by the architects in accordance with the stipulations of the contract. When this is done the case stands as any other suit upon any other evidence of indebtedness setting forth a liquidated demand. Matters properly the subject-matter of a plea of confession and avoidance are affirmative defenses, the existence of which need not be negatived by the plaintiff.

Judgment affirmed.



(159 N. C. 102)

## WICKER v. JONES et al.

(Supreme Court of North Carolina. May 2, 1912.)

## 1. ALTERATION OF INSTRUMENTS (§ 10\*)—"ALTERATION."

"Alteration" in a writing implies a change made after its execution, and, although an erasure or interlineation, is not an alteration, if made before the final execution of the writing.

[Ed. Note.—For other cases, see Alteration of Instruments, Cent. Dig. §§ 54-56; Dec. Dig. § 10.\*]

For other definitions, see Words and Phrases, vol. 1, pp. 360-365.]

## 2. ALTERATION OF INSTRUMENTS (§ 16\*)—"EFFECT OF MATERIAL ALTERATION."

A material alteration in a written instrument avoids the instrument, but an immaterial alteration does not affect its validity.

[Ed. Note.—For other cases, see Alteration of Instruments, Cent. Dig. §§ 114-121; Dec. Dig. § 16.\*]

## 3. ALTERATION OF INSTRUMENTS (§ 2\*)—"MATERIAL ALTERATION."

Any alteration of a written instrument is "material," if it affects the identity of the instrument, or the rights and obligations of the parties to it.

[Ed. Note.—For other cases, see Alteration of Instruments, Cent. Dig. §§ 1-4; Dec. Dig. § 2.\*]

For other definitions, see Words and Phrases, vol. 5, pp. 4405-4406; vol. 8, p. 7717.]

## 4. ALTERATION OF INSTRUMENTS (§ 30\*)—"QUESTIONS FOR JURY."

The materiality of an alteration of a written instrument is a question for the court, but the question when the alteration was made is for the jury.

[Ed. Note.—For other cases, see Alteration of Instruments, Cent. Dig. §§ 264-270; Dec. Dig. § 30.\*]

## 5. ALTERATION OF INSTRUMENTS (§ 11\*)—"ALTERATION BY STRANGER—EFFECT."

The alteration of a written instrument by a stranger without the knowledge of the grantee or obligee, while it cannot enlarge the obligation of the grantor or obligor, does not affect the right to enforce the instrument as originally intended, and the intent with which the alteration is made is immaterial unless it is fraudulent, in which case a court will not lend its aid.

[Ed. Note.—For other cases, see Alteration of Instruments, Cent. Dig. §§ 57-76; Dec. Dig. § 11.\*]

## 6. COURTS (§ 87\*)—"NATURE OF JUDICIAL DETERMINATION—ABSENCE OF PRECEDENT."

In determining a question without the guidance of precedent in the same court, a court must adopt the rule which in its opinion agrees with the habits and customs of the people, and which will, in the majority of cases, be conducive to a settlement of disputes of such character according to right.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 306-310; Dec. Dig. § 87.\*]

## 7. EVIDENCE (§ 370\*)—"DOCUMENTARY EVIDENCE—PROOF OF EXECUTION."

A party claiming under a deed is entitled to introduce it in evidence upon proof of its execution.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1559-1579, 1592; Dec. Dig. § 370.\*]

## 8. ALTERATION OF INSTRUMENTS (§ 27\*)—"EVIDENCE—BURDEN OF PROOF."

Where a deed is introduced in evidence with proof of its execution by a party claiming title thereunder, a party who assails it on account of erasures or interlineations apparent on its face has the burden of showing that such erasures or interlineations were made after the execution of the deed.

[Ed. Note.—For other cases, see Alteration of Instruments, Cent. Dig. §§ 230-247; Dec. Dig. § 27.\*]

## 9. ALTERATION OF INSTRUMENTS (§ 27\*)—"EVIDENCE—PRESUMPTION."

Where deeds were registered in 1885 and their validity was not attacked by the grantor, nor any one claiming under him, and the grantees were in actual possession of parts of the land since a time previous to such registration, it will be presumed that erasures or interlineations apparent on the face of the deeds were made before they were executed.

[Ed. Note.—For other cases, see Alteration of Instruments, Cent. Dig. §§ 230-247; Dec. Dig. § 27.\*]

## 10. ALTERATION OF INSTRUMENTS (§ 29\*)—"ADMISSIBILITY OF EVIDENCE—DIFFERENCE IN INK AND HANDWRITING."

In determining when an erasure or interlineation in a deed was made, the jury may consider any difference in ink or handwriting, in the absence of explanation, and may give weight to the fact that the deed may have been withheld from registration, according to the length of time elapsing and any change in the condition of the parties thereto.

[Ed. Note.—For other cases, see Alteration of Instruments, Cent. Dig. §§ 259-263; Dec. Dig. § 29.\*]

## 11. ALTERATION OF INSTRUMENTS (§ 22\*)—"PERSONS WHO MAY COMPLAIN."

Where the parties affected by a change in an instrument do not complain thereof, others not parties to the instrument or affected by the change cannot ordinarily set up the change, unless there is evidence of fraud between the parties to the injury of creditors, as the alteration must relate to the parties to the particular instrument altered.

[Ed. Note.—For other cases, see Alteration of Instruments, Dec. Dig. § 22.\*]

## 12. APPEAL AND ERROR (§ 1058\*)—"HARMLESS ERROR—ADMISSIBILITY OF EVIDENCE—FACTS OTHERWISE SHOWN."

The exclusion of competent testimony was harmless, where the witness afterwards testified without objection to the facts sought to be elicited by the testimony excluded.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4195, 4200-4206; Dec. Dig. § 1058.\*]

## 13. EJECTMENT (§ 90\*)—"ADMISSIBILITY OF EVIDENCE—PLATS."

In ejectment where the plaintiff claimed through his ancestor, a plat of the division of the lands of such ancestor was admissible, and a mortgage made by plaintiff was also admissible.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. §§ 254-277; Dec. Dig. § 90.\*]

## 14. APPEAL AND ERROR (§ 1057\*)—"HARMLESS ERROR—ADMISSION OF EVIDENCE."

The admission of documentary evidence in ejectment was not prejudicial to plaintiff when he himself admitted that the boundary sought to be shown thereby was one of his boundary lines.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4194-4199, 4205; Dec. Dig. § 1057.\*]

**15. EJECTMENT (§ 9\*)—TITLE TO SUPPORT ACTION—SUFFICIENCY OF TITLE.**

The plaintiff in ejectment must recover upon the strength of his own title.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. §§ 16-29; Dec. Dig. § 9.\*]

**16. JUDGMENT (§§ 251, 256\*) — FORM—CONFORMITY TO PLEADINGS.**

In ejectment, where defendants alleged that they were in possession of all the lands which they claimed, and where the finding of the jury established the fact that the plaintiff was not the owner of any part of the land in controversy, an affirmative judgment in favor of the defendant "that the defendants are the owners and entitled to possession of said lands" is not supported by the pleadings and findings.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 437, 446-454; Dec. Dig. §§ 251, 256.\*]

**17. JUDGMENT (§ 747\*)—FORM OF JUDGMENT—ESTOPPEL TO BRING NEW ACTION.**

A judgment in ejectment which established that plaintiff was not the owner of any part of the lands in controversy, but which did not establish any title in defendant, will operate as an estoppel on the plaintiff to prevent his further prosecution of an action.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1284-1296; Dec. Dig. § 747.\*]

Clark, C. J., dissenting.

Appeal from Superior Court, Lee County; Cooke, Judge.

Ejectment by L. A. Wicker against Hayes Jones and others. From a judgment for defendants, plaintiff appeals. Modified and affirmed.

This was originally a processioning proceeding, and, it appearing that title to the land was in controversy, it was transferred to the civil issue docket by consent of all parties, and pleadings were filed. The plaintiff complained for the possession of certain lands alleged to be in possession of defendants, and for a judgment clearing the title of certain other parts of the same tract alleged to be in plaintiff's possession. The defendants admitted possession of a portion of the land described in the complaint, which part was described by metes and bounds in the answer, and claimed title thereto. Nearly all the land in controversy was on the west side of Juniper branch, and the remainder on the east side.

The plaintiff offered evidence that Elisha Wicker, his father, was dead, and introduced the following deeds: Deed from Daniel McGilvary to A. H. McLeod, dated October 19, 1867, registered in office of register of deeds of Moore county, in Book 82, p. 558, on the 5th day of November, 1867. Deed of Alexander H. McLeod and wife to Elisha Wicker, dated September 16, 1874, registered in the office of the register of deeds of Lee county, in Book No. —, p. —, July 19, 1911. The plaintiff also offered evidence tending to prove that the deeds covered the lands in controversy and other land, and that he and those under whom he claimed had been in possession of the same

for more than 30 years, but he admitted that his home was on the land in the deeds outside of the dispute, and that he had not cultivated continuously the land in controversy.

The defendant introduced the following deeds, which were admitted without objection: Deed of Daniel Hall and wife, Mary Hall, to Mary J. Jones, dated 15th day of April, 1879, registered in Moore county, September 30, 1885, in Book No. 56, p. 361. The courthouse was burned in that county, and the deed was re-registered the 18th day of January, 1908, in Book No. 40, p. 50. Deed from Daniel Hall and wife to Mary J. Jones, dated the 29th day of April, 1882, registered in the office of the register of deeds in Moore county, September 29, 1885, Book No. 56, p. 359, and re-registered in Moore county on the 5th day of September, 1898, in Book No. 18, p. 470. Deed of W. C. Edwards to Daniel Hall, dated 2d day of April, 1876, registered in Lee county June 19, 1911, in Book of Deeds No. 5, p. 118. Deed of J. W. Burns to Daniel Hall, dated December 31, 1878, registered in the office of register of deeds, Lee county, March 16, 1909, Book of Deeds No. 1, p. 292. There were erasures and interlineations, in material parts, on the first and second of these deeds, and the plaintiff introduced evidence tending to prove that the erasures and interlineations were not in the same handwriting as the body of the deed, that different ink was used, and that they were not made at the date of the deed, but afterwards. The defendant also introduced evidence tending to prove that said deeds covered the lands in controversy, and that she had been in possession thereof for 30 years, and had, during that time, cultivated continuously five or six acres of the land. The home of the defendant was not on the land in dispute.

John B. Cameron, a surveyor, was asked the following question: "Q. Examine that plat, and see if you can locate this description (attorney reading deed of Daniel Hall and wife to Mary J. Jones, dated 15th day of April, 1876). Also this tract (Daniel Hall and wife to Mary J. Jones, dated 29th day of April, 1882). State whether or not, as a surveyor, you can say whether or not this land on the west side of Juniper branch within that line running from 5 to B, B to C, and from C to Juniper branch, and Juniper branch to the beginning, is contained in that description. (Objection by plaintiff. Overruled. Exception.) A. According to your papers, it does. I didn't survey that. I platted it." This witness afterwards testified, without objection, that the deeds of the defendant covered the land in controversy.

Defendant introduced certified copies of the plat of division of the lands of Elisha Wicker, father of the plaintiff. (Objection by plaintiff. Overruled. Plaintiff excepted.)

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Also certified copy of mortgage of L. A. Wicker to Elisha Watson, dated 20th day of March, 1891. (Objection by plaintiff. Overruled. Plaintiff excepted.) The western line of the land in the division and of the land in the mortgage is Juniper branch. The plaintiff testified that all the land he owned was not embraced in the mortgage.

The only part of his honor's charge excepted to is as follows: "Now, in respect to the two deeds put in evidence by the defendants, and purporting to be made to Mary J. Jones—one dated the 15th of April, 1879, and the other dated the 29th of April, 1882—the plaintiff contends that, according to the evidence on the face of the deeds, there has been, since the execution and delivery of the deeds, a change in the grantee, and that the name of Mary J. Jones has been by such change made the grantee in such deed. Now, the burden of showing this, and that such change was made by the grantee or some one in her interest, or the interest of the defendants, or that it was not made by the grantor or by his consent, is upon the plaintiff."

The following verdict was returned by the jury: "(1) Is the plaintiff the owner of and entitled to the possession of the lands included in the following lines: C to D to 3 to 4 to 5 to B and to C—or any part thereof?" Answer: "No." The court rendered the following judgment: "This cause coming on to be heard, and being heard before his honor, C. M. Cooke, judge, and a jury, and the following issues having been submitted to the jury: (1) Is the plaintiff the owner of, and entitled to, the possession of the lands included in the following lines: C to D to 3 to 4 to 5 to B and to C—or any part thereof? (2) And, if a part, what part? (3) Are the defendants in the wrongful possession of said lands? (4) What damage, if any, is the plaintiff entitled to recover against the defendants? And the jury having answered the first issue, 'No,' it is therefore considered, ordered, and adjudged that the plaintiff is not the owner nor entitled to the possession of the lands within the following lines: C to D to 3 to 4 to 5 to B and to C, as shown on the map on file in this cause, but that the defendants are the owners and entitled to the possession of said lands. It is further adjudged that the defendant recover of the plaintiff and D. D. Bule, surety on the prosecution bond filed in this cause, their costs, to be taxed by the clerk of the court."

The plaintiff excepted and appealed.

A. A. F. Seawell, for appellant. Hoyle & Hoyle and D. E. McIver, for appellees.

ALLEN, J. [1] When we speak of an "alteration" in a writing, we refer to the legal acceptance of the term, which implies a change made after its execution, and, while an erasure or interlineation may be an alteration, it is not such if made before the final execution of the writing. Under

the rule of the ancient common law, as illustrated in its earliest decisions, it was held that any alteration, however insignificant, rendered the writing void, and that the judge must pass on the whole question (*Pigot's Case*, 11 R. 26b), but this was modified even in the time of Lord Coke to the extent that the alteration must be material, and that the question as to the time when made should be submitted to a jury. In *Co. Litt.* 225b, it is said that "of ancient time, if the deed appeared to be erased or interlined in places material, the judges adjudged upon their view the deed to be void, but of latter time the judges have left that to the jurors to try whether the rasing or interlining were before the delivery."

[2-4] Modern authority in England and in the United States has further modified the doctrine until it is now generally agreed that, when an alteration is established, it avoids the instrument, if it is material; that the materiality of the alteration is a question to be decided by the court, without the aid of a jury; that any alteration is material if it affects the identity of the instrument or the rights and obligations of the parties to it; and that the question of the time when the alteration was made is a fact to be determined by the jury. It is also held in all the states, except Missouri and New Jersey, that an immaterial alteration does not affect the validity of the writing.

[5] An alteration by a stranger, without the knowledge of the grantee or obligee, while it cannot enlarge the obligations of the grantor or obligor, does not affect the right to enforce the writing as it was originally executed, and the intent with which the alteration is made is immaterial, unless it is fraudulent, in which event a court will not lend its aid. The cases supporting these principles are collected in the valuable note to *Burgess v. Blake*, 86 Am. St. Rep. 79, and in the learned and comprehensive article on *Alteration of Instruments* by Judge John F. Dillon, in 2 Cyc. p. 150.

Many other questions may arise as to the effect of the alteration of instruments, but in the midst of much conflict of authority we confine ourselves to those necessary to the consideration of the principal question presented by the appeal, which is whether the burden is on the party claiming under a deed, on which an erasure or interlineation is apparent, to prove that it was made at the time of or before the execution of the deed, or is the burden on the party attacking the deed to prove that it was made after its execution. The question is important, and many titles may depend on its correct solution, as it will frequently arise after the parties to the transaction are dead. If it is held that the burden is on him who urges that the deed is void because of the erasure or interlineation, it may furnish

the opportunity to the grantee to withhold the deed from registration after he has altered it until the evidence is lost by which the wrongful act can be proven, and thus secure the title to property which was not conveyed to him; and, if it is decided that the burden is on the party claiming under the deed, he may lose property for which he has paid, because of inability to prove that the erasure or interlineation was on the deed when delivered. A brief summary of all the North Carolina cases bearing on the alteration of instruments, which we have been able to find after diligent research, shows that the question has not been settled in this state.

In *Nunnery v. Cotton*, 8 N. C. 222, it was held that any alteration by the obligee in a bond, whether material or not, avoided it. In this case the alteration was the cutting off the name of a witness on the bond. In *Pullen v. Shaw*, 14 N. C. 238, held that an alteration by the obligee in a bond avoids, whether material or not, and by a stranger does so, if material. If no evidence is introduced, the question whether the alteration was made before or after execution is dependent on whether the alteration is favorable to the obligee or not. In *Sharp v. Bagwell*, 16 N. C. 115, held that equity would not relieve one who had cut off the name of a witness from the bond in ignorance of its effect. In *Mathis v. Mathis*, 20 N. C. 55, the action was on a bond for \$12.50, and the proof was that the bond was given for \$7.40. Held, that the plaintiff could not recover \$7.50, but that, if he had sued for \$7.50, he could have recovered that amount, as the alteration was made by a stranger. In *Blackwell v. Lane*, 20 N. C. 247, 32 Am. Dec. 675, held, that the addition of the name of a subscribing witness to a bond, without the consent of the obligor, is not an alteration, because not material. In *Davis v. Coleman*, 29 N. C. 426, held, cutting off the name of one obligor and adding another avoided the bond as to all who did not consent to the change. In *Simms v. Paschall*, 27 N. C. 276, held, that the fraudulent expunging of a credit on a bond was no alteration, because the credit was no part of the bond. In *Smith v. Eason*, 49 N. C. 38, held, that an alteration in a material part of a bond avoids it. In *Dunn v. Clements*, 52 N. C. 59, held, that retracing the name of the obligor, which had faded, does not avoid, although the name was misspelled in retracing; the sound of the name being the same. In *Norfleet v. Edwards*, 52 N. C. 457, the action was on an instrument to pay money, and the signature was that of a partnership. Two seals after the partnership name were erased, and the word, "witness," at the left of the paper, stricken out. The judge charged the jury that the burden was on the plaintiff to show that the erasures were made before or at the time of

the execution. Held error, because, as the paper was signed by the partnership, the erasure was made to fix its character. The court says: "In most, if not in all, the cases in which the contrariety of decision may be seen, it will be observed that the erasures, interlineations, or rather alterations, were made in deeds, negotiable securities, or other instruments, whose nature and character were determined upon or fixed; that is, they either were intended to be, or were, at the time when the alterations were made, deeds or negotiable securities or instruments of some other particular kind. The instrument in the present case differs from them all in this particular: That the alteration was made for the very purpose of determining and fixing its character. With a seal it would be a deed; while, if that were erased, it would become a promissory note. If it were executed as a deed, it could not bind all the partners, but, if made as a promissory note, it would have that effect. \* \* \* Under such circumstances, is it not a fair presumption that the seal was erased at the time when the instrument was given by the one party and accepted by the other?" In *Darwin v. Rippey*, 63 N. C. 319, held, that the addition of the words, "in specie," after "dollars," in a bond, with the consent of the payee and the principal, avoided the bond as to the surety. In *Long v. Mason*, 84 N. C. 16, held, that the addition of the words, "at ten per cent.," in a bond, by the principal, without the knowledge of the payee, a guardian, or of the surety, but with the consent of the ward, avoided the bond as to the surety. In *Respass v. Jones*, 102 N. C. 5, 8 S. E. 770, held, that where the vendee struck out his name in a deed, and inserted that of his wife, to defraud his creditors, no title passed, and a court of equity would not aid him. In *Cheek v. Nail*, 112 N. C. 370, 17 S. E. 80, a husband raised the amount of a bond signed by him and his wife. Held, that the bond was void as to the wife. It was also held that an immaterial alteration would not avoid, such as changing the recited consideration in a mortgage; the description of the debt in the mortgage remaining unchanged. In *Howell v. Cloman*, 117 N. C. 77, 23 S. E. 95, a note and mortgage were for \$500 when signed, and for \$1,000 when registered. Held, that the burden was on the plaintiff to prove that the defendant consented to the change. In *Martin v. Buffalo*, 121 N. C. 35, 27 S. E. 995, held, that the insertion of the name of the attorney and the amount of his fee in a deed to secure creditors, with the consent of the grantor after he signed it, did not avoid the deed, because it was not a clause necessary to the operation of the deed. In *Wetherington v. Williams*, 134 N. C. 279, 46 S. E. 728, the question was one of fact as to the time of the change, and the question of the burden

of proof was not raised. In *Gaskins v. Allen*, 137 N. C. 426, 49 S. E. 919, a married woman while under age signed a deed. After she became of age, she signed another deed to the same party for the same land. Both deeds were registered under one probate, the commission authorizing it being dated before, and the date of probate after, she was 21. A charge was approved, placing the burden on the plaintiff, a subsequent grantee, to prove that the date of the probate had been changed. In *Perry v. Hackney*, 142 N. C. 368, 55 S. E. 289, 115 Am. St. Rep. 741, 9 Ann. Cas. 244, the grantee after probate struck out his name from a deed and inserted the name of his wife, without the consent of the grantor, and it was held that no title passed. The authorities elsewhere are in hopeless confusion as to the burden of proof.

Judge Freeman says, in the note to *Burgess v. Blake*, 86 Am. St. Rep. 128: "Among the almost innumerable decisions, and the conflict of authorities upon the subject of the presumptions arising from alterations apparent upon the face of the instrument, there seems to be but one principle upon which the authorities are in harmony. That is, where an alteration in an instrument is alleged to have been made, and such alteration is not apparent upon the face of the instrument, the burden of showing that the latter has been altered is upon the party who alleges it. This, however, seems to be the single note of harmony. Where the alteration is apparent, the authorities are hopelessly divided as to the presumptions arising from such apparent alteration. Any attempt to reconcile them would be useless, and an accurate classification of their varying views is impossible. They seem to fall, however, into four general classes, each of which is representative of a view opposed to that of the others: (1) One line of cases holds that no presumption arises from an alteration apparent on the face of the instrument, but that the entire question of the time when the alteration was made is for the jury to consider in the light of all the evidence, intrinsic and extrinsic. (2) Another holds that an alteration apparent on the face of the paper raises a presumption that it was made after execution and delivery. (3) A third line of authorities holds that the presumption that the alteration was made after execution arises only where the alteration or the facts surrounding it are suspicious. And finally it is held by another group of courts: (4) That an alteration apparent on the face of the paper is, without explanation, presumed to have been made before delivery. This classification of the authorities is, at best, approximate only, as many of the courts have taken compromise positions holding the presumption to depend upon various matters, such as denial under oath that the paper was executed, the nature

of the instrument; i. e., whether a specialty or not," etc.

[6] As eminent authority may be found for either position, and we have no precedent in this state to guide us, we must adopt that rule which in our opinion accords with the habits and customs of our people, and which will, in the majority of cases at least, be conducive to the settlement of controversies of this character, according to the right. A very large percentage of the deeds executed in this state are never seen by a lawyer until some question is raised as to title. They are written, in many instances, by men who know little or nothing of legal rules, and who are not expert pensmen, and the materials used—pen, ink, paper—are such as are gathered in the household, and frequently not the best. Under these circumstances, a mistake in writing the deed may be expected, and, when discovered, an erasure or interlineation follows naturally, without thought of the consequences. If two kinds of ink are present, they would be used indiscriminately, and the draughtsman would not hesitate to ask one sitting by to make a necessary change.

[7, 8] We do not doubt that 99 per cent. of the erasures and interlineations that appear in deeds are made in this way, and from honest and proper motives, and, if this is true, it would seem to be wise and just to adopt a rule which will tend to preserve and sustain titles acquired by such deeds, although under it an injustice may occasionally result, and in our opinion it is safer, and in accord with the better public policy, to hold, as we do, that the party claiming under a deed is entitled to introduce it in evidence upon proof of its execution, and that the burden is on the party who assails it, on account of erasures or interlineations appearing on its face, to satisfy the jury by the greater weight of the evidence that the erasures or interlineations were made after the execution of the deed. A discussion of the numerous authorities in favor of this rule (and there are, perhaps, as many against it) would be useless, and we content ourselves by reference to a small number selected from many. In *Tatum v. Catomore*, 71 E. C. L. R. 746, Lord Campbell says: "In *Co. Litt.* 225b, it is said that 'of ancient time, if the deed appeared to be rased or interlined in places material, the judges adjudged upon their view, the deed to be void. But of latter time the judges have left that to the jurors to try whether the rasing or interlining were before delivery.' In a note upon this passage in *Hargrave and Butler's Edition of Coke upon Littleton*, it is laid down: 'Tis to be presumed that an interlining, if the contrary is not proved, was made at the time of making the deed.' This doctrine seems to us to rest upon principle. A deed cannot be altered, after it is executed, without fraud or wrong; and the presumption is

against fraud or wrong." This language was quoted with approval in *Little v. Hernndon*, 77 U. S. 26, 19 L. Ed. 878, and the court says, after citing *Tatum v. Calomore*, supra: "In the absence of any proof on the subject, the presumption is that the correction was made before the execution of the deed." And this last case was approved in *Hanrick v. Patrick*, 119 U. S. 158, 7 Sup. Ct. 147, 30 L. Ed. 396, the court, after discussing the charge of the judge, saying: "At any rate, the presumption was that the erasure was made before the execution of the deed." In *Wickes v. Caulk*, 5 Har. & J. (Md.) 41, the court says: "It is incumbent on the party who wishes to avoid a deed by its erasure to prove that the alteration was made after its execution and delivery." And in *Hopkins on Real Property*, 429, it is said: "Where alterations or interlineations are present in a deed, the presumption is that they were made before the deed was delivered, though there are cases holding the contrary." To the same effect, see *Hagan v. Ins. Co.*, 81 Iowa, 330, 46 N. W. 1114, 25 Am. St. Rep. 493; *Neil v. Case*, 25 Kan. 210, 37 Am. Rep. 259; *Wilson v. Hayes*, 40 Minn. 531, 42 N. W. 467, 4 L. R. A. 196, 12 Am. St. Rep. 761; 2 Cyc. 233, 235.

[9] This presumption is greatly strengthened by the facts appearing in this record, that the deeds were registered in 1885, and until this day neither the grantor nor any one claiming under him has attacked their integrity; and the defendants have been in the actual occupation of parts of the land since 1879. The Supreme Court of the United States said in *Malarin v. U. S.*, 68 U. S. 282, 17 L. Ed. 594, when speaking of an alteration in a deed, that the fact that no suspicion had been suggested for 18 years was entitled to no little weight.

[10] The jury will, of course, have the right, in determining when the erasure or interlineation was made, to consider any difference in ink and handwriting and other relevant circumstances, and, if the deed has been withheld from registration, this circumstance, in the absence of explanation, would be entitled to consideration, and should have more or less weight according to the length of time elapsing and viewed in connection with any change in the condition of the parties to the deed.

[11] If, however, the presumption was against the deed, it is doubtful if the plaintiff is in a position to take advantage of it, as it does not appear that he claims under the grantors in the deed. Judge Dillon says, in 2 Cyc. p. 189: "If the parties affected by a change in an instrument do not complain thereof, others, who are not parties to the instrument or affected by the change, cannot ordinarily set up the change, unless there is evidence of fraud between the parties, to the injury of the creditors. The alteration must relate to the parties to the particular instrument altered." See, also, *Hochmark v.*

*Richler*, 16 Colo. 263, 26 Pac. 818; *Logue v. Smith*, *Wright* (Ohio) 10; *Asylum v. Hauns* (Ky.) 64 S. W. 643.

[12] The exceptions to evidence cannot be sustained. If it be conceded that the answers of the surveyor to questions asked him were incompetent, it appears that he afterwards testified, without objection, that the deeds of the defendant covered the land claimed by her, which is all that was elicited by the examination objected to.

[13, 14] In our opinion, the plat of the division of the lands of Elisha Wicker, father of the plaintiff, and the mortgage of the plaintiff to Elisha Watson, of date March 20, 1891, were properly admitted, but, if not, their introduction did not prejudice the plaintiff, as they were offered for the purpose of showing that Juniper branch was the western boundary claimed by the plaintiff, and he admitted on cross-examination that Juniper branch was one of his lines in the division of his father's land.

[15, 16] The objection to the form of the judgment is well taken. The finding of the jury establishes the fact that the plaintiff is not the owner of any part of the land in controversy, and the defendants allege, in their answer, that they are in possession of all the lands which they claim. The plaintiff must recover upon the strength of his own title, and, upon failure of proof by him, the jury may well find that he is not the owner of the land, although satisfied that the defendant has no title. There is no fact admitted by the pleadings or found by the jury which will support an affirmative judgment in favor of the defendants, and the judgment must be modified by striking out the clause, "but that the defendants are the owners and entitled to the possession of said lands," and, as thus modified, it is affirmed.

[17] The judgment will, of course, operate as an estoppel on the plaintiff to prevent the further prosecution of an action on his behalf.

Modified and affirmed.

CLARK, C. J. (dissenting). It is reasonably well settled, though contrary to the ancient decisions, that, when there is an immaterial alteration by erasure or interlineation in a deed or other instrument, it does not vitiate. It is also settled that whether an interlineation or erasure is material or not is a question of law for the court. When a material erasure or interlineation appears on the face of an instrument, or is shown by proof dehors, whether the burden is upon the party that produces it to account for it, or whether the burden is upon the other party to show that it took place after the execution of the instrument, is a matter as to which the decisions outside this state are in conflict. In many cases the rule is laid down that: "Where a written instrument shows an interlineation or erasure upon its face, the presumption, in the absence of evidence,

is that it was made after execution, and the burden is upon the parties claiming under the instrument to account for the alteration." 3 Enc. L. & P. 478; 2 A. & E. (2d Ed.) 276; 2 Cyc. 238, and many cases cited in those volumes. In this state we have but two decisions expressly in point, and they are in accord with the above citations. In *Dunn v. Clements*, 52 N. C. 60, it is said: "Wherever the alteration is a material one, a presumption of fraud arises. But it is, we conceive, a rebuttable presumption, but, where the alteration is not material, the instrument will not be affected thereby unless it be shown that the alteration was made with an intent to defraud. 2 Pars. Cont. 226 (notes); *Adams v. Frye*, 3 Metc. (Mass.) 103." In *Norfleet v. Edwards*, 52 N. C. 457, the court cites with approval the following from 2 Pars. Cont. 228: "In the absence of explanation, the evident alteration of any instrument is generally presumed to have been made after the execution of it; and consequently must be explained by the party who relies on the instrument, or seeks to take advantage from it. Such is the view taken by many authorities of great weight. But others of perhaps equal weight hold that there is no such presumption; or, at least, that the question whether the instrument was written as it now stands, before it was executed, or has since been altered or whether as so altered it was done with or without the authority or consent of the other party are questions which should go to a jury, to be determined according to all the evidence in the case." Our court then adds: "Very many cases are referred to in the note to that page which fully support the remarks of the learned author in the text." See, also, *Dunn v. Clements*, ante 58. The rule in *Dunn v. Clements*, thus cited and approved in *Norfleet v. Edwards*, is not only the precedent in this state, but it would seem to comport with reason. The natural and orderly condition of a paper is that it should not bear on its face, or be shown by proof to have, any material alteration or erasure. It is out of the ordinary course, and the party who produces the instrument should account for them. It will be almost impossible for the other party to show when or how the erasures were made. The party in possession has, or should have, knowledge and be able to show that the instrument when received by him already had such erasures or alterations. If prudent, he would not accept such instrument without a contemporaneous entry duly witnessed that they were on the instrument when it was delivered to him. This view has additional weight as to a deed now, since our registration laws require prompt registration. If the deed is promptly registered, notice of any alteration or erasure may be conveyed to any one examining the record, whereas, if the instrument is

withheld from registration, it is in the power of the grantee to make any alteration as to the boundaries, courses, and distances, or acreage as he may think proper, and it will be out of the power of the grantee when, after years have elapsed, the deed is produced in evidence upon a recent registration, to prove that the alterations and erasures were made after delivery. It is always in the power of the grantee to protect himself against the charge that a material erasure or interlineation was made after execution by requiring a memorandum stating that they were in the instrument at the time of the execution thereof. But the grantor cannot thus protect himself against alterations and erasures made after the execution, except by requiring proof of the grantee when he produces the instrument in evidence. As to negotiable instruments, though they cannot be held back as a deed can be held from registration, yet as to them the law is well settled, and the burden is on the holder to show that any alterations were made in such instrument at or before its execution, and no prudent bank will accept such paper in the ordinary course of dealings without such proof. It has been the general understanding in this state that material alterations by erasure or interlineation in an instrument, especially in a deed, must be noted and witnessed at the time of the delivery. *Dunn v. Clements*, 52 N. C. 60, has been understood to be the rule in this state. But, if it is understood that this safe precedent is no longer the law, we may well apprehend that there will be a flood of cases in which instruments have been materially altered after delivery, and are withheld from registration till the grantor or other witnesses who can prove the fact have passed beyond the reach of the court, by death or otherwise. The grantee remains in possession. It should be in his power always either to refuse a conveyance containing material alterations or require a contemporary note thereof on the instrument. If he does not do so, and especially if he withholds the deed from registration, it is but fair that the burden should be upon him to account for such alterations or erasures.

(159 N. C. 121)

## IVIE v. BLUM &amp; BITTING et al.

(Supreme Court of North Carolina. May 2, 1912.)

## 1. PARTNERSHIP (§ 181\*)—ASSIGNMENT BY PARTNER—RIGHTS OF FIRM CREDITORS.

Where a person assigns his interest in the firm to secure his individual debt, and the assignee permits the business to go on in its ordinary course, the firm creditors are entitled to priority over the assignee.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 316, 317; Dec. Dig. § 181.\*]

## 2. PARTNERSHIP (§ 210\*)—RECEIVERS—RIGHTS OF CREDITORS.

Where a receiver of a firm continued the business with the consent of the firm creditors and incurred debts in so doing, the creditors of the receiver, including the landlord of the business premises, were entitled to priority over the firm creditors.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. § 403; Dec. Dig. § 210.\*]

Appeal from Superior Court, Forsyth County; Lyon, Judge.

Action by J. W. Ivie against Blum & Bitting and others. From a judgment for plaintiff, defendants appeal. Affirmed.

Manly, Hendren & Womble, for appellants. D. H. Blair, W. V. Hartman, and J. E. Alexander, for appellee.

CLARK, C. J. In 1906 C. R. Bitting bought the half interest of Fleming in the firm of Blum & Fleming, and to obtain money to pay for the same executed a mortgage on the half interest thus acquired, and the firm became Blum & Bitting. In May, 1907, Blum & Bitting made a deed of assignment to Charles E. Shelton. Later this suit was instituted and a receiver was appointed. W. A. Whitaker and Mrs. L. P. Bitting were indorsers on the note of C. R. Bitting for \$1,600, for which the aforesaid mortgage was executed. They paid off the note to the bank, and seek to foreclose the mortgage which was given to secure them by reason of their indorsement. The creditors of Blum & Bitting and W. A. Whitaker and Mrs. L. P. Bitting consented for C. E. Shelton, assignee, to continue the business, which he did with their consent for more than a year. While so conducting the business, C. E. Shelton contracted sundry debts. In December, 1908, this suit was brought and a receiver appointed therein. He sold the property of the firm, which brought \$1,600. The case was referred to a referee to state an account and determine the priorities of the different creditors claiming the fund derived from the sale of the property. The referee found that the creditors of C. E. Shelton, assignee, while continuing the business with the consent of the creditors, were entitled to the first lien; that the creditors of Blum & Bitting were entitled to the second lien; and that W. A. Whitaker and Mrs. L. P. Bitting, claiming by virtue of their mortgage on the undivided one-half interest of Bitting in the business, came in after the above two classes of creditors.

[1] In *Daniel v. Crowell*, 125 N. C. 521, 34 S. E. 685, the court cites with approval from *Bank v. Fowle*, 57 N. C. 8, as follows: "Where the interest of one partner in the property of the firm is assigned by him as security for his individual debt, and the assignee permits the business to go on in its ordinary course, such security becomes subject to the fluctuations of the business, and upon the subsequent dissolution he is only

entitled to what remains to such partner after the payment of the debts of the firm." Bates on Partnership, § 186, says: "But his (the partner's) interest, mortgaged or sold, is subject not only to existing liabilities, but also to subsequent equities and the claims of subsequent creditors and the fluctuations of business. Hence, though the partnership debts are later in date than the mortgage or assignment of the share, yet the mortgagee gets only the interest in the surplus as of the date of its ascertainment or of the foreclosure, and not as of the date of its execution or default."

[2] It is equally well settled that the creditors in the indebtedness incurred by Shelton in continuing the business with the consent of the prior creditors of the firm are entitled to priority over such creditors. 3 A. & E. Enc. 117; *Sherrill v. Shuford*, 41 N. C. 228; *Clark v. Hoyt*, 43 N. C. 222. In this class of preferred debts was properly allowed the rent to Grogan for the buildings and grounds where the business was conducted by Shelton.

The report of the referee was properly confirmed by the court.

Affirmed.

(159 N. C. 321)

## WILLIAMSON et al. v. BITTING et al.

(Supreme Court of North Carolina. May 1, 1912.)

## 1. MORTGAGES (§ 40\*)—INSTRUMENT AMOUNTING TO MORTGAGE.

An instrument, in form a chattel mortgage, whereby a debtor, to secure his creditor, conveyed personal property described, and all of the money and other property due or to become due from his father's estate, and an instrument whereby he assigned to the creditor his interest in the estate to secure the same debt and an additional debt, and to save the creditor harmless as an indorser, and authorizing the creditor to retain so much of the interest in the estate as is necessary to pay the indebtedness and for the other purposes specified, are mortgages passing the interest of the debtor in his father's estate, under the rule that the law will not allow a plain intention to be defeated by omissions of technical words to express it, where equivalent terms are employed.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 114; Dec. Dig. § 40.\*]

## 2. MORTGAGES (§ 175\*)—VALIDITY AS AGAINST CREDITORS OF MORTGAGOR.

An instrument, sufficient as a mortgage to pass title, does not affect any land in a county in which the mortgage was not recorded as against creditors of the mortgagor.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 417, 418; Dec. Dig. § 175.\*]

## 3. APPEAL AND ERROR (§ 848\*)—QUESTIONS REVIEWABLE—FINDINGS OF REFEREE.

The court on appeal from a judgment on the report of a referee can only review the facts found, in case there is no evidence to support them, or in case they are based on incompetent evidence; but it cannot find additional facts.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3372-3376; Dec. Dig. § 848.\*]



**4. MORTGAGES (§ 175\*)—STATUTES—APPLICABILITY.**

An instrument in form a chattel mortgage, whereby a debtor, to secure his creditor, conveyed personal property described, and all money or other property due or to become due from his father's estate, and another instrument, whereby he assigned to the creditor all his interest in the estate to secure the same debt and an additional debt, and to save the creditor harmless as indorser, and authorizing the creditor to retain so much of the interest in the estate as is necessary for the specified purposes, are governed by Revisal 1905, § 982, providing that no mortgage shall be valid as against creditors, except from the registration of the mortgage in the county where the land is located, and not by section 1040, providing that a chattel mortgage shall be good when the same shall be registered, but no sale thereunder shall be made without giving a specified notice.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 417, 418; Dec. Dig. § 175.\*]

**5. EXECUTORS AND ADMINISTRATORS (§ 178\*)—ALLOWANCE TO WIDOW OF TESTATOR—VALIDITY.**

Where a widow was entitled under the will of her deceased husband to proper support, and the amount paid her was a reasonable sum for her support, an allowance of the amount paid was proper.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 668; Dec. Dig. § 178.\*]

**6. MORTGAGES (§ 376\*)—RIGHTS OF MORTGAGEE.**

Where a mortgage covered the mortgagor's entire interest in the estate of his father, the mortgagee was entitled to the fund realized from a sale of the property of the estate and to the interest accrued on the fund to the extent that the same was necessary to pay the indebtedness secured; but the interest on the fund would not be applied to the debt until there was a final settlement.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 1125-1132; Dec. Dig. § 376.\*]

**7. PARTITION (§ 114\*)—COMMISSION—STATUTORY PROVISIONS.**

Where a sale is a sale for partition and not in the execution of any testamentary trust by an executor, the commissioner or executor making the sale must be allowed commissions only at the rate prescribed by Revisal 1905, § 2792.

[Ed. Note.—For other cases, see Partition, Cent. Dig. §§ 440-449; Dec. Dig. § 114.\*]

**8. ASSIGNMENTS FOR BENEFIT OF CREDITORS (§ 8\*)—INSTRUMENT CREATING MORTGAGE.**

An instrument executed by a debtor to secure a bona fide indebtedness is a mortgage, and not an assignment for the benefit of creditors, where it does not cover, or purport to cover, the debtor's entire estate.

[Ed. Note.—For other cases, see Assignments for Benefit of Creditors, Cent. Dig. § 7; Dec. Dig. § 8.\*]

Appeal from Superior Court, Forsyth County; Lyon, Judge.

Consolidated actions by R. L. Williamson, by R. C. Click, and by Jessie B. Fields, against Casper R. Bitting and others. From a judgment for defendants, plaintiffs appeal. Modified and affirmed.

L. M. Swink and D. H. Blair, for appellants. Manly, Hendren & Womble, for appellees.

**WALKER, J.** These are actions brought by the plaintiffs, as creditors of Casper R. Bitting, to recover the amount due by him to them. They were consolidated, and an order was then made, by which the cause was referred to Mr. J. E. Alexander, who afterwards reported his findings of fact and conclusions of law to the court. It appears therefrom that attachments were issued in the several suits and levied on the interest of Casper R. Bitting in the lands devised by the will of his father and situated in Forsyth and Yadkin counties, and the funds due to him under said will were garnished by writs or notices duly served upon W. A. Whitaker and L. P. Bitting, executors of the will.

[1] Before these actions were brought, Casper R. Bitting became indebted to W. A. Whitaker and L. P. Bitting for money loaned in the sum of \$1,600, and, in order to secure payment of the same, he executed to them a paper writing, which was in the form of a chattel mortgage, and conveyed to them certain articles of personal property described therein, and also all of the money and other property "due, or to become due, from his father's estate," and afterwards, but before these suits were commenced, he executed another instrument, by which he assigned and transferred to them all his interest in the estate, to secure the payment of the said sum of \$1,600 and an additional indebtedness of \$275, and for the purpose of saving them harmless as his indorsers, and authorized them to retain so much of his interest in the estate as was necessary to pay the said indebtedness and for the other purpose recited in the paper. These instruments were proven and registered in Forsyth county before these suits were commenced, but were never registered in Yadkin county. The first instrument is called therein a "mortgage," and contains a power of sale, authorizing the mortgagees to sell the property at public auction, after advertising the same, and to apply the proceeds of sale to the payment of the debts. The defendants W. A. Whitaker and L. P. Bitting interpleaded and, as executors, answered the notice of garnishment, denying that they held any property of Casper R. Bitting, subject to plaintiffs' attachment or garnishment, and as individuals claimed the entire interest of Bitting in his father's estate, under the instruments executed by him to them. It was agreed between the parties that the property should be sold by W. A. Whitaker, as commissioner, free and clear of all liens, and the proceeds held by him, subject to the rights and interests of the parties herein, which should not be impaired by reason of the sale; the fund being substituted for the property which had been sold. The property was sold by the commissioner, and there is now a fund of \$1,527.88, which is to be

disposed of according to the rights and interests of the parties therein.

We are of the opinion that the two instruments executed by Casper R. Bitting to W. A. Whitaker and L. P. Bitting, with the declared purpose of securing the debts, are sufficient to pass his entire interest in the estate of his father. They were informally and inartificially drawn; but the intent to mortgage all he had in his father's estate, whether real or personal property, is perfectly evident. The law will not allow the plain intention to be defeated by any omission to use technical words to express it, if equivalent terms are employed for the purpose. This we held in *Triplett v. Williams*, 149 N. C. 394, 63 S. E. 79, 24 L. R. A. (N. S.) 514; *Gudger v. White*, 141 N. C. 513, 54 S. E. 386; and very recently in *Acker v. Pridgen*, 74 S. E. 335, decided at this term. Judge Story, in *Tierman v. Jackson*, 5 Pet. 580, 8 L. Ed. 234, said that: "Whatever may be the inaccuracy of expression, or the inaptness of the words used in an instrument, in a legal view, if the intention to pass the legal title to property can be clearly discovered, the court will give effect to it, and construe the words accordingly." In *Hutchins v. Carleton*, 19 N. H. 487, it was held that the words "assign" and "make over" are as effectual, when a consideration is expressed, to raise a use or pass an estate, as many other forms that have been sanctioned by the courts as sufficient for the purpose. Many cases are cited in the brief of defendant's counsel in that case, to which the court refers as fully sustaining the liberal and practical rule which has generally been adopted for the construction of deeds. *Patterson v. Carneal*, 3 A. K. Marsh. (Ky.) 618, 13 Am. Dec. 208; *Chapman v. Charter*, 46 W. Va. 769, 34 S. E. 768; *Gordon v. Haywood*, 2 N. H. 402; 13 Cyc. 542, 543, and notes. "Attempts have been made to establish artificial rules for discovering the intention, and the offices of terms of general and particular description defined. The truth is, no positive rule can be laid down; for as each subject differs in some respects from another, and each writer will be more or less precise or perspicuous in expressing himself, the whole instrument is to be looked at, and the inquiry then made: Can it be found out, from this, what the party means?" *Proctor v. Pool*, 15 N. C. 370.

[2] While we decide that the writings are sufficient to pass the title or interest of Casper R. Bitting, they will not affect any land in Yadkin county, as they were not registered there.

[3] Plaintiffs say that, while the referee held that the unsold lands were; for this reason, subject to the lien of the attachments, he made no ruling as to lands which had been sold; but there is no finding of fact in the report upon which to base this exception, and we cannot find any additional facts. We can only consider those which were reported

by the referee and adopted by the judge. *Frey v. Lumber Co.*, 144 N. C. 759, 57 S. E. 464; *Harris v. Smith*, 144 N. C. 439, 57 S. E. 122; *Cotton Mills v. Cotton Mills*, 115 N. C. 475, 20 S. E. 770; *Pell's Revisal*, § 525, and note. If a fact is found of which there is no evidence, or upon incompetent evidence, we can review the ruling below, because there is a question of law involved. But there are no facts before us upon which we can make any ruling. It seems that the referee reported that the plaintiffs are entitled to enforce their attachment liens against certain lands in Yadkin county; but it does not appear, by any finding of fact, whether or not those lands are sufficient in value to pay their claims. If they are, nothing has been lost by the adverse decision of the referee, which was approved and confirmed by the court.

[4] The two paper writings or mortgages were properly registered. The law does not designate in what particular book instruments of this character shall be recorded. If they were actually registered and indexed, it is sufficient. The provision in regard to chattel mortgages (*Revisal*, § 1040) does not determine the mode of registration. That was intended simply to provide an inexpensive form of chattel mortgage. This case is governed by *Revisal*, § 982.

[5] The plaintiffs complain that the executors have paid to the widow of J. A. Bitting \$3,000 without authority, and that Casper R. Bitting is entitled to one-tenth of this amount so wrongfully misapplied. But the referee finds as a fact that the widow, under J. A. Bitting's will, was entitled to "a proper support," and that the amount paid to her, during several years and aggregating \$3,000, was a proper and reasonable support for her, and did not exceed what was necessary for that purpose. This being so, we do not see why the allowance of this sum, in stating the account, was not correct.

[6] As we have held that the instruments executed by Casper R. Bitting to W. A. Whitaker and L. P. Bitting are, in law, sufficiently definite in their language to constitute them mortgages upon his entire interest in J. A. Bitting's estate, which would entitle them to receive the fund of \$1,527.88 realized from the sale of the property under the consent order in this case, they are entitled also to the interest accrued on the fund, to the extent that it is necessary to pay the indebtedness secured by those papers. The exception as to the interest on that fund, amounting to \$144, is therefore overruled; but the interest on the fund will not be applied to the debts until there is a final settlement in this suit, and if it has already been applied, it must be restored.

[7] The defendants excepted to the report of the referee, because he had allowed W. A. Whitaker, as commissioner, on the proceeds of the sale of the land, more than the amount fixed by the statute for sales in partition pro-

ceedings. This was a sale for partition, and not in the execution of any trust by the executors. It is such in form and substance, and the commissioner or executors should be allowed commissions only at the statutory rate. Revisal, § 2792; Ray v. Banks, 120 N. C. 389, 27 S. E. 28. This exception is sustained.

The other exceptions are covered by the ruling that the two writings, given by Casper R. Bitting to Whitaker and Bitting, are valid as mortgages to the extent we have already stated, and the said defendants are entitled to apply so much of the mortgagor's interest in his father's estate as will be necessary for the payment of the indebtedness secured by them, but no more.

[8] The paper writings executed by Casper R. Bitting to secure his indebtedness are bona fide mortgages, and not assignments for the benefit of creditors. They do not cover, or purport to cover, his entire estate, but only a part thereof; or at least it does not appear that he did not have other property than that described in them. Odom v. Clark, 146 N. C. 544, 60 S. E. 513.

The judgment will be modified as herein indicated; each party to pay his own costs in this court.

Modified.

(159 N. C. 494)

**BRADY v. CITY OF RANDLEMAN et al.**

(Supreme Court of North Carolina. May 1, 1912.)

**1. MUNICIPAL CORPORATIONS (§ 797\*)—INJURIES IN STREETS—NEGLIGENCE—FAILURE TO LIGHT STREETS.**

Where the street in which plaintiff was injured by being struck by a vehicle, because, as claimed, the streets of the city were not properly lighted, was in good condition, there was no breach of duty by the city giving right of action in failing to sufficiently light the streets.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1656; Dec. Dig. § 797.\*]

**2. ELECTRICITY (§ 16\*)—NEGLIGENCE OF POWER COMPANY—LIABILITY.**

A power company, under a contract to light the streets of a city only at the places designated by the city authorities, was not negligent in not furnishing lights, where not requested by the city to do so.

[Ed. Note.—For other cases, see Electricity, Cent. Dig. § 9; Dec. Dig. § 16.\*]

Appeal from Superior Court, Randolph County; Daniels, Judge.

Action by B. B. Brady against the City of Randleman and another. From a judgment of nonsuit, plaintiff appeals. Affirmed.

E. Moffitt and J. T. Brittain, for appellant.  
H. M. Robins, for appellees.

**PER CURIAM.** There was evidence tending to show that on July 5, 1909, about 9 o'clock p. m., plaintiff, pursuing his regular occupation, was taking the United States

mail in a hand car from the post office to the railroad station in the town of Randleman, and at the time was on Depot street, in said town, when he was run into by a horse and buggy, driven by a third person, and seriously injured. The ordinance prohibited carts of the kind from being on the sidewalk; and plaintiff, with his cart, was, at the time of the injury, in the street proper or driveway.

[1] It appears that the defendant Power Company was under contract to supply lights for the town at a specified rate; the poles and lights to be erected and placed under the direction and supervision of the board of aldermen and the street committee. The lights to be turned on not later than half an hour after sundown, and to be kept in action "until 12 o'clock, except on nights when the moonlight would render the electric lights useless." That the arrangement was just being entered upon, and all the lights required had not been placed. That Main street was lighted to the depot or station, and one of the lights on that street was as near as 75 feet; but the effect was very much destroyed by the intervening buildings. That a light was put on the street in question on the night following the injury. Plaintiff himself testified that the street where the injury occurred was in good condition. "Macadamized and all right," is the language of the witness, and the only negligence imputed was the absence of proper lights. Without considering the allegations of contributory negligence alleged against the plaintiff, we think that his honor made correct decision in directing a nonsuit. Our cases hold that the absence of lights in a town, even when power has been conferred upon the authorities to light the streets, is not negligence per se, but is only a relevant circumstance as to whether the streets, at a given place, are in a reasonably safe condition. Johnson v. City of Raleigh, 156 N. C. 269, 72 S. E. 368; White v. City of New Bern, 146 N. C. 447, 59 S. E. 992, 13 L. R. A. (N. S.) 1166, 125 Am. St. Rep. 476. And a perusal of these cases and the authorities cited will further show that, even when the lighting of the streets has been undertaken and entered on, the number of lights required and their placing are left largely to the discretion of the city authorities.

[2] Applying the principle, and on the facts in evidence showing there was a firm, broad, smooth way, in good condition, we concur in the view that no breach of duty was shown against the city, and the Power Company, which could only place the lights as required and directed by the city, is necessarily without fault. Nor is there evidence in the record that justifies or permits a finding that there was a breach of contract on the part of the Power Company, giving plaintiff a right of action against said company on

the principle upheld and applied in *Gorrell v. Water Co.*, 124 N. C. 328, 32 S. E. 720.

There is no error; and the judgment dismissing the action is affirmed.

(159 N. C. 78.)

**SOUTHERN PANTS CO. v. ROCHESTER GERMAN INS. CO. et al.**

(Supreme Court of North Carolina. May 1, 1912.)

**INSURANCE (§ 328\*)—FIRE POLICIES—FORFEITURE—"CHANGE OF INTEREST, TITLE, OR POSSESSION."**

Appointment of a receiver for a corporation is not ground for forfeiting a fire policy issued to the corporation, as a change in interest, title, or possession of the property insured, though Revisal 1905, § 1224, provides that title to property shall vest in a receiver on his appointment.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 794-822, 825; Dec. Dig. § 328.\*]

Appeal from Superior Court, Mecklenburg County; Adams, Judge.

Action by the Southern Pants Company against the Rochester German Insurance Company and others. Judgment for plaintiff, and defendants appeal. Affirmed.

Maxwell & Keerans, for appellants. Burwell & Cansler, for appellee.

**CLARK, C. J.** This action is to recover against nine insurance companies for loss admitted by them to have been sustained in the destruction by fire of a stock of merchandise. The only controversy raised is as to the validity of said policies by reason of the fact that, a receiver having been appointed of the Southern Pants Company prior to the fire, the defendants contend that he was in actual possession of the property at the time of the fire, and thus they claim the insurance was forfeited under the clause in the policies against change in the "interest, title, or possession" of the property insured.

The mere appointment of a receiver does not have the effect to work such a change either in the interest or title of property as will forfeit insurance thereon under the nonalienation clause in the standard fire insurance policies. This has often been decided. In *Thompson v. Insurance Co.*, 136 U. S. 287, 10 Sup. Ct. 1019, 34 L. Ed. 408, the court held: "The title to the property in the hands of a receiver is not in him, but in those for whose benefit he holds it." Nor in a legal sense is the property in his possession. It is in the possession of the court by him as its legal officer. In *Insurance Co. v. Bartlett*, 91 Va. 305, 21 S. E. 476, 50 Am. St. Rep. 832, the court said: "The utmost effect of the appointment of a receiver is to put the property from that time into his custody as an officer of the court, for the benefit of the party ultimately proved to be entitled, but not to change the title or even the

possession in the property, citing *Bank v. Bank*, 136 U. S. 236 [10 Sup. Ct. 1013, 34 L. Ed. 341]." In *Insurance Co. v. Baker*, 94 Md. 545, 51 Atl. 184, the court held that the appointment of a receiver does not have the effect to invalidate a policy under the non-alienation clause. In *Vance on Insurance*, § 161, it is said: "The appointment of a receiver does not constitute such a change of interest as violates this condition (the alienation clause in the standard policy), nor does a change of receivers, when the policy was procured by a former receiver."

The defendants, however, strenuously contend that this was changed by Rev. 1224, which vests the title of the property in a receiver upon his appointment, and divests it out of the corporation. That section by its terms applies only to insolvent corporations, which is not the case here. But, even if it were insolvent, we do not think that the meaning of the section is to make the receiver the sole owner of the corporate property. He is vested, it is true, with the title, but that is for the purpose of executing the trust, and is in no way such an alienation as impairs the validity of an insurance policy. The receiver has the legal title, but he holds it for the benefit of the equitable owner, the corporation, whose property is to be administered by him under the orders of the court. In *Insurance Co. v. Bartlett*, supra, the court says: "This condition in the policy against alienation refers only to such sale or disposition of the property as caused all interest of the assured in, or control over, the property to cease." This court has always looked upon the receiver of a corporation as simply an agent of the court to hold and manage the property under its direction. In *Farris v. Receivers*, 115 N. C. 600, 20 S. E. 167, and *Grady v. Railroad*, 116 N. C. 952, 21 S. E. 304, the court held: "Service upon the receivers is service upon the corporation as fully as if made upon the president and superintendent, whose duties they are temporarily discharging." The receiver, therefore, is simply temporarily substituted for the president or other manager of the corporation. As to the possession, it was said in *Gordon v. Insurance Co.*, 120 La. 442, 45 South. 386, 15 L. R. A. (N. S.) 827, 124 Am. St. Rep. 434, 14 Ann. Cas. 886: "It is universally held that the mere taking possession of property by a receiver is not a change of possession to avoid the policy." Numerous authorities can be cited to the above effect. We think it clear that, while the appointment of a receiver vests the legal title in him (Rev. 1224), he holds the same, and takes possession also, as the agent of the court for the beneficial owner, under the direction of the court. Such appointment in no wise invalidates the policy under the provision of the nonalienation clause

in the standard policies. The interest of the owner is in no wise changed by the appointment of a receiver. The legal title and possession is held by him for the owner and the property is to be administered under the orders of the court. There is no alienation from the owner till the property is sold and sale is confirmed. Till then the property still belongs to the insured.

No error.

(159 N. C. 119)

**GREENE & KAHL v. A. F. MESSICK GROCERY CO.**

(Supreme Court of North Carolina. May 1, 1912.)

**1. EVIDENCE (§ 183\*)—BEST AND SECONDARY—DESTRUCTION OF WRITING.**

Where it is admitted that a telegram was originally in writing and in the office of the telegraph company, and accessible if in existence, parol proof of its contents was inadmissible without proof of a search made and a failure to find it by the officer having such papers in charge.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 605-637; Dec. Dig. § 183.\*]

**2. EVIDENCE (§ 179\*)—BEST AND SECONDARY—CUSTODY OF WRITING OUTSIDE STATE.**

Though a copy of a telegram kept in the files of a telegraph company was sent to its headquarters outside the state, a party seeking to prove its contents by parol is not relieved from a duty to show its destruction or nonexistence.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 595-599; Dec. Dig. § 179.\*]

Appeal from Superior Court, Forsyth County; Daniels, Judge.

Action by Greene & Kahl against the A. F. Messick Grocery Company. From a judgment for plaintiffs, defendant appeals. Affirmed.

Watson, Buxton & Watson, for appellant. Louis M. Swink, for appellees.

**HOKE, J.** This was an action to recover \$400 as money had and received to plaintiffs' use, and was before this court on a former appeal. 153 N. C. 409, 69 S. E. 412. From a perusal of that case, it will appear that the right of plaintiffs to recover was properly made to depend on whether defendant company, resident at Winston, N. C., had sent a telegram to plaintiffs at St. Louis, Mo., accepting a proposal of plaintiffs' to rent a hotel from defendant on terms contained in a letter from plaintiffs to defendant company. On the present trial, defendant testified that on receipt of plaintiffs' letter, containing the proposal, he had gone to the Western Union office, and sent a telegram; the message having been written and left with the company for transmission. In reference to this message and its contents, it appeared that at the time of this occurrence, written messages, the kind in question, were kept at the local office in Winston for six months, and were then ei-

ther destroyed or sent to Richmond, Va., the headquarters of the company for this division; that defendant had applied to the office at Winston, and failed to get the message, and had then gone to Richmond, Va. and made inquiry, and failed to procure it there, having applied for it at company's offices. On this testimony, the court, being of the opinion that the loss of the written message had not been satisfactorily established, declined to allow witness to give the contents of the message to the jury, and defendant excepted. It was urged by plaintiffs that this ruling of his honor should be sustained for the reason that the contents of the supposed message were nowhere sufficiently disclosed to render its exclusion a material circumstance, but, conceding that it is otherwise, we are of opinion that the ruling of the court must be upheld for the reason given by his honor that the loss of the message has not been shown so as to permit parol evidence of its contents.

[1] As heretofore stated, the contents of the telegram were a material part of the contract, directly involved in the issue, and, it having been admitted that the one referred to was originally in writing and accessible if in existence, these contents came within what is known and frequently referred to as the "best evidence" rule, forbidding the reception of parol testimony until the loss of the writing has been satisfactorily established.

[2] It is held with us that the operation of this rule is not necessarily affected by the fact that the proper custody of the written paper is no longer within the jurisdiction of the court. We find no testimony showing that search had been made for the written message at Richmond, Va., by the officer or agent of the company having such papers in his care, and, on the facts in evidence, the decision of his honor on the question presented is fully supported by authority here and elsewhere. *Avery v. Stewart*, 134 N. C. 287, 46 S. E. 519; *Blair v. Brown*, 116 N. C. 631, 21 S. E. 484; *Justice v. Luther*, 94 N. C. 793-797.

This judgment in plaintiffs' favor is therefore affirmed.

No error.

(159 N. C. 272)

**HOLT et al. v. ZIGLAR et al.**

(Supreme Court of North Carolina. May 1, 1912.)

**1. WILLS (§ 355\*)—FRAUD—ACTS CONSTITUTING.**

A will, whereby testator devised two-thirds of his real estate to his son and to the children of his two daughters, and the remainder to them on the death of his wife, was admitted to probate in common form. The son instituted a suit against the daughters and husbands and their minor children to set aside the will. A citation was served on the children after the commencement of the term and three

or four days before the trial. The bond for costs, executed by the son, was signed by one of the husbands, and the husbands, as guardians ad litem of the children, answered, consenting to the setting aside of the will. *Held*, that the judgment vacating the will was procured by legal fraud perpetrated on the children, who were not effectively made parties to the suit; and they could sue to set aside such judgment.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 811-819; Dec. Dig. § 355.\*]

## 2. WILLS (§ 340\*)—PROBATE IN COMMON FORM—SUIT TO SET ASIDE.

An issue of *devisavit vel non* cannot be determined by consent of the parties, some of whom are infants.

[Ed. Note.—For other cases, see Wills, Dec. Dig. § 340.\*]

Appeal from Superior Court, Rockingham County; Lyon, Judge.

Action by Elizabeth Holt and others against S. B. Ziglar and others. From a judgment for defendants, plaintiffs appeal. Reversed, and new trial ordered.

Civil action tried in the superior court of Rockingham county, November term, 1911; his honor, Judge Lyon, presiding. Fourteen issues were submitted to the jury by his honor; but, as the finding of the jury in response to the first issue is determinative of the action, it is necessary to set out only that issue, to wit:

"(1) Was the judgment setting aside the will of Valentine Allen obtained by collusion between Samuel A. Allen, J. Ham Cardwell, and S. B. Ziglar, for the purpose of vesting the title to the lands conveyed in the will of Valentine Allen in their respective wives, and divesting the children of the said respective wives of their interest in said land under the provisions of said will? Answer: No."

In response to a second issue by consent, the facts were found by the court, and his honor found them as follows: An unsigned paper was filed in the clerk's office, in the form of a caveat to the will of Valentine Allen, and on the 20th day of October, 1885, the clerk issued a citation to the heirs and devisees of said Allen, notifying them to appear at the November term, 1885, of the superior court, which began on the 9th day of November, 1885. This citation was served on some of the heirs on the 9th of November, 1885, and on the others on the 11th of November, 1885, and on the 12th of November, 1885, guardians ad litem were appointed for the infant defendants, and they filed answer, admitting the allegations of the complaint. There was a motion for a new trial. The motion was overruled. There was judgment that the defendants go without day. The plaintiffs excepted and appealed.

Watson, Buxton & Watson and C. O. McMichael, for appellants. Humphreys & Sharp and Manly, Hendren & Womble, for appellees.

BROWN, J. A paper writing, purporting to be the last will and testament of Valentine Allen, was duly admitted to probate in common form by the clerk of the superior court of the county of Rockingham in 1885. A paper writing, undated, purporting to be a caveat to said will, was filed in the office of the said clerk during said year, and on the 20th of October, 1885, notices were issued by the clerk direct to Elizabeth A. Allen and others, devisees under the said will, and an issue of *devisavit vel non* was made up and certified for trial to the regular term of the superior court of said county on November 9, 1885. At said term, it appears that the issue was submitted to the jury in the following form: "Is the paper writing propounded for probate the last will and testament of Valentine Allen? Answer: No." Whereupon the usual decree was entered, denying probate to the said paper writing, and declaring it not to be the last will of Valentine Allen.

This action is brought by the plaintiffs, a granddaughter and a great-grandson of Valentine Allen, against a son, a married daughter, and certain grandchildren of Valentine Allen, for the purpose of setting aside the aforesaid decree upon the ground of fraud and collusion between the adversary parties to the record of the suit in which said decree was rendered.

In the consideration of this appeal, we deem it necessary to consider only one assignment of error.

[1] In apt time, the plaintiffs' counsel offered the following special instructions (the trial of the Allen suit was had on November 11, 1885, being Wednesday of the first week):

"(1) If the jury find from the evidence that, prior to November term, 1885, of the superior court of Rockingham county, the last will and testament of Valentine Allen was probated and proved in common form before the clerk of the superior court of Rockingham county, and was duly admitted to record by the examination, on oath, of the subscribing witnesses thereto, and that under the provisions of said will the lands belonging to the estate of the said Valentine Allen were devised to the minor children of Margaret J. Ziglar and S. B. Ziglar, and to the minor children of Ellen Cardwell and J. Ham Cardwell, and that Samuel A. Allen, the son of Valentine Allen, was only willed a grandchild's share, and the jury further find from the evidence that at said term of court a proceeding was instituted in the name of Samuel A. Allen, as Plaintiff, v. Margaret J. Ziglar and Her Husband, S. B. Ziglar, and Ellen Cardwell and Her Husband, J. Ham Cardwell, and the Minor Children of Margaret J. Ziglar and Ellen Cardwell, Defendants, for the purpose of setting aside the will of Valentine Allen, and that a citation issued, which was served upon the

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

minor children of Margaret Ziglar by John Boyer, sheriff of Forsyth county, by reading the summons to them on November 11, 1885, two days after the beginning of said November term of court of Rockingham county, and which was also served upon the minor children of Ellen Cardwell by reading the same to them on November 9, 1885, the first day of said November term of court, and they further find that the bond for cost in the said proceeding, purporting to have been given by Samuel A. Allen, was signed by S. B. Ziglar, one of the defendants, as surety for the maintenance of said action, and if the jury further find from the evidence that the written motion in the handwriting of counsel of record for the defendants S. B. Ziglar and J. Ham Cardwell in said proceedings was made to appoint S. B. Ziglar and J. Ham Cardwell guardians ad litem for their minor children, and that said Ziglar and Cardwell were appointed by the court such guardians ad litem of their respective children in said proceedings, and that a joint answer was filed in the handwriting of counsel for defendants J. Ham Cardwell and his wife, Ellen, S. B. Ziglar and his wife, Margaret, and that S. B. Ziglar and J. Ham Cardwell answered as guardians ad litem for their respective minor children, in which said answer it was admitted that the said paper writing, probated as the last will and testament of Valentine Allen, was not the last will and testament of Valentine Allen, and upon the back of said answer there appears in the handwriting of counsel for the plaintiff Samuel A. Allen, the following: 'November 12, 1885. We authorize the within answer to be filed both for ourselves and in our capacity as guardians ad litem. J. Ham Cardwell. S. B. Ziglar'—and if the jury find that a judgment was rendered at said November term of court to which the summons, purporting to have been served upon the minor defendants upon said action, was returnable, and in which said judgment it was declared that the said paper writing, purporting to be the last will and testament of Valentine Allen, was not his last will and testament, and adjudging that Samuel A. Allen, the plaintiff, should pay the cost of said proceeding, that if the jury find these to be the facts, the court holds that the said proceedings, so far as the minor children of Margaret Ziglar and Ellen Cardwell are concerned, were collusive and a fraud in law upon the rights of the said minor children under the provisions of their grandfather's will, and if they find such to be the facts the plaintiffs in this said action are entitled to have the judgment depriving them of their interest in said land, granted at November term, in 1885, of the superior court of Rockingham, in the case of Samuel A. Allen v. Margaret Ziglar and Others, set aside, and the jury will answer the first issue, 'Yes.'"

The court declined to give the instruction,

except as modified, as follows: "That if the jury find these to be the facts the court charges you that you may consider these facts in passing upon the question of fraud and collusion between S. A. Allen and J. Ham Cardwell and S. B. Ziglar in obtaining the judgment, at fall term, 1885, setting aside the will of Valentine Allen."

We think the court erred in adding the modification. The plaintiffs were entitled to the prayer as asked. The record disclosed that there is abundant evidence to substantiate every fact set out in the prayer for instruction. In fact, there is practically no evidence to the contrary; and, if these facts are taken to be true, they constitute legal fraud, fraud in law, which would entirely vitiate and destroy the force and effect of the decree setting aside the will of Valentine Allen.

Under that will, the testator devised two-thirds of his landed estate to be equally divided between the children of his two daughters, Margaret Ziglar and Ellen Cardwell, and his son Samuel; and at the death of his wife Elizabeth the third which had been devised to her for life was to be divided, share and share alike, "between my son Samuel and my grandchildren, the heirs of the bodies of my two daughters, Margaret Ziglar and Ellen Cardwell, and that portion given to his son Samuel was to be placed in the hands of a guardian."

It is patent that it was the manifest interest of Margaret Ziglar and Ellen Cardwell and of Samuel Allen to have this will set aside. They were heirs at law of the testator, and the children of Margaret Ziglar and Ellen Cardwell (these plaintiffs) were the principal beneficiaries under the will. The evidence shows that the fathers of these children went deliberately to work to have that will set aside, and to consent, in behalf of their children, to the decree entered in the proceedings.

[2] The policy of the law will not permit the last will and testament of a person to be set aside by consent. An issue of *deviseavit vel non* is not such a proceeding as can be determined by the consent of the parties thereto, where some of them, as in this case, are infant children. So careful is the law to give effect to the disposition of property that even the witnesses to the will are regarded as the witnesses of the law, and not the witnesses of any particular party.

The facts embodied in the prayer for instruction are scarcely denied, and show that the infant devisees were only served with notice after the term of court began, when the issue was to be tried. This service was made on Monday, November 11th, when the court began on November 9th, and the case was "railroaded" through on Thursday, November 12th, during a temporary suspension of the criminal docket, for the purpose of submitting this issue to a jury.

Under all our decisions, the infant devisees

sees were really not parties to the proceeding. *Doyle v. Brown*, 72 N. C. 393; *Condry v. Cheshire*, 88 N. C. 375; *Harrison v. Harrison*, 106 N. C. 282, 11 S. E. 356; *Card v. Finch*, 142 N. C. 144-148, 54 S. E. 1009; *Hughes v. Pritchard*, 153 N. C. 141, 69 S. E. 5, 138 Am. St. Rep. 649. In this last case, Mr. Justice Manning eloquently says: "Infants are, in many cases, the wards of the courts, and these forms, enacted as safeguards thrown around the helpless, who are the victims of the crafty, are enforced as mandatory, and not directory only. Those who venture to act in defiance to them must take the risk of their action being declared void, or set aside."

The evidence shows that the father of the Ziglar children became the surety of Samuel Allen, the caveator, on the bond for cost at the very time that he was appointed guardian ad litem to protect the rights of his children, the infant defendants; and, further, that the father, Ziglar, paid the attorney's fee to represent him as defendant in the case which Ziglar was assisting in prosecuting by signing the cost bond. Ziglar and his brother-in-law, Cardwell, were each appointed guardian ad litem of his own children; and they filed a joint answer in their individual capacity, representing their wives, and also as guardians of their minor children, although their interests were diametrically opposed.

It was quite like these faithful guardians to see to it that this joint answer admitted that the paper writing was not the will of Valentine Allen, when by doing so they deprived their children and wards of all interest in more than 800 acres of land, which then, of course, descended to their wives in fee.

The evidence shows that the same counsel represented Ziglar and Cardwell and their wives in their individual capacity, and also acted as their attorney as guardians of their children, whose interests, as we have shown, were opposed to that of their parents. It requires no citation of authority to show that upon these facts the law must pronounce a decree, rendered under such circumstances, without even the semblance of a trial, collusive and fraudulent as to the rights of the minor children.

It is another singular fact appearing in evidence that this will was written by a Dr. Scales and executed on November 22, 1875, and the testator lived for 10 years afterwards. Upon the so-called trial, it was not contended that Valentine Allen had no capacity to make a will; but the only evidence offered bearing upon the execution of

the will was that of Dr. Scales, who stated, 10 years after he had written the will, that he did not think he had drawn the will as Valentine Allen wished it drawn, although, when the will was probated by the clerk, this same witness made no such declaration.

It is held that a guardian ad litem of infant defendants must be a person who has no adversary interests to his ward. *Ellis v. Massenburg*, 126 N. C. 129, 35 S. E. 240. In this case, the court says: "The court has no higher duty than the protection of infant defendants; and there can be no trust more sacred than that of a guardian, who must be absolutely free from any interest or motive that can possibly interfere with the faithful performance of his duties." If he has any interest at all in the suit, it must be thoroughly consistent with that of his wards. Even his attorney must be equally disinterested; and a mere colorable interest is a sufficient disqualification for either, if at all adverse. *Moore v. Gidney*, 75 N. C. 34; *Molyneux v. Huey*, 81 N. C. 106-113; *Arrington v. Arrington*, 116 N. C. 170-179, 21 S. E. 181; *Cotton Mills v. Cotton Mills*, 116 N. C. 647-652, 21 S. E. 431. Says the court: "We think that this rule is analogous to that forbidding a trustee to deal with himself, which, founded upon natural justice and public policy, has become too firmly inbedded in our jurisprudence by repeated decisions to need citation of authorities."

In *Covington v. Covington*, 73 N. C. 172, Judge Pearson comments with some severity upon a guardian who makes use of the name of his ward to maintain a proceeding directly opposed to the interest of his ward, and for his own benefit. In *Morris v. Gentry*, 89 N. C. 248, it was held that no person should be selected as guardian ad litem, unless he is in position to protect the rights of the infants, and has no adverse interests.

The learned counsel for the defendant submitted an elaborate argument that Samuel Allen and the other devisees would take per stirpes, and not per capita; and therefore that no injustice was done by setting aside the testator's will, although the proceeding was collusive and fraudulent in law. It is not necessary to determine as to what share Samuel Allen would take under his father's will until that will is established and probated according to law. The only issue raised by the pleadings in this case is one of fraud and collusion in respect to the manner in which that will was set at naught. We are of opinion that the court should have given the prayer for instruction in the manner and form as requested.

New trial.



(159 N. C. 87)

## JONES v. FLYNT.

(Supreme Court of North Carolina. May 1, 1912.)

## 1. ELECTIONS (§ 295\*)—CONTESTS—PRESUMPTIONS AS TO RETURNS AND CERTIFICATES.

Under Revisal 1905, § 4356, requiring the board of county canvassers to judicially determine the result of an election, where they find as a fact the number of votes for each candidate and that one of the candidates was duly elected, this finding makes out a prima facie case for such candidate in an action involving the title to the office.

[Ed. Note.—For other cases, see Elections, Cent. Dig. §§ 297-299; Dec. Dig. § 295.\*]

## 2. ELECTIONS (§ 291\*)—CONTESTS—PRESUMPTIONS AND BURDEN OF PROOF.

A party commencing an action to recover an office, alleging that he received a majority of the votes cast but that defendant is in possession of the office, has the burden of proving these allegations.

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 286; Dec. Dig. § 291.\*]

## 3. REFERENCE (§ 86\*)—ELECTION—CONTEST—PRESUMPTIONS AS TO RETURNS OR CERTIFICATES.

In an action involving the title to an office, the referee should determine which of the exhibits in evidence is the original return required to be made by Revisal 1905, § 4348, and the one he determines to be the original return is prima facie correct.

[Ed. Note.—For other cases, see Reference, Cent. Dig. § 132; Dec. Dig. § 86.\*]

## 4. REFERENCE (§ 94\*)—FINDINGS OF REFEREE—ULTIMATE OR EVIDENTIARY FACTS.

It is not necessary for the referee in an election contest to find the evidentiary facts if he finds the facts as to the number of votes cast for each candidate.

[Ed. Note.—For other cases, see Reference, Cent. Dig. § 145; Dec. Dig. § 94.\*]

## 5. REFERENCE (§ 89\*)—REPORT AND FINDINGS—OPERATION AND EFFECT.

It is the duty of a referee, with power to find the facts, to weigh the evidence, and pass on the credibility of witnesses, and it is not improper for him to determine the weight to be given the testimony of certain witnesses, and it cannot affect his report that he states what he thinks on these points.

[Ed. Note.—For other cases, see Reference, Cent. Dig. §§ 135-140; Dec. Dig. § 89.\*]

## 6. REFERENCE (§ 63\*)—RECEPTION OF EVIDENCE—EFFECT.

Where a referee admitted and considered evidence offered, the fact that he expressed doubts as to its competency did not constitute error.

[Ed. Note.—For other cases, see Reference, Cent. Dig. §§ 94, 95; Dec. Dig. § 63.\*]

## 7. EVIDENCE (§ 317\*)—HEARSAY—ADMISSIBILITY.

After the votes at an election had been counted, an election officer took a ticket on which some one other than himself had marked the number of votes for a certain office, and went to a nearby telephone for the purpose of telephoning the result of the election. S. read the figures from the ticket to the officer, and he gave them to another party over the telephone. In an election contest, S. was not called, and the officer testified that he did not remember the figures on the ticket, or those called out to him, or telephoned by him. *Held*, that the testimony of others as to the figures

called out by S. and telephoned by the officer was properly excluded.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1174-1192; Dec. Dig. § 317.\*]

Appeal from Superior Court, Forsyth County; Lyon, Judge.

Action by the State, on the relation of D. A. Jones, against George W. Flynt. From a judgment for defendant, relator appeals. Affirmed.

This is an action brought to try the title to the office of sheriff of Forsyth county. At the election held in said county in November, 1910, D. A. Jones and George W. Flynt were opposing candidates for said office. The board of county canvassers declared said Flynt elected by 12 votes, and he was accordingly inducted into office. Summons was issued returnable to February term, 1911, of the superior court of said county, and complaint and answer were thereafter duly filed. The case turned upon the number of votes cast for the relator and for defendant, respectively, in Broadbay township and in Middle Fork precinct No. 1, in said county. Relator alleged that in Broadbay township he received 443 votes, and his opponent 214 votes. Defendant claimed that in said township relator received 433 votes only, while he received 214. In Middle Fork (precinct No. 1) relator alleged that he received 196 votes and his opponent 49 votes. Defendant claimed that at said precinct relator received only 186 votes, and that he received 49. The board of county canvassers accepted the contention of defendant as to both of these precincts, and declared him to have been elected sheriff by a majority of 12 votes. At May term, 1911, by consent of parties, the case was referred to F. C. Robbins, Esq.

The order of reference is as follows: "This cause coming on to be heard before the undersigned judge of the superior court. It is now, by consent of parties, ordered that the said cause be and the same is hereby referred to F. C. Robbins, who shall, as soon as may be, proceed to hear and determine said cause, and who shall make and file herein his findings of fact and conclusions of law separately, his findings of fact to be final and the conclusions of law to be subject to review upon exception and appeal as provided by law. It is, by consent of the parties, further ordered that said referee shall consider and determine only the number of votes actually cast for the office of sheriff of said county in the township of Middle Fork, precinct No. 1, and the township of Broadbay, in said county, for the relator and for the defendant, respectively, at the election of 1910, it being agreed that outside of said precincts in said county, at said election, there were actually cast for said relator 2,805 and for said defendant 2,673 votes for said office, as appears from

the returns from the precincts, and that all other questions of law and fact raised by the pleadings are waived."

It was in evidence that there were four papers before the county board of canvassers, purporting to be returns from Broadbay township, all of which were signed by the judges of election and the registrar, and they are referred to as Exhibits Nos. 10, 2, 3, and 4. In Exhibit No. 10 the vote of the relator is 443, in writing and in figures. In Exhibits No. 2 and 3 his vote is 433 in figures and in writing. In Exhibit No. 4 his vote is 443 in writing and 433 in figures. Exhibits Nos. 2 and 3 are referred to in the evidence as the long sheets, and are the official papers sent out to the election officers, upon which to make their returns. One of these was returned to the board of canvassers, and the other to the county board of elections. Exhibits Nos. 10 and 4 are referred to as the short sheets, which were not sent to the election officers on which to make returns. J. F. Reynolds, a supporter of the relator, filled out Exhibits Nos. 10, 3, and 4. There was evidence on the part of the relator tending to prove that Exhibit No. 10 was returned to the county court board of canvassers, and evidence on the part of the defendant that it was not seen by the board until the day it met to canvass the returns, and that the said Reynolds then took it from his pocket.

There was also evidence that on the night of the election the votes were called out and counted, and the result marked on tally sheets made by George Clodfelter and others, and that the number of votes were marked on tickets from the tally sheets, and that 443 votes were cast for the relator. The tally sheets were not in evidence, and the defendant introduced evidence tending to prove that they were left on the table where the election was held, at the request of said Reynolds, and that he said they had been destroyed, and also that Reynolds and others were drinking on the night of the election, and there was some confusion, all of which was denied by Reynolds.

George Clodfelter, who kept a tally sheet, testified, among other things, that, after the vote for the relator and the defendant was counted, some one marked the number of votes on a ticket, and that he took the ticket and went to a store near by to phone the result to Winston; that, when he reached the store, it was dark and he could not see, and he handed the ticket to Luther Snyder, who called out the number of votes from the ticket, and he gave the vote over the phone to Winston. He also testified that he did not remember the figures on the ticket, nor the vote given by him over the phone, and Luther Snyder was not introduced as a witness. The relator offered to prove by two witnesses that Snyder called out 443 votes for the relator, and that Clodfelter phoned

that number to Winston. This evidence was excluded, and the relator excepted. The referee found that the relator received 433 votes in Broadbay township, and it is conceded that, if this finding stands, the defendant was elected by a majority of 2 votes, and, if he received 443 votes, he was elected by a majority of 8 votes.

The referee states his impression of the evidence and his findings as follows:

"Having considered and weighed all of the evidence with care, I here state as briefly as possible some of the points in it which have led me to the conclusion reached.

"Plaintiff's Exhibit 10, showing 443 votes for Mr. Jones, written and in figures, and 214 for Mr. Flynt, written and in figures, is signed and certified by the election officers, and Mr. J. F. Reynolds testifies that he made it out, and that it was the first one, and put it in an envelope and Mr. Rominger took it, and Mr. Glenn Hoover, one of the judges, testifies that, after they got through signing returns, Mr. Rominger took charge of them. Sidney Teague, the other judge, testifies that he don't know whether Exhibit 10 was given to Rominger or not. Mr. Rominger brought the sealed envelope of the county vote to the canvassing board, and Mr. Bynum, secretary, testifies that he took out of that envelope Defendant's Exhibit 2, that there was no other in it, and that Exhibit 10 was not in it, and Mr. Foy testifies that he saw Mr. Bynum take Exhibit 2 out of the envelope.

"Reynolds further testifies on his direct examination that he made out but two returns, Plaintiff's Exhibit 10 and Defendant's Exhibit 3, and perhaps one other for Congress, but on cross-examination, when confronted with Defendant's Exhibit 4, he admits that he filled out that also. He also testifies that while making out Exhibit 10, he did not say, 'It is easy to think one thing and write another,' in which he is contradicted by Sidney M. Teague, one of the judges, and Mr. Langston also testifies that he thinks Mr. Reynolds made that remark.

"Also, when he came in before the canvassing board, he testifies that he walked up to the table, and one of the board, he thinks, passed up to him Exhibit 10, and he said, 'There is nothing wrong about this,' and he also denies pulling out of his pocket Exhibit 10; whereas several witnesses for Mr. Jones, to wit, May, Tavis, Savage, and Boyles, and several witnesses for Mr. Flynt, to wit, Foy, Shamel, Conrad, Goode, Hinshaw, and others, all testify that he first got hold of the regular return, Defendant's Exhibit 2, and said, 'It is not right,' or 'It is wrong,' or some such words, and Mr. Beroth and Mr. Stafford testify that he did not get it (Exhibit 10) off the table, nor was it handed to him from the table, but that he pulled it out of his pocket, Mr. Stafford saying out of his left breast coat pocket, and Mr. Hinshaw testifies that, when Mr

Reynolds got half way to the table, on coming in, he saw the paper in his (Reynolds') hand; and Mr. Crouse testifies that that paper was not on the table prior to that time. This, with other evidence on that point, shows by the greater weight of evidence that Exhibit 10 was brought in before the board by Mr. Reynolds.

"In filling out Defendant's Exhibit 3, he testifies he did not say, 'Now, Doc. (M. E. Teague), ain't that right?' and 'Is that right?' but Mr. Langston testifies that he did say it.

"It seems to me a matter of some weight, if not of considerable weight, that Mr. Reynolds suggested that the tally sheets, especially that of Mr. Clodfelter, be left on the table at the counting of the votes on the night of the election, as Mr. Clodfelter testifies that he did; and again, when it was suggested before the canvassing board, in the dispute about the vote at Broadbay, that the tally sheets be sent for, Mr. Reynolds said they were destroyed, so Mr. Foy testifies, and Mr. Bynum says he thinks Mr. Reynolds said they were destroyed. Basing his contention that Mr. Jones received 443 votes upon his inspection of that tally sheet, and several of his party friends also pointing to that tally sheet as the source of their entries on tickets, it is little short of amazing that Mr. Reynolds did not see to it that that tally sheet was safely preserved.

"He is also contradicted about drinking liquor that night, and about asking some gentlemen to go by his house for Wilkes county corn, and on other minor points which appear in the evidence, but which I do not stop to mention.

"It is also very significant that after admitting that he took great interest in the election, and while contending that 443 for Mr. Jones is right because he had so written it that night from Mr. George Clodfelter's tally sheet, as he says, Mr. Reynolds then wrote out Defendant's Exhibit 3, which shows for Mr. Jones 433, written and in figures, and for Mr. Flynt 214, written and in figures, and then another, Defendant's Exhibit 4, which shows for Mr. Jones 443 written, and 433 in figures.

"It seems to me that these contradictions and this sort of action can only be accounted for on the ground that Mr. Reynolds' memory is treacherous, and on the further ground that, being anxious for Mr. Jones' election, under the impulse of partisan zeal to run his vote up, he somehow or other got these figures, 443, into his head, and under the force of the same zeal now wishes to maintain them.

"A number of witnesses on both sides testify that Mr. Reynolds claimed that Mr. Rominger knew how the vote was and insisted on his being examined before the board, and yet it is significant that Mr. Rominger, after being sworn as a witness for Mr. Jones, was not examined, although he was one of the election officers who, Mr. Reynolds claim-

ed, knew all about how the vote was, and whether Mr. Jones received 443 votes; and it is also noticeable that neither of the judges of election, Mr. Hoover and Mr. Sidney Teague, testified as to what the vote for Mr. Jones was, although both were examined for Mr. Jones.

"These two judges testify that they heard no declaration of the result of the vote when the counting was completed. The statute says, 'The counting of the votes shall be continued without adjournment until completed and the result thereof declared'; but I have not been able to find any decision defining the meaning and purpose of the words, 'the result thereof declared.' Whatever its meaning, I do not think it can mean simply a declaration made by one tallyman to another, as Mr. Clodfelter says he did to Mr. Teague alone, as they added up the tally sheets, although it may have been overheard by three or four men standing around, Mr. Reynolds, Mr. Charlie Teague, Mr. Sides, and Mr. Stewart, as appears from their testimony.

"Andrew Stewart (Exhibit 14), Cicero Jones (Exhibit 15), S. A. Sides, (Exhibit 16), and J. F. Reynolds (Exhibit 17), all testify that they saw the tally sheet of Mr. George Clodfelter as he ran up the vote, and it showed 443 for Mr. Jones, and that they severally took it down on said exhibits. While it seems to me that it would be competent evidence for one present at the counting and figuring by the judges and who saw and heard what they said at the time of the counting and figuring and saw what they actually did to testify to it, yet it will be observed that the testimony clustering round said exhibits and the entries on the tickets are based on what Mr. Clodfelter, a tallyman, said and did, and, in the absence of the tally sheet, I am in grave doubt whether such evidence is competent at all, and, if competent, its weight is quite another matter, and declarations by bystanders and excited partisans, and entries made by them on tickets under such circumstances, are, I think, entitled to but little weight. W. A. Hege testifies that he got the vote from Mr. Clodfelter's ticket, 443, and it seems to me that this had less weight than the ones last-mentioned. What J. A. Nicholson testifies he heard George Clodfelter phone, and what Charlie Clodfelter heard him say in the store, is excluded as hearsay. Mr. Cicero Jones testifies that, independent of the ticket, he remembers the vote was 443 for Jones and 214 for Flynt, but how he got his information does not appear. Mr. M. E. Teague, the other tallyman, and supporter of Mr. Jones, and who must have known what his own tally sheet showed, filled out the official returns (Defendant's Exhibit 2) sent in to the county board of canvassers, signed and certified by election officials, showing for Mr. Jones 433 votes, written and in figures, and for Mr. Flynt 214 votes, written and in figures; and Mr. Reynolds filled out

Defendant's Exhibit 3, showing for Mr. Jones 433 votes, written and in figures, and for Mr. Flynt 214 votes, written and in figures; and both of these, Exhibits 2 and 3, were filled out and signed some hours after the entries on the tickets as aforesaid. The sworn election officers, when they signed and certified the official return (Defendant's Exhibit 2), notwithstanding some carelessness in signing and certifying too many papers, must have known and seen to it that they were sending up a correct return of the votes cast for Mr. Jones and Mr. Flynt to the county board of canvassers at this precinct, Broadbay, which return shows for Mr. Jones 433 votes, written and in figures, and for Mr. Flynt 214 votes, written and in figures.

"After a careful consideration and weighing of all the evidence that particularly specified and all the other offered by Mr. Jones, I am forced to the conclusion that he has failed, by a preponderance of the evidence, to overthrow the prima facie case made in favor of Mr. Flynt on said return passed upon by the canvassing board.

"I therefore find as a fact that D. A. Jones, relator of plaintiff, received four hundred and thirty-three (433) votes, and that George W. Flynt, defendant, received two hundred and fourteen (214) votes, at Broadbay precinct."

The referee sustained the contention of the relator as to Middle Fork precinct No. 1. The judge confirmed the report of the referee, and rendered judgment in behalf of the defendant, and the relator excepted and appealed.

The assignments of error relied on in appellant's brief are: (1) That the referee held that the decision of the board of canvassers made out a prima facie case in favor of the defendant, and that the burden of proof was on the relator, and that he had not overcome the prima facie case by a preponderance of the evidence. (2) That the referee held that Exhibit No. 2 was the original return, and, when passed on by the board of canvassers, made out a prima facie case for the defendant. (3) That the referee failed to state what the facts were as to counting the votes and declaring the result on the night of the election. (4) That the referee gave no weight to the evidence of certain witnesses, who are named. (5) That the referee held that the evidence of certain witnesses, who are named, was entitled to but little weight. (6) That the referee admitted certain evidence offered by the relator, and said he had grave doubts as to its competency. (7) That the referee said he thought the evidence of one witness introduced by the relator was entitled to less weight than the evidence of another of his witnesses. (8) That there was no more evidence to show that Exhibit No. 2 was the original return than that Exhibits Nos. 10, 3, and 4 were such. (9) That as there were

four returns, and they were not alike, there could be no prima facie case in behalf of the defendant. (10) That the referee excluded the evidence as to what occurred when George Clodfelter phoned to Winston. (11) That the referee found that the relator received 433 votes in Broadbay township. (12) That the referee declared that the defendant had been elected sheriff.

A. E. Holton, Lindsay Patterson, W. P. Bynum, and R. C. Strudwick, for appellant.  
O. B. Watson, E. B. Jones, A. H. Eller, and G. H. Hastings, for appellee.

ALLEN, J. (after stating the facts as above). The controversy between the parties is such that a full statement of the facts is necessary, and, when this is considered, in connection with the assignments of error, it demonstrates that the issue in dispute is one of fact, and not of law, and that this has been decided against the relator by the tribunal selected by the plaintiff and the defendant.

[1] The board of canvassers were acting under a statute (Rev. § 4356) which made it their duty "to judicially determine the result of the election," and having found as a fact that the relator received 433 votes in Broadbay, and that the defendant was duly elected, the referee properly held that this made out a prima facie case for the defendant. *Bynum v. Com'rs*, 101 N. C. 412, 8 S. E. 136; *Gatling v. Boone*, 98 N. C. 573, 3 S. E. 392; *Wallace v. Salisbury*, 147 N. C. 58, 60 S. E. 713.

[2] In any event, however, the burden of proof was on the relator, because he commenced the action to recover the office of sheriff, and he alleges that the defendant is in possession of the office and that he, the relator, received a majority of the votes cast, and having made these allegations, the burden was on him to prove them.

[3] The statute (Rev. § 4348) seems to contemplate but one original return, and it was as competent for the referee to determine which was the original, when four exhibits were in evidence, each of which might be claimed to be the original, as it was for him to determine any other fact, and, when identified by the finding of the referee, the original was prima facie correct. In speaking of an election return in *Roberts v. Calvert*, 98 N. C. 585, 4 S. E. 130, the court says: "It was not conclusive, but it was official and strong evidence. It appearing to be regular proved the pertinent facts stated in it prima facie. It put the burden on him who alleged the contrary to prove it clearly."

[4] It was not essential to the integrity of the report for the referee to find the facts as to what occurred when the votes were counted on the night of the election as these incidents were merely evidentiary on the

principal issue of the number of votes cast for the relator and the defendant.

[5, 6] The referee was acting as a jury, with power to find the facts, and it was his duty to weigh the evidence, and to determine on which side it preponderated, and to pass on the credibility of witnesses. In order to find the ultimate fact as to the number of votes cast, it was necessary and proper for him to settle in his own mind whether the evidence in behalf of the relator preponderated; whether the evidence of certain witnesses was entitled to no weight; whether the evidence of other witnesses was entitled to but little weight; whether the evidence of one witness was entitled to less weight than that of another, and the fact that he told what he thought, cannot affect the report, nor is it material that he had grave doubts as to the competency of certain evidence which he admitted and considered.

[7] The evidence as to what occurred when George Clodfelter phoned to Winston was properly excluded. George Clodfelter kept a tally sheet, and, after the votes were counted, some one marked the votes for sheriff on a ticket, and he took the ticket to a store to phone the result to Winston. It was so dark in the store that he could not read the figures on the ticket, and he handed it to Luther Snyder, who called out some figures, and Clodfelter phoned to Winston. Luther Snyder was not a witness and there was no evidence that he called out the figures as they appeared on the ticket, and George Clodfelter testified that he did not remember what the figures were on the ticket, nor the figures called out or phoned by him. The relator offered to prove the figures called out by Snyder and phoned by Clodfelter, and this was excluded. The case of Propst v. Mathis, 115 N. C. 526, 20 S. E. 710, seems to be directly in point. In that case the plaintiff relied on a will as a part of his title of date 1853. He offered evidence of the destruction of the records in the clerk's office of Burke county in 1865, and then offered to prove that he went to the clerk's office in 1853, and that the clerk read the will to him from the record, and its contents, and the court held this evidence inadmissible. The case of Hart v. Railroad, 144 N. C. 91, 56 S. E. 559, 12 Ann. Cas. 706, relied on by the relator, is clearly distinguishable, because in that case the party on whose statements the paper in controversy was made up was examined as a witness, and testified that his statements were correct, and the decision rests upon the principle that, "where a witness testifies that he has truly stated to a third person of his own knowledge, a fact which he has since forgotten, the testimony of such third party as to what the statement was is competent."

The remaining assignments are to the finding as to the number of votes cast for the

relator, which we cannot review, and to the conclusion that the defendant was duly elected, which follows as a matter of course from the facts found.

No error.

(159 N. C. 285)

# GARRISON et ux. v. J. I. CASE THRESHING MACH. CO.

(Supreme Court of North Carolina. April 24, 1912.)

## 1. TRIAL (§ 352\*)—ISSUES—PLEADINGS.

In an action for damages for the wrongful sale of land under mortgage foreclosure, issues tendered by the defendant, but not embracing the questions raised by the pleadings, were properly rejected.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 840-842, 844, 845; Dec. Dig. § 352.\*]

## 2. TRIAL (§ 352\*)—VERDICT—ISSUES.

The form of issues to be submitted to the jury is within the discretion of the judge, provided they are sufficient to determine the rights of the parties and to support the judgment.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 840-842, 844, 845; Dec. Dig. § 352.\*]

## 3. EVIDENCE (§ 444\*)—PAROL EVIDENCE—AVOIDING INSTRUMENT.

In an action to recover damages for the wrongful sale of land under foreclosure of a mortgage, evidence of an oral agreement that the mortgage and note secured by it were not to take effect until the engine for which they were given had satisfactorily stood a certain test, and that the engine failed to stand the test, was admissible; the rule excluding parol evidence of the contents of a written instrument not excluding evidence to show that the instrument never had any existence in fact.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1929-1944, 2049; Dec. Dig. § 444.\*]

## 4. MORTGAGES (§ 216\*)—RIGHTS OF PARTIES—DAMAGES.

Where a mortgage, which by parol agreement was to become effective only under certain conditions which never came about, was sold by the mortgagee to an innocent purchaser for value before maturity, and the mortgaged land was taken by a foreclosure of the mortgage, the mortgagor could recover the value of the land from the mortgagee.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 554-558; Dec. Dig. § 216.\*]

Appeal from Superior Court, Rockingham County; C. C. Lyon, Judge.

Action by John A. Garrison and wife against the J. I. Case Threshing Machine Company. From a judgment for plaintiffs, defendant appeals. No error.

This action was brought to recover damages for the sale of certain land under mortgage, which was made under the following circumstances: The plaintiffs were solicited by two agents of the defendant to purchase one of its traction engines; they representing that the engine would haul from five to eight thousand feet of green lumber over the road from McIver to Reidsville, in Rockingham county. The plaintiffs declined to buy the engine, unless it would do this; and

it was thereupon agreed that they should sign the usual order for the engine, and also notes and a mortgage to secure the price, with the understanding that the papers should be left with the agents and held by them until the engine was tested, and it should be ascertained that it would haul the lumber as represented, and that the papers should not take effect until the test was made and the representation found to be true. The papers were accordingly signed and delivered to the agents under said agreement. The test of the engine was made by one of the defendant's engineers, and proved that the representation was utterly false, and that the engine would be worthless to the plaintiffs. The defendant transferred the papers for value and before maturity, in violation of said agreement, to the Bank of Racine, and the bank sold the land under the power contained in the mortgage, after the plaintiffs had refused to accept the engine and demanded a return of the papers, with which demand the defendant refused to comply.

The court submitted issues to the jury, which, with the answers thereto, are as follows:

"(1) Were the real estate, mortgage, and contract, referred to in the complaint, signed and placed with Bowden and Iseley, or either of them, under the agreement and condition precedent that the papers were not to be delivered to the defendant and become operative, unless the engine should meet the tests alleged to have been guaranteed by the defendant that it would meet? Answer: Yes.

"(2) Did the machine, upon the test, meet the conditions guaranteed as a condition precedent to the delivery of the contract and mortgage to the defendant? Answer: No.

"(3) Was the said mortgage taken by the defendant and thereafter assigned by it to a bank, in violation of an agreement by defendant that it would not treat the mortgage and contract as being executed, unless the engine, upon test made, came up to the standard of efficiency guaranteed by defendant? Answer: Yes.

"(4) Did the defendant procure the delivery of the contract and mortgage to Bowden and Iseley by fraud, as alleged in the complaint? Answer: Yes.

"(5) What amount was due the said bank at the time it received said mortgage? Answer: \$1,542.

"(6) What was the amount of freight paid by the plaintiffs and the value of the real estate described in the mortgage at the time of the sale of the property to satisfy said mortgage? Answer: \$2,081.00.

"(7) Could the plaintiffs have paid off the mortgage and have redeemed the real estate described in the mortgage? Answer: No."

Judgment was entered upon the verdict for the plaintiffs, and the defendant appealed.

Johnston, Ivie & Dalton and Dorman Thompson, for appellant. P. W. Glidewell, A. L. Brooks, J. H. Vernon, and E. J. Justice, for appellees.

WALKER, J. (after stating the facts as above). [1, 2] The defendant tendered certain issues, and, without setting them out, it is sufficient to say that they did not embrace the questions raised by the pleadings, and were therefore properly rejected by the court. Those adopted by the court were sufficient for the defendant to present its contentions and to develop its case; and this is all that could be asked. The form of the issues are within the discretion of the judge, provided they are sufficient to determine the rights of the parties and to support the judgment. *Roberts v. Baldwin*, 155 N. C. 278, 71 S. E. 319; *Clark v. Guano Co.*, 144 N. C. 71, 56 S. E. 858, 119 Am. St. Rep. 931; *Kimberly v. Howland*, 143 N. C. 398, 55 S. E. 778, 7 L. R. A. (N. S.) 545; *Fields v. Bynum*, 156 N. C. 413, 72 S. E. 449.

[3] We also think that the testimony of the plaintiffs, as to the transactions and dealings between them and defendant's agent, was competent. It does not fall within the rule excluding parol evidence of the contents of a written instrument, and requiring the production of the paper. This is not an action for the breach of a written contract; but the theory upon which it rests is that the instrument was never delivered, and this is the principal question in the case. If the contract had been executed, or the writing delivered to the agents, with the understanding that it should presently take effect, the plaintiff could not, by parol evidence, contradict or vary its terms. *Moffitt v. Maness*, 102 N. C. 457, 9 S. E. 399. But this is not what was proposed to be done; but, on the contrary, the purpose was to show that the contract never had any existence in fact. The case is governed, in all its features, by *Pratt v. Chaffin*, 136 N. C. 350, 48 S. E. 768, and *Bowser v. Tarry*, 156 N. C. 35, 72 S. E. 74.

In the case last cited, Justice Hoke, quoting from *Walker v. Venters*, 148 N. C. 388, 62 S. E. 510, and commenting upon the same and other cases, says: "Even when a contemporaneous oral stipulation would be otherwise received, because it, too, was a part of the contract, this will not be allowed when it contradicts the portion of the agreement which is reduced to writing. This is well stated by the present Chief Justice in *Walker v. Venters*, as follows: 'It is true that a contract may be partly in writing and partly oral, except when forbidden by the statute of frauds, and in such case the oral part of the agreement may be shown; but this is subject to the well-established rule that a contemporaneous agreement shall not contradict that which is written. The written word abides.' While this

position is unquestioned, it is also fully understood that, although a written instrument, purporting to be a definite contract, has been signed and delivered, it may be shown by parol evidence that such delivery was on condition that the same was not to be operative as a contract until the happening of some contingent event; and this on the idea, not that a written contract could be contradicted or varied by parol, but that, until the specified event occurred, the instrument did not become a binding agreement between the parties. It never in fact became their contract. The principle has been applied with us in several well-considered decisions, as in *Pratt v. Chaffin*, 136 N. C. 350 [48 S. E. 768], *Kelly v. Oliver*, 113 N. C. 442 [18 S. E. 698], *Penniman v. Alexander*, 111 N. C. 427 [16 S. E. 408], and is now very generally recognized." And in *Ware v. Allen*, 128 U. S. 590, 9 Sup. Ct. 174, 32 L. Ed. 563, the court held that "parol evidence is admissible, in an action between the parties, to show that a written instrument, executed and delivered by the party obligor to the party obligee, absolute on its face, was conditional, and not intended to take effect until another event should take place."

It is said in *Anson on Contracts* (Am. Ed.) p. 318: "The parties to a written contract may agree that, until the happening of a condition, which is not put in writing, the contract is to remain inoperative." The principle is a familiar one, and is directly applicable to the facts of this case. It has been well stated, in its application to similar facts, by Judge Devens, in *Wilson v. Powers*, 131 Mass. 539, as follows: "The manual delivery of an instrument may always be proved to have been on a condition which has not been fulfilled, in order to void its effect. This is not to show any modification or alteration of the instrument, but that it never became operative, and that its obligation never commenced." And also by *Crompton, J.*, in *Pym v. Campbell*, 6 Ed. & Bl. 88, thus: "If the parties had come to an agreement, though subject to a condition not shown in the agreement, they could not show the condition, because the agreement on the face of the writing would have been absolute and could not be varied; but the finding of the jury is that this paper was signed on the terms that it was to be an agreement if *Abernathie* approved of the invention, not otherwise. I know of no rule of law to estop parties from showing that a paper, purporting to be a signed agreement, was in fact signed by mistake, or that it was signed on the terms that it should not be an agreement till money was paid, or something else done." Those two cases were cited with approval in *Pratt v. Chaffin*, supra. See, also, 1 *Elliot* on Ev. § 575; *Gazzam v. Insurance Co.*, 155 N. C. 330, 71 S. E. 434. As practically all of the defendant's exceptions are based

upon a misapprehension of this rule, as the one controlling the case, they cannot be sustained.

We do not think that the trial judge expressed any opinion upon the facts. He was merely stating the contentions of the respective parties in that part of the charge to which this exception was taken.

[4] As the defendant passed the papers to an innocent purchaser for value, and plaintiffs cannot recover the land, they are entitled to be compensated by the defendant for the loss they have sustained by its wrongful act, which, in this case, is the value of the land. *Sprinkle v. Wellborn*, 140 N. C. 163, 52 S. E. 666, 3 L. R. A. (N. S.) 174, 111 Am. St. Rep. 827; *Hale on Damages*, 72.

It is unnecessary to discuss the exceptions relating to the fourth issue, as, without this issue, the verdict is sufficient to support the judgment (*Sprinkle v. Wellborn*, supra), though we think they are without merit, as there was some evidence of the fraud.

No error.

(91 S. C. 379)

#### MEETZE v. SOUTHERN EXPRESS CO.

(Supreme Court of South Carolina. May 3 1912.)

#### CARRIERS (§ 37\*)—EXPRESS COMPANIES—FAILURE TO TRACE SHIPMENT—ACTION FOR PENALTY.

Under Carmack Amendment Act of Congress 1906 (Act June 29, 1906, c. 3591, § 7, 34 Stat. 595 [U. S. Comp. St. Supp. 1906, p. 1166]), which makes an initial carrier of an interstate shipment of freight liable for injury to the shipment on a connecting line, and under Act Feb. 15, 1910 (26 St. at Large, p. 717), authorizing recovery of a penalty against a carrier for failing to trace and inform concerning a shipment over its line, there can be no recovery against an express company as an initial carrier of an interstate shipment for failing to trace and inform concerning the package.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 95, 927; Dec. Dig. § 37.\*]

*Hydrick and Watts, JJ.*, dissenting.

Appeal from Common Pleas Circuit Court of Richland County; *John S. Wilson*, Judge. Action by *Mrs. C. E. Meetze* against the *Southern Express Company*. Judgment for plaintiff, and defendant appeals. Reversed, and case dismissed.

*Barron, Moore, Barron & McKay* and *J. Nelson Frierson*, all of Columbia, for appellant. *Rembert & Monteith*, of Columbia, for respondent.

*FRASER, J.* This is an action by the "plaintiff for the sum of \$50 penalty for failing to trace and inform in regard to package shipped over defendant's line on December 15, 1910." Judgment was obtained for the loss of the package, and a subsequent action was brought for the penalty under the act of the General Assembly of South Carolina

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

1910, p. 717. The action was brought in the magistrate's court, where judgment for the penalty was obtained. The defendant appealed to the circuit court. The circuit court sustained the magistrate, and the defendant again appealed to this court.

Mrs. C. E. Meetze lives in Columbia, S. C., and shipped a parcel from that place by express to Mrs. B. F. Cantey at Williston, N. D. This is unquestionably within the law that governs interstate commerce. The regulation of interstate commerce is within the control of the federal government, and when it undertakes to regulate a matter of interstate commerce, its regulations are exclusive. Where shipments passed through the hands of several carriers, it was always hard, and sometimes impossible, in case of loss or damage, for the shipper to fix the responsibility. In order to remedy this evil, Congress adopted what is known as the "Carmack Amendment" in 1906 (Act June 29, 1906, c. 3591, § 7, 34 Stat. 595 [U. S. Comp. St. Supp. 1909, p. 1166]), whereby it is provided "that any common carrier, \* \* \* receiving property for transportation from a point in one state to a point in another state, shall issue a receipt or bill of lading therefor and shall be liable to the lawful holder thereof for any loss, damage or injury to such property caused by it or by any common carrier, railroad or transportation company to which such property may be delivered, or over whose line or lines such property may pass, and no contract, receipt, rule, or regulation shall exempt such common carrier, railroad, or transportation company from the liability hereby imposed: Provided, that nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under existing law."

The state statute, under which this action was brought, was passed subsequently and cannot be included in the proviso. The state statute of 1910 affords the means of answering the question in intrastate shipment: Who is liable? The federal statute in interstate shipments answers the question before it is asked. It says the receiving carrier is liable. The first exception is sustained.

The first exception being sustained, the other questions do not fairly arise.

The judgment of this court is that the judgment of the circuit court is reversed, and the case dismissed.

GARY, C. J., concurs. WOODS, J., concurs in the result. HYDRICK and WATTS, JJ., dissent.

WOODS, J. (concurring in the result). This action was brought by the plaintiff, the shipper of a package from Columbia, S. C., to Williston, N. D., against the defendant, the initial carrier, to recover the penalty of \$50, provided by the state statute of 1910 (26 Stat. 717), for failure to pay the loss or

damage or trace the property and inform the person interested when, where, and by which carrier the said property was lost, damaged, or destroyed within 40 days.

The federal statute known as the "Carmack Amendment" provides that, in such shipments as this, the initial carrier shall be liable at all events for the loss or damage. This statute, without doubt, covers the subject of the liability of the initial carrier; and the later statute of the state providing an additional or different liability by imposing a penalty for failure to pay for the loss or damage, or to trace and locate the loss or damage and give information to the person interested, must yield to the federal statute. Hence there can be no recovery in this suit for the penalty against the initial carrier. The case does not require an expression of opinion as to whether the state statute is not of force in so far as it relates to terminal and intermediate carriers, and on that important point I think the court should expressly reserve its opinion.

HYDRICK, J. (dissenting). I cannot agree that there is any conflict between section 1710 of the Code of Laws of 1902, as amended by the act of 1910, and the Carmack amendment. The Carmack amendment makes the initial carrier liable at all events, but it does not pretend to interfere with the right of action which the holder of the bill of lading had against the carrier actually in default. On the contrary, in express terms, it saves to him that right of action. For various reasons—especially for reasons of convenience—the holder of the bill of lading may prefer to prosecute his right of action against the carrier who lost, destroyed, or damaged his goods, because that may be the carrier nearest to him. Take the present case for illustration. The plaintiff sent her sister a Christmas present. When it failed to reach its destination, she might well have said to her sister: "I have given you the present, but I do not care to incur the trouble and expense of litigating with the express company to recover its value for you." On the other hand, the sister living in North Dakota might have concluded that the inconvenience and expense would be too great for her to come to South Carolina and sue the initial carrier for its value. But if she could have ascertained that the terminal carrier, at her own home, had lost the goods, and was liable to her, she would have undertaken to enforce her rights there at less trouble and expense. There may be other reasons why the holder of the bill of lading would find it to his advantage to sue the defaulting instead of the initial carrier. The initial carrier has the means whereby he can, in most instances, readily and at little trouble or expense trace the shipment and ascertain when, where, and by which carrier it was lost, damaged, or destroyed; but if, after exercising due diligence in that behalf, it fails to do so, it



is excused. On the other hand, the holder of the bill of lading has no means whatever of getting the desired information. There is nothing in the interstate commerce law, including the Carmack amendment, upon the subject of requiring the initial carrier to give the holder of the bill of lading this information. Therefore Congress has not undertaken to regulate that subject. That it is within the power of the state to do so, until Congress does take jurisdiction of the subject-matter by appropriate legislation, is well settled by the decisions of this court and the Supreme Court of the United States.

WATTS, J., concurs.

(91 S. C. 104)

JOYNER v. ATLANTIC COAST LINE R. CO.  
(Supreme Court of South Carolina. March 25, 1912.)

1. TRIAL (§ 228\*)—INSTRUCTIONS—REQUESTS.  
The court may charge the law of the case in its own language.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 509-512, 526; Dec. Dig. § 228.\*]

2. TRIAL (§ 260\*)—INSTRUCTIONS—ABSTRACT INSTRUCTIONS.

If the court has fully covered the law of the case in the instruction, it need not charge any abstract question of law or give other charges already covered.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 651-659; Dec. Dig., § 260.\*]

3. APPEAL AND ERROR (§ 1064\*)—HARMLESS ERROR.

The trial judge stated that defendant's requests to charge were all on the facts, but "I have no objection to reading them," and after reading them he stated, "That is correct as applied to the case in which it was affirmed by our Supreme Court," and further stated the facts on which the request was predicated were questions of fact in the present case, and after reading over other requests, the court stated, "This is correct," and as to another request he stated that all the matters of fact covered therein were for the jury on the principles of law as they had been charged, and he also stated, as to another request, "That is true as an abstract proposition," but the facts upon which it was predicated were left to the jury. Held, that any error in stating that the requests were on the facts was not prejudicial, since the trial judge virtually charged all of the requests leaving the facts for the jury.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4219, 4221-4224; Dec. Dig. § 1064.\*]

Appeal from Common Pleas Circuit Court of Berkley County; R. W. Memminger, Judge.

Action by M. Joyner against the Atlantic Coast Line Railroad Company. From a judgment for plaintiff, defendant appeals. Affirmed.

The following is the charge of the court, with the requests to charge and the court's ruling thereon, and the exceptions taken by defendant:

"This case presents for you gentlemen a very plain and simple issue, which you have to solve on the facts which are entirely for

your determination. The business of the court is to charge you such principles of law by which you are to be governed in considering the case. In this case there are but one or two principles of law involved, and they are easily explained. The charge brought by Mr. Joyner against the railroad is that the railroad negligently killed his horse, that they failed to exercise due care, that they brought about the death of his horse, and that they are responsible for the value of the horse, which he alleges is \$150. The law requires of the railroad company toward the horse the exercise of due care. To do that which a reasonably prudent and careful person would have done, and not to do that which a reasonably prudent and careful person would not have done, and it is all for you to say whether they have exercised due care, under all the facts in this case, toward the horse. If they have failed, if the evidence satisfies you by the greater weight that something should have been done, in the exercise of due care by a railroad company, which would have avoided the injury to the horse, then they have failed in the duty which the law imposes on them, and the law gives you this rule by which you are to be governed. Where the killing of the stock has been proved to have been done by the railroad company, where it has been proved that the killing was the result of a collision with a railroad train, then the law raises the presumption that the killing was caused by the negligence of the railroad company, and that presumption exists until it is overcome by evidence showing that they did exercise due care. If you have the killing of the stock by the railroad company and nothing more, that would fix the blame of the killing on the railroad company. If you have all the testimony, then you are to decide whether the railroad company has exercised due care. If you decide that the railroad company has failed to exercise due care, and that they ought to pay for the stock, then the question is how much are they to pay, and you go on and take the testimony and fix the value of the stock, not to exceed the \$150 asked for. You say either, 'We find for the defendant,' if the plaintiff has not made out his case, 'We find for the defendant,' or if you decided that Mr. Joyner has made out his case by the greater weight of the testimony, and is entitled to recover, then you will say, 'We find for the plaintiff so much money,' writing out the amount in words and not in figures, not to exceed \$150. That is the whole case, gentlemen, and it is for you to decide. Either, 'We find for the plaintiff so much money,' or, 'We find for the defendant.' You sign your name at the bottom of this blue paper with the word foreman, and the date. I will give you the one marked, 'Original.' This other paper

is the answer of the defendant railroad company. They come in and deny that they are responsible for the death of the horse, that is what is called the 'answer.'

"Mr. Cohen: About the requests to charge, your honor.

"His Honor: They are all on the facts, but I have no objection to reading them.

"First. If the train was running at a lawful rate, and had the customary appliances, and force of trainmen, and the stock, seen by the engineer, or might with due care have been seen, was so close that the train could not be stopped in time to avoid striking it, then the plaintiff cannot recover. That is correct as applied to the case in which it was affirmed by our Supreme Court; but it is a question of fact for you to decide, in this case, whether by the stopping of the train they could have avoided the injury, or whether by the exercise of due care they could have avoided the injury to the horse.

"Second. To excuse the company, on the ground that the killing was accidental, it is not enough to show that it was not intentional; it must be shown to have occurred unavoidably and without the least fault on the part of the engineer. That is correct.

"Third. The jury must find for the plaintiff, unless the company, by proof of the particular manner or circumstance under which the cattle were killed, rebut the presumption of negligence. That is correct.

"Fourth. The presumption of negligence is not rebutted by the mere production of evidence on the part of the company, unless such evidence is sufficient to rebut this presumption, by making out affirmatively a case of accident. But if it is sufficient to rebut this presumption, the plaintiff cannot recover, and your verdict must be for the defendant. I charge you that those are all matters of fact for you gentlemen to settle in the light of the principles of law that you have been charged.

"Fifth. If the defendant's evidence overthrows the prima facie, and makes out affirmatively a case of accident, the presumption is gone, and the plaintiff must fail. That is correct as an abstract proposition, and the facts are all for you to decide in this case. That case which this was cited from was decided long before the Constitution of 1895, which prohibited the judge from charging a jury on the facts.

"Take the record and go out and decide the case.

#### "Exceptions.

"(1) Because the judge erred in charging the jury as follows: 'If they have failed, if the evidence satisfies you by the greater weight that something should have been done, in the exercise of due care by a railroad company, which would have avoided the injury to the horse, then they have failed in the duty which the law imposes on them, and the law gives you this rule by which you

are to be governed. Where the killing of the stock has been proved to have been done by the railroad company, where it has been proved that the killing was the result of a collision with a railroad train, then the law raises the presumption that the killing was caused by the negligence of the railroad company, and that presumption exists until it is overcome by evidence showing that they did exercise due care. If you have the killing of the stock by the railroad company and nothing more, that would fix the blame of the killing on the railroad company. If you have all the testimony, then you are to decide whether the railroad company has exercised due care.' The error assigned being that, the complaint in this action having alleged that the killing was negligent, the plaintiff should have been held to a proof of facts constituting negligence, and the law which raises a presumption of negligence from the mere fact of killing did not apply in this case.

"(2) Because the judge erred in ruling upon the defendant's requests to charge, as follows: 'They are all on the facts, but I have no objection to reading them.' The error assigned being that the requests to charge presented by the defendant were not on the facts, but contained propositions of law applicable to the case, and the remarks of the judge were prejudicial to the defendant, in that the jury might infer therefrom that they were not to consider the requests to charge as stating the law of the case to them.

"(3) Because the judge erred in ruling as follows, upon the defendant's first request to charge: 'That is correct as applied to the case in which it was affirmed by our Supreme Court, but it is a question of fact for you to decide in this case, whether by the stopping of the train they could have avoided the injury, or whether by the exercise of due care they could have avoided the injury to the horse.' The error assigned being that such request did not embody a question of fact, but stated a proposition of law applicable to the case.

"(4) Because the judge erred in ruling upon defendant's fourth request to charge as follows: 'I charge you that those are all matters of fact for you gentlemen to settle in the light of the principles of law that you have been charged.' The error assigned being that the proposition of law requested by the defendant did not embody a charge upon the facts, but was a statement of law applicable to the case.

"(5) Because the judge erred in ruling upon the defendant's fifth request to charge as follows: 'That is correct as an abstract proposition, and the facts are all for you to decide in this case. That case which this was cited from was decided long before the Constitution of 1895, which prohibited the judge from charging a jury on the facts.' The

error assigned being that the proposition requested by the defendant was not an abstract proposition, but was applicable to the case, and was also a charge, not upon the facts, but a statement of the proposition of law."

Mordecai & Gadsden, Rutledge & Hagood, and Octavus Cohen, for appellant. E. J. Dennis, for respondent.

WATTS, J. This action was brought to recover damages for the alleged wrongful killing of stock, the property of plaintiff. The allegation of the complaint was the plaintiff owned and was in possession of a horse which casually and without the fault of the plaintiff strayed on the track of the defendant, and that the defendant by its agents and servants, not regarding its duty in that respect, so carelessly ran and managed a locomotive that the same ran against the horse and killed it. The defendant interposed a general denial, and a further plea that the injury to the horse was due to the sole negligence of the plaintiff, and in a separate defense pleaded contributory negligence. Upon the trial of the case a verdict was rendered for the plaintiff. Defendant appeals, and by five exceptions questions the correctness of the judge's charge, and refusal to charge requests as asked for by the defendant. Let the judge's charge and defendant's request to charge, together with the judge's remarks thereon, and defendant's exceptions, be set out in the report of the case. As to the exceptions Nos. 1, 2, and 3 of defendant's request to charge, we think they were taken under a misapprehension, for we find the following at the close of his honor's charge: "Mr. Cohen: About the request to charge, your honor. His Honor: They are all on the facts, but I have no objection to reading them." He then read them, and after reading them said: "That is correct, as applied to the case in which it was affirmed by our Supreme Court; but it is a question of fact for you to decide, in this case, whether by the stopping of the train they could have avoided the injury, or whether by the exercise of due care they could have avoided the injury to the horse." After reading over the second and third requests, he said, "This is correct." After reading the fourth request, he instructed the jury that all matters of fact were for them to settle by the principles of law laid down as they had been charged. By reference to his charge it will be seen that he had in his own language fully instructed the jury as to the law in the case, and subsequently charged the first and fourth requests of defendant, and explicitly charged the second and third requests of defendant. As to the fifth request, he charged it as correct. It is true he said, "That is true as an abstract proposition"; but he left the facts for the jury to decide. An examination of the judge's

charge as a whole will show that he fully charged the jury as to the law applicable to the case and left the facts to them.

[1, 2] It is the duty of the court to declare the law of the case, and he has a right to do so in his own language, and when he fully discharges this duty he is not compelled to charge any abstract questions of law, or even sound propositions of law, applicable to the case if he has already covered the ground.

[3] Even if the judge erred in saying the requests presented were on facts, and not a proposition of law, it was not prejudicial, as he virtually charged them all, leaving the facts for the jury. We think there was no error on part of the circuit judge; that the exceptions are technical, wanting in merit, and defendant was in no manner prejudiced by remarks of circuit judge.

Exceptions overruled. Judgment affirmed.

GARY, C. J., and WOODS, HYDRICK, and FRASER, JJ., concur.

(91 S. C. 439)

#### DAVIS et al. v. REYNOLDS.†

(Supreme Court of South Carolina. May 7, 1912.)

#### 1. APPEAL AND ERROR (§ 837\*)—SCOPE OF REVIEW.

In determining whether a motion for a nonsuit was properly refused, the Supreme Court can consider the evidence introduced by defendant as well as that introduced by plaintiff.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3262-3278; Dec. Dig. § 837.\*]

#### 2. TRIAL (§§ 142, 143\*)—DIRECTION OF VERDICT.

Where the testimony is conflicting and more than one inference could be drawn therefrom, a verdict should not be directed.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 337, 342, 343; Dec. Dig. §§ 142, 143.\*]

#### 3. TROVER AND CONVERSION (§ 48\*)—MEASURE OF DAMAGES.

In an action for the conversion of standing timber which plaintiff had purchased of defendant, the measure of damages is the highest market value of the timber from the time of the conversion to the time of trial.

[Ed. Note.—For other cases, see Trover and Conversion, Dec. Dig. § 48.\*]

#### 4. APPEAL AND ERROR (§ 215\*)—RESERVATION OF QUESTIONS FOR REVIEW—ERRONEOUS INSTRUCTIONS.

An alleged error, in charging that punitive damages might be recovered, cannot be reviewed, where the court's attention was not called to the fact that the pleadings did not justify such damages.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1309-1314; Dec. Dig. § 215.\*]

Appeal from Common Pleas Circuit Court of Marion County; S. W. G. Shipp, Judge.

"To be officially reported."

Action by S. U. Davis and others against J. K. Reynolds. From a judgment on a ver-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

† Rehearing denied May 28, 1912.

dict for plaintiffs, defendant appeals. Reversed, and new trial granted.

J. W. Johnson, of Marion, for appellant. Livingston & Gibson, of Dillon, and W. F. Stackhouse, of Marion, for appellees.

WATTS, J. This is the second appeal in this case. The first appeal is reported in 77 S. C. 255, 57 S. E. 850. It was then tried before Judge Ernest Gary and a jury, and the verdict set aside by him and a new trial granted. It was then tried before Judge Shipp and a jury, and a verdict rendered for the plaintiff for \$650.

[1, 2] At close of testimony, defendant asked the court to grant a nonsuit or direct a verdict, on the grounds set forth in the case, in his favor. Both motions were refused. As to the nonsuit, there was some testimony to go to the jury from the plaintiffs, and in considering a motion for a nonsuit this court can examine all of the testimony introduced in the case, both that of plaintiffs and defendants. Dupuy v. Williams, 74 S. E. 381, and cases therein cited in Chief Justice Gary's opinion in that case. As to the motion to direct verdict, there was a conflict of testimony, and more than one inference could be drawn from it, and it is the peculiar province of the jury to pass upon just such issues, and there was no error on the part of the circuit judge in refusing the motion.

[3] The plaintiff's first and sixth exceptions question the correctness of the circuit judge's charge as to the law which should govern the jury in measuring damages, if they should find for the plaintiffs. These exceptions are: First. "Because his honor erred, it is respectfully submitted, in charging defendant's tenth request to charge, which was as follows: 'That the measure of damages in this action, so far as the standing timber is concerned, is the amount of the purchase money in the timber at the time of alienation, with legal interest from the date they were deprived of the property.' Whereas, he should have charged that the measure of actual damages in this action, so far as the standing timber is concerned, is the market value of the said timber in its condition at the time and place at which plaintiffs were deprived of same, with legal interest from the date they were deprived of same, if they were deprived of same, by acts of defendant." Sixth exception: "That his honor erred in charging the jury as follows: 'Under the statute law of this state, the measure of damages would be the purchase price of the timber, so much of it as was standing, with interest at the legal rate on that sum, from the time that the plaintiffs were notified by Krenmer and Kintzing of their purchase of the land.' Whereas, he should have charged them, it is respectfully submitted, that we have no statute law in

this state covering the law of this case on this subject, and that the measure of actual damages in this action, so far as the standing timber is concerned, is the market value of the said timber in its contention at the time and place at which plaintiffs were deprived of the same, with legal interest from the date they were deprived of the same. If they were deprived of the same by acts and conduct of defendant, or certainly the market value of said timber at the nearest market, in its condition at the time and place at which plaintiffs were deprived of the same, with legal interest from the date they were deprived of same, if they were deprived of same by acts and conduct of the defendant."

We deem it unnecessary to consider the other exceptions in the case, as the first and sixth exceptions must be sustained, as the law as laid down by Judge Shipp was erroneous. Wherever there is a wrongful taking and conversion of property, the jury may give the highest market value from the time of the taking up to the time of the trial. The rule applicable to cases of this character is well stated in Gregg v. Bank, 72 S. C. 464, 52 S. E. 197, 110 Am. St. Rep. 633. Mr. Justice Woods, as the organ of the court, says: "The defendant next submits, if it was liable at all, the jury should have been confined in estimating damages to the value of the property at the time of conversion, and it was error to charge: 'In a case of conversion of personal property the jury may give the highest market value up to the time of the trial.' It will be observed the instruction was not that the plaintiff in all cases of conversion is entitled to recover the highest market value up to the time of trial, but that the jury may adopt that as the measure of damages. This was a correct statement of the law as laid down in this state in Carter v. Du Pre, 18 S. C. 179. The just measure in some circumstances may be the value at the time of conversion, as was considered by the court in Reynolds v. Witte, 13 S. C. 9 [36 Am. Rep. 678]. In other circumstances the just measure might clearly be the highest market value, and the jury may adopt the one or the other according to their view of the justice of the case. No doubt if either measure were capriciously adopted, the circuit judge would have the power to relieve against injustice by ordering a new trial. For instance, if the conversion were made under a bona fide claim of right, without grievous wrong or oppression, and it appeared reasonably certain the plaintiff would have sold about the time of the conversion, manifest injustice would have been done to make an erroneous sporadic rise in the market price, due to abnormal conditions occurring long after the conversion, the measure of damages. On the other hand, to give only the value at the time of the conversion would, in some circumstances, be equivalent to requiring the owner of the property to

sell his property at a time and for a price fixed by a wrongdoer."

[4] As to defendant's exception to charge of judge as to punitive damages, no motion was made for nonsuit or direction of verdict on this ground, neither was his attention called to the fact there was no allegation of such damages in complaint, and this issue is not before us; but in new trial the point can be made if defendant be so advised.

The judgment of the circuit court is reversed, and a new trial granted.

GARY, C. J., and WOODS and HYDRICK, JJ., concur. FRASER, J., concurs in the result.

(91 S. C. 384)

LOVE et al. v. DORMAN et al.

(Supreme Court of South Carolina. May 4, 1912.)

1. APPEAL AND ERROR (§ 273\*)—ASSIGNMENTS OF ERROR—SUFFICIENCY.

On an appeal from a decree for an intervenor, an exception, which complains of the action of the judge in reversing a finding of a referee and that the judge "should have confirmed said report and dismissed the claim" of the intervenor, is too general for consideration.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1620-1630; Dec. Dig. § 273.\*]

2. JUDGMENT (§ 291\*)—TRANSCRIPT TO COURT OF RECORD.

Code Civ. Proc. 1902, § 87, provides that a magistrate, on the demand of a party in whose favor he shall have rendered judgment, shall give a transcript thereof, which may be docketed in the circuit court of the county where rendered, which shall constitute it a judgment of the circuit court. *Held*, that the statute requires a filing of the transcript of the judgment and not of the summons, pleadings, and proceedings, which, while the basis of, are not the judgment itself, and such matters need not be shown.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 573-577; Dec. Dig. § 291.\*]

3. JUDGMENT (§ 474\*)—COLLATERAL ATTACK—JUDGMENT OF MAGISTRATE—FILING IN CIRCUIT COURT.

Under Code Civ. Proc. 1902, § 87, which provides that on the filing of a transcript of a judgment of a magistrate in the circuit court the judgment "shall be a judgment of the circuit court," such a judgment becomes a judgment of a court of record and general jurisdiction, and cannot be attacked collaterally, but only by direct proceeding.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 809; Dec. Dig. § 474.\*]

Appeal from Common Pleas Circuit Court of Cherokee County; Ernest Gary, Judge.

Action by W. P. Love and others against Nannie J. Dorman and others, in which L. D. Childs intervened. From a decree for intervenor, plaintiffs appeal. Affirmed.

Butler & Hall, for appellants. J. C. Otts, for respondent.

FRASER, J. "This was originally an action by the plaintiffs against the defendants,

who were the heirs at law of Jas. G. Love, deceased, to partition the lands of the deceased. Under the decree of the court, the lands were ordered to be sold for partition and division among the parties in interest. After the lands had been sold, and the proceeds partially paid out, claim was made by the attorney for L. D. Childs, the respondent herein, that he held two judgments which had been 'transcripted' to the circuit court from the magistrate court of J. R. Poole, magistrate, and that said judgments were liens on the proceeds in the hands of the clerk of the court, Cherokee county. The clerk in his report to the presiding judge recited the above claim, and showed further that he had on hand the sum of \$65.30 arising out of the proceeds of the first installment paid on the real estate sold by him, and which was held subject to the validity of the claim of the said L. D. Childs' judgment. Thereupon, on motion of the attorney for the plaintiffs and other heirs at law of J. G. Love, deceased, against whom the said judgments were alleged to have been obtained, an order was obtained from the circuit court, directing and requiring that the said L. D. Childs be made a party to the action, and that he file a pleading in the cause setting up his alleged rights under said judgments, with leave to the other parties to file such pleadings in reply as might be deemed proper, and in said order it was referred to the clerk of court to take testimony and to report on all issues of fact and law. Pursuant to this order, L. D. Childs filed an answer setting up said judgments, as shown by the record herein, to which the plaintiffs and heirs at law of J. G. Love filed a reply. Upon the issues so made, the clerk, after due notice, held a reference and took such testimony as was offered and filed his report thereon, recommending that the claim of L. D. Childs be rejected, on the grounds set out in his report. To this report the attorney for L. D. Childs filed exceptions. The matter came on to be heard before his honor, Judge Ernest Gary, who reversed the report of the referee and ordered the sum of money in dispute to be paid to the said L. D. Childs, upon grounds stated in his order. From this order the appellants gave due notice of appeal to the Supreme Court."

The order of his honor, Judge Ernest Gary, is as follows: "This matter comes before me on exceptions to the report of the referee, who found that it did not appear from the record that the magistrate who gave the original judgment had jurisdiction of the defendant. I hold that if the jurisdictional defects do not appear on the face of the record, the record cannot be attacked collaterally; and such defect, if there be, must be taken advantage of by direct proceeding. It does not appear from the transcript that the magistrate court was without jurisdiction, and I cannot hold in a collateral

proceeding, in the absence of the original record, that jurisdiction was lacking."

The following is the transcript of judgment:

"Name of parties against whom judgments have been obtained: J. G. Love. ———, Attorney.

"Name of parties in favor of whom judgments have been obtained: L. D. Childs. Wallace & Otts, Attorneys.

**"Damages and Costs.**

Amount of judgment:	
Principal .....	\$37 50
Interest .....	3 75
Costs .....	1 65

Amount forward .....	\$42 90
Amount brought forward.	
Total costs and disbursements.	

"Filed on the 17th day of March, 1899.

"Filed in my office 17th March, at Sunnyside, S. C., 1899. I certify that the foregoing is a correct transcript from the docket of judgment kept in my office. J. Rufus Poole, Magistrate. [Seal.]

"Judgment signed, sealed, and enrolled July 27, 1903. J. Eb. Jeffries, C. C. O. and G. S. [Seal of Clerk of Circuit Court, Cherokee County, South Carolina.]

"Judgment Roll No. 428."

From this order the appellants appealed because, it is said, his honor, the circuit judge, erred in not holding that the judgments were void, because it failed to show (a) that a summons and complaint were issued by the magistrate, (b) that they were served on J. G. Love, (c) that the action was brought in the county in which J. G. Love resided at the time of the commencement of the action, (d) that J. G. Love answered, demurred, or served notice of appearance, or in any way submitted himself to the jurisdiction of the magistrate's court, or (e) that a trial was ever had. (2) That the circuit judge erred in holding that the transcript could not be attacked in a collateral proceeding. (3) In sustaining the alleged judgment, in that section 182 of the Code of Civil Procedure requires that where pleadings set up the judgment of the court of special or limited jurisdiction, and the same is controverted, the party pleading shall be bound on the trial to establish all facts conferring jurisdiction, and that the same was not done in this case. (4) That the circuit judge, for the reasons hereinabove given, erred in reversing the referee, but should have confirmed said report and dismissed the claim of the said L. D. Childs, the respondent therein.

[1] The fourth exception is too general for consideration. All the other exceptions raise but a single point, and that is whether it is necessary for the transcript of judgment to show the jurisdictional facts or not.

[2] Section 87, Code of Civil Procedure, provides: "A magistrate, on the demand of a

party in whose favor he shall have rendered a judgment, shall give a transcript thereof which may be filed and docketed in the office of the circuit court of the county where the judgment was rendered. The time of the receipt of the transcript by the clerk shall be noted thereon and entered in the abstract of judgments, and from that time the judgment shall be a judgment of the circuit court." It will be observed that the thing to be filed in the circuit court is a "transcript thereof"; that is, a transcript of the judgment. It does not require the filing of the original papers in the cause, but simply a transcript of the judgment. The summons, complaint, answer, proof of service, and proceedings, while the basis of the judgment, are not the judgment. It may have been wise if the Legislature had required the filing of the original papers, but the statute does not require it, and this court has no power to amend the statute, however desirable or wise such an amendment may be.

[3] The transcript, when filed, "shall be a judgment of the circuit court," which is a court of record and general jurisdiction and takes equal rank, or rather is a judgment of the circuit court, and as long as it continues to be a judgment of the circuit court, must be treated as other judgments of the circuit court are treated. It cannot be attacked collaterally, but only in a direct proceeding in the cause; that is, by a motion in the cause to set it aside.

The cases of *Barron v. Dent*, 17 S. C. 75, and *Benson v. Carrier*, 28 S. C. 119, 5 S. E. 272, were cases in which the original papers were filed, instead of a transcript, and they are not authority here.

The recent case of *New York Life Insurance Company v. Mobley*, 73 S. E. 1032, is full authority for the position that judgment of the circuit court can only be attacked in a direct proceeding, issued for that purpose, when the jurisdictional defect does not appear upon the face thereof.

The judgment of this court is that the judgment of the circuit court be affirmed and the appeal herein dismissed.

GARY, C. J., and WOODS, HYDRICK, and WATTS, JJ., concur.

(138 Ga. 8)

**DAVIS v. DAVIS.**

(Supreme Court of Georgia. April 9, 1912.)

(Syllabus by the Court.)

1. CONTEMPT (§ 40\*) — DIVORCE (§ 269\*) — ALIMONY — ATTACHMENT.

Attachments for contempt are either civil or criminal, or both.

(a) In the former, the attachment, being remedial, is merely to compel obedience to an order requiring the payment of money, or to do some act for the benefit of a party litigant, and where the party ordered fails to comply,

not out of disrespect to the court, but for other causes within or without his control.

(b) In the latter, the attachment is for disrespectful or contumacious conduct towards the court, and is punitive.

(c) Where a party litigant to an application filed by his wife against him for alimony is ordered by the court to pay a certain amount to his wife as temporary alimony, and he fails to pay the amount so ordered to be paid, and on a rule nisi to show cause before the judge why he should not be attached for contempt, and the failure to pay as set out by the respondent's answer tended to show that it was not caused by disrespect to the court, but solely because he could neither borrow the money, mortgage or sell enough of his property to raise the amount, although he had endeavored to do so, and had requested libellant's attorney to have the sheriff to levy on a sufficiency of his property to make the amount ordered to be paid, which was done, and the sum so paid was more than sufficient to pay the present demands, and also for several future payments, and this was done before the rule was made absolute, *held*, that the court erred in ordering the respondent to jail for an indefinite period for contempt.

(d) It is error for the court to order a certain sum to be paid by a respondent for temporary alimony and other sums to be paid at future intervals, and provide that, if the future payments were not made at the time specified, then the sheriff might remand the respondent to jail until the same were paid; no provision being made in the order for a hearing by the respondent before being adjudged in contempt and committed to jail.

[Ed. Note.—For other cases, see Contempt, Cent. Dig. §§ 122-124; Dec. Dig. § 40;\* Divorce, Cent. Dig. §§ 756-763; Dec. Dig. § 269.\*]

## 2. DIVORCE (§ 269\*) — ALIMONY — CONTEMPT PROCEEDINGS.

Where a rule nisi is served upon one ordered, but who failed, to pay temporary alimony, and who alleges that he intended no contempt of the court, and that he has not paid the alimony for reasons beyond his control, and requests, among other things, in his answer that the amount of temporary alimony ordered paid in future be reduced, and where it appears from the judge's order that he said nothing about the application for reduction of alimony, *held*, that the judge erred in holding the respondent in contempt, and ordering him sent to jail for an indefinite imprisonment, subject to enforcement by the sheriff, if the respondent did not make prompt payments in the future. *Held*, further, that the judge will not be directed to reduce the amount of alimony, where it appears that the application for its reduction was merely incidental to and embodied as a part of the contempt proceedings, and no evidence was introduced showing that such reduction should be granted.

(a) In such a case, the defendant can, if he so desires, file an application to have the order granting temporary alimony modified.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 756-763; Dec. Dig. § 269.\*]

## 3. CONTEMPT (§ 66\*)—APPEAL AND ERROR—PROCEEDINGS AFTER TRANSFER OF CAUSE—NATURE AND FORM—ASSIGNMENT OF ERROR.

From a judgment in a case of attachment for contempt, a writ of error may be brought to the Supreme Court in the same manner as in injunction cases; and where the judge upon the hearing adjudged the defendant in contempt, and directed that he be imprisoned therefor, an assignment of error is sufficiently definite when set out as follows: "To which order in adjudging plaintiff in error to be in contempt of court, and in refusing to modify

and reduce the amount of alimony, the plaintiff in error then and there excepted, and now excepts, and assigns the same as error, and says that the court erred in adjudging the plaintiff for being in contempt, and erred in refusing to reduce said judgment for alimony."

[Ed. Note.—For other cases, see Contempt, Cent. Dig. §§ 213-215, 223-237, 365; Dec. Dig. § 66.\*]

Error from Superior Court, Screven County; B. T. Rawlings, Judge.

Suit by Mrs. Lecie Davis against J. A. Davis. From a judgment adjudging respondent in contempt, and ordering that he be committed to the common jail without bail or mainprize, he brings error. Reversed.

Mrs. Lecie Davis filed her petition for divorce against her husband J. A. Davis, on the ground of cruel treatment, and also petitioned the court for temporary alimony for herself and minor daughter, who lacked only a few weeks of being 21 years of age. The hearing was before the judge on the sworn petition and answer and the testimony of the plaintiff and defendant. A schedule of the defendant's property was set forth by the plaintiff, who alleged it was worth something like \$25,000 or \$30,000. The defendant did not attempt to avoid the payment of a reasonable sum for alimony to the wife, but insisted that the property he owned was not worth more than \$13,000, upon which there was a mortgage of \$8,000, and that he also owed other debts. In addition to this, he alleged that he could earn little or nothing by his present efforts, having recently lost an arm in a cotton gin. On the other hand, he alleged that he had educated his daughter at the Girls' Normal and Industrial College at Milledgeville; that she was strong and capable of earning a living, and was at that time within a few weeks of arriving at age, when he would no longer be legally responsible for her maintenance and support; that the mother was likewise strong and well, and could earn a livelihood.

After hearing the oral testimony of the husband and wife, which was conflicting, the trial judge ordered the respondent to pay the applicant \$60 per month, as temporary alimony, and \$150 as attorney's fees. Failing to pay the amount ordered, a rule was issued against the respondent, at the instance of his wife, requiring him to show cause why he should not be attached as in contempt of court for failing to pay alimony as required by the order. To this rule, the respondent made a sworn answer, which was not traversed or contradicted by oral testimony, and alleged the respondent's inability to raise the money by loan, sale of his property, or otherwise, though he had attempted to do so, and that he had pointed out to the sheriff sufficient of the property belonging to him to make the sum required, and caused the same to be sold for the purpose of paying the alimony, which was done. He further

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

alleged in his answer that his failure to pay the alimony was not intended as any disrespect to the court, but was the result solely of inability to raise the money, which was subsequently done, as above set forth. He prayed the court to modify the order and reduce the amount of alimony. Upon consideration of the case, the judge made the rule absolute, and adjudged the respondent in contempt, and ordered that he be committed to the common jail of Jefferson county (his then residence), without bail or mainprize. It was further ordered that the sheriff suspend the execution of the order until the 7th day of October, 1911, pending prompt payment at that time of the award of alimony that would be due on the 1st day of October, 1911, of \$60, but that, should the said award not be promptly paid by the said date, or that any awards in future not be paid within five days from the date on which they became due, namely, on the 1st day of each month, then "the said sheriff shall, and he is hereby ordered, to proceed with the execution of this order." The judge did not modify his order fixing the amount of alimony to be paid. To the judgment of the court, the respondent excepted.

J. W. Overstreet, of Sylvania, for plaintiff in error. White & Lovett, of Sylvania, for defendant in error.

HILL, J. (after stating the facts as above). [1] 1. Attachment for contempt for failure to pay an amount of alimony ordered by the court is a remedial proceeding to enforce its payment for the benefit of one of the parties to the suit. This proceeding is not a penal process to punish as for contumacious conduct toward the court, but to enforce the payment of the sum ordered and failed to be paid. There is no suggestion in the record that the plaintiff in error was disrespectful or contumacious in his conduct toward the court. In a case of that sort, the rule is different from where the attachment for contempt is merely to compel obedience to an order requiring the payment of money for the benefit of a litigant, where the party ordered does not fail to comply out of disrespect to the court, but for other causes within or without his control. Here the answer of the plaintiff to the rule nisi to show cause why he should not be punished for contempt alleged that he did not comply with the order of the court because of his inability to comply; that he had made every reasonable effort to raise the money to pay the amount ordered by the court, but had been unsuccessful in doing so for reasons therein stated, and had even pointed out a portion of his property to be levied on and sold, in order that the money might be raised; that this was done, and money more than sufficient to satisfy all that had been ordered paid was turned over to the attorneys of the libellant for that purpose. This

answer of the respondent was not traversed nor contradicted by testimony, and hence must be taken as true. So taking it, we think the court erred in holding the respondent in contempt and in committing him to jail, without bail or mainprize, and also because the judge ordered that if any future payment was not met that the sheriff might remand the respondent to jail until the same was so paid. We think the judge exceeded his authority in this respect. It makes the sheriff the judge of a violation of the order. If the order is violated, and respondent fails to obey it, before he can be punished as for a civil contempt, he has the right to be heard and purge himself of the contempt, if any has been committed, or to show any valid reason why he should not be adjudged in contempt.

But surely a judgment of a court cannot subject one to imprisonment for a future act, or failure to act, without a hearing, and especially upon the judgment of a sheriff, without any new attachment for contempt and a hearing upon the same. Suppose the respondent had paid the money, but there was an issue as to that fact between the respondent and the sheriff, can it be said that the sheriff, by virtue of the former order of the court, could imprison the respondent on his own will and judgment? And can it be said that the respondent is not entitled to a hearing on this issue before he is so imprisoned? The rule for contempt, where one fails to pay alimony by order of the court, being a remedial proceeding to enforce the payment of the money ordered, the respondent is purged of the civil contempt whenever the money is shown to have been paid before final judgment. *Chittenden v. Brady*, Ga. Dec. 219, pt. 2, and cases cited. There is a clear distinction between civil and criminal contempt. 9 Cyc. 6. "Attachment, the object of which is purely to compel the payment of money, is said to be clearly an execution upon the civil side of the court, and does not differ from the nature of other civil demands." *Chittenden v. Brady*, Ga. Dec. 219, pt. 2.

The distinction between criminal and civil attachment has been very clearly defined by Judge Jenkins, in the case of *Cobb v. Black*, 34 Ga. 162, 166, 167, in the following language: "It is attempted to prove that the judge exceeded his power in prolonging the imprisonment beyond 20 days by references to sections 4902, 4593, and 242 (specification 5). Those provisions of law refer to attachments for contempt, which are purely punitive. They apply where an act has been done which has disturbed the regular proceedings of the court, or resisted its authority, or reflected contempt upon it. To prevent a repetition of the offense, and to deter others from its commission in future, the power of inflicting summary punishment is given to courts. The act has been done;



and when the punishment shall have been inflicted the whole matter is at an end. These are the cases in which the power of fining is limited to \$200, and of imprisoning to 20 days. But there are cases, and such is the present, wherein the process of attachment is remedial. The court orders or decrees that a party, regularly before it, do a certain act necessary to the administration of justice, according to law, and the party refuses to do it. As the only means of compelling obedience and furthering the administration of justice, courts, in such cases, have power to imprison the refractory party until he shall obey the precept. A party may be practicing a scheme of fraud, involving millions of dollars, to the accomplishment of which the continued possession of certain assets, or papers, or books of account is necessary. The mind of the chancellor having jurisdiction over him, in a case pending, being properly informed, and his conscience satisfied, he requires the delivery of the assets, books, or papers to a receiver appointed, on pain of attachment for contempt. But if the extreme consequence of the attachment be a fine of \$200 and imprisonment for 20 days, what prospect is there that he will forego the anticipated rich harvest of fraud, rather than suffer these light afflictions? Such a limitation of the power would operate rather as a license to than a prevention of fraud. The power of imprisonment, to be effectual, must be coextensive with the contumacy of the wrongdoer. The object, in this case, is not to punish for an *act done* in contempt of court, but to compel the doing of an act necessary to the administration of justice."

Applying the ruling above made to the present case, we think the court erred, whether the case be treated as one of civil or criminal attachment. If it was civil for failure to pay the money ordered to be paid, then the respondent has purged himself of this contempt by having his property sold and the proceeds put into the hands of the plaintiff's attorneys, which, the record shows, was more than sufficient to pay the demands of the judgment of the court. And this fact is not controverted by the record. The end of the law, therefore, having been attained, namely, the enforcement of the payment of the alimony ordered to be paid by the court, it follows that to imprison the respondent after this has happened is error. On this branch of contempt, the purpose of the law is not punitive, but remedial; and, when the desired end of enforcing the claim of one of the parties against the other has been accomplished by the method provided by law, it is error to order the respondent to jail. If the case is to be considered as criminal attachment, the record shows that the answer of the respondent, which is not traversed nor denied by testimony, alleges that no contempt of the court was intended. And this sworn

answer, in the absence of a traverse or denial by testimony, is to be taken as true. The record nowhere discloses that there was any contumacious conduct on the part of the respondent towards the court, or that he resisted its authority expressly, or otherwise reflected contempt upon it. So that, in either view of the case, we think the court erred in ordering the respondent remanded to jail as for contempt, without bail or mainprize.

[2] 2. This is a proceeding to attach respondent for contempt, in the answer to which he includes a request to have the alimony reduced in the future. The judge found him guilty of contempt and ordered him imprisoned. In his order, he said nothing about the application for reduction of alimony, except in so far as a ruling thereon is to be implied from his ruling on the attachment for contempt. And, inasmuch as we are holding that the defendant was not in contempt at the time the order so adjudging him was passed, and that the judge erred in holding him in contempt at all under the statements set out, we will not direct him as to the application for reduction of alimony, which was merely incidental to and embodied as a part of the contempt proceeding. The application for reduction of future alimony we will not pass upon, inasmuch as we are now holding that he was not in contempt at all under the original order, and inasmuch as the application to have it reduced in future was incidental to and a part of the contempt proceeding, and inasmuch as it appears that he had already paid ahead of the time he filed application to have it modified. The defendant can, if he desires, file an application to have the order granting temporary alimony modified, or can resist contempt proceedings, should they arise hereafter. What we have said in the first division of the opinion disposes of the case on its substantial merits. It was a proceeding begun for the purpose of attaching the defendant for an alleged contempt. As a part of his showing, in his answer to this proceeding, he showed cause why he should not be attached. In addition to this, he prayed that the original order be modified. No evidence was introduced; but the case was submitted on the pleadings. The facts showed that execution had issued against the defendant's property, and that enough of it had been sold and the proceeds turned over to the attorney for the plaintiff to pay all arrears of alimony; and this fact was mentioned as being true in the order of the judge. It appears from the uncontradicted, sworn answer of the defendant that a sufficient amount had been thus realized and paid over to the plaintiff's attorneys to cover installments of alimony for some time in the future. We have held that under the showing made the defendant was not in contempt, and the judge had no authority to pass an order for an

indefinite imprisonment of him, to be suspended, but subject to enforcement, if the defendant did not make prompt payments in the future. This disposes of the real question at issue.

As to the added application in the defendant's answer that the order previously granted, awarding alimony to his wife, should be modified, no evidence was introduced and no such showing made as would authorize us, on this hearing, to declare that the judge erred in not modifying the previous order. If the defendant desires a modification, the burden is on him to show reasons therefor and support them by proper proof. It appears that in passing the original order the judge heard evidence of the parties, and passed upon the facts as disclosed by it. In connection with the affirmative request of the defendant for a modification of the order thus made, he made no further showing. In the order granted by the judge in the present proceedings, he did not specifically refer to this prayer; but, treating the ignoring of it as being equivalent to a refusal, we cannot say, on the meager showing presented to us, that there was any such abuse of discretion as to authorize us to direct such a modification.

[3] 3. A proceeding in an attachment for contempt is brought up on a fast writ, the same as injunction cases. *Stokes v. Stokes*, 126 Ga. 804, 55 S. E. 1023; *Gray v. Gray*, 127 Ga. 345, 56 S. E. 438. The procedure is analogous to the procedure in injunction cases; and where the judge upon the hearing adjudged the defendant in contempt, and directed that he be punished therefor, an assignment of error that, "to which order in adjudging plaintiff in error to be in contempt of court, and in refusing to modify and reduce the amount of alimony, the plaintiff in error then and there excepted, and now excepts and assigns the same as error, and says that the court erred in adjudging the plaintiff for being in contempt, and erred in refusing to reduce said judgment for alimony," is a sufficiently definite assignment of error.

Judgment reversed. All the Justices concur.

(138 Ga. 120)

**RIGBERS et al. v. HATHCOCK.**

(Supreme Court of Georgia. April 13, 1912.)

(*Syllabus by the Court.*)

**CORPORATIONS (§ 563\*)—LIABILITY OF PROMOTERS—STATUTORY PROVISIONS.**

The liability of persons who organize a corporation and transact business in its name, before the minimum capital stock has been subscribed for, is to creditors, and is not an asset of the corporation; and under the rule in the case of *Farwell Co. v. Jackson Stores*, 73 S. E. 13, the receiver of the corporation could not maintain a suit against persons falling within the provisions of section 2220 of the

Code to collect from them as an asset of the corporation an amount necessary to pay the outstanding debts of the corporation.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. §§ 2280, 2280½; Dec. Dig. § 563.\*]

Error from Superior Court, Fulton County; J. T. Pendleton, Judge.

Action by T. O. Hathcock, receiver, against F. H. Rigbers and others. Judgment for plaintiff, and defendants bring error. Reversed.

A petition was brought in the name of T. O. Hathcock, as the duly appointed receiver of Rigbers Ice Cream Company, alleged to be a corporation, against four named defendants, alleged in the petition to be the persons who organized and transacted business in the name of said corporation. It is alleged in the petition that while said corporation was organized with a minimum capital stock of \$20,000, none of said stock was subscribed, and not exceeding \$1,000 was paid in by said defendants with which to carry on business, but that said defendants, doing business as a corporation, transacted business and incurred debts to the amount of more than \$1,800 due to several named creditors; that said creditors dealt with defendants as representatives of a properly and legally organized corporation having a minimum capital stock of \$20,000; and that upon petition of all the creditors the superior court had appointed said Hathcock as receiver. Petitioner seeks to recover from defendants an amount equal to the indebtedness to creditors and \$1,000 as reasonable fees for the receiver and his attorneys. The defendants demurred to the petition generally, and the demurrer was overruled.

Geo. Gordon, of Atlanta, for plaintiffs in error. W. S. Dillon and Anderson, Felder, Rountree & Willson, all of Atlanta, for defendant in error.

BECK, J. (after stating the facts as above). Under the ruling made in the case of *Farwell Co. v. Jackson Stores*, 137 Ga. —, 73 S. E. 13, the general demurrer to the petition in this case should have been sustained. The receiver was but the active officer of the corporation to collect the assets and administer them for the benefit of the creditors of the corporation. "Persons who organize a company and transact business in its name before the minimum capital stock has been subscribed for are liable to creditors to make good the minimum capital stock with interest." Civil Code, § 2220. The liability imposed by this section of the Code is to the creditors directly, and is not an asset of the corporation, which can be collected and administered by a receiver of the corporation. It will be seen that we differ with the Court of Appeals in regard to this question, as

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

decided in the case of *Walters v. Porter*, 3 Ga. App. 73, 59 S. E. 452. The ruling there made upon the question, which is common to that case and the instant case, was based upon the decision in the case of *Moore v. Ripley*, 106 Ga. 557, 32 S. E. 647, where it was held: "When a banking corporation has been shown to be insolvent, and its assets placed in the hands of a receiver, and in pursuance of an order of the court the receiver undertakes to collect by suit the liability of the stockholders for the payment of the debts of the bank as fixed by the statute, all of the stockholders so liable may be joined as defendants in one action." The writer of the opinion, through whom the court spoke in the case of *Walters v. Porter*, supra, apparently overlooked the difference between the case which he had in hand and the case upon which he relied; that is, *Moore v. Ripley*, supra. For in the case last cited the Supreme Court was dealing with the right of a receiver of a corporation to recover in a suit against a stockholder; and, while this court pointed out that the liability fixed by the act of incorporation was in that case to the creditors, and not to the corporation, it also distinctly pointed out the fact that the liability of the stockholder in that case was an asset of the corporation, and under the provisions of section 1890 of the Code of 1895 (section 2249, Code 1910) that liability was one "to be enforced by the assignee, receiver or other officer having the right to collect, marshal and distribute the assets of such failed corporation." There the receiver was clearly vested by statutory provisions with the right to proceed against the stockholder upon his individual liability. While the liability in that case may have been to the creditors of the corporation, it is declared by the statute to be an asset of the corporation, and by statute the receiver had the right to proceed.

In the case at bar there is no statute declaring that the liability of the persons who organize the corporation and transact business in its name before the minimum capital stock is subscribed for shall be an asset of the corporation; but their liability, under the statute, is declared to be one to creditors. It would seem that creditors alone can proceed to enforce this liability, and such in substance is the rule laid down in the case of *Farwell Company v. Jackson Stores*, supra, where it is said: "Where the corporation had been adjudged a bankrupt, and proceedings in bankruptcy were pending, the right of action referred to in the preceding notes was not in the trustee in bankruptcy. Bankruptcy Act July 1, 1898, c. 541, § 70 (a), 30 Stat. 565, 1 Fed. Stat. Ann. 697 (U. S. Comp. St. 1901, p. 3451). The liability imposed by the statute constituted no part of the assets of the corporation. See *Lane v. Morris*, 8 Ga. 468 (7); *In re Crystal Bottling Co. (D. C.)* 3 Am. Bankr. Rep. 194, 96 Fed.

945; *In re Beachy Co. (D. C.)* 22 Am. Bankr. Rep. 538, 170 Fed. 825; *In re Jassoy Co.*, 23 Am. Bankr. Rep. 622, 178 Fed. 515, 101 C. C. A. 641. Section 2249 of the Civil Code, making the individual liability of a stockholder under the charter of the corporation an asset of such corporation, applies to those who have subscribed for stock, and not to the liability prescribed by section 2220, which is a liability to creditors imposed upon organizers of a company who transact business in its name, whether they be actual stockholders or not. This distinction is recognized in *Commercial Bank v. Warthen*, 119 Ga. 990, 994, 47 S. E. 536, in commenting on the case of *Dutcher v. Marine Bank*, 12 Blatchf. 435, Fed. Cas. No. 4,203." The rule there made seems sound; at any rate we are bound by it.

Judgment reversed. All the Justices concur.

(138 Ga. 101)

WEAVER et al. v. TUTEN.

(Supreme Court of Georgia. April 12, 1912.)

(Syllabus by the Court.)

1. EVIDENCE (§ 345\*) — DOCUMENTARY EVIDENCE—EXEMPLIFICATION.

An exemplification from the record of the various proceedings in the court of ordinary relating to the administration of an estate is not to be rejected from evidence because the verification of the whole is embraced in one certificate, where the entire record is competent evidence.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1302-1314, 1331-1360; Dec. Dig. § 345.\*]

2. EVIDENCE (§ 340\*) — JUDGMENT — ADMISSIBILITY.

The general rule is that where a judgment is relied upon as an estoppel, or establishing a particular state of facts, of which it was the judicial result, it can be proved only by offering in evidence the complete and duly authenticated copy of the entire proceedings in which the same was rendered, yet, where the only direct object to be subserved is to show the existence and contents of such judgment, a properly authenticated copy of the judgment entry of a court of record, possessing general original jurisdiction is admissible, without more.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1294-1301; Dec. Dig. § 340.\*]

3. EXECUTORS AND ADMINISTRATORS (§ 535\*) — LIABILITIES ON BONDS—ACTIONS—EVIDENCE.

In a suit against the sureties of a removed administrator by his successor in office, a judgment rendered by the ordinary against the administrator on a citation by the distributees for a settlement is competent evidence.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 2462-2475; Dec. Dig. § 535.\*]

4. EXECUTORS AND ADMINISTRATORS (§ 537\*) — LIABILITIES ON BONDS — ACTIONS — DIRECTION OF VERDICT.

Civil Code, § 3974, authorizes a suit against the sureties of an administrator alone, if their principal is beyond the jurisdiction of the state, or is dead and his estate unrepresented, or in such position that an attachment may be issued against him. Where, in an action against the sureties, it is alleged that the administrator ab-

seconds and has removed from the state, and this allegation is denied in the answer, it is error to direct a verdict without uncontradicted proof of this allegation of the petition.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 2453, 2485-2581; Dec. Dig. § 537.\*]

Error from Superior Court, Applying County; C. B. Conyers, Judge.

Action by J. L. Tuten, administrator de bonis non of the estate of G. W. Freeman, against J. L. Weaver and others, sureties on the bond of W. R. Lee, former administrator. Judgment for plaintiff, and defendants bring error. Reversed.

W. W. Bennett, of Baxley, for plaintiffs in error. J. R. Thomas, of Jesup, and W. H. Watson, V. E. Padgett, and J. B. Moore, all of Baxley, for defendant in error.

EVANS, P. J. The action is by J. L. Tuten, administrator de bonis non on the estate of G. W. Freeman, against J. L. Weaver and others, sureties on the bond of W. R. Lee, the former administrator. From the pleadings and evidence it appeared that G. W. Freeman died intestate, and W. R. Lee was duly appointed administrator on his estate and gave bond, with the defendants as sureties; that the heirs at law filed a caveat to the return of the administrator, and upon the issue made thereon the court rendered a judgment showing a net amount in the hands of the administrator due to the estate, in the sum of \$1,990.21. The heirs at law cited the administrator to a settlement, and upon the hearing it was adjudged that the administrator had in his hands the sum of \$1,990.21, which sum he was ordered to distribute among the distributees of the estate of G. W. Freeman; and subsequently W. R. Lee was discharged from the office of administrator, and letters of administration de bonis non on the estate of G. W. Freeman were duly issued to the plaintiff. A verdict was directed for the plaintiff in the sum of \$1,990.21. Whereupon a motion for a new trial was made, which being overruled, the defendants excepted.

[1] The plaintiff tendered in evidence the following exemplifications from the records of the court of ordinary: A judgment reciting that John Freeman, as guardian for the distributees, had caveated the annual return of the administrator, and that the ordinary had heard evidence and had made an account stated, wherein the various amounts collected by W. R. Lee were charged against him and the various amounts allowed as credits were stated, leaving a balance in his hands of \$1,990.21; a petition of the guardian of the distributees of the estate, praying that W. R. Lee, administrator, be cited to a settlement, the citation issued by the ordinary on this petition, entry

of service on the administrator, and the judgment rendered; an application by the guardian of the distributees against W. R. Lee, administrator of G. W. Freeman, praying his removal as such on the ground of waste and mismanagement, citation and entry of service, and the judgment removing the administrator. To the exemplification from the records the following certificate was attached: "I, Jas. S. Patterson, ordinary and an ex officio clerk of the court of ordinary of said county, do hereby certify that I have compared the foregoing copy of petition to remove an administrator, the return of the administrator, petition to dismiss Freeman, guardian of the minor children of G. W. Freeman, for settlement, and all other and further papers connected therewith, and W. R. Lee, administrator of the estate of G. W. Freeman, deceased, and is a true copy of the original record whereof now remaining in this office, and the same is a correct transcript thereof and of the whole of such papers." Objection was made to the copies from the record being received in evidence under this certificate, on the ground that the several matters could not be joined together and certified in bulk. The statute provides that a certificate of any public officer shall give sufficient validity and authenticity to any transcript of any record in his office so as to admit the same in evidence in any court in this state. Civil Code, § 5798. Where the various records appertain to the same subject-matter, it is proper that they be joined together and certified under one certificate. All of the records refer to the same subject-matter, and were properly comprehended under one certificate, which sufficiently identified them. See, in this connection, *Lee v. Giles*, 124 Ga. 494, 52 S. E. 806.

[2] 2. The objection to the exemplification of the record of the judgment on the caveat to the return of the administrator was upon the ground that it was not accompanied by the annual return and the caveat. The statute provides for objections being filed to annual returns within 30 days. Civil Code, § 3994. The administrator had made his return, and the distributees had caveated certain items. All of these matters are fully recited in the judgment, and each item of the debit and credit side of the account was stated in the judgment of the ordinary. The plaintiff also introduced in evidence the judgment rendered in the suit by the guardian of the distributees against the administrator for the same amount, found to be in the hands of the administrator by the corrected return. The general rule is that where a judgment is relied upon as an estoppel, or establishing a particular state of facts, of which it was the judicial result, it can be proved only by offering in evidence the complete and duly authenticated

copy of the entire proceedings in which the same was rendered; yet, where the only direct object to be subserved is to show the existence and contents of such judgment, a properly authenticated copy of the judgment entry of a court of record, possessing general original jurisdiction is admissible, without more. *Gibson v. Robinson*, 90 Ga. 756, 16 S. E. 969, 35 Am. St. Rep. 250.

[3] 3. It is contended that the judgment in favor of the guardian of the distributees against the administrator is inadmissible in a suit brought by the administrator *de bonis non* against the sureties on the former administrator's bond, for the reason that the parties are not the same. The purpose of this evidence was to show a breach of the bond. Distributees may cite the administrator to a settlement before the ordinary. Civil Code, § 4073. But such distributees cannot sue a removed administrator for a devastavit, except where there is no administrator *de bonis non*, or, if there is one, he fails to sue. Civil Code, § 3982; *Bailey v. McAlpin*, 122 Ga. 616, 628, 50 S. E. 388. The judgment rendered on the application of the distributees for a settlement was conclusive on the administrator that he was indebted to them in the amount stated. After the administrator *de bonis non* was appointed, the distributees could not sue on the bond in their own name, and the action against the sureties for the administrator's devastavit, established by their judgment, was properly brought by the administrator *de bonis non*. A recovery by the plaintiff will inure to the benefit of the distributees, and an unsatisfied judgment in their favor against the administrator is admissible to show his devastavit in an action against his sureties.

[4] 4. We do not think that the court should have directed a verdict. The action was against the sureties alone. The petition alleged that the administrator had absconded and removed from the state. This allegation was denied in the answer, and no proof was offered to sustain it. Civil Code, § 3974, reads as follows: "The administrator and his sureties shall be held and deemed joint and several obligors, and may be sued as such in the same action, and if the administrator is beyond the jurisdiction of the state, or is dead, and his estate unrepresented, or is in such position that an attachment may be issued against him, the sureties, or any one or more of them, may be sued. No prior judgment, establishing the liability of the administrator or a devastavit by him, shall be necessary before suit against the sureties on the bond." Under this section sureties are not suable without joining the administrator in the suit, save in the excepted instances. The plaintiff alleged his case to be within the exception, the defendants denied it, and

as the plaintiff failed to prove this allegation he was not entitled to a verdict.

Judgment reversed. All the Justices concur.

(138 Ga. 105)

COONEY v. CITY OF ATLANTA et al.

(Supreme Court of Georgia. April 12, 1912.)

(Syllabus by the Court.)

1. INTERLOCUTORY INJUNCTION REFUSED—NO ERROR.

There was no error in refusing an interlocutory injunction.

(Additional Syllabus by Editorial Staff.)

2. MUNICIPAL CORPORATIONS (§ 521\*)—SPECIAL ASSESSMENTS—INSTALLMENTS.

Though a contract by a city for street improvements provided that abutting property owners should have the option of paying assessments in cash or in installments, with interest, an abutting owner must pay his assessment in cash, unless the city assigns the bill to the contractor.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1228, 1230, 1231, 1238, 1239; Dec. Dig. § 521.\*]

Error from Superior Court, Fulton County; J. T. Pendleton, Judge.

Action by R. L. Cooney against the City of Atlanta and others. Judgment for defendants, and plaintiff brings error. Affirmed.

Shepard Bryan, of Atlanta, for plaintiff in error. J. L. Mayson, W. D. Ellis, Jr., and Moore & Branch, all of Atlanta, for defendants in error.

EVANS, P. J. The plaintiff in error filed a petition against the city of Atlanta and its marshal to enjoin the city from further proceeding with the levy of a fl. fa. for street improvements. The injunction was refused, and, on writ of error to this court, the judgment was affirmed. 136 Ga. 118, 70 S. E. 950. When the remittitur was made the judgment of the court, the plaintiff amended by alleging: That the city had entered into a contract with certain contractors (who were made parties defendant) to pave a portion of the street in front of his property with wooden blocks, which contract contained the following language: "The contractors furthermore agree and stipulate, as to each and all assessments against abutting property owners on account of said pavement, that each and every abutting property owner shall have the option of paying the said assessments all in cash within 30 days after the completion and acceptance of said pavement, or of paying one-fourth cash within 30 days as aforesaid, and the balance in three equal installments, each of which installments shall bear interest at the rate of 7 per cent. per annum until paid, falling due in one, two, and three years." That the city was acting for the contractors in the collection of the fl. fa., and that the funds when collected would not belong to the city, but to the con-

tractors, who were demanding full payment in cash, and had refused to allow the plaintiff in error to pay by installments, and that he was entitled to have the contract between the city and the contractors specifically performed. An injunction was refused.

[1, 2] When the judgment refusing an injunction was under review in 136 Ga. 118, 70 S. E. 950, it was held: "An abutting landowner, upon whose property a street assessment is made is not entitled as a matter of right, under section 150 of the Code of Atlanta, to have his assessment divided into installments, unless the same has been transferred to the contractor doing the work." By the amendment the plaintiff no longer relies upon section 150 of the City Code as entitling him to payment in installments, but founds his contention to pay in installments upon his right to compel performance of the contract between the city and the contractors. Under this contract the city was to pay for the work partly in cash and partly by transfer of the claim against the abutting landowner. In the event the city transferred the assessment to the contractors, the abutting landowner was given an option to pay in cash or installments, and this right was reserved in the contract. The contractors' claim is against the city until the abutting landowners' assessment is transferred to them. The abutting property owner under the city charter must pay his assessment for street improvement in cash, unless the city assigns the bill for same to the contractor. He is not a party to the contract between the city and the contractors, and cannot compel performance of a contract to which he is not a party. There was no error in refusing an injunction.

Judgment affirmed. All the Justices concur.

(128 Ga. 123)

**WORKINGMEN'S UNION ASS'N v. REYNOLDS et al.**

(Supreme Court of Georgia. April 13, 1912.)

(Syllabus by the Court.)

**EXCEPTIONS, BILL OF (§ 61\*)—APPEAL AND ERROR (§ 299\*)—FILING OF BILL.**

An equitable petition was brought by the plaintiff, a corporation, against J. S. Reynolds and others, seeking a decree for the delivery into court and the cancellation of a deed, and other equitable relief. The deed purported to convey certain real property of which petitioner was the owner, and it was alleged that the defendants had executed this deed to one Jones in the name of the corporation, and ostensibly in the exercise of authority vested in them as members and officers of the corporation, but that the deed had been executed without lawful authority and under circumstances which rendered the instrument fraudulent and void. Jones was named as a party defendant, but had not been served, and plaintiff instituted proceedings to have him served and made a party, and a rule nisi was issued for this purpose. When the hearing was had on the proceedings to make him a party, the court discharged the rule and

refused the order. To the judgment discharging the rule and refusing the order making Jones a party, the plaintiff sued out a direct bill of exceptions. *Held:*

(a) That the judgment excepted to is an interlocutory order or judgment, and, as it does not appear that the case in which it was sought to make the defendant named a party had been finally decided, the case has been prematurely brought to this court; for, although with respect to a part of the relief sought Jones was a necessary party, the case could proceed against the other party defendants for other relief, which was obtainable under the allegations of the petition as it stood. *Workingmen's Union Ass'n v. Reynolds*, 135 Ga. 5, 68 S. E. 697.

(b) That this court is without jurisdiction to consider the question raised by the exceptions to a judgment purely interlocutory in nature, and it is therefore ordered that the bill of exceptions be dismissed.

(c) Under the special facts of the case it is ordered that plaintiff in error have leave to file the official copy of the bill of exceptions now in the office of the clerk of the superior court as exceptions pendente lite.

[Ed. Note.—For other cases, see *Exceptions, Bill of*, Dec. Dig. § 61; \* *Appeal and Error*, Dec. Dig. § 299.\*]

Error from Superior Court, Chatham County; W. G. Charlton, Judge.

Action by the Workingmen's Union Association against J. S. Reynolds and others. Judgment for defendants, and plaintiff brings error. Dismissed, with directions.

See, also, 135 Ga. 5, 68 S. E. 697.

Oliver & Oliver, of Savannah, for plaintiff in error. Travis & Travis, of Savannah, for defendants in error.

BECK, J. Writ of error dismissed, with direction. All the Justices concur.

(128 Ga. 118.)

**ADKINS et al. v. BENNETT, Justice of the Peace, et al.**

(Supreme Court of Georgia. April 12, 1912.)

(Syllabus by the Court.)

**1. MANDAMUS (§ 10\*)—RIGHT TO WRIT.**

In order to entitle one to the writ of mandamus, it must appear that he has a clear legal right to have the particular act performed, the doing of which he seeks to have enforced. *Civil Code*, § 5440; *State v. Georgia Medical Society*, 38 Ga. 608 (5), 95 Am. Dec. 408; *Jackson v. Cochran*, 134 Ga. 396, 67 S. E. 825, 20 Ann. Cas. 219; 28 Cyc. 151.

[Ed. Note.—For other cases, see *Mandamus*, Cent. Dig. § 37; Dec. Dig. § 10.\*]

**2. JUSTICES OF THE PEACE (§ 141\*)—APPEAL—JURISDICTION OF AMOUNT.**

An appeal from a justice's court to the superior court lies in a claim case only when the amount of the execution or the value of the property claimed exceeds the sum of \$50. *Acts 1875*, p. 85; *Civil Code*, § 4998; *Napier v. Woodall*, 118 Ga. 830, 45 S. E. 684, and cases cited.

[Ed. Note.—For other cases, see *Justices of the Peace*, Cent. Dig. §§ 467-476; Dec. Dig. § 141.\*]

**3. MANDAMUS (§ 57\*)—WRIT AGAINST JUSTICE—AMOUNT IN CONTROVERSY.**

From the principles announced in the foregoing notes it follows that a petition for man-

damus was open to general demurrer, where the alleged official duty which it was sought to have performed was the acceptance by a justice of the peace of a paper affidavit offered by the claimant, after a judgment had been rendered against him by the justice in a claim case, and refused by the justice, the affidavit having been presented in connection with proceedings to appeal the case to the superior court, and where it did not appear from the petition for mandamus that either the amount of the execution or the value of the property claimed amounted to more than \$50.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. §§ 68, 114, 120; Dec. Dig. § 57.\*]

Error from Superior Court, Richmond County; H. C. Hammond, Judge.

Action between Mose Adkins and others against E. T. Bennett, Justice of the Peace, and others. From the judgment, Adkins and others bring error. Affirmed.

M. C. Barwick and W. Inman Curry, both of Augusta, for plaintiffs in error. C. E. Dunbar, of Augusta, for defendants in error.

FISH, C. J. Judgment affirmed. All the Justices concur.

(128 Ga. 107)

# CENTRAL OF GEORGIA RY. CO. v. BROWN.

(Supreme Court of Georgia. April 12, 1912.)

(Syllabus by the Court.)

## 1. CARRIERS (§ 317\*)—CARRIAGE OF PASSENGERS—ACTIONS FOR INJURIES—EVIDENCE.

Where suit is brought against a railroad company by one who has received personal injuries on account of alleged negligence on the part of the railroad company by reason of a depression on the side of the track at the place where the injury occurred, it is not error to allow the plaintiff to testify as follows: "Q. Had you ever been to Davisboro before? A. Yes, sir; I had got off there once, going north. They stopped at the crossing just north of the depot, and I got off on the opposite side. That is the only time I had gotten off at that landing."

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1295-1306; Dec. Dig. § 317.\*]

## 2. TRIAL (§ 255\*)—INSTRUCTIONS—LIMITING CONSIDERATION OF EVIDENCE.

Where evidence is admissible for one purpose, it is not error for the court to fail to instruct the jury to limit its consideration to the one purpose for which it is admissible, in the absence of a request to so instruct the jury.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 627-641; Dec. Dig. § 255.\*]

## 3. CARRIERS (§ 321\*)—CARRIAGE OF PASSENGERS—ACTION FOR INJURIES—INSTRUCTIONS.

In a suit by one against a railroad company to recover damages for personal injuries to the one alleged to be caused by the negligence of the other, it is not error for the court to charge the jury two sections of the Code in immediate connection with each other, where one states a general rule authorizing recovery against a railroad company where both parties are at fault, and the other sec-

tion states a particular instance in which a recovery cannot be had.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1247, 1326; Dec. Dig. § 321.\*]

## 4-6. SUFFICIENCY OF INSTRUCTIONS—CHARGE AS A WHOLE.

While the charges to which exception were taken in the eighth, ninth, and tenth grounds of the motion for a new trial were not entirely accurate, when considered by themselves, yet in view of the entire charge they would not alone require a reversal; but, as the case is to be returned for a new trial, they can be corrected on the next hearing.

## 7. TRIAL (§ 207\*)—RECEPTION OF EVIDENCE—RESTRICTION TO PARTICULAR PURPOSE.

Where evidence is admissible for one purpose, but (in the absence of instructions from the court to the jury to limit its consideration to that purpose) may be considered by the jury for other purposes, it is harmful error requiring a new trial for the court, on written request made therefor, to refuse to instruct the jury that the evidence was admissible for one purpose only, and not to consider it for any other purposes, notwithstanding counsel for the plaintiff stated to the court in the presence of the jury, when objection was made to the admission of the evidence, that the purpose of the evidence was that for which it was admissible.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 498, 499, 501; Dec. Dig. § 207.\*]

## 8. CARRIERS (§ 321\*)—CARRIAGE OF PASSENGERS—ACTIONS FOR INJURIES—INSTRUCTIONS.

In a suit brought by one against a railroad company to recover damages for injuries alleged to have been caused, among other things, by the negligence of the latter in not providing a safe place for passengers to alight from its passenger trains at a particular place, it is not error for the court to refuse to charge the jury that: "The plaintiff can recover only upon the specific acts of negligence set out in the petition. The plaintiff alleges that the place was unsafe because the landing was lower than the tops of the cross-ties. If you should find from the evidence that the landing was not lower than the tops of the cross-ties, you should find that the landing place was not unsafe so far as the surface of the ground was concerned."

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1247, 1326-1337, 1343; Dec. Dig. § 321.\*]

(Additional Syllabus by Editorial Staff.)

## 9. TRIAL (§ 296\*)—INSTRUCTIONS—CONSTRUCTION AS A WHOLE.

In an action against a railroad for injuries, an instruction that if the plaintiff sustained injuries, and defendant did not in transporting him exercise extraordinary care, the plaintiff would be entitled to recover, though omitting any reference to the principle that if plaintiff, by ordinary care, could have avoided the consequences of defendant's failure to exercise extraordinary care, he could not recover, could not have confused the jury, where the general charge covered the latter subject.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 705-713, 715, 716, 718; Dec. Dig. § 296; Carriers, Cent. Dig. § 1406.]

## 10. CARRIERS (§ 321\*)—CARRIAGE OF PASSENGERS—ACTIONS FOR INJURIES—INSTRUCTIONS.

In an action against a railroad for injuries, an instruction that if plaintiff and the agents of the company were both at fault, and plaintiff may have contributed to the injury, and he could not have avoided the consequences of defendant's negligence if he had exer-

cised ordinary care, then he "may" recover damages, is inaccurate in the use of the word "may" for "shall."

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1247, 1326-1337, 1343; Dec. Dig. § 321.\*]

Beck and Atkinson, JJ., dissenting.

Error from Superior Court, Washington County; B. T. Rawlings, Judge.

Action by C. C. Brown against the Central of Georgia Railway Company. Judgment for plaintiff, and defendant brings error. Reversed.

C. C. Brown filed his petition in the superior court of Washington county to recover damages for personal injuries, alleged to have been caused by defendant's negligence, as hereinafter set out, and recovered a verdict for \$8,000. The case, as shown by the petition and evidence of plaintiff, is substantially as follows: The plaintiff was a passenger on one of defendant's passenger trains, and Davisboro, in Washington county, was his destination. The train reached Davisboro on defendant's line of road at night, or so early in the morning that it was yet dark. As the train approached Davisboro the station was announced. The plaintiff, who was a traveling salesman, left the train when it stopped, a suit case in one hand and a sample case in the other. There were no lights at the point where plaintiff alighted, nor was the moon shining, and no lantern was used by the train crew to give light; it appearing that the lantern used by the crew for such purpose was broken. The ground at the point at which the plaintiff alighted was considerably lower than the rails of the track, being several inches lower than the cross-ties. Being in total darkness, and in ignorance of the long distance from the bottom step of the car to the ground, and carrying the two valises, plaintiff was, on account of the unexpected distance and the absence of any stool on which to step, thrown violently to the ground when he attempted to alight. In attempting to regain his feet, plaintiff again fell against a brick wall, receiving the injuries for which suit is brought. The negligence alleged, on which plaintiff relies for a recovery, is the failure of the defendant to furnish plaintiff a safe place to alight from said train, and in failing to furnish a light at said point, and that both concurred in making the particular place at the particular time an unsafe one for passengers to alight; that the negligence of defendant in furnishing such unsafe place caused the plaintiff's injuries. Plaintiff alleged that by reason of the negligence of defendant as above set out, and his being violently thrown to the ground and against the brick wall, the muscles and nerves of plaintiff were wrenched and torn, his back was wrenched, and spinal concussion has resulted therefrom. He had to have assistance in reaching the hotel after the

injury, and was confined to his bed during the following day. He had to have immediate medical attention, and to have opiates administered to him. He was later taken to the company's physician in an adjoining town, later still came to Atlanta, and from there went to his home in Alabama. Much medical testimony was introduced on the trial of the case. The plaintiff's witnesses tended to show that he suffers pain most of the time, and is unable to do any work which requires physical effort, and that the injuries are permanent. At the time of the injury plaintiff was a traveling salesman, 55 years old, and earning \$75 per month and expenses. His physician's bills were alleged as \$200. The defendant denied all the paragraphs of plaintiff's petition, except the first, and required strict proof thereof. Under the evidence and charge of the court the jury returned a verdict for the plaintiff for \$8,000. The defendant made a motion for new trial, which was overruled, and defendant excepted.

Lawton & Cunningham, of Savannah, for plaintiff in error. Smith, Hastings & Ransom, of Atlanta, and Hardwick & Wright, of Sandersville, for defendant in error.

HILL, J. (after stating the facts as above).

[1] 1. It is contended that the court committed error in allowing the plaintiff to testify, over the objection of the defendant that the same was irrelevant, as follows: "Q. Had you ever been to Davisboro before? A. Yes, sir; I had got off there once. Going north, they stopped at the crossing just north of the depot, and I got off on the opposite side. That is the only time I had gotten off at that landing. Q. Do you know the condition of that landing? A. Yes, sir; it is higher than the track." This evidence was not irrelevant, but was admissible for two purposes: (a) As tending to show that the plaintiff did not know of the depression on that side of the track, where he alighted from the train on the night of the injury; and (b) from the condition of the landing, as tending to show negligence on the part of the defendant.

[2] 2. Error is assigned on the admission of the following testimony by the court, over the objection of the defendant: "I know there has been some change made in the condition of the ground at the place where Mr. Brown stated he fell, since he fell there. It was filled in from about the bottom of the rail to the top of the rail. That is where the people get off the train that go from Tennille to Savannah. On the other side it was already filled up. I could not say when that change took place. It is my best recollection that it was some time afterwards. I couldn't say how long to save my life. I couldn't say whether it was right quick afterwards or not. My recollection is

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes



it was done some short time afterwards. I don't know whether it was some 30, 60, or 90 days. I couldn't say positively, but it was done afterwards. The thing that fixed it in my mind was that possibly they were trying to raise the ground there like it was on the opposite [side], and that this thing had occurred and impressed it on my mind. That is about what caused me to notice it. I could not say whether it was a short while or not." It is insisted by the plaintiff in error that the testimony quoted was irrelevant, except for the purpose of showing that the measurement of the distance from the bottom step of the coach from which the plaintiff alighted (the conductor of the train having testified that he had made such measurement on October 17, 1908) to the surface of the ground was not the correct distance as it existed at the time of the alleged injury to the plaintiff; that the court admitted the evidence without limiting its application, and authorized the jury to find that any change made by the defendant was an admission that the place at which plaintiff alighted was unsafe. We do not agree with this contention. If the evidence was admissible for one purpose, and the defendant wanted it limited to that one purpose, the court should have been asked to so limit it in his instructions to the jury. But where it is admissible for one purpose, it cannot be excluded entirely, but may be limited to the purpose for which it was admitted, if a request to limit it has been made to the court. And a failure to give such limitation, in the absence of a request, will not work a reversal of the judgment. *Garbutt Lumber Co. v. Camp et al.*, 137 Ga. 2, 73 S. E. 841.

[3] 3. Complaint is made that the court erred in charging the jury as follows: "No person shall recover damages from a railroad company for injuries to himself or his property, where the same is done by his consent, or caused by his own negligence. If the plaintiff and the agents of the defendant company are both at fault, the plaintiff may recover; but the damages shall be diminished by the jury in proportion to the amount of default attributable to him. I charge you further that if the plaintiff, by the exercise of ordinary care, could have avoided the consequences to himself caused by the defendant's negligence, he is not entitled to recover; but in other cases the defendant is not relieved, although the plaintiff may have in some way contributed to the injury sustained." It is insisted that the error in said charge is that it stated in immediate connection two conflicting principles, without explanation or qualification. We do not think this assignment well taken. By section 2781 of the Civil Code of 1910, it is declared that no person shall recover damages from a railroad company for injury to himself or his property, where the same is done by his consent or is caused by his own

negligence. If the complainant and the agents of the company are both at fault, the former may recover; but the damages shall be diminished by the jury in proportion to the amount of the fault attributable to him. There is, however, another rule of law touching the character and extent of negligence on the part of the plaintiff which will prevent a recovery. This is contained in section 4426 of the Civil Code of 1910, which declares that if the plaintiff by ordinary care could have avoided the consequences to himself caused by the defendant's negligence he is not entitled to recover, but in other cases the defendant is not relieved, although the plaintiff may in some way have contributed to the injury sustained.

The presiding judge in the present case charged each of these sections, in the order in which they have been quoted above. It is contended that this was calculated to confuse the jury, and the case of *Americus, etc., Ry. Co. v. Luckie*, 87 Ga. 6, 13 S. E. 105, is cited to sustain the position. It does not do so. In that case the presiding judge first charged the rule that if the plaintiff by the use of ordinary care could have avoided the consequences of the defendant's negligence he could not recover, then immediately, in the same sentence, separated only by a semicolon, and with the appearance of qualifying the rule, added: "But if both parties are at fault, and the alleged injury was the result of the fault of both, then, notwithstanding the plaintiff's negligence, he would be entitled to recover, but the amount of the recovery would be abated in proportion to the amount of fault on her part." Taking these statements together, the jury might have understood that the general rule was that the plaintiff could not recover if she could have avoided the consequences to herself of the defendant's negligence by the use of ordinary care, and failed to use it, but that this was qualified by the fact that if both were guilty of negligence she might recover the diminished amount. In other words, that she might recover the diminished amount, although she was guilty of want of ordinary care and could have prevented the injury to herself by its use. In the present case the charge of the court exactly reversed this principle, and first stated the general rule of comparative negligence, that there might be a recovery in case both the plaintiff and the railroad company were at fault, with diminution of damages in proportion to the amount of default, and then instructed the jury that if the plaintiff's fault amounted to a want of ordinary care, by the use of which he could have avoided the consequences to himself of the defendant's negligence there could be no recovery. In other words, the charge in the *Luckie* Case qualified or apparently qualified the rule preventing recovery because of failure to use ordinary care, by the rule allowing recovery by abatement of damages

if both parties were at fault. In the case before us, if there was a qualification, it was exactly the reverse of that made in the Luckie Case, so that, after charging the general rule of recovery, with abated damages if both were at fault, he then charged that if the plaintiff's fault amounted to want of ordinary care by the use of which he could have avoided the consequences of defendant's negligence he could not recover. This is not only the proper instruction to give in such a case, but in the case of *Southern Ry. Co. v. Gore*, 128 Ga. 627, 58 S. E. 180, it has been held error not to give it.

It is true that in some of the cases the Luckie Case has been rather loosely cited, without regard to the exact point which the charge there considered involved, as above explained. But if the judge should give both of these rules of law in a particular case, and if the rule preventing a recovery for failure to use ordinary care is really in substance the limitation upon the rule allowing recovery against a railroad company where both parties are at fault, it is difficult to see how giving the general rule first and the limitation or exception second can be error. The truth is that these two sections of the Code are the law of the state. One states a general rule, authorizing a recovery against a railroad company where both parties are at fault; the other states a particular instance in which a recovery cannot be had. How can it be error to charge the Code of Georgia in the proper order of general rule first and limitation or exceptional case second is not easy to perceive. An examination of the charge given in this case will show that it was very closely analogous to that which it was said in the opinion in the Luckie Case it would be proper to give. In the case of *Macon, etc., R. Co. v. Moore*, 99 Ga. 229, 25 S. E. 460, no opinion was filed, but only a head-note. As it cited and depended for what was said on that subject upon the Luckie Case, it can hardly be supposed that it was intended to conflict with it. If it does so, it will have to yield to it.

[4, 8] 4. The eighth ground of the amended motion alleges error because of the following charge of the court: "So if you find, from the facts and circumstances in this case, that the plaintiff sustained injuries, and the defendant did not in transporting him exercise extraordinary care, then the plaintiff would be entitled to recover." It is contended that this charge omitted any reference to the principle that, if the plaintiff could by ordinary care have avoided the consequences of failure on the part of the defendant to exercise extraordinary care, he could not recover. The court in his general charge had covered this subject, and we do not see how the charge complained of could have confused the jury.

[5, 10] 5. The ninth assignment is because the court erred in charging the jury: "If

you find, however, as I have before instructed you, gentlemen, that the plaintiff and the agents of the company are both at fault, the plaintiff may have in some way contributed to the injury, and he could not have avoided the consequences to himself, caused by the defendant's negligence, if he had exercised ordinary care, then I charge you that he may recover damages of the defendant company; but the damages may be by the jury trying the case diminished in proportion to the amount of default attributable to him." It is contended that this charge left to the discretion of the jury the diminution of the damages, when it is imperative that the damages "shall" be diminished under the circumstances stated. The use of the word "may" for "shall" by the court in that portion of the charge indicated was inaccurate, though he had previously in his charge correctly used the word "shall." As the case is to go back, this apparent slip of the tongue will probably not occur at the second trial.

[6] 6. Complaint is made of the following charge: "Certain tables have been introduced in evidence, and it will be necessary for me to give you some instructions relative to them. You can use them if you see fit, or you may adopt any method which you see proper in arriving at the amount which the plaintiff would be entitled to recover, in the event you so find." It is contended that this charge vested the jury with the power arbitrarily to fix the measure of damages, in the event they should see fit not to use the mortality and annuity tables. The language here used by the court without qualification might have been understood as giving the jury some arbitrary power. But as the case goes back for new trial, the court will probably not employ language so broad and unqualified as in the former trial. He doubtless meant to instruct the jury that, if they saw fit not to use the mortality and annuity tables, they might find an amount for the plaintiff, if the evidence and the law as given them in charge authorized it, after seeking honestly, fairly, and impartially to arrive at a true verdict therefrom, by some deduction of their own, independently of the tables which had been explained to them.

[7] 7. Exception is taken to the refusal of the court to charge the jury as follows: "If you should find that the defendant after August 22, 1908, elevated the surface of the ground at the point where the plaintiff alleges that he alighted, you would not therefrom be authorized to find that the defendant was negligent as to the safety of the alighting place at the time of the occurrence." In a note to this ground of the motion for new trial the presiding judge certifies that, when the testimony set out in the sixth ground of the amended motion for new trial was objected to, plaintiff's counsel stated to the court, in the presence

of the jury, that the purpose of the testimony was to show that, between the time of plaintiff's injury and the time of the measurement made by the witness Wheeler, the ground at the place of the injury had been raised. Will the above statement of counsel to the court in the presence of the jury take the place of instructions from the court to the jury that the consideration of the evidence was to be limited to the particular purpose for which it was admitted? We hold that it does not, and that the failure of the judge to so instruct the jury was harmful error requiring a new trial. The defendant was entitled to have the evidence which was admissible for one purpose only to go to the jury, not merely with the statement of counsel for the plaintiff to that effect, but with the force of an instruction from the court that it was to be so limited. The jury could not know from the statement of counsel that the consideration of the evidence was to be restricted to the purpose for which it was admitted. The defendant was entitled to have this instruction come from the court itself. The statement of counsel does not have the force of restricting the evidence to the purpose as expressed by counsel, as if an instruction is given to the jury by the court. The statement of counsel would not prevent the jury from considering it, but with a charge from the court to the jury to that effect they are bound to consider it for the purpose alone for which it is admissible. The statement of counsel would not have the effect of a negation of its use by the jury. If the court had followed up the statement with an instruction to the jury to so restrict its use, it would be all that could be required; but, instead of doing that, the court refused to so instruct the jury on a written request. Had he instructed the jury as requested, it would have had the sanction of one having authority to speak. It was recognized by counsel for plaintiff that the sole purpose of the evidence was that between the time of plaintiff's injury and the time of the measurement made by the witness the ground at the place of the injury had been raised, because he so stated, and this court has held a number of times that, where evidence is admissible for one purpose, but it might be considered for another purpose for which it was not admissible, in the absence of instructions from the court, if counsel wanted the evidence restricted, a request should be made therefor. See *A. G. Garbutt Lumber Co. v. Camp*, 73 S. E. 841. Here defendant did make the request, and the court should have restricted the consideration of the evidence by the jury as requested.

This was a vital question in this case. And the fact that defendant did change this place of alighting after plaintiff's injury might be considered a strong circumstance by the jury to show negligence on the part

of the defendant, in the absence of the instruction requested. It is impossible to say that the jury did not so consider it, although counsel said the purpose of the evidence was as stated by him. This court has ruled that, following an injury to a person by a railroad company which is sought to be held responsible therefor, the fact that the railroad company took additional precautions to prevent other persons from being likewise injured cannot by taking such precaution be regarded as an admission that it was negligent in not taking such precautions sooner. *Ga. Southern & Florida R. Co. v. Cartledge*, 116 Ga. 164, 42 S. E. 405, 59 L. R. A. 118; *L. & N. Railroad Co. v. Barnwell*, 131 Ga. 792 (3), 63 S. E. 501. When the evidence was offered, the attention of the court was called to the point that it was admissible solely on the question of whether there had been a change in the level of the ground before certain measurements were made, and was not admissible for the purpose of showing negligence. Again in this request the court was asked to instruct the jury that this evidence could not be considered as proving negligence. He refused it, and nowhere in the charge touched on the subject. The request used the expression that if, after the alleged injury, the defendant elevated the surface of the ground at that place, "you would not therefrom be authorized to find that the defendant was negligent as to the safety of the alighting place at the time of the occurrence." If this evidence was wholly inadmissible as tending to show negligence, and could not be considered for that purpose, then certainly the jury would not be authorized to find negligence "therefrom"; that is, from such evidence. The court let in the evidence for another purpose. It was a sound proposition of law that it could not be considered as showing negligence, or to base a finding of negligence upon. The request did not really or apparently rule out the evidence for the only purpose for which it was admitted, nor intimate that it could not be considered for that purpose. It only excluded its consideration for an unlawful purpose. It contained a complete and correct proposition of law in itself. If the judge so desired, he could have further charged as to the purpose for which the jury could consider the evidence; but the request contained a complete and correct principle of law, and the fact that it did not include some other additional matter did not render its refusal proper.

[8] 8. Error is assigned on the refusal of the court to charge the jury as follows: "The plaintiff can recover only upon the specific acts of negligence set out in the petition. The plaintiff alleges that the place was unsafe because the landing was lower than the top of the cross-ties. If you should find from the evidence that the landing was

not lower than the top of the cross-ties, you should find that the landing place was not unsafe so far as the surface of the ground was concerned." There is no merit in this ground of the motion for new trial. The acts of negligence alleged by the plaintiff against the defendant were that no light of any description was placed by the defendant at the place where the injury occurred, that it failed to place a stool beneath the steps of the passenger cars to be used by persons in alighting from said cars as was customary, and that the place where plaintiff had to alight was rough and uneven, and the ground was from three to six inches below the top of the cross-ties, making the place unsafe for alighting. The request to charge was confined to only one of these alleged acts of negligence, which was calculated to mislead the jury. The court could not instruct the jury what was safe or unsafe, and the charge as requested would virtually have done so. It would have been equivalent to instructing the jury that certain facts proven were not negligence. It is not the province of the court to instruct the jury that certain facts proven do or do not constitute negligence. In the case of *Atlanta & West Point R. Co. v. Hudson*, 123 Ga. 108 (1), 51 S. E. 29, it was held: "Except where a particular act is declared to be negligence, either by statute or by valid municipal ordinance, the question as to what acts do or do not constitute negligence is for determination by the jury, and it is error for the presiding judge to instruct them what ordinary care required should be done in a particular case."

Judgment reversed. All the Justices concur, except BECK and ATKINSON, JJ., who dissent.

BECK, J. (dissenting). I dissent from the holding of the majority which has the effect of granting a new trial on the ground that the court erred in refusing to give in charge to the jury the written request for the instructions set forth in the seventh division of the opinion. It was not error to refuse to give this charge, unless it was perfect and complete in itself relatively to the subject dealt with. I do not think this request complete and perfect. Standing alone, it might have had the effect of leading the jury to believe that the evidence as to raising the surface of the ground had been withdrawn from their consideration. This evidence had been properly admitted, as it was admissible for one purpose. If counsel desired to have the jury limited in their consideration of the evidence to that particular purpose, they should have requested a charge embodying the limitation, and a proper charge for this purpose would have stated to the jury that the evidence was still before them for the particular purpose, but would not be considered by them as tending to show that the

defendant had been negligent in respect to the condition of the surface of the ground or its distance from the steps of the car, at the place where the plaintiff alighted. The jury might have been led to regard the request under consideration as one requiring exclusion, rather than limitation to a particular purpose. The idea of exclusion was more prominent in the charge requested than the idea of limitation, and the instruction desired was faulty in this respect.

I am authorized to say that Justice ATKINSON concurs with me in the views expressed in the dissent.

(11 Ga. App. 130)

DOUGLAS NAVAL STORES CO. v. GEORGIA FERTILIZER & OIL CO.

(No. 4,016.)

(Court of Appeals of Georgia. May 7, 1912.)

(Syllabus by the Court.)

PARTNERSHIP (§ 296\*)—ACTION ON NOTE—DEFENSE.

Where suit is brought on a promissory note against a partnership composed of two members, it is no defense that one of the partners had used the funds of a new partnership, formed after the note was given and composed of the two partners and four others, in settlement of an individual debt due the plaintiff by one of the original partners. The question of the misappropriation of the partnership assets can be raised only by the new firm; it not appearing that it assumed the liabilities and took over the assets of the old partnership.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 662, 663, 666-678; Dec. Dig. § 296.\*]

Error from City Court of Douglas; W. C. Lankford, Judge.

Action by the Georgia Fertilizer & Oil Company against the Douglas Naval Stores Company. Judgment for plaintiff, and defendant brings error. Affirmed.

F. Willis Dart, Lawson Kelley, and C. A. Ward, all of Douglas, for plaintiff in error. J. W. Quincey, of Douglas, for defendant in error.

POTTLE, J. The Douglas Naval Stores Company was a copartnership composed of A. B. Fisher and C. A. Ward. The suit is against the partnership for a balance due on a promissory note given to the plaintiff for guano. The defense was that the note had been overpaid, and judgment was prayed for the amount of the overpayment.

It appears from the evidence, that after the note was given a partnership was organized, composed of A. B. Fisher, C. A. Ward, and four other persons, under the name and style of A. B. Fisher & Co. Fisher owed the plaintiff an individual note for fertilizer, and gave to plaintiff's agent a draft signed A. B. Fisher & Co. and drawn against that firm's account with the Downing Company, a naval stores factor with

which the drawer had an account. There was testimony for the plaintiff that the draft was given by Fisher in settlement of the balance due on his individual note, and that it was so applied, while Fisher testified that he directed the draft to be applied on the note due by the Douglas Naval Stores Company. There was further evidence that the firm of A. B. Fisher & Co. did not authorize Fisher to use the funds of that partnership in settlement of his individual debt. Fisher also testified that "A. B. Fisher & Co. was the successor of the Douglas Naval Stores Company; the name having been changed to A. B. Fisher & Co." The plaintiff prevailed, and the defendants' motion for a new trial was overruled.

The point made in behalf of the defendants is that the plaintiff was not entitled to prevail, because, even if the testimony of the plaintiff's agent that Fisher authorized the application of the proceeds of the draft to his individual debt be accepted as true, yet it appeared, from the evidence, that the new partnership of A. B. Fisher & Co. did not authorize Fisher to use its funds in payment of his individual debt. It is undoubtedly true that one partner cannot, without the consent of his copartners, use the partnership funds in settlement of his individual debt. *Wise v. Copley*, 36 Ga. 508; *Harper v. Wrigley*, 48 Ga. 496. But this principle has no application to the facts here. The money used to pay Fisher's individual debt was the property of A. B. Fisher & Co. They are not parties to the case. If they are not complaining at the misappropriation by Fisher of their assets, it certainly does not lie in the mouth of the Douglas Naval Stores Company to do so. Whether A. B. Fisher & Co. might recover the money from the plaintiff, upon the ground that, with knowledge of the source from which the money came, it consented to the misappropriation, or whether the plaintiff had a right to assume that Fisher had lawfully acquired title to the fund paid on his individual debt, and the only remedy of A. B. Fisher & Co. would be against Fisher, we do not say; but we are clear that this is a matter which does not concern the present defendant.

Fisher's statement that the new firm was the successor of the defendant does not affect the question. There is no proof that the new firm took over the assets and assumed the liabilities of the old. "An incoming partner is not bound for the debts of the firm, in the absence of an express agreement, on sufficient consideration, to assume the old indebtedness." Civil Code 1910, § 3174. The case is simply one where a firm composed of two members was dissolved, and a new firm under a different name organized with six members, including the two original copartners. The two firms were as separate and distinct as two individuals. The only issue properly in the case was whether Fisher had

directed that the proceeds of the draft be applied on the note due by the defendants; and, this issue having been settled against them, the verdict will not be disturbed. Judgment affirmed.

(11 Ga. App. 118)

FRANZONI v. STATE. (No. 3,928.)

(Court of Appeals of Georgia. May 7, 1912.)

(Syllabus by the Court.)

## 1. REVIEW ON APPEAL.

The verdict is strongly supported by the evidence, and no material error of law was committed.

## 2. CRIMINAL LAW (§ 945\*)—NEW TRIAL—NEWLY DISCOVERED EVIDENCE.

There was no abuse of discretion in refusing a new trial because of alleged newly discovered testimony, as it would not probably produce a different result.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2324-2327, 2336; Dec. Dig. § 945.\*]

Error from Superior Court, Pickens County; N. A. Morris, Judge.

A. Franzoni was convicted of crime, and brings error. Affirmed.

Gober & Griffin, of Marietta, and Roscoe Pickett and Isaac Grant, both of Jasper, for plaintiff in error. J. P. Brooke, Sol. Gen., of Alpharetta, for the State.

HILL, C. J. Judgment affirmed.

(11 Ga. App. 156)

HARVIL v. WILSON BROS. (No. 3,809.)

(Court of Appeals of Georgia. May 7, 1912.)

(Syllabus by the Court.)

## BROKERS (§§ 54, 60\*)—COMMISSIONS.

Where, during the agency, a broker finds a purchaser ready, able, and willing to buy, and who actually offers to buy, on the terms stipulated by the owner, his commissions are earned. Civ. Code 1910, § 3587. Or if, during the agency, the broker enters into a contract in behalf of his principal, which is mutually binding and enforceable, the broker has fully complied with his obligation, and is entitled to his commission. In order, however, for the broker to recover commissions on the latter theory, he must allege and prove, either that the owner or the purchaser refused to comply without legal cause, and that, when the purchaser refused to comply, he was solvent, or that the question of his solvency had been waived by the owner. Applying these principles to the allegations of the petition, the demurrer thereto should have been sustained.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. §§ 75-81, 91; Dec. Dig. §§ 54, 60.\*]

Error from City Court of Atlanta; H. M. Reid, Judge.

Action by Wilson Bros. against J. J. Harvil. Judgment for plaintiffs, and defendant brings error. Reversed.

Walter McElreath, of Atlanta, for plaintiff in error. Dean E. Ryman, of Atlanta, for defendants in error.

HILL, C. J. Judgment reversed.

(11 Ga. App. 141)

CARTER et al. v. STATE. (No. 4,094.)  
(Court of Appeals of Georgia. May 7, 1912.)

*(Syllabus by the Court.)***CRIMINAL LAW (§ 598\*)—CONTINUANCE—ABSENCE OF WITNESSES.**

The showing for a continuance on account of the absence of material witnesses for the accused being complete in all respects, it was error, requiring a new trial, to place the accused upon trial in their absence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1335-1341; Dec. Dig. § 598.\*]

Error from Superior Court, Liberty County; W. W. Sheppard, Judge.

Simon Carter and another were convicted of crime, and bring error. Reversed.

B. A. Way and W. A. Way, both of Hinesville, for plaintiffs in error. N. J. Norman, Sol., of Savannah, for the State.

POTTLE, J. As we understand the record, the accused were committed for trial by a justice of the peace, and subpoenas were then issued by the justice for two of the defendants' witnesses, requiring them to appear at the superior court and testify in behalf of the defendants. This was in accord with the authority conferred upon the magistrate by Penal Code 1910, § 943. The witnesses did appear in compliance with these subpoenas, but left court before the case was reached for trial, in order to attend the funeral of a near relative, who had suddenly died. No subpoenas were issued for the witnesses by the clerk of the superior court. The case was postponed for one day, and an officer sent for the witnesses; but they refused to come, for the reason above stated. Their testimony would have been very material. The showing was in every respect complete.

The fact that they had not been subpoenaed by the clerk of the superior court would make no difference. The accused had the right to have subpoenas issued by the justice of the peace, and when the witnesses, without fault on the part of the accused, failed to be present when the case was called, the accused were entitled to a continuance, in order to obtain their presence. Section 944 of the Penal Code of 1910 provides that unless the accused, at the time of commitment, avails himself of the right offered by section 943 to have his witnesses summoned by the magistrate, he would not be entitled to a continuance on account of their absence at the trial. If he does comply with the terms of section 943, he is entitled to a continuance if his witnesses fail to appear, even though he does not have subpoenas issued by the clerk of the superior court.

We direct a new trial solely on account of the refusal of the judge to grant a continuance. There is no merit in any of the other assignments of error.

Judgment reversed.

(11 Ga. App. 148)

SHELTON et al. v. STATE. (No. 4,099.)  
(Court of Appeals of Georgia. May 7, 1912.)

*(Syllabus by the Court.)***1. HOMICIDE (§ 286\*)—INSTRUCTIONS—ASSAULT WITH INTENT TO MURDER.**

On a trial under an indictment charging the offense of assault with intent to murder, the trial judge instructed the jury as follows: "If you find that the defendant assaulted and wounded the party alleged to have been assaulted and wounded, and assaulted with a weapon likely to produce death, and it was done with malice—that is, there was a specific intent to take human life, without justifying or mitigating circumstances—and you believe such to have been established by the evidence, and as to whether or not there was any malice in the mind at the time of the occurrence is a question for you to determine, by looking to all the surrounding facts and circumstances as reflected by the evidence, and if you so find and determine, you would be authorized to find the defendant guilty of assault with intent to commit murder." *Held*, this excerpt from the charge is not erroneous, but is a correct presentation of the law applicable to the charge in the indictment. The specific intent to kill unjustifiably constitutes legal malice, whether death results or not; and where an assault is made with a deadly weapon, or a weapon likely to produce death, with a specific intent to kill, the jury would be authorized to infer the existence of malice in the assault.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 586-591; Dec. Dig. § 286.\*]

**2. SUFFICIENCY OF EVIDENCE—NO ERROR.**

The evidence supports the verdict, and no material error of law appears.

Error from Superior Court, Warren County; B. F. Walker, Judge.

Tom Shelton and others were convicted of assault with intent to murder, and bring error. Affirmed.

L. D. McGregor, of Warrenton, for plaintiffs in error. Thos. J. Brown, Sol. Gen., of Elberton, for the State.

HILL, C. J. Judgment affirmed.

(11 Ga. App. 104)

BALLARD et al. v. STATE. (No. 3,729.)  
(Court of Appeals of Georgia. May, 7, 1912.)

*(Syllabus by the Court.)***1. CRIMINAL LAW (§ 807\*)—INSTRUCTIONS.**

The instruction of a trial judge should present to the jury with reasonable fullness the law applicable to the various phases of the evidence introduced, but the judge is not required to follow an *ignis fatuus* in attempting to enforce or correct a statement of legal propositions which are only collaterally connected with the main issue. Any attempt on the part of the court to apply the law to argument addressed merely to the credibility of testimony is likely to be argumentative and erroneous, unless the language used be very carefully guarded, and especially is this true where the instructions relate to a particular incident in the testimony upon which rests the stress of the case.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1805, 1959, 1960; Dec. Dig. § 807.\*]

## 2. CRIMINAL LAW (§ 728\*)—TRIAL—OBJECTIONS TO ARGUMENT.

When a timely objection is made to improper argument, the court should rule directly upon the question presented for a joinder of two antagonistic contentions, or a waiving of the issue raised by the objection is likely to be prejudicial to the complaining party.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1689-1691; Dec. Dig. § 728.\*]

Hill, C. J., dissenting.

Error from Superior Court, Campbell County; L. S. Roan, Judge.

Sam Ballard and others were convicted of gaming, and bring error. Reversed.

J. F. Golightly, of Atlanta, for plaintiffs in error. C. S. Reid, Sol. Gen., of Palmetto, for the State.

RUSSELL, J. There is evidence which would have authorized the conviction of the defendants, and yet it cannot be said that this is not a close case, for the only direct witness for the state was an accomplice, and there was evidence of contradictory statements which would have authorized the jury to disregard his testimony. If the trial had been absolutely free from error, we should unhesitatingly affirm the judgment refusing a new trial upon the well-settled rule that, there being some evidence which would have authorized the verdict, and the finding of the jury being approved by the trial judge, this court is without jurisdiction to pass upon an issue of fact; but in view of the fact that the only witness to the gaming was, according to his testimony, avowedly an accomplice, not only in the alleged gaming, but in an arson with which the defendants were charged, and the merits of which appear to have been intermingled in the trial now under review, the really pertinent subject of inquiry is whether the circumstances of which complaint is made in the special assignments of error were of such a nature as deprived the plaintiffs in error of their right to a fair and impartial trial. If these circumstances were prejudicial, it cannot truly be said that as there was evidence which would have authorized the conviction the accused were not hurt, because it cannot be said that, if the trial had been free from error, the jury would have believed the witness who was confessedly an accomplice, and who was shown by testimony in the case to have made contradictory statements. We have been in so much doubt in regard to the case that we ordered that it be argued a second time. After mature consideration of the assignments of error, a majority of the court are of the opinion that a new trial should be ordered, in order that the guilt or innocence of the plaintiffs in error may be determined free from such extra-

neous influences as are complained of in the special assignments of error, and which are not likely to recur upon a second trial. In reaching this conclusion, we recognize fully the absolute impartiality of the learned trial judge who presided in the cause, and yet we are not able to escape the conviction that the matters of which complaint is made in the special assignments of error naturally tended to prejudice the jury against the accused although this result was not at all intended either by the court or the solicitor general.

[1] 1. Treated as an abstract statement of the law, there is no error in the instruction of the court that the accused could be convicted of a misdemeanor upon the testimony of an accomplice, though his testimony was not corroborated. But when the judge, as the jury may have understood it in apparently direct response to the argument of the counsel for the accused, emphasized the difference between the rules as to felonies and misdemeanors, by charging the jury that "if this was a felony being tried, and there was no evidence except the testimony of George Mitchell, and the jury believed he was an accomplice and assisted in burning the house, then there could be no conviction; but I charge you, gentlemen, this is not the rule in a misdemeanor case, and you are not now trying a felony, the case you are now trying is what is known in law as a misdemeanor," and thereafter further instructed the jury that, while they might inquire whether the witness George Mitchell (naming him) had been corroborated, still they might, if they saw proper, find the defendants guilty on the evidence of Mitchell, even though he was not corroborated, the instruction, in our opinion, became so argumentative as to be objectionable. The instruction of a trial judge should present to the jury with reasonable fullness the law applicable to the various phases of the evidence introduced, but the judge is not required to follow an *ignis fatuus* in attempting to enforce or correct a statement of legal propositions which are only collaterally connected with the main issue. Any attempt on the part of the court to apply the law to arguments addressed merely to the credibility of testimony is likely to be argumentative and erroneous, unless the language used is very carefully guarded, and especially is this true where the instructions relate to a particular incident in the testimony upon which rests the stress of the case.

[2] 2. We think that the language employed by the court in passing upon the motion for mistrial was prejudicial, because it tended to minimize the objection interposed by counsel for the accused, and was likely to mislead the jury by impressing them that the objection was frivolous.

The solicitor general stated to the jury, in response to the criticism of counsel for the accused, that the state should have tried the arson case pending against the accused before trying the indictment for gaming, by stating that it was immaterial which case was tried first, because, even if the state had elected to try the arson case first, the accused would have had to remain in jail anyway, because of his inability to give bond. In response to this statement counsel for the accused moved for a mistrial, and the judge, in declining to order a mistrial, instructed the jury that what was said by counsel on either side about this matter had nothing to do with the case. Our first impression was that this statement of the judge could not have prejudiced the accused, because it was, no doubt, intended to be fair to both parties to the cause. However, the court's statement to the jury that what was said by counsel on either side about this matter had nothing to do with the case was in fact not so much a rebuke to the solicitor general for arguing to the jury circumstances which had no pertinency to the guilt or innocence of the accused as it was an intimation that there was no point in the objection made to the argument, and for that reason it might be construed by the jury as an intimation that the objection was unimportant and immaterial. In rulings upon testimony and argument, the trial court should carefully and cautiously guard against the possibility of saying anything that can be construed as an intimation adverse to the contention of either party. It appears to us that it can, with good reason, be insisted that the mere statement that "what was said by counsel on either side about this matter had nothing to do with the case" could reasonably have been taken by the jury as a ruling adverse to the contention of counsel for the accused that the statement of the solicitor general was improper, or certainly that, even if it was, it was of so little consequence that the objection to it was unimportant. As a matter of fact, the question as to whether the accused could give bond or would have to lay in jail was a matter of no concern to the jury, and yet we are aware that there are few things upon which jurors and taxpayers look with less favor than the probability of paying jail fees when the accused, if guilty, might be employed upon the public roads. Upon the objection made we think the court should have instructed the jury, not that what the counsel said about it had nothing to do with the case, but (in direct response to the objection) should have instructed the jury that they were not concerned with whether the accused could not give bond, and that ability or inability to give bond

should not affect the jury's consideration of the case or have any bearing whatever on their verdict. When a timely objection is made to improper argument, the court should rule directly upon the question presented for a joinder of two antagonistic contentions, or a waiving of the issue raised by the objection is likely to be prejudicial to the complaining party.

Upon the whole, we are of the opinion that it cannot safely be said that the matters to which the two special assignments of error relate did not have the effect of prejudicing the rights of the accused upon the trial, and for this reason the judgment refusing a new trial is reversed.

HILL, C. J. (dissenting). While fully agreeing to the abstract correctness of much that is said by Judge RUSSELL, I do not concur in the decision of the majority. I think the trial judge fairly stated the statutory difference relating to the evidence of an accomplice in felony and misdemeanor cases, and made a concrete application of that law to the facts of the case and the contention of counsel. I also think that the presiding judge fully drew the sting from the improper remarks of the solicitor general, if, indeed, they were improper. Both special assignments of error, in my opinion, have no material relation to the merits of the case; and the consideration given to them by the majority of the court is largely in excess of their importance.

(11 Ga. App. 106)

SMEDLEY v. STATE. (No. 3,828.)

(Court of Appeals of Georgia. May 7, 1912.)

(Syllabus by the Court.)

INTOXICATING LIQUORS (§ 152\*)—SALE BY DRUGGIST.

The evidence fully authorized the conviction of the defendant, and there was no error in refusing a new trial. Alcohol cannot lawfully be sold by a druggist for the purpose of being used as a beverage.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. §§ 161, 165, 167; Dec. Dig. § 152.\*]

Error from City Court of La Grange; Frank Harwell, Judge.

W. T. Smedley was convicted of violation of the prohibitory law, and brings error. Affirmed.

M. U. Mooty and M. F. McLendon, both of La Grange, for plaintiff in error. Henry Reeves, Sol., of La Grange, for the State.

RUSSELL, J. The plaintiff in error excepts to the judgment overruling his motion for new trial. His contention here is that it is not unlawful for a licensed druggist to sell alcohol, and that section 426 of the Penal Code of 1910, so far from prohibiting the



sale of alcohol, permits it to be sold, and that the only liquors prohibited under the prohibition law are such as can be reasonably used as a beverage. The evidence shows that the accused was interested in a drug store in Troup county, and that on different days and to a number of persons he sold grain alcohol. Some of it he diluted with water, and some was sold by the drink, to persons who drank it in the drug store. According to one witness he sold a drink which he called a "cocktail." Even if the defendant was not guilty of a violation of the prohibition law unless the intoxicant he sold was capable of being used as a beverage, still, under the evidence in the record, he would be clearly guilty. And again, under the evidence, the defendant was guilty, because there was no evidence that the alcohol was sold upon that formal written prescription of a regular practicing physician, required by section 426 of the Penal Code of 1910; and when it was shown that he had sold alcohol, the burden was upon him to show this. Furthermore, under the provisions of section 428 of the Penal Code of 1910, it would have been unlawful for Smedley to fill any prescription given by his partner in business, who was a practicing physician, or to fill any prescription for alcohol more than one day after its date.

The main points presented in this case are fully controlled by the ruling of the Supreme Court in *Snider v. State*, 81 Ga. 753, 7 S. E. 631, 12 Am. St. Rep. 350. According to the evidence in this record, the defendant sold alcohol (and in fact, in his statement, he admitted it); and though, by the provisions of section 433 of the Penal Code of 1910, it devolved upon him to show that the sale was of pure alcohol, under a prescription, such as is required in section 426, there was no competent evidence to this effect. There was testimony to the effect that there were prescriptions in some instances; but the prescriptions themselves were not introduced, nor was there testimony that they complied in form or substance with the form of prescription required in cases of the legal sale of alcohol, nor that they were filled (by the furnishing of the alcohol) the same day that the prescription was dated, or at least not later than the day thereafter. Penal Code 1910, § 427. Under the provisions of the general prohibition law, the sale of alcohol is not permitted, except under very close restrictions and rigid regulations, which, by the letter of the law, are required to be strictly complied with. The rules and restrictions imposed upon the dispensing of alcohol appear to us to be a measure of wise regulation, and, as such, each requirement should be rigidly complied with. In *Roberts v. State*, 4 Ga. App. 207, 60 S. E. 1082, we held that "the true scope and meaning of the prohibition statute is to stop the use, as bev-

erages, of all intoxicating liquors, by whatever name called, or under whatever guise made." Recognizing, as we do, the distinction pointed out by counsel for the plaintiff in error between regulation and prohibition, we hold that under the prohibition law alcohol cannot be sold as a beverage, and though the prohibition law does not prohibit the sale of pure alcohol, and permits its sale under the regulations which the statute imposes, still every one who attempts to sell alcohol must comply with the regulations. This the plaintiff in error did not do.

Judgment affirmed.

POTTLE, J., not presiding.

(11 Ga. App. 110)

NETHERLAND v. FIRST NAT. BANK OF LOUISVILLE. (No. 3,866.)

(Court of Appeals of Georgia. May 7, 1912.)

(Syllabus by the Court.)

BILLS AND NOTES (§ 484\*)—ACTION ON NOTE—PLEADING.

The defendant's plea, which sought to set up the defense that the note upon which the suit was based, and of which the plaintiff was the transferee, had been paid to the original payee, and alleged that the plaintiff had actual knowledge of the payment, was good, as against an oral motion to strike, though on special demurrer it might have been held to be defective.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1535-1538, 1563; Dec. Dig. 484.\*]

Error from City Court of Waynesboro; Wm. H. Davis, Judge.

Action by the First National Bank of Louisville against J. E. Netherland. Judgment for plaintiff, and defendant brings error. Reversed.

C. B. Garlick, of Waynesboro, for plaintiff in error. H. J. Fullbright, of Waynesboro, for defendant in error.

RUSSELL, J. The plaintiff recovered upon a note originally executed and delivered by the defendant to the Louisville Manufacturing Company. The defendant's plea was stricken, on oral motion, and a verdict in favor of the plaintiff was directed by the court. The only real question in the case turns on whether the court ruled correctly in striking the fifth paragraph of the defendant's answer.

The plaintiff's petition alleged that the defendant (Netherland) was indebted to it, because his note, payable to the Louisville Manufacturing Company, had been transferred to the plaintiff before maturity. The defendant, in his plea, admitted the execution of the note and refusal to pay it, but pleaded that his liability upon the note had been extinguished by payment to the original payee, and averred that the transferee took the note with full and actual notice of all defenses which he had against it. The fifth paragraph of the plea averred as follows:

"For further plea in this behalf, defendant says that he was engaged and employed by the Louisville Manufacturing Company, during the season 1910 and 1911, to buy cotton seed for the former at the price of \$100 per month; that he worked six months in said capacity; that he was indebted to said Louisville Manufacturing Company for fertilizers, and in the spring of the year of 1911 defendant and said Louisville Manufacturing Company had a settlement, defendant paying the difference between his debt against Louisville Manufacturing Company and the debt owing [by] him, which was accepted by said Louisville Manufacturing Company. Said transaction occurred in the building of plaintiff, and its officers had actual knowledge thereof." At the trial term the plaintiff's counsel made an oral motion to strike this paragraph, and the court sustained the motion; and in conformity with this ruling, the court refused to allow evidence in support of the allegations of the stricken paragraph, and directed a verdict for the plaintiff for the amount sued for.

We think the court erred in holding that the fifth paragraph of the plea set up no defense as against the plaintiff, and in excluding the testimony in support of the allegation that the officers of the plaintiff had actual knowledge of the settlement by which, as alleged, Netherland's debt upon the note was discharged. The case runs quatuor pedibus, so far as the subject of payment is concerned, with the recent case of *Prince v. Cochran*, 10 Ga. App. 495, 73 S. E. 693. Certainly, as against a suit upon a note, brought by one who claims to be an innocent purchaser for value before maturity and without notice, the fact that the purchaser knew at the time he bought it that it had been fully paid would present a good defense and defeat recovery. We have no hesitation in holding that the stricken paragraph, while subject to special demurrer, presents this defense with sufficient fullness and clearness to withstand a general demurrer or an oral motion to strike. It alleges that the defendant and Louisville Manufacturing Company, the original payee of the note, had a complete settlement, the defendant paying the difference between his debt against the Louisville Manufacturing Company and the debt due by himself, and that the plaintiff's "officers had actual knowledge thereof." By timely special demurrer the plaintiff could have required the defendant to allege when, how, and to whom payment was made, and to name what particular officers of the plaintiff had actual knowledge of the transaction, so as to enable the court to determine whether, in the first place, the note had been paid to a duly authorized agent of the original payee; next, whether the payment claimed to have been made was made prior to the transfer of the note; and, thirdly, whether the officers of the plaintiff bank (who were alleged to have had actual knowledge of the

settlement and payment of the note) were such officers as that their knowledge would be imputed to the plaintiff. But, in the absence of a special demurrer, the statement that the defendant had paid the note to the Louisville Manufacturing Company, the original payee, and that the transferee had actual knowledge of that fact, taken in connection with the allegation of the fourth paragraph, that the transferee took the note with full and actual notice of all the defenses the defendant had against it, would certainly make a defensive statement, which, if supported by proof, would amply withstand a general demurrer and defeat recovery. The petition alleged that the note was transferred on May 3, 1911. The allegation of the fifth paragraph, that the defendant paid the note in the spring of 1911, is not such a statement as would preclude him from showing in the proof that the payment, which he alleges was made with the knowledge of the officers of the bank, antedated May 3, 1911. In the absence of a special demurrer, and with the statement that the officers of the bank had actual knowledge of the transaction in which the defendant paid the note to the manufacturing company, it would remain for the evidence to develop whether the officers who knew of the settlement between the original payee and the maker of the note were such as that the bank would be charged with their knowledge. The plaintiff would have had the right to know whether the day in the spring when the defendant averred he paid the note in question was before or after the 3d day of May. It would have had the right to know how the payment was made, and whether the person who received it was authorized to accept payment. It would have had the right to be informed which of its officers was charged to have had actual knowledge of a settlement or payment of the note, which rendered the note so valueless that the plaintiff could not have bought it without danger of total loss of the amount invested; but there is no presumption of fact or law which would authorize the conclusion that a day in the spring of 1911 was subsequent to May 3d, any more than that it was a day prior to May 3d, nor is the inference that the officers of the bank who are alleged to have had actual notice of the defendant's discharge were officers whose knowledge would not bind or charge the company more conclusive than that the officers referred to were those in active control and management of the bank's business. The plaintiff not having specially demurred, the court could not adjudge these matters without the aid of evidence; for even if it had been true that the transferee of the note, after its purchase, had knowingly permitted the maker to pay the full amount due upon it, it could be inferred, and a jury would be authorized to find, that the party to whom the payment was made was in fact an agent of the transferee.

To test the sufficiency of the fifth paragraph of the answer, we need only ask the usual question: Could the plaintiff admit its statements and still recover? We think not. While the answer is too vague and indefinite to withstand special demurrer, the plaintiff was not entitled to recover if the defendant, with the knowledge of the transferee, and without objection on its part, paid the note to another person. It would be estopped thereafter to demand payment of the maker of the note. But, further than that, the defendant pleaded that the purchaser of the note bought it with full notice of the defense; and this, when the two statements are construed together, makes it reasonably plain that the purchase was after the transaction referred to in the fifth paragraph of the answer, in the absence of a special demurrer, which might have compelled the admission that this transaction was subsequent to May 3, 1911.

Judgment reversed.

(11 Ga. App. 154)

FRAZIER v. STATE. (No. 4,112.)

(Court of Appeals of Georgia. May 7, 1912.)

(Syllabus by the Court.)

INTOXICATING LIQUORS (§ 139\*)—"PLACE OF BUSINESS"—ILLEGALLY KEEPING LIQUOR.

Where intoxicating liquor is kept in a room apparently used solely as a bedroom and adjoining the owner's place of business, he cannot be convicted of keeping such liquor on hand at his place of business, unless it appears that the room was used not in good faith, solely as a place of abode, but as a convenient cover or subterfuge for keeping the liquor for use in connection with his business. Where in such a case the evidence as to the real purpose for which the room is being used is in conflict, and a finding that it was being used as a part of the "place of business" and for an illegal purpose is dependent upon inference, it is error to charge: "If one elects to make his place of abode at his place of business, then the keeping on hand of spirituous, malt, or intoxicating liquors is a violation of the law."

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 149; Dec. Dig. § 139.\*]

For other definitions, see Words and Phrases, vol. 6, pp. 5390-5392.]

Error from City Court of Americus; J. A. Hixon, Judge.

H. D. Frazier was convicted of a violation of the prohibitory law, and brings error. Reversed.

C. R. Winchester and J. B. Hudson, both of Americus, for plaintiff in error. J. R. Williams, Sol. Gen., of Americus, for the State.

POTTLE, J. The prohibition law is very broad, but not sufficiently so to prevent one from keeping intoxicating liquors in his private residence for a lawful purpose. The phrase "place of business," as used in the statute, has been defined by this court to

be "a place where the public, having business with the owner, are impliedly or expressly invited for its transaction." *Roberts v. State*, 4 Ga. App. 207, 60 S. E. 1082. See, also, *Cantrell v. State*, 8 Ga. App. 725, 70 S. E. 96. In *Jenkins v. State*, 4 Ga. App. 859, 62 S. E. 574, the expression was defined to mean "a place devoted by the proprietor to the carrying on of some form of trade or commerce." One may have his residence or place of abode near by or adjoining his place of business, but he cannot keep intoxicating liquors on hand in such residence if he uses it in connection with his place of business or as a convenient adjunct thereto, and expressly or impliedly invites the public to use it as a part of his place of business. *Jenkins v. State*, 4 Ga. App. 859, 62 S. E. 574; *Smith v. State*, 74 S. E. 711 (#4064). Indeed, one may use the same room both as a place of business and as a place of abode, and when it is closed to the public as a place of business the room may be employed for any purpose for which any other residence may lawfully be used. *Land v. State*, 5 Ga. App. 98, 62 S. E. 665. The true question in all such cases is: Was the room or apartment in good faith being used solely as a residence or place of abode at the time the whisky was being kept there, or was it merely a cloak, or cover, or pretext, and really used for the purpose of having the whisky convenient to the main place of business, and for the benefit of persons who have business with the owner?

In the present case the accused had a grocery store. Adjoining, and separated from the store by a thin partition, which did not extend to the top, was another room, where he slept. This room had in it articles of furniture usually found in a bedroom. The only way to enter the bedroom was by a door from the store. Several pints of whisky were found by the officer in a valise on the floor in the bedroom. There was also evidence that whisky had been seen in the main storeroom, but it does not clearly appear when this was. The accused admitted having the whisky in his bedroom, but claimed he kept it for his personal use, and that the room was used solely as a place of abode. He denied ever having kept whisky in the store. The judge charged the jury as follows: "If one elects to make his place of abode at his place of business, then the keeping on hand of spirituous, malt, or intoxicating liquors is a violation of the law." This was not an accurate statement of the law, and was not adjusted to the facts of the case. As was pointed out in *Land's Case*, one might keep whisky in a place while it was being used solely as a residence, even though at other times it was used as a place of business. It is a close question whether the jury could properly find in this case that the bedroom was being

used in connection with and as a part of the place of business. The charge complained of practically amounted to an instruction to the jury that the bedroom was a part of the defendant's place of business. The jury should be allowed to say whether or not sufficient facts and circumstances were proved to warrant the inference that the room in which the whisky was found was not used in good faith solely as a bedroom, but was merely a convenient cover and subterfuge for carrying on an illegal traffic in whisky, or keeping it and using it to induce trade. If it was, the law would deem the room so much a part of the place of business as to make the accused guilty. But if the room was a bona fide residence, and the accused kept whisky there for a lawful purpose, the mere proximity of the room to the store would not alone be sufficient to make the room a part of the place of business.

In view of the evidence, the charge complained of was not a fair statement of the law, and for this reason alone a new trial is ordered. The other assignments of error are without merit.

Judgment reversed.

(11 Ga. App. 128)

**BONE v. STATE.** (No. 3,982.)

(Court of Appeals of Georgia. May 7, 1912.)

(*Syllabus by the Court.*)

**WEAPONS (§ 17\*)—POINTING WEAPONS—CRIMINAL PROSECUTION—VARIANCE.**

The decision in this case is controlled by the ruling of this court in *Caswell v. State*, 5 Ga. App. 486 (5), 63 S. E. 566. An allegation that the accused unlawfully pointed and aimed a pistol at William Bone and E. B. Corey is not supported by proof that the accused pointed and aimed a pistol at William Bone and Jack Coker, for the reason that the merit of the defendant's plea of former jeopardy must be determined by the allegations of the accusation or indictment upon which the former trial was had, and one in fact convicted of pointing a pistol at William Bone and Jack Coker, or at William Bone alone, would not be protected from being again placed in jeopardy for the same offense, upon a plea exhibiting an indictment, upon which he might have been acquitted or convicted, which charged that the pistol was aimed and pointed at William Bone and E. B. Corey. Even allegations originally immaterial may be made material by their averment, and be required to be proved as alleged, in order to protect the defendant from again being placed in jeopardy for the same transaction.

[Ed. Note.—For other cases, see *Weapons*, Cent. Dig. §§ 20-33; Dec. Dig. § 17.\*]

Error from City Court of Tifton; R. Eve, Judge.

Susie Bone was convicted of unlawfully pointing and aiming a pistol, and brings error. Reversed.

J. J. Murray and C. C. Hall, both of Tifton, for plaintiff in error. Jas. H. Price, Sol. of Tifton, for the State.

**RUSSELL, J.** The plaintiff in error was convicted under an accusation charging a violation of section 349 of the Penal Code of 1910, and excepts to the refusal of a new trial. The accusation alleged that the accused pointed and aimed a pistol at William Bone and E. B. Corey. There is some evidence which indicates that the defendant might perhaps have been held justifiable in pointing the pistol in defense of her habitation and her children; but we pass this phase of the case, because there is sufficient evidence to have authorized the conviction of the defendant for unlawfully pointing and aiming a pistol at William Bone.

We come, then, to the ground of the motion for new trial in which it is insisted that the verdict is contrary to the evidence and without evidence to support it, for the reason that there is a fatal variance between the allegations and the proof, in that the accused was charged with pointing a pistol at William Bone and E. B. Corey, and the proof shows that the defendant pointed the pistol, if at all, at William Bone, or William Bone and Jack Coker, who were at that time engaged in a hand to hand personal difficulty. There is only one question for determination: Will proof that the accused pointed a pistol at William Bone, or at William Bone and Jack Coker (Jack Coker not even being mentioned in the indictment), support a conviction upon an accusation charging the pistol to have been pointed at William Bone and E. B. Corey? In other words, is the allegation that the pistol was pointed at E. B. Corey so material that a conviction of the defendant was not authorized after it appeared, without dispute, from the evidence, that the pistol was in fact never pointed at Corey, nor in his direction? We think the verdict was contrary to the evidence, and that there was a fatal variance between the allegation and the proof.

The decision is controlled by the ruling of this court in the fifth division of the opinion in *Caswell v. State*, 5 Ga. App. 486, 63 S. E. 566. The statement that the accused pointed the pistol at E. B. Corey might originally have been immaterial; but when it was charged that the pistol was pointed at him, as well as at Bone, the allegation became a material one, and any other ruling would deprive the accused of the right to plead former jeopardy, as well as tend to confuse the defendant in making her defense. As we said in *Caswell v. State*, supra: "A plea of not guilty puts in issue every allegation in the accusation which is material to the offense charged. Allegations not necessary may be made material by their averment. But whether intrinsically material, or rendered material

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

by the particularity of statement employed in making the charge, the burden devolves upon the state, not only to prove those allegations necessary to show the defendant's guilt of the nominal charge preferred against him, but also to go further and prove that the crime was committed (in the particular instance identified by the accusation) 'in the manner and form alleged,' in order that the defendant may be protected from being again placed in jeopardy for the same transaction."

Nothing is better settled than that the merit of the plea of former jeopardy is to be determined largely by the allegations of the accusation or indictment upon which the accused has been formerly tried. The former indictment is a part of the plea, and must be exhibited as such. In the present case the solicitor appears to have abandoned the charge of pointing the pistol at E. B. Corey; but this does not alter the case, because if the defendant were hereafter accused of in fact pointing a pistol at Bone only (although she has been convicted for pointing the pistol at Bone), and were to plead former jeopardy, the accusation, which would appear as part of the plea, would show that she had been convicted of pointing a pistol at Bone and Corey, and the court would be authorized by the record to strike the plea of former jeopardy, because it would be plain that it was not the same case as an accusation of pointing the pistol at William Bone only. Instead of abandoning so much of the accusation as charged the pointing of the pistol at Corey, the solicitor should have formally amended the accusation; and as this was not done, the defendant should have been granted a new trial, for she had been found guilty of pointing a pistol at two men upon proof of pointing it at one of them, when, perhaps, if she had been apprised by the accusation that she was only charged with pointing at this one, she might have been able to prove that she never in fact pointed the pistol at all at any one.

One accused of crime has the right to be apprised of the nature of the charge against him, and to be informed of enough of the details of the alleged criminal prosecution to at least enable him to prepare to defend against the charge. The accusation in the present instance was not demurrable, because one may point a pistol at two persons, and this accusation charged that such was the case. This being the case, the defendant (with the knowledge that the state is required to prove the charge as laid) had the right to rely merely upon the state's inability to establish the allegation. If the allegation had been that the pistol was pointed at William Bone and Jack Coker, or at William Bone only, she might have been able to procure witnesses (whose at-

tendance in the instance first named would have been unnecessary) to prove that she never pointed the pistol at any one.

Judgment reversed.

(11 Ga. App. 108)

# HUTCHINSON v. GREENE COUNTY.

(No. 3,874.)

(Court of Appeals of Georgia. May 7, 1912.)

(Syllabus by the Court.)

## BRIDGES (§ 46\*)—DEFECTIVE BRIDGES—CONTRIBUTORY NEGLIGENCE.

The court erred in awarding a nonsuit. The issue as to whether the plaintiff, in attempting to cross the bridge, was guilty of such contributory negligence as would amount to an assumption of the risk and defeat recovery, was one exclusively for determination by the jury, under the peculiar circumstances of the case. The existence and the degree of negligence, if any, is a question of fact.

[Ed. Note.—For other cases, see Bridges, Cent. Dig. §§ 108-122; Dec. Dig. § 46.\*]

Error from Superior Court, Greene County; J. B. Park, Judge.

Action by Gus Hutchinson against Greene County. Judgment of nonsuit, and plaintiff brings error. Reversed.

J. G. Faust, of Greenvboro, for plaintiff in error. Noel P. Park, of Greenvboro, for defendant in error.

RUSSELL, J. The trial court nonsuited the plaintiff. The action is based upon an injury to the plaintiff's mule, alleged to be due to the failure of Greene county to perform its duty in keeping a certain public bridge in good and safe order. According to the testimony of the plaintiff, he knew that in the bridge there was a hole, which had been there for perhaps three months. "It was on one side of the bridge, about where the wheels cross between the last plank and the dirt alongside the bridge." Another hole consisted of a broken plank at the other end of the bridge. It would appear, from the evidence, that the bridge was not of any considerable length, because the plaintiff testified that one of the mules got frightened at the broken plank and shied, forcing the other mule to the other end of the bridge, and the mule got his foot in the hole first described, near where the wheels usually cross. The plaintiff testified that he drove over the bridge, slowly, and tried to cross over it on the side opposite where the mule fell in the hole. There was no possible road by which he could get to his farm except over this bridge, unless he went several miles out of the way to get to another road.

In support of the judgment of nonsuit, counsel for the defendant relies upon the fact that the plaintiff knew of the condition of the bridge, and contends that no one who was the alter ego of the county had knowledge or notice of its defective condition. As to the latter proposition, we think the jury

could properly have inferred that, as the defect had existed from three to four months, the county authorities had knowledge of its existence. So far as the knowledge of the plaintiff himself is concerned, we think it was within the province of the jury to say, under the peculiar circumstances of the case, whether he was negligent in attempting to cross the bridge, or whether the exercise of due caution would have required him to go several miles out of the way to get to his farm, which lay right across from the bridge. The existence of negligence is peculiarly a question of fact, and the determination as to whether it exists in such a degree on the part of the plaintiff as to defeat recovery, by reason of the fact that he must be presumed to have assumed all the risks consequent upon his undertaking, is also a question of fact. In the present case the jury would have been authorized to infer that, if there had been only the hole in which the plaintiff's mule broke his leg, the care used by the plaintiff would have sufficed to have avoided the casualty. In other words, the second hole, caused by the broken plank (which it was the duty of the county authorities to have repaired) caused the mule to shy, and a jury might find that either or both of the defects in the bridge, while they were known to the plaintiff, might properly have been disregarded by him in the urgency of the necessity to cross the bridge, which it was the duty of the county authorities to keep in proper repair.

In our judgment, the whole question should have been submitted to the jury, under proper instructions from the court.

Judgment reversed.

(11 Ga. App. 119)

**CENTRAL OF GEORGIA RY. CO. v. PELFRY.** (No. 3,961.)

(Court of Appeals of Georgia. May 7, 1912.)

*(Syllabus by the Court.)*

**1. RAILROADS (§ 356\*)—OPERATION—INJURIES TO PERSON ON TRACK—CARE REQUIRED.**

Ordinarily a railway engineer is not bound to keep a lookout for a trespasser, and owes him only the duty to use ordinary care not to injure him after his presence in a perilous position is discovered. But if with the knowledge of the company its tracks at a given point have been used for many years longitudinally by pedestrians as a footway, the amount of care and caution required in running the trains is to some extent to be measured by the frequency and publicity of such use.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1228-1234; Dec. Dig. § 356.\*]

**2. RAILROADS (§ 376\*)—OPERATION—INJURIES TO PERSONS ON TRACK—INJURIES AVOIDABLE NOTWITHSTANDING CONTRIBUTORY NEGLIGENCE.**

If a railway engineer sees a person lying on the track at some distance away, and honestly mistakes him for an inanimate object, failure to check the speed of the train or take other precautionary measures will not render the company liable; but if, after seeing a sus-

picious object upon the track at such distance that it cannot be distinguished, the engineer increases the speed of the train, takes his eyes from the track, and, after approaching too near to stop the train again looks around, and for the first time discovers a human being prone upon the track, in a helpless condition, and runs over and kills him, the company will be liable, even though the deceased was a trespasser, and without regard to whether his perilous position was the result of his voluntary act or not. Especially is this true if the homicide occurs at a place where the track had for many years been used as a footway by pedestrians in such a frequent and public way as that employees of the company must have known of the use. Under the circumstances, the omission of the engineer to make any effort to check the train will be deemed so reckless as to amount in law to wantonness.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1275-1279; Dec. Dig. § 376.\*]

**3. DEATH (§ 14\*)—ACTIONS FOR CAUSING DEATH—NATURE OF LIABILITY.**

A killing may be wanton, though not intentional in fact; for, where a homicide results from gross carelessness and a reckless disregard of the rights of others, the natural consequences of the reckless act will be presumed to have been intended.

[Ed. Note.—For other cases, see Death, Cent. Dig. § 16; Dec. Dig. 14.\*]

**4. SUFFICIENCY OF EVIDENCE—NO ERROR.**

Applying the foregoing principles to the facts of the present case, the verdict was warranted, and no substantial error was committed during the trial.

Error from City Court of Athens; H. S. West, Judge.

Action by Mary Pelfry against the Central of Georgia Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Harris & Harris, of Macon, and Shackelford & Shackelford, of Athens, for plaintiff in error. Samuel H. Sibley, of Union Point, and E. R. Lambert and J. S. Grant, both of Madison, for defendant in error.

**POTTLE, J.** The plaintiff's husband was run over and killed while lying down upon the defendant's track. He had been drinking, and a short time before the homicide was seen on the defendant's trestle with a sack of flour, weighing 50 pounds, on his shoulder. At that time he was very drunk, fired his pistol promiscuously, and, when warned that a train would come along in a few minutes, remarked that he "had a gun to stop anything—he didn't care anything about the train." He walked on across the trestle about a quarter of a mile beyond, and evidently lay or fell down across the track in a drunken stupor. The sack of flour fell beside him, and between him and the train which ran over him. The train was behind time, and, when it came upon the trestle, the engineer saw a white object at a point on the track where the man was lying. He says he thought the object was a white piece of paper or something of that sort. He inquired of the fireman what it was, and the fireman replied that he did not

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.

know. Thereupon the engineer increased the speed of the train, or, to use his own language, "rawhided his engine pretty hard," in order to make up the lost time. It was a clear day, and there was nothing to obscure the engineer's vision. While the track curved slightly at the end of the trestle, the track was straight and the view unobstructed from the point of the curve to the place where the homicide occurred. After going some distance and arriving within 150 or 200 feet of where the white object was on the track, the engineer said he "looked around and discovered it was a man." In another portion of his testimony he testifies that his eyesight was good, and that he continued to look up the track after seeing the white object, and did not discover the presence of the plaintiff's husband on the track until it was too late to stop the train, after doing everything it was possible for him to do to accomplish this purpose. The place where the deceased was killed was some 700 yards from the nearest public crossing, between the stations of Whitehall and Sidney. There were woods on each side of the track for some distance, and few, if any, houses. There was some evidence that pedestrians had been accustomed to use the track to go from Whitehall across the trestle to Sidney and beyond, it being about a mile and a half by rail and some four or five miles around by the dirt road; but there was no evidence that the company's employes in charge of the train knew of this custom, though there was some evidence that there was a well-worn path between the tracks, which had been made by pedestrians. The jury found for the plaintiff \$1,500, and the defendant's motion for a new trial was overruled. It excepted.

There may have been some inaccuracies in the charge, but the case really turns upon the question whether the plaintiff was entitled to recover under that view of the evidence most favorable to her contentions. It is inferable from the argument that, if a recovery was authorized, both sides are satisfied with the amount of the verdict, or at least that the plaintiff in error is not complaining. We will, therefore, not notice the special assignments of error further than to say that, under our view of the law, no such substantial error was committed as would justify us in setting aside the verdict in the plaintiff's favor.

[1] Manifestly the deceased was a trespasser, and ordinarily a railway company owes such a one no duty except not to injure him willfully or wantonly, or, to express it somewhat differently, to use ordinary care for his safety after his presence in a perilous position has been discovered. *Kendrick v. Seaboard Air Line Ry. Co.*, 121 Ga. 775, 49 S. E. 762; *Gulf Line Ry. v. Way*, 137 Ga. 109, 72 S. E. 917. Applying this rule, it has been many times held that no recovery can be had for injury to or death of

one trespassing on the company's tracks, when the employes did not know and had no reason to anticipate his presence at the time when and place where he was injured or killed. In such a case the act of the trespasser is one of such gross negligence as to preclude a recovery, even though the employes in charge of the engine may likewise have been guilty of negligence in failing to keep a lookout down the track. *Raden v. Georgia Railroad*, 78 Ga. 47; *Central R. Co. v. Smith*, 78 Ga. 604, 3 S. E. 397; *Id.*, 82 Ga. 801, 10 S. E. 111; *Wilds v. Western R. Co.*, 82 Ga. 687, 9 S. E. 595; *Parish v. W. & A. R. Co.*, 102 Ga. 285, 29 S. E. 715, 40 L. R. A. 364. In all of the foregoing cases the injury occurred at night. In *Leach's Case*, 91 Ga. 419, 17 S. E. 619, 44 Am. St. Rep. 47, recovery was denied where the trespasser was killed in the daytime on a trestle, and was not discovered in time to have stopped the train. Cases may arise, however, where the company would be under a duty to anticipate the presence of a trespasser upon the track and to take proper precautions to prevent injury to him. *Ashworth v. Sou. Ry. Co.*, 116 Ga. 635, 43 S. E. 36, 59 L. R. A. 592.

This rule was applied by the Supreme Court against the railway company in *Shaw v. Georgia Railroad*, 127 Ga. 8, 55 S. E. 960, where it appeared that the tracks of the company were constantly being used longitudinally by pedestrians, with the knowledge of the section foreman, at the place where the homicide occurred. In that case authorities were approvingly cited for the proposition that, "where no permission is given, but there is a habit on the part of individuals or the public of traveling over the track on foot, and nothing is done to prevent it, that does not modify or change the legal rights or obligations of either the public or the company. By such use the public are not tacitly licensed to go upon the track, and the consent of the company to the use is not implied; but the fact that they do go there enters into the situation as it is known to the company, and affects the caution and amount of care required in running the trains." This court, in *Waldrep's Case*, 7 Ga. App. 342, 66 S. E. 1030, recognized the soundness of the general rule just quoted, but declined to apply it in favor of one trespassing in a switchyard, because, as was said by Judge Russell, the inference of implied invitation to use tracks in a switchyard "is so inconsistent with the continuous use of its tracks for switching purposes as not to admit of the presumption that there is an invitation or permission granted by the railroad to the public." The Supreme Court likewise declined to apply the doctrine of implied invitation to use a railway trestle in favor of a bridge watchman, whose wife was killed on a trestle which she had been for some time using as a footway with the knowledge of certain subordinate employes,

including the section foreman, but without knowledge on the part of the servants in charge of the train. *Comer v. Hill*, 101 Ga. 340, 28 S. E. 856. Without reference to whether this decision may conflict with the later ruling in the *Shaw Case*, the latter is controlling upon us, because the former decision was concurred in by only three Justices. In *Gulf Line Ry. Co. v. Way*, supra, "it did not appear from the petition whether few or many pedestrians were accustomed to walk along or near the defendant's track at the place of the homicide."

The doctrine of the Code, that recovery cannot be had for a homicide if the deceased could by the exercise of ordinary care have avoided the consequences of the defendant's negligence, has no application to a case like the present, because the duty to avoid negligence does not arise until after the negligence "is existing, and is either apparent, or the circumstances are such that an ordinarily prudent person would have reason to apprehend its existence." *Western & Atlantic R. Co. v. Ferguson*, 113 Ga. 708, 39 S. E. 306, 54 L. R. A. 802. If the defendant was negligent here at all, the negligence came into existence at a time when the plaintiff's husband was in such a condition that he could not have done anything to avoid the consequences of the negligence. The real question in the case, therefore, is whether the act of the deceased in voluntarily going upon the track in a drunken condition was an act of such gross negligence as that it can be said his homicide was in a legal sense "done by his consent," or was caused solely "by his own negligence." Civil Code 1910, § 2781. If it was, then his widow cannot recover, but if not, and if the company was negligent, she may recover, even if the deceased was himself at fault. The common-law doctrine of contributory negligence is not of force in this state; but, where both parties are at fault, the injured party may recover if his negligence was not equal to or greater than that of the party inflicting the injury, and if he could not by the exercise of ordinary care have avoided the consequences of the other's negligence after it came into existence. In the *Way Case*, supra, recovery was denied; but it affirmatively appeared that *Way* voluntarily and unnecessarily sat down on a cross-tie and subsequently became unconscious, and the Supreme Court pointed out the difference between that case and one where a person on the track suddenly became unconscious and fell down in that condition upon the track.

[3] While the rule is well settled that in case of the death of a trespasser recovery can be had only where the homicide was the result of wanton or willful conduct on the part of the servants of the defendant, it is a mistake to assume that the homicide must be shown to have been intentional in point of fact; for, if the conduct of the defend-

ant's servants was so reckless as to evidence an utter disregard of consequences, the law would imply willfulness and an intention to do the wrong. *Southern Ry. Co. v. Chatman*, 124 Ga. 1030, 53 S. E. 692, 6 L. R. A. (N. S.) 283, 4 Ann. Cas. 675. One may be convicted of murder, even where he did not intend to kill, and even where he had no malice against the person killed. He may recklessly shoot into a crowd, intending merely to frighten, and kill a man whom he had never seen and against whom he had no ill will; but the homicide would be murder. And so, if an engineer should see one lying on the track in an apparently helpless condition, he would have no right to assume that the person would leave the track in time to save himself. To run him down under such circumstances would be such gross negligence and recklessness as would amount in law to wantonness.

[2] There are two lines of decisions in reference to the duty of an engineer when he sees a suspicious object which proves to be a human being upon the track and cannot perceive what it is. One line holds broadly that the engineer need take no precautions, such as to slacken the speed, until he advances far enough to see that the object is a human being. Thus, in *L. R., M. R. & T. R. Co. v. Haynes*, 47 Ark. 497, 1 S. W. 774. it was held: "Though an engineer sees one lying upon the track at a distance before him, yet if he honestly mistakes him for some inanimate object until it is too late to avoid running over him, the company is not liable for the mistake and injury." To the same effect is *Tucker v. Railway Co.*, 92 Va. 549, 24 S. E. 229, where the object was lying in a ditch on the side of the roadbed. An illustration of the other line of decisions is found in *Keyser v. Chicago & Grand Trunk Ry.*, 56 Mich. 559, 23 N. W. 311, 56 Am. Rep. 405 (reaffirmed in 66 Mich. 390, 33 N. W. 867), where it was ruled: "It is negligence not to slacken the speed of a train, so that it can be stopped if necessary, if the engineer has seen an object on the track a long way off and cannot tell what it is." See, also, *East Tenn. R. Co. v. St. John*, 5 Sneed (Tenn.) 524, 73 Am. Dec. 149; *Hyde v. Union Pacific Ry. Co.*, 7 Utah, 356, 26 Pac. 979. Compare *Burg v. Chicago Ry. Co.*, 90 Iowa, 106, 57 N. W. 680, 48 Am. St. Rep. 419.

In commenting upon these two lines of decisions, Judge Thompson, one of the most eminent commentators on the law of negligence and corporation law generally, says: "We now come to a class of decisions, very questionable, and from many points of view very regrettable, which are to the effect that the engineer in charge of a railway train, upon discovering an object on the track, which may or may not be a human being, is under no duty, as a matter of law, to slacken the speed of his train before the nature of the object is known. According to the doctrine of these cases, he is not obliged to



slacken the speed of his train merely because he has doubts as to the nature of the object, unless, for some reason, he has cause to believe that it will not leave the track; but he is entitled to drive his train forward, although at a great rate of speed, until he has an opportunity of inspecting the object, and of discovering what it is, after which it will generally be too late to avert injury to the object if it turns out to be a human being, and notwithstanding the further fact that, by so doing, he may derail his train and kill or injure the passengers or other persons on board of it." 2 Thomp. Neg. § 1740.

A railroad track is a place of danger anywhere and at any time and one who trespasses upon the track is guilty of negligence. If he goes upon the track at a time when a train is due, and in a condition where he cannot help himself when the danger arises, he is guilty of gross negligence. But, while this is true, yet when the company discovers this negligence, or has reason to anticipate it, it must use ordinary care to prevent injury to the trespasser; and where he is on the track in an apparently helpless condition, certainly ordinary diligence would require the use of every means at hand to keep from running him down and killing him. If under such circumstances, the company's servants fail to exercise this degree of care, and death results, the killing will be deemed in law to have been willful and wanton. Contributory negligence on the part even of a trespasser never defeats recovery for a wanton homicide.

In the light of these principles we come to a discussion of the facts of this case: The deceased and the sack of flour were together on the track. The engineer saw a white object (probably the flour sack) at a point where deceased was lying. The sack weighed 50 pounds, and the man 140 or 150 pounds. The day was clear. The track was straight and free from obstructions. The engineman says he thought the object was a piece of paper, just like he was accustomed to seeing often on the track; but, if so, why did he ask what the object was, and why did the fireman answer that he did not know or could not tell? The inquiry and the answer show that the object was of a suspicious nature. Again, if he saw the flour, why did he not see the man, who weighed 100 pounds more than the flour? What was the engineer's duty under the circumstances? Did he have a right to "rawhide" his engine, as he says he did, in utter disregard of what the object might prove to be? The jury could well find that he saw the man, though he did not know it was a man until too late to stop. Will the courts set such little store by human life as to hold as a matter of law that, when a person is lying helpless on a track, the engineer may increase the speed of his train and run him down and kill him,

merely because he cannot certainly tell when he sees the object on the track that it is a human being? Shall human lives be sacrificed in this way in the interest of speed and the making of schedules? Which was more important, that six minutes' lost time should be made up, or that the life of this man should have been saved at the risk of losing a few more minutes of time? These were questions which doubtless arose in the minds of the jury, and, in our opinion, were proper subjects-matter of inquiry, under the facts of this case and the law applicable thereto.

Moreover, it does appear, from a number of witnesses, that for many years pedestrians generally had been using the track as a footway, with at least the tacit acquiescence of the company. According to some of the witnesses, this use was so general that the section foreman must have known of it. Indeed, he testified himself that he met the plaintiff's husband on the trestle just before he was killed, and saw two others walking across about the same time. Under the decision of the Supreme Court in the Shaw Case and cases therein cited, evidence of this use of the track by pedestrians was proper matter for consideration by the jury as affecting "the caution and amount of care required in running the trains."

[4] It must be borne in mind that, in dealing with facts after verdict, this court can only inquire whether, under the law, any facts and circumstances upon which a recovery could properly have been based are disclosed by the evidence. The evidence demanded a finding that the deceased was grossly negligent; but it also authorized a finding that, under all the circumstances, the failure of the engineer to check the speed of his train was, legally speaking, so wanton as to authorize a recovery of some amount. Certain it is that, after seeing the object, it was at least the duty of the engineer to fasten his vision on the track until he got near enough to distinguish what was on the track. He says he did this, but there were facts and circumstances in evidence from which the jury could conclude that he did not.

Counsel for the plaintiff in error relied in part upon *Moore v. Southern Railway Co.*, 136 Ga. 872, 72 S. E. 403. That case, however, upon its facts differs materially from this. There the person killed was sitting on a cross-tie, in dark night, and was behind weeds and bushes as high as a man's head, which prevented him from seeing the engine and prevented the engineer from seeing him. Several hundred yards away the engineer saw an object, but thought it was a dog, and naturally supposed the dog would leave the track, and there was nothing to suggest that, if the object was a man, he was helpless or in a position of peril. The case of *Southwestern Railroad v. Hankerson*, 61 Ga. 115, is also relied on. There the engineer saw an object on the track, which he took to be

a hog. Under his instructions from his superiors, he never stopped for hogs, but took chances upon their getting out of the way. The ruling made in the case is broad—very broad—to the effect that, "if one voluntarily becomes drunk, and consequently falls down, or lies down, in a state of insensibility on a railroad track, so that he is injured by a passing train, he cannot recover for injuries so received, even though there may have been contributory negligence on the part of employes of the road." The court did not discuss the question of checking the speed of the train, to ascertain what a suspicious looking object really was, and no such question was involved in the case. The engineer did not say he could not distinguish the object, but, on the contrary, stated positively he thought it was a hog, and, so believing, did not stop. If he had said he saw an object which might have been a hog, but he did not know what it was, and, upon inquiry of his fireman as to what the object was, the fireman had said he did not know either, and then the engineer had increased the speed of the train and had taken his eyes from the track, and "looked around" again, and saw a man when it was too late to stop, the case would have been like the present one, and we apprehend the ruling would have been different.

We cannot believe that the Supreme Court meant to hold in the Hankerson Case that, because a man may get drunk and lie down on the track, he forfeits his life to those in charge of the railroad company, or that its servants in charge of one of its trains have the right to run over him and kill him wantonly and willfully. As we hold that the evidence in the present case justified a finding that the engineer was guilty of such recklessness as amounted to wantonness, we do not think the ruling in the Hankerson Case, properly understood, applies. Besides, there was no evidence in that case of any habitual and general use of the track by pedestrians at the point of the injury.

Our conclusion is that the judgment should be affirmed.

(11 Ga. App. 149)

**LAMBERT v. STATE.** (No. 4,100.)  
(Court of Appeals of Georgia. May 7, 1912.)

*(Syllabus by the Court.)*

**CRIMINAL LAW (§ 970\*)—ARREST OF JUDGE—GROUNDS.**

After a verdict of guilty, judgment will not be arrested because a blank left in the indictment for the name of the county for which the grand jurors were sworn has not been filled; the name of the county being stated in the caption of the indictment. *Forrester v. State*, 34 Ga. 107.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2445-2462; Dec. Dig. § 970.\*]

Error from Superior Court, Pulaski County; J. H. Martin, Judge.

Oliver Lambert was convicted of crime, and brings error. Affirmed.

H. F. Lawson, of Hawkinsville, for plaintiff in error. E. D. Graham, Sol. Gen., of McRae, for the State.

**POTTLE, J.** Judgment affirmed.

(11 Ga. App. 110)

**MACON, D. & S. R. CO. v. STINSON.**  
(No. 3,840.)  
(Court of Appeals of Georgia. May 7, 1912.)

*(Syllabus by the Court.)*

**NEW TRIAL (§ 70\*)—GROUNDS—VERDICT CONTRARY TO EVIDENCE.**

Though there was evidence on the part of the employes of the defendant railroad company rebutting the usual presumption, there is in the record sufficient evidence, introduced in behalf of the plaintiff, contradictory of this testimony, to fully authorize the verdict rendered. There was, therefore, no error in refusing a new trial.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 142, 143; Dec. Dig. § 70.\*]

Error from City Court of Dublin; K. J. Hawkins, Judge.

Action by Beulah Stinson against the Macon, Dublin & Savannah Railroad Company. Judgment for plaintiff, and defendant brings error. Affirmed.

John S. Adams, of Dublin, and Minter Wimberly and Akerman & Akerman, all of Macon, for plaintiff in error.

**RUSSELL, J.** Judgment affirmed.

(11 Ga. App. 133)

**BUTLER v. MAYOR, ETC., OF CITY OF WASHINGTON.** (No. 4,089.)  
(Court of Appeals of Georgia. May 7, 1912.)

*(Syllabus by the Court.)*

**INTOXICATING LIQUORS (§ 236\*)—CRIMINAL PROSECUTION—SUFFICIENCY OF EVIDENCE.**

The keeping of intoxicating liquor for the purpose of illegal sale may be shown circumstantially, as well as by direct evidence of a sale. In the present case there were circumstances and legitimate inferences sufficient to authorize the conviction.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. §§ 300-322; Dec. Dig. § 236.\*]

Error from Superior Court, Wilkes County; B. F. Walker, Judge.

George Butler was convicted of violating an ordinance of the City of Washington, and brings error. Affirmed.

F. H. Colley, of Washington, for plaintiff in error. Wm. Wynne, of Washington, for defendant in error.

**POTTLE, J.** Judgment affirmed.

(11 Ga. App. 149)

**DEAL v. STATE.** (No. 4,101.)

(Court of Appeals of Georgia. May 7, 1912.)

*(Syllabus by the Court.)***REVIEW ON APPEAL.**

No error of law is complained of, and the evidence demanded the verdict.

Error from City Court of Springfield; J. H. Smith, Judge.

John Deal was convicted of crime, and brings error. Affirmed.

W. H. Boyd and D. S. Atkinson, both of Savannah, for plaintiff in error. R. W. Sheppard, Sol., of Guyton, for the State.

HILL, C. J. Judgment affirmed.

(70 W. Va. 600)

**KEENAN v. DONOHUE et al.**

(Supreme Court of Appeals of West Virginia. April 9, 1912.)

*(Syllabus by the Court.)***NEW TRIAL (§ 71\*)—GROUNDS—INSUFFICIENCY OF EVIDENCE.**

The jury are the sole judges of the credibility of witnesses and of the comparative value of their conflicting testimony; and the court has no right to disturb a verdict, depending wholly upon such evidence, because his view of the worth of the testimony may differ from that entertained by the jury.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 144, 145; Dec. Dig. § 71.\*]

Error to Circuit Court, Randolph County. Action by L. H. Keenan against Thomas Donohue and others. Judgment for plaintiff, and defendants bring error. Reversed, and judgment rendered.

Talbott & Hoover, of Elkins, for plaintiffs in error. Cunningham & Stallings, of Elkins, for defendant in error.

WILLIAMS, J. This writ of error was awarded upon petition of Thomas Donohue and others, and brings up for review an order made by the circuit court of Randolph county on the 25th of November, 1909, setting aside the verdict of the jury, rendered in petitioners' favor, in an action upon an account for \$300, brought against them by L. H. Keenan.

The sole question presented by the record for our decision is, Was the trial judge justified in setting aside the verdict? We have carefully read and considered all the evidence. It consists wholly of the testimony of witnesses, and is very conflicting on all material questions. It could serve no useful purpose to recite the evidence, pro and con, in this opinion; it would only be pointing out the particular testimony in respect to which there is conflict, and that is not necessary. That the verdict rested on conflicting testimony of witnesses is admitted by plaintiff's counsel in their brief. But they seek to demonstrate that the testimony large-

ly preponderated in favor of plaintiff, and that therefore the court was justified in setting the verdict aside. No other reason is advanced in brief of counsel in support of the court's action. But it clearly appears that, in order to reach a verdict, the jury were compelled to believe some of the witnesses for one of the parties, and to disbelieve other witnesses for the other. Such a state of the evidence makes the verdict to depend wholly upon the credibility of witnesses, a matter solely for jury determination. The testimony of defendants' witnesses is ample to support the verdict, and the jury must have believed them, else their verdict would not have been as it is. The law does not permit the court to disturb a verdict depending upon such evidence. The judge has no right to set aside a verdict, because his opinion in respect to the credibility of the witnesses differs from that held by the jury. This case is peculiarly one for jury determination, and the court had no right to disturb the verdict. This principle has been frequently applied by this court, and very recently, in *McGuire, Adm'r v. N. & W. Ry. Co.*, infra, where the rule was stated thus: "If the verdict rests upon conflicting testimony of witnesses, and there is sufficient evidence to support it, the court will not set it aside. The jury are the sole judges of the credibility of witnesses. They may believe one witness in preference to believing two, or more, who testify against him." See, also, *Cook v. C. & O. Ry. Co.*, 74 S. E. 730.

It was clearly the jury's right to weigh, compare, and determine the value of the conflicting testimony of witnesses, and not the right of the court; and, the jury having found for defendants solely upon such testimony, the court had no right to set aside their verdict. Consequently the order of the court, setting aside the verdict and awarding a new trial, will be reversed; and judgment will be entered in this court for defendants.

(70 W. Va. 538)

**McGUIRE v. NORFOLK & W. RY. CO.**

(Supreme Court of Appeals of West Virginia. March 26, 1912.)

*(Syllabus by the Court.)***1. RAILROADS (§ 369\*)—OPERATION—PERSONS ON TRACK—CHILDREN.**

In so far as it is consistent with their other duties in operating their train, it is the duty of both the fireman and engineer to keep a reasonable lookout for children of tender years, trespassing upon the railroad track.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1259-1262; Dec. Dig. § 369.\*]

**2. RAILROADS (§ 369\*)—OPERATION—PERSONS ON TRACK—CHILDREN.**

If a child of tender years is killed by a railroad engine, and it appears that the child was on the track, or perilously near it, at a point where there was nothing to obstruct the view of the fireman, and far enough in front of

the moving train for it to have been stopped, by exercising reasonable diligence, in time to prevent injury to the child, the failure of the fireman to observe the child until it is too late to stop before running upon it is negligence, and such negligence is, in law, the proximate cause of the death, and the railroad company is liable, notwithstanding the engineer may not himself have been negligent.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1259-1262; Dec. Dig. § 369.\*]

### 3. TRIAL (§ 252\*)—OPERATION—PERSONS ON TRACKS — INSTRUCTIONS — APPLICABILITY TO EVIDENCE.

An instruction is properly refused which would submit to the jury the question of the mother's imputed negligence, as affecting her right, as distributee, to recover for the negligent killing by a railroad company of her child, 2½ years old, when the only proof of such negligence is the fact that the child, unattended by an older person, went upon the company's track, in a populous town, and was killed by a moving train.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 596-612; Dec. Dig. § 252.\*]

### 4. APPEAL AND ERROR (§ 1002\*)—REVIEW—QUESTIONS OF FACT—CONFLICTING TESTIMONY.

If the verdict rests upon conflicting testimony of witnesses, and there is sufficient evidence to support it, the court will not set it aside. The jury are the sole judges of the credibility of witnesses. They may believe one witness in preference to believing two, or more, who testify against him.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3935-3937; Dec. Dig. § 1002.\*]

### 5. WITNESSES (§ 400\*)—IMPEACHMENT—RIGHT TO IMPEACH ONE'S OWN WITNESS.

A party who uses his adversary's witness to prove a certain fact makes him his own witness for that purpose; but he is not bound by his testimony, on cross-examination, in respect to other matters, concerning which he was not examined in chief. As to such new matter, the witness becomes the witness of the cross-examiner.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1268, 1269; Dec. Dig. § 400.\*]

Error to Circuit Court, McDowell County.

Action by J. G. McGuire, administrator, against the Norfolk & Western Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Wyndham Stokes and J. Graham Sale, for plaintiff in error. Harold A. Ritz and Cook, Litz & Howard, for defendant in error.

WILLIAMS, J. J. G. McGuire, administrator of Juanita Hunt, recovered a judgment for \$2,000 against the Norfolk & Western Railway Company for negligently causing the death of his intestate, and defendant has brought the case to this court on writ of error. The principal errors assigned relate to the sufficiency of plaintiff's evidence to support the verdict, and to the action of the court in refusing to give certain instructions asked for by the defendant.

[1] Plaintiff's intestate, a child 2½ years old, got upon defendant's railroad track in the town of Welch, and was killed by an en-

gine and train in charge of defendant's servants. The record presents these questions, viz.: Did the engine crew keep a proper lookout for helpless and irresponsible trespassers on defendant's tracks; and, if not, was their failure to do so the proximate cause of the child's death? Defendant's liability depends upon a proper answer to these questions, because it is the well-settled law of this state that the engineer and fireman must keep a reasonable lookout for children and helpless trespassers upon the track. *Gunn v. Railroad Co.*, 42 W. Va. 676, 28 S. E. 546, 36 L. R. A. 575; *Dempsey v. Railway Co.*, 71 S. E. 284, 34 L. R. A. (N. S.) 682.

[2] Jim Brown, a witness for plaintiff, is the only witness who locates definitely the place where the engine was at the time the child came upon the track. He was hauling a load of goods from the depot, and was at a point 49 feet from the place where the child was hit by the engine. From his position, he could see both the engine and the child, and, seeing the child's danger, he hallooed to the trainmen and, not attracting their attention, he says he jumped from his wagon and ran to the track to rescue her, and reached it in time to save another child that was on the track, about 8 or 10 feet from the child that was killed. He also succeeded in catching hold of Juanita Hunt's hand, but not until it was too late to save her. The wheels of the truck caught her. He says that he himself was struck by the cylinder of the engine and thrown down. On the day before the case was tried, he pointed out to W. C. Morgan, a civil engineer, the place where he was standing, and the respective points on the track where the approaching engine and the deceased were, when deceased came upon the track. Mr. Morgan measured the distances between the points shown him by Brown, and testified that the two points on the railroad track measured 125 feet apart. It is proven, and not denied, that the train was running at a rate of speed not exceeding, in the opinion of any witness, 10 miles an hour, and could have been stopped in a distance of from 60 to 80 feet; and it is proven that it was in fact stopped, after the brakes were applied, in a distance of 70 feet. Therefore, if the engineer had seen the child when she first came upon the track, and had used diligence to stop his train, he could have done so before striking her. But, for some distance along the railroad, in both directions from the place of accident, the track curved to the left. The engineer's position was on the right-hand side of the engine, which placed him on the outside of the curve, and made it impossible for him to see the track very far ahead. He testified that he was at his place of duty in charge of his engine; that, on account of the curvature of the track, the front of his engine obstructed his

view along the track; and that he did not see the child until after his engine had struck her. There is no evidence that he could have seen the child from his position on the engine in time to stop his train. There is some evidence, however, tending to prove that he was not on his engine at the time. Jim Brown says that, after the train stopped, he saw the engineer come out of one of the coaches. He also says that, when he first saw the child on the track, he looked toward the engine and hallooed, but could not see the fireman, whose place on the engine was on the inside of the curve and nearest to witness. But Brown is contradicted by both the engineer and the fireman, who testify that they were in their respective places on the engine. The fireman says he first saw the child as the engine was crossing Wyoming street. That is shown to be about 70 feet from where the child was struck. It is proven that, from the fireman's place on the engine, he had an unobstructed view along the track, ahead of the engine, for a distance of over 400 feet.

[4] There is irreconcilable conflict between the testimony of Jim Brown and Jesse Mathews, witnesses for plaintiff, on the one hand, and the fireman and engineer, witnesses for defendant, on the other. Consequently, if the facts testified to by Brown and Mathews are sufficient to prove negligence on the part of defendant company, then we have no right to disturb the verdict, because the question of the credibility of witnesses is a matter solely for jury determination. It was the duty of both engineer and fireman to keep a reasonable lookout for children and other helpless trespassers upon the track, so far as it was consistent with their other duties in the running of the train. They both say they were at their respective places on the engine; and the fireman says he was keeping a lookout. But they are both contradicted by the facts, as they are made to appear from the testimony of witnesses Brown and Mathews. These witnesses say the fireman was not in his place on the engine; that his window of the cab was next to them and in plain view; and that they looked and could see no one on the engine. Brown also says that, after the train had stopped, the engineer came out of one of the coaches. If this statement of Brown's is true, it tends to prove that the fireman was the only one on the engine, and that he was on the opposite side, running the engine in the engineer's stead, and was in a position where he could not see the tracks in front of him, on account of the curve in the track. But, in any view, their testimony, if true, proves that the fireman was absent from his usual place on the engine at the time of the accident. The fireman says he got in the engine cab as the train was crossing the bridge, and, when asked why he did so, replied that it was

"necessary for a man to be on the lookout coming into Welch, or any passenger stop, as you cannot tell who may be on the track, or anything else." Here we have an admission of what his duties were at the time of the accident. The question is: Did he perform them? If he did, the killing of plaintiff's intestate was an unavoidable accident. If the fireman and engineer performed their duty, it follows, as a matter of course, that the accident was unavoidable; and defendant is not liable. But, in view of the conflicting testimony of witnesses, it was for the jury to say whether they were in their respective places on the engine. In view of the fact that the engine was approaching the depot in a populous town, on a curve in the railroad track which cut off the engineer's view of the track to a considerable extent, it was incumbent on the fireman to keep a more careful lookout than would be required of him under different conditions. According to Brown's testimony, corroborated by Mathews, the fireman could have seen the child on the track for a distance of 125 feet, if he had been at his post of duty, and had been looking out; and, according to the undisputed proof, the train was stopped in a distance of 70 feet after the brakes were applied. The testimony of Brown and Mathews, supplemented by the actual measurements made by the civil engineer, Morgan, proves that the engine was 125 feet from the child when she first came upon the track, within plain view from the fireman's place on the engine. Therefore, according to the law, as applied in *Gunn v. Railroad Co.*, *supra*, and *Dempsey v. Railway Co.*, *supra*, the jury were justified in finding defendant guilty of negligence, and we have no right to disturb their verdict. There is conflict in the testimony of the witnesses; and the jury had the right to believe Brown and Mathews, and to disbelieve the engineer and the fireman, and we have no right to say that they were wrong. The fact that Brown had made an affidavit before the trial, describing the manner of the accident, which in some respects differs from his testimony before the jury, was a matter affecting his credibility only, and was a matter which, no doubt, the jury considered and passed upon.

[5] Plaintiff examined G. W. Thomas, the engineer, to prove two facts, viz.: (1) In what distance he could have stopped his train, and (2) in what distance he did actually stop it, at the time of the accident. His answers to these questions are not inconsistent with the facts testified to by other of plaintiff's witnesses. But, on cross-examination, he was asked to tell when he first saw the child on the track, and all he knew about how she was killed. Many of the facts related by him are contradictory of the facts testified to by Brown and Mathews; and it is insisted by counsel for defendant that

plaintiff is bound by that testimony. Such is not the law. By placing the engineer on the stand in his own behalf, plaintiff no doubt vouched his credibility, and would not be permitted to impeach his general character for veracity. *Lambert v. Armentrout*, 65 W. Va. 375, 64 S. E. 260, 22 L. R. A. (N. S.) 556; 30 A. & E. E. L. 1128; 1 Greenl. on Evi. § 442. But he is not prohibited from proving the truth of any particular fact by some other witness, although it may be in direct contradiction of what such witness may have testified to. Authorities, *supra*; 1 Greenl. on Evi. § 443. But defendant did make the engineer its own witness to prove many of the facts testified to by him on his cross-examination; and, as to matters in relation to which he was not examined in chief, plaintiff did not make him his witness, and is not bound by his testimony in relation thereto. He was not offered as a witness by plaintiff for the purpose of proving them. As to such new matter, brought out by cross-examination, the witness became defendant's witness. *Hollen v. Crim & Peck*, 62 W. Va. 451, 59 S. E. 172.

[3] The court refused an instruction, asked for by defendant, which would have told the jury that there can be no recovery for the death of an infant of Juanita Hunt's age, when it appears that the negligence of the custodian of the child contributed to its death. Without going into the intricate question of imputed negligence, about which there is so much conflict in the authorities, we may, nevertheless, say that the instruction was properly refused in this case, because there is not sufficient evidence to prove that the mother of the child was negligent in permitting it to get upon the railroad track. It does not appear how far the mother lived from the point where the child was killed, nor how long the child had been out of her presence. True, witness Brown does say that he saw her outside of her mother's yard at other times, and that Juanita and the other child that he rescued were nearly always together. It is scarcely possible that a mother would be able to keep her eye upon her child all the time; and it would be unreasonable to hold her guilty of negligence for not doing so. Common observation and experience teach us that children of 2½ years of age often get out of the sight of their parents or custodians; and the fact that Juanita Hunt did, on this occasion, get out of her mother's sight, and upon the railroad track, is not, of itself, sufficient proof of negligence to warrant the instruction, even if it be the law that the negligence of the custodian of the child is attributable to the child. *Dempsey v. Railway Co.*, *supra*; *Gunn v. Railroad Co.*, *supra*. The child itself was of too tender years to appreciate its danger; and the law, of course, imputes no negligence to it. Moreover, it does not appear that the child's mother is its sole dis-

tributee. She was married; and it appears that her husband was the child's stepfather. It does not appear that the child left no brothers and sisters, who would be joint distributees with its mother. And, even granting that the law does, in case of the contributory negligence of a parent who is the custodian and sole distributee of the child, prevent recovery, the query arises, Would such negligence of the custodian prevent recovery by the other joint distributees, to whom the law certainly imputes no negligence? One of the principal reasons assigned for applying the doctrine of imputed negligence by the courts that have applied it is that, under the statute known as Lord Campbell's Act, the recovery for the wrongful death of a person is for the benefit of the distributees of the deceased, and not for the benefit of his estate, and that, to permit a distributee to recover for the death of his child, caused by the negligent act of another, to which his own negligence had contributed, would be to permit him to profit by his own wrong, and would encourage negligence. But this reason can certainly have no application to infant distributees of tender years. If, therefore, there were other distributees besides the mother, who under the law share equally with her, would the mother's imputed negligence, if proven, defeat their right to recover? We suggest the question, but do not decide it.

The law imposes a greater duty upon railroad companies to keep a lookout for small children trespassing upon its tracks than it does in case of adult persons in full possession of their faculties. It owes to the former the duty to keep a reasonable lookout for them consistent with the other duties of its employes engaged in the operation of its trains; and if children are discovered upon the tracks, or perilously near the same, the company's servants are bound to exercise reasonable diligence to avoid injury to them. Defendant's instruction No. 7 was therefore properly refused. By it defendant asked the court to apply the same rule to the infant deceased that the law applies in the case of an adult trespasser.

Defendant's No. 8 was also properly refused. By implication it would limit the duty of keeping a lookout for helpless trespassers on the track to the engineer only. The duty to keep such lookout rested on the fireman, as well as on the engineer; and, in this particular case, it would appear to be more the duty of the fireman than it was of the engineer, for the reason that the fireman's position afforded him a commanding view of the track, while the engineer's position did not afford such view to him. Moreover, the train was approaching the depot in a populous town, where, as the evidence shows, the tracks were much used by pedestrians. Under such circumstances, reason requires that the fireman should keep a more

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careful lookout than would be necessary at a place where pedestrians might not be expected to be upon the track.

Plaintiff's instruction No. 1 is consistent with the law herein stated, and was properly given. It reads: "The court instructs the jury that, if the employes of a railroad company fail to keep a proper lookout consistent with their other duties for helpless trespassers on the track, and thereby such helpless trespasser is negligently killed, such failure is the approximate cause of such killing, and the company will be liable therefor, notwithstanding the prior negligence with which such helpless trespasser may be on the track." It is argued by counsel for defendant that the failure to keep a lookout was not the proximate cause of the child's death, but that the failure to stop the engine in time to avoid injury was the proximate cause. The law does not regard so fine a distinction. Failure to keep a reasonable lookout is the negligent act established by the evidence. It matters not how diligent the engineer and fireman may have been to stop the train after the child had been discovered, if, by failure to keep a proper lookout, they did not discover her in time to stop before running upon her. If it had been proven to the satisfaction of the jury that defendant's servants, by the exercise of reasonable diligence, could not have discovered the child, in a place of danger, in time to have prevented her injury, then, of course, the failure to stop before running upon her would not alone establish negligence. Logically, running over the child with the engine caused her death; this resulted directly from the failure to stop in time, and the failure to stop in time was due to the fact that the child was not discovered; and, finally, the failure to discover her was due to the negligence of those in charge of the engine in not keeping a reasonable lookout. All these several subsequent acts and occurrences follow so closely upon, and are such natural and inevitable consequences of, the original act of negligence, to wit, the failure to keep a reasonable lookout, that the law does not regard them as having any causal relation. The law looks to the last negligent act which caused the injury as the proximate cause, and disregards all intervening acts and occurrences, which are the natural and immediate consequences flowing from it. Hence, if the jury believed that defendant's servants were negligent in failing to see the child when she came upon the track, when the engine was far enough away from her to have been stopped before striking her, all of which they had a right to believe from the evidence, then no amount of diligence, exercised after they actually discovered her on the track, could relieve defendant from liability.

The judgment will be affirmed.

BROOMALL et al. v. NORTH AMERICAN STEEL CO.

MONAHAN v. NORTH AMERICAN STEEL CO. et al.

(Supreme Court of Appeals of West Virginia. April 9, 1912.)

(Syllabus by the Court.)

1. CORPORATIONS (§ 473\*) — BONDS — BONA FIDE HOLDERS.

The Broomall Iron & Steel Company gave a deed of trust upon its property to secure a bond issue of \$50,000, and sold \$30,000 of them, and deposited the remaining \$20,000 as collateral to secure a loan. It then conveyed all its property to a newly formed corporation, the North American Steel Company, which assumed to pay the bonds. The new corporation paid the debt secured by the \$20,000 of bonds, and put them into circulation before they became due. *Held*:

First. That the new company, having rightfully acquired the bonds of the old company before they were due, could negotiate them.

Second. That in a suit by a holder of the bonds sold by the old company to enforce their collection by a sale of the trust property, a bona fide holder of the bonds put into circulation by the new company is entitled to equal protection with the holders of the bonds first sold.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1842-1853, 1855; Dec. Dig. § 473.\*]

2. CORPORATIONS (§ 473\*) — BONDS—ASSIGNMENT.

A bona fide holder of bonds, lawfully issued by a corporation, may pass good title to his assignee, without consideration.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1842-1853, 1855; Dec. Dig. § 473.\*]

3. CORPORATIONS (§ 473\*) — BONDS — BONA FIDE HOLDER.

A stockholder in a corporation may lawfully acquire and hold its bonds, and is entitled to equal protection with other holders of like bonds; and, in the absence of proof of bad faith, he is presumed to be a bona fide holder.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1842-1853, 1855; Dec. Dig. § 473.\*]

Appeal from Circuit Court, Barbour County.

Bill by Grant C. Broomall and others against the North American Steel Company, and by H. A. Monahan, who sues for the use, etc., against the North American Steel Company and others. The suits were consolidated. Decree for complainants, and the North American Steel Company and James R. Harris appeal. Modified and affirmed.

Avis & Hardy, of Charleston, and J. Hop Woods and J. B. Ware, both of Philippi, for appellants. Wm. T. George, of Philippi, for appellee H. A. Monahan. Blue & Dayton, of Philippi, for other appellees.

WILLIAMS, J. The Broomall Iron & Steel Company, a West Virginia corporation, executed a deed of trust upon its property in Barbour county, W. Va., to secure a \$50,000 bond issue. Bonds amounting to

\$30,000 were purchased by various individuals, and the remaining \$20,000 were deposited by said company as collateral security for a loan made to it by a bank in the city of Baltimore. Thereafter another West Virginia corporation, the North American Steel Company, was formed, and on the 13th of April, 1906, the old company conveyed all its property to the new company, which, in consideration therefor, assumed the payment of said bonds. Shortly before the conveyance to the new company, Henry Koehler, Jr., one of its promoters, and later one of its largest stockholders, paid the debt held by the bank of Baltimore, and took up the \$20,000 of bonds held by it as collateral. On repayment to him of the money advanced to pay the bank, Koehler turned the bonds over to the new company, and it then placed them with the Commonwealth Trust Company, of St. Louis, Mo., to secure a debt which the new company owed it. That debt was not paid, and the Commonwealth Trust Company sold the bonds to James C. Harvey, and he assigned them to James R. Harris. On the 8th of January, 1906, the promoters of the new company entered into a written contract with the old company and its stockholders, whereby two of its stockholders, Grant C. Broomall and Hart Hatch, were to be protected in respect to a certain secret process for the manufacture of planished steel, which the contract provided should be used by the new company. Broomall and Hatch were also to receive a certain portion of the stock of the new company, and were to be employed by it, for a period of not less than five years, at a stipulated salary per month. This contract was made binding on the new company to be formed. In two or three years after the new company was formed, it became seriously embarrassed, financially, and ceased to operate its plant, or to carry on business, and failed to pay the interest on the aforesaid bonds; whereupon, by the terms of the trust deed securing them, both principal and interest became payable. Broomall and Hatch then brought a suit to compel the company to operate its plant, and to carry out the agreement made by its promoters for their benefit. Shortly thereafter, H. C. Monahan, a holder of some of the \$30,000 of bonds that had been sold by the old company, brought another suit, on behalf of himself and all the other bondholders, alleging the insolvency of the company and its failure to pay interest on the bonds, and prayed for the appointment of a receiver to take charge of the company's property, and for a sale of the same, for the purpose of paying off the bonds in accordance with the provision in the deed of trust. These two suits were consolidated, and the causes were referred to a commissioner to state, and report to court, an account of the liens upon the company's property, and their

priorities. The two causes were heard together, on the commissioner's report and exceptions thereto, and a decree was pronounced on the 29th of July, 1909, holding that, by virtue of the provisions in the deed of trust, the failure to pay the interest caused the whole of principal and interest of the bond issue to become due and payable, and determined the order of the liens upon the property, and decreed that it be sold. It was sold, and D. A. Nease, one of the promoters of the North American Steel Company, purchased it at the price of \$50,000. Nease paid only \$1,000 of the \$12,500 cash payment, and a decree was entered confirming his purchase, on condition that he should comply with the terms of sale by the 1st of December, 1909. Whether he has complied with the terms of sale or not does not appear; nor is that fact material to the decision of the question presented by this appeal. The North American Steel Company and James R. Harris appealed from that decree.

[1] The principal error assigned, and the only one argued by counsel in their briefs, is that the decree erroneously subordinated the lien of the \$25,400 of bonds and their interest, held by said Harris, to the lien of the holders of the remaining portion of the original \$50,000 bond issue and the interest thereon. That assignment is well taken. It is not alleged in the bill, in either of the suits, that the \$20,000 of bonds which the old company had used as collateral security for a loan was fraudulently acquired, or was fraudulently held by said Harris. On the contrary, Monahan, who sues on behalf of himself and all other holders of any of said bonds, avers in his bill that the whole of the bond issue of \$50,000 was a valid, subsisting obligation, outstanding and unpaid. He made this averment with full knowledge of the manner in which the old company had used the bonds. Indeed, it clearly appears from a reading of the bill that plaintiff brought the suit as much for the benefit of the holders of the \$20,000 of bonds as for himself, or for any other holder of any portion of the \$30,000 of bonds. Moreover, he prays "that the proceeds of the sale of the said property be applied as in the said deed of trust directed until all of said bonds are paid." In view of the averments and prayer of plaintiff's bill, neither he nor any other bondholder who came into the suit as a coplaintiff would have a right to impeach the title of any other bondholder. It is not questioned that the \$20,000 of bonds were properly and lawfully used by the North American Steel Company, to secure a debt which it owed to the Commonwealth Trust Company, and that, by that means, they got into circulation, and are not paid. At that time the bonds were not payable, and the new company had a right to negotiate them. 3 Cook, Corp. (6th Ed.) § 262; *Pruyne v. Adams Furniture Co.*, 155 N. Y. 629, 49 N. E. 1103; *Atwood v.*



Railroad Co., 85 Va. 966, 9 S. E. 748. And the holders of other bonds of the same issue, previously purchased, had no right to complain, for the lien of all the bonds existed from the recordation of the deed of trust, whether issued then or later. "All outstanding bonds in bona fide hands are conclusively presumed to have been issued on the date of the recording of the mortgage." 3 Cook, Corp. (6th Ed.) § 764; Central Trust Co. v. Bartlett, 57 N. J. Law, 206, 30 Atl. 583; Caylus v. Railroad Co., 76 N. Y. 609; Nelson v. Railroad Co., 8 Am. Ry. Rep. 82.

[2] It is proven, and not denied or even controverted, that James C. Harvey, who purchased the bonds from the Commonwealth Trust Company, paid full value for them. He had a right to purchase them. Could he not then, even by gift, confer title upon his indorsee, good against the maker and the guarantor? We know of no rule of law forbidding his doing so. So long as the bonds are not held by the company itself that guaranteed their payment, or by some person for its benefit, having been properly put into circulation, it matters not to the other bondholders who owns them, for they purchased subject to the right of the old company, or its successor, the new company, to dispose of the whole of the issue. It is not even contended in brief of counsel that Harris holds the bonds for the new company.

[3] But counsel do intimate that he holds them for Adolphus Busch, who is a large stockholder in the company, and who is individually liable as its indorser for a large amount of its debts. There is no evidence to support that view; but it is argued that, because Harris is general manager for the Anheuser Busch Brewing Association in which Adolphus Busch is interested, because he is secretary of the new company, and because he refused to answer questions before the commissioner in relation to the consideration paid by him for the bonds, the commissioner could infer that he was not a bona fide holder. But Harris testified that he is the absolute and unqualified owner of the bonds, and he produced a written assignment from Harvey for them. If Harvey was a bona fide holder, it mattered not then, as between Harris and the other bondholders, whether he paid anything for them or not. But even if it had been proven that he purchased them with money supplied by Adolphus Busch and held them in trust for him, that would not invalidate them. Busch's relation to the company as stockholder is not inconsistent with his rights as a creditor. 1 Cook, Corp. (6th Ed.) § 11. It is shown that he was liable, as indorser for the company, for a large amount of its indebtedness, and that it is insolvent. It is no doubt true that, if the \$20,000 of bonds were really owned by the new company, they should be treated as paid, and canceled; and if the court was of the opinion that Harris held the bonds for the

benefit of the company, it should not have allowed them as a lien in favor of any one, for to do so would be to protect an insolvent debtor against its creditors. But there is nothing in the record from which it could even be inferred that Harris held the bonds for the company. If the court believed that Harris was not a bona fide holder, we do not see on what theory it gave the bonds which he held any place whatever, as a lien against the property. Because, if entitled to be allowed at all, they should have been given equal dignity with the other bonds. They were a part of the same issue, and all protected alike.

The decree, entered on the 29th of July, 1909, in so far as it decreed the debt of J. R. Harris to constitute a distinct lien of the third class, will be corrected by an order entered here, so as to make the \$25,400 of bonds and interest decreed to him a lien upon the property conveyed by the deed of trust hereinbefore mentioned, second in order of priority along with the liens of the holders of the remainder of the \$50,000 bond issue, and to be paid ratably with them out of the proceeds of sale, and, as so modified, the decree will be affirmed, with costs in favor of said J. R. Harris, and the cause will be remanded for further proceedings.

(70 W. Va. 607)

#### FREDLOCK v. FREDLOCK et al.

(Supreme Court of Appeals of West Virginia.  
April 9, 1912.)

#### (Syllabus by the Court.)

#### 1. SPECIFIC PERFORMANCE (§ 121\*)—PROCEEDINGS—SUFFICIENCY OF EVIDENCE.

Specific execution of an alleged contract with the widow, to divide and partition the personal estate of a decedent otherwise than according to the law of descents and distribution, in consideration of the conveyance by the heirs to her of the homestead, denied for failure of proof of such contract.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 387-395; Dec. Dig. § 121.\*]

#### 2. EXECUTORS AND ADMINISTRATORS (§ 500\*)—ACCOUNTING—COMMISSIONS.

If a fiduciary has not, within six months after the end of any year after his qualification, laid before a commissioner of accounts, a statement of his receipts for such year, or has not within such time laid such statement before a commissioner, who in a pending suit may have been ordered to settle his accounts, as provided by section 7, chapter 87, Code 1906, he shall be allowed no commissions. The statute is mandatory.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 2131-2139; Dec. Dig. § 500.\*]

#### 3. PARTNERSHIP (§ 219\*) — ACTIONS — JUDGMENT—VALIDITY.

The judgment of a justice in favor of a firm, suffered by default, is not void, and subject to collateral attack, because the names of the individuals composing the firm have not been set forth in the summons, as provided by section 25, chapter 50, Code 1906.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 429-445; Dec. Dig. § 219.\*]

#### 4. JUSTICES OF THE PEACE (§ 125\*) — JUDGMENT—VALIDITY.

The following entry in the docket of a justice: "Feb'y. 19, 1908, time for trial; the plaintiff appeared; defendant did not appear, and after waiting for some time plaintiff claimed judgment for the amount of his claim and interest thereon," constitutes no judgment, and is void, as a lien on defendant's land.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 390-392, 395-399; Dec. Dig. § 125.\*]

#### Appeal from Circuit Court, Mineral County.

Bill in equity by Frederick L. Fredlock against Susan M. Fredlock and others. From a decree for defendants, plaintiff appeals. Affirmed in part, and reversed in part, and remanded.

Taylor Morrison, of Keyser, and H. K. Drane, of Piedmont, for appellant. Frank C. Reynolds, of Keyser, for appellees.

MILLER, J. The decree below, on review here, overruled all exceptions to the commissioner's report, adjudged plaintiff not entitled to have the deed, from himself and brothers to his mother, Susan M. Fredlock, set aside, nor to have the personal property of his father's estate partitioned in the proportion of one fourth to his mother, and a like one fourth to himself and to each of his brothers, as he alleges in his bill it was agreed should be done as a consideration for making said deed. And among other things, the court further decreed, that said Susan M. Fredlock, administratrix, in accordance with the settlement of her fiduciary accounts, made and reported by said commissioner, should forthwith make distribution of the funds reported in her hands, to A. M. Fredlock, \$976.03, and to W. H. Fredlock and Frederick L. Fredlock, each, the sum of \$976.04, and that she should also forthwith have appraised, all the household and kitchen furniture owned by her late husband at his death, not included in the prior appraisement returned to the clerk's office, and thereafter sell the same, and return a report thereof, with said appraisement to the next term of the court.

For reasons not very apparent, except the probable necessity of a sale of the lands sought to have partitioned, plaintiff, in his original and amended bills, impleaded the defendant, William T. Jamesson, surviving partner of himself and Jacob S. Jamesson, deceased, late partners as Jacob S. Jamesson & Brother, alleging in his original bill that suit had been previously brought in the name of Jacob S. Jamesson & Brother against him before a justice, and summons served upon him; that at the time of the suit Jacob S. Jamesson was dead, but regardless of this fact the justice, on February 19, 1908, had pronounced judgment against him for \$294.00, and costs, which judgment had been afterwards docketed in the county clerk's office. In his original

and amended bills he charges the proceedings of the justice to be null and void; that the judgment is a nullity, and constitutes no lien on his interest in the real estate sought to have partitioned: first, because the suit is in the name of the partnership, without naming the individuals comprising the partnership, as required by law, section 25, chapter 50, Code 1906; second, because, though he made certain entries in his docket, the justice in fact pronounced no judgment against him, that the entry on his docket, on February 19, 1908, that after waiting for some time, "plaintiff claimed judgment for the amount of his claim and interest thereon," constituted no judgment against him. On the issues of law and fact presented by these allegations, and the answer of William T. Jamesson, surviving partner, etc., thereto, the court by the same decree denied relief to plaintiff against said judgment, and adjudged that the amount thereof as found by the commissioner be paid out of the interest of plaintiff in the proceeds of the sale of the lands sold in partition, and this action of the court is another point of error relied on here.

The main purpose of the suit is to have set aside the deed from plaintiff and his brothers to Susan M. Fredlock, or, in the alternative, to specifically enforce the alleged contract, to divide and partition the personal estate in the proportions aforesaid, instead of in the proportion of one-third to the mother, and one-third of the remaining two-thirds to each of the three brothers, as certain stocks in certain corporations had been previously divided and distributed by her; to settle the accounts of said administratrix, and to have distributed the remaining personal estate in like proportion; and also to have all the real estate of which plaintiff's father died seized and possessed, which it was alleged was not susceptible of partition in kind, sold, and the proceeds thereof divided and partitioned to those entitled thereto.

[1] We have carefully examined and considered the pleadings and proofs on the issues presented, respecting the alleged contract with Mrs. Fredlock. Though the bill alleges the contract to have been between grantors and grantee, plaintiff's own evidence is, that the contract was made with him alone. His mother in her evidence flatly contradicts him; and his two brothers both deny that any such contract was made with them. They and their mother testify that the deed was made to her for the homestead, because they thought she ought to have it, and because it was her individual money mainly which had gone into the construction of the house. We are of opinion, therefore, that plaintiff has wholly failed to make out his case, and that the decree below on this issue is clearly right.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

[2] The next point of error relied on by plaintiff is, that the court erred in overruling his exception to the commissioner's report, allowing the administratrix commissions on the money found in her hands, because of her failure to settle her accounts, within the time required by law. E. J. Fredlock, his father, died February 7, 1908. Mrs. Fredlock was appointed and qualified administratrix, February 27, 1908. So far as the record shows the administratrix never made settlement of her accounts before a commissioner of accounts; and, except to distribute to the heirs certain stocks in certain corporations soon after the death of decedent, she never settled with the heirs for what was due them. This suit was brought February 23, 1909, within less than a year after her appointment and qualification as administratrix; but the order of reference to the commissioner before whom she was required to make settlement was not made until January 27, 1910, and the commissioner did not give notice to begin the account until May 3, 1910, and did not complete his report until July 19, 1910.

It therefore clearly appears that the administratrix, for more than six months after the end of the year following her appointment, failed to lay her accounts before a commissioner of accounts of the county court; nor did she within such period lay a statement of her receipts within the year before the commissioner, before whom in this suit she was ordered to settle her accounts, or in any other way comply with section 7, chapter 87, Code 1906, so as to entitle her to allowance of commissions. The commissioner, however, in his report, excepted to, allowed Mrs. Fredlock commissions to the amount of \$234.89.

A proper construction of our statute, we think, requires us to hold that this was error for which the decree below must be reversed. Our statute, section 7, chapter 87, Code, is the same as section 8, chapter 132, Code Virginia, 1860, differing materially from the present statute of that state, serial section 2679, Code 1904. The Virginia Code of 1860 was materially amended by Acts of Assembly 1866-67, chapter 279. By that act the statute of Virginia was so amended as to leave the allowance of commissions within the sound discretion of the court. *Trevelyan's Adm'r v. Lofft*, 83 Va. 141, 148, 1 S. E. 901. The old statute of Virginia, our present section 7, chapter 87, *supra*, was, prior to the amendment, and in all cases in Virginia arising under the law as it then stood, always construed to be arbitrary and absolute. *Trevelyan's Adm'r v. Lofft*, *supra*; *Strother v. Hull*, 23 Grat. (Va.) 652; *Wood's Ex'r v. Garnett*, 6 Leigh (Va.) 271; *Boyd's Ex'rs v. Boyd's Heirs*, 3 Grat. (Va.) 114. And the statute has been so construed in this state. *Knight v. Watts*, 26 W. Va. 175, 205; *Hescht v. Calvert*, 32 W. Va. 215,

231, 9 S. E. 87. The only discretion given the court by our statute is when a fiduciary is found chargeable with money not embraced in his statement, in which case he shall have no commissions on such money "unless allowed by the court." *Kester v. Hill*, 46 W. Va. 744, 34 S. E. 798.

[3] The remaining question is as to the correctness of the decree in favor of Jacob S. Jamesson & Brother: First, is the judgment void because the names of the individuals composing the firm were not set forth in the summons, as required by section 25, chapter 50, Code 1906? By chapter 8, Acts of 1881, this section specifically provided that it should not be necessary to allege or prove who are the persons composing the partnership. The suit might then be brought in the firm name by which the partnership was usually known. But as amended by chapter 36, Acts of 1895, this section now requires that "the names of the individuals composing such firm shall be set forth in the summons." In terms the statute is mandatory. In the summons in this case they were not so set forth, nor do they appear in the transcript from the justice's docket. There was no appearance by defendant, and no amendment made or proposed so far as is shown by the record.

Are the judgment, or proceedings before the justice void, and subject to collateral attack on this account? In *Dorr v. Dewing & Sons*, 36 W. Va. 466, 15 S. E. 93, it is said: "It may be taken as true, as a general proposition, that, wherever suit is brought by or against partners, all of them must be joined in the suit, either as plaintiffs or defendants." At common law it seems partners could not be sued otherwise than in their individual names. *Courson v. Parker*, 39 W. Va. 521, 20 S. E. 583. According to *Totty v. Donald*, 4 Munf. (Va.) 430, however, a declaration in the name of the firm, omitting to mention the names of the partners is good after verdict. And in *Downer v. Morrison*, 2 Grat. (Va.) 250, the fact that the suit was in the firm name, without naming all the individuals composing the firm, no objection being taken thereto, it was held no ground for defeating the action on the trial. In *Pate v. Bacon & Co.*, 6 Munf. (Va.) 219, a declaration in the firm name, without mentioning the names of the partners, was held good after verdict for plaintiff on the general issue. Citing *Murdock v. Herndon*, 4 Hen. & M. (Va.) 200; *Scott v. Dunlop, Pollock & Co.*, 2 Munf. (Va.) 349. Certainly, therefore, the omission of the individual names of the partnership is not jurisdictional and fatal, and we do not think the judgment, if otherwise good, is void and subject to collateral attack on this account.

[4] But was any judgment pronounced by the justice? The docket of the justice simply says, "plaintiff claimed judgment for the amount of his claim and interest thereon."

After the styling of the action on the docket, it recites, "in which the plaintiff claims judgment for \$294.55;" but the whole record of the trial is: "Feby. 19, 1908, time for trial; the plaintiff appeared; defendant did not appear, and after waiting for some time plaintiff claimed judgment for the amount of his claim and interest thereon." Is this a judgment? We do not think so. The justice does not say judgment is given or rendered in favor of or against anybody—it is simply said the plaintiff claimed judgment; but was judgment pronounced in his favor? The docket does not say so. But it is said that the marginal entry, "Debt \$294.55. Cost \$1.70" is a memorial of the judgment, showing that a judgment was in fact pronounced; or if not this, that the abstract thereof issued by the justice, dated February 19, 1908, constitutes such memorial, and that these cure any formal defect, if any, in the judgment. But the memorandum does not say "Judgment \$294.55"; it says "Debt \$294.55." This may have been made at the time the action was brought; it in no way signifies a judgment. And how could the abstract amount to such memorial? The original abstract is not produced, only a copy from the clerk's office was introduced. But an abstract is not evidence of the judgment when put in issue. *Thompson v. Mann*, 53 W. Va. 432, 44 S. E. 246; *Dickinson v. Railroad Co.*, 7 W. Va. 390, 413. The judgment is not questioned on the ground of delay in entering it by the justice, as in *Packet Co. v. Bellville*, 55 W. Va. 560, 47 S. E. 301, and cases cited therein. The question here is, does the final record of the justice in his docket in this case amount to a judgment? On the principles of *Ferrell v. Simmons*, 63 W. Va. 46, 59 S. E. 752, 129 Am. St. Rep. 962, we hold that it does not. The evidence of the justice taken on the trial does not clearly show that he in fact pronounced judgment.

Perceiving no other errors in the decree it will be reversed in so far as it allows commissions to the administratrix, and decrees that the alleged judgment in favor of *Jamesson & Bro.*, is a lien on appellants land, and decrees payment thereof out of the proceeds of the sale thereof. In all other respects it will be affirmed, and the cause remanded for further proceedings.

(70 W. Va. 613)

**BROWN v. UNITED STATES FIDELITY & GUARANTY CO.**

(Supreme Court of Appeals of West Virginia. April 9, 1912.)

(Syllabus by the Court.)

**1. PRINCIPAL AND SURETY (§ 73\*) — ACTION FOR DAMAGES—BOND.**

If after judgment for damages recovered against a retail liquor dealer and his landlord, under section 26, c. 32, Code 1906, known as the civil damage act, such judgment, interest

and costs, as well as the costs of a suit in equity brought to enforce such judgment against the real estate of such landlord, be fully paid off and discharged by the surety on such liquor dealer's bond, and his property be not actually seized or taken and sold to satisfy such judgment, interest and costs, such landlord cannot thereafter sue and recover upon such bond, damages by way of counsel fees, expended by him, in said action or suit, though he may have notified the principal and surety in said bond of the institution of such action, and of his intention to look to them for all damages, costs and expenses incurred by him therein.

[Ed. Note.—For other cases, see *Principal and Surety*, Cent. Dig. §§ 114, 115, 455; Dec. Dig. § 73.\*]

(Additional Syllabus by Editorial Staff.)

**2. INTOXICATING LIQUORS (§ 321\*) — CIVIL DAMAGES—"LIEN"—"SEIZURE OR TAKING."**

Under Civil Damage Act (Code 1906, c. 32) § 26, providing that if a landlord's property be "seized or taken" for any fine, etc., by reason of his tenant's unlawful acts, such landlord may recover damages and costs, a "lien" upon a landlord's property, being defined as a hold or claim which one has upon the property of another as a security for some debt or charge, does not constitute a "seizure or taking" of his property within the meaning of the statute.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. § 463; Dec. Dig. § 321.\*]

For other definitions, see *Words and Phrases*, vol. 5, pp. 4144-4153; vol. 8, p. 7707; vol. 7, pp. 6399-6401; vol. 8, pp. 6846-6848; vol. 8, p. 7812.]

**Error to Circuit Court, Randolph County.**

Action by Paul Brown against the United States Fidelity & Guaranty Company. Judgment for plaintiff, and defendant brings error. Reversed.

Claude W. Maxwell, of Elkins, for plaintiff in error. D. H. Hill Arnold, of Elkins, for defendant in error.

**MILLER, J.** On appeal from the judgment of a justice, the court below, on facts agreed, pronounced the judgment complained of, that plaintiff recover of the defendant \$174.25, being the debt, interest, and costs in said action up to the time the appeal was taken, with damages at the rate of ten per cent. per annum, from February 24, 1910, until paid, together with his costs in that behalf expended.

Defendant was summoned by the justice to answer the complaint of plaintiff in a civil action for recovery of money due on contract, in which he would demand judgment for \$165.00. There was no complaint filed; but the account filed with the justice stated the defendant to be indebted to plaintiff for counsel fees, aggregating the amount demanded.

The agreed facts show that defendant was surety for one Hill, a saloon keeper, upon his bond of \$3500.00, conditioned to "pay all damages and costs as may be recovered against him by any person under any of the provisions of chapter thirty-two of the

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

Code of West Virginia, as amended." It is furthermore agreed that plaintiff was the owner of the building, in the city of Elkins, occupied by said Hill as a saloon; that during Hill's occupancy of Brown's building, both were sued in three several actions by Cora Daniels, and her infant children, by their next friend, for sums aggregating \$20,000.00, and that judgments therein, aggregating \$1700.00, were recovered against them; that immediately on being sued Brown notified the defendant company thereof, and that the purpose of said suits was to recover damages for alleged illegal sale of intoxicants, by the defendant Hill to Floyd Daniels, husband and father of the plaintiffs, and that the defendant would be held liable by him, for any damages, costs or expenses, which he might sustain or incur in said suit, and that by virtue of its said bond, he would look to defendant, as bondsman for said Hill, for reimbursement; that after recovery of said judgments, a chancery suit was instituted by the plaintiffs against Brown, to enforce said judgments, and that he had employed one Hill Arnold, an attorney, to defend him in said actions at law, and also in said chancery suit, and had paid him for his services the sum sued for in this action, but for which defendant denies liability. It was further agreed, that at the time of the institution of said suits at law Hill was believed by Brown to be insolvent, and that defendant had never been able to collect from Hill any part of the judgments recovered; that after the judgments were recovered they were docketed in the judgment lien docket of Randolph County, and after the return of the executions thereon, "Not satisfied, no property found," Hill owning no real estate, the chancery suit had been instituted by the judgment plaintiffs against Brown to enforce payment thereof out of his real estate, but that this suit was finally dismissed on payment by the defendant company of the judgment, interest, and costs recovered. Defendant denies all liability for the counsel fees sued for in this action, but, if liable, does not dispute the reasonableness of these fees.

[1, 2] The provision of section 28, chapter 32, Code 1906, relied upon by plaintiff, is as follows: "All suits for damages under this chapter may be by any appropriate action in any of the courts of this state having competent jurisdiction: provided, however, that if the property of the landlord be seized or taken for any fine, forfeiture or amercement, by reason of the unlawful acts of his tenant, arising under the provisions of this chapter, such landlord may sue upon the bond required by this chapter to be given, and may recover thereon damages to the amount incurred by him, together with costs."

The pivotal question presented is: Was Brown's property "seized or taken" within the meaning of this statute? If not, of course he has no right of action for counsel

fees. Judgment was recovered against him, and recorded as a lien against his land. Execution was also issued, but was returned "not satisfied, no property found." It is agreed also that a chancery suit was brought to charge his real estate with the payment of the judgments; but did these proceedings, or either of them, amount to a seizure or taking of his property? This is the question.

The argument of plaintiff's counsel is that the judgments and the lien thereby acquired upon his lands constituted in law a seizure or taking of his property within the meaning of the statute. For this proposition they cite 1 Jones on Liens, section 3, and *In re Byrne* (D. C.) 97 Fed. 762. We find nothing in these authorities, however, justifying the position of counsel. Jones defines a lien, as applied in various modes, as "an obligation, tie, or claim annexed to or attaching upon property, without satisfying which such property can not be demanded by its owner." In the federal decision, the court refers to the definition given by Bouvier, as "a hold or claim which one has upon the property of another as a security for some debt or charge." Certainly these definitions are no justification for the proposition that a mere lien thereon constitutes a seizure or taking of land. Nor can the institution of the chancery suit to enforce such lien, without more, have that effect. In *Morgan v. Kinney*, 38 Ohio St. 610, the question was whether the sheriff or the assignee for the benefit of creditors had the better title to certain town lots of the debtor, and this depended on whether the sheriff had made a valid levy on the property. Without going to the lots he had endorsed on the execution in his hands, that for want of goods and chattels whereon to levy, he had levied upon certain town lots in Bellaire, as the property of the debtor, no other record than this being made, any where, until after the filing of the assignment. The priority of the levy depended on the question whether within the meaning of the statute the lots had been "seized on execution," and whether the statute should be construed as intending an actual seizure. In answering this question the court said: "From the time that a valid levy is made, the land is in legal sense 'seized in execution,'—that is, rendered liable for its satisfaction." The court said in that connection that the statute nowhere required an actual seizure, which it would seem could only be done by ousting the judgment debtor.

While the case just referred to is more analogous to the case at bar than any other we have found, we do not think it throws much light on the question we have here. We must construe our statute as was plainly intended by the legislature, and in the light of the objects to be accomplished. What was that intention? Plainly to protect the landlord from having his property seized, taken and sold out of his possession, in satis-

faction of some fine, forfeiture or amercement, to his hurt and injury. It cannot mean that if only a judgment is recovered and a lien acquired, which has been discharged by the obligors of the bond, before the landlord's property has been seized or taken to satisfy the same, he may still have right of action upon the bond. Such right of action we cannot conceive to be within either the spirit or letter of the bond. Moreover, the facts agreed in this case show that O. L. Hill, the principal in the bond, who was also notified by the plaintiff to defend the actions, employed competent counsel to defend them. There was, therefore, no apparent necessity that plaintiff should also incur the expense of counsel. Having done so for some motive or purpose of his own, we do not see upon what principles of justice he should be permitted to impose the additional burden on principal or surety.

Having reached this conclusion it becomes unnecessary to consider or decide any other questions raised on the record. We therefore reverse the judgment below, and on the issues and facts agreed, find for the defendant; and the judgment which we think the circuit court should have pronounced will be entered here, that the plaintiff take nothing by his action, and that the defendant recover its costs in this court and in the circuit court, in this behalf expended.

(70 W. Va. 602)

**WILSON v. GUYANDOTTE TIMBER CO.**  
(Supreme Court of Appeals of West Virginia.  
April 9, 1912.)

*(Syllabus by the Court.)*

**1. PLEADING (§ 8\*)—ALLEGATIONS IN GENERAL—CONCLUSIONS OR MATTERS OF FACT.**

Counts in a declaration for damages to plaintiff's rights as a user of a river from the operation of a boom by a chartered company, which rest the claim of injury on the charge merely that defendant negligently and unlawfully stopped up the river and caught so great an accumulation of logs that the boom broke, are bad for not averring wherein lay the negligence and unlawfulness of the ordinarily lawful acts by a chartered boom company in stopping up a river and catching a great accumulation of logs.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 12-28½; Dec. Dig. § 8.\*]

**2. NAVIGABLE WATERS (§ 21\*) — RIGHT TO USE—BOOM COMPANY.**

Under ordinary circumstances a boom company has no right to use all of the surface of the river below its boom for rafting purposes to the exclusion of transportation by others; and if one is unreasonably kept from the use of the river by the boom company in this particular he may have action for the injury.

[Ed. Note.—For other cases, see Navigable Waters, Cent. Dig. §§ 121-131; Dec. Dig. § 21.\*]

**3. APPEAL AND ERROR (§ 1040\*)—DISPOSITION OF CAUSE—REVERSAL—RULINGS ON PLEADINGS.**

When a demurrer to faulty counts in a declaration has been overruled, and at the trial

evidence enhancing the damages has been admitted under no good count, a judgment so partially resting on the bad counts must be reversed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4089-4105; Dec. Dig. § 1040.\*]

**4. NAVIGABLE WATERS (§ 21\*)—RIGHT TO USE—STATUTORY PROVISIONS.**

Code 1906, c. 54a, § 28, does not insure damages regardless of negligence or unlawful act by the boom company, to individuals using the river for transportation.

[Ed. Note.—For other cases, see Navigable Waters, Cent. Dig. §§ 121-131; Dec. Dig. § 21.\*]

**5. DAMAGES (§ 106\*)—MEASURE—INJURIES TO PROPERTY—RENTAL VALUE.**

Rental value is a proper measure in ascertaining damages for loss by delay in the operation of a mill.

[Ed. Note.—For other cases, see Damages, Cent. Dig. § 272; Dec. Dig. § 106.\*]

Error to Circuit Court, Cabell County.

Action by T. W. Wilson against the Guyandotte Timber Company. Judgment for plaintiff, and defendant brings error. Reversed, demurrer sustained, and new trial awarded.

Campbell, Brown & Davis, all of Huntington, for plaintiff in error. Simms, Enslow, Fitzpatrick & Baker, all of Huntington, for defendant in error.

ROBINSON, J. Plaintiff has recovered damages for the loss of logs swept away by the breaking of defendant's boom and for delay in getting logs to his saw mill by reason of the occupancy of the river by the boom company in rafting out a gorge of logs formed opposite his mill after the boom broke. Defendant submits that the trial court erred in overruling the demurrer to the declaration and each count thereof, in refusing the admission of certain testimony offered at the trial, in the giving and the refusing of instructions to the jury, and in refusing to set aside the verdict and grant a new trial.

[1] We hold the first and second counts of the declaration to be insufficient. That which is averred therein as negligence is not negligence. The gist of the first and second counts is that it was unlawful and negligent for the boom company to stop up the river entirely and allow an enormous accumulation of logs in the boom. This alleged act of negligence is stated as that which caused the injury for which recovery is sought. It is averred that this great accumulation of logs caused the boom to break and to sweep away plaintiff's logs which were below it. But it is not averred that defendant knowingly permitted an accumulation of logs beyond the strength of the boom, or that defendant negligently undertook to hold logs with a weak and insecure boom. Defendant had the right to use its boom for the catching of a great accumulation of logs. It had the right to stop up the river entirely under

circumstances reasonably demanding that it do so for the successful carrying on of its business. It was chartered and given the lawful right to do these very things. The mere statement that plaintiff's injury came from acts which were ordinarily lawful on the part of defendant will not make a case. The charge that the boom broke by defendant stopping up the river entirely and catching a great accumulation of logs is not enough. Such breaking may have been without blame on defendant's part. Nor will it do merely to say that these acts were negligently and unlawfully done without showing wherein the negligence and unlawfulness lay; for, it is not always a negligent or unlawful act in a boom company to stop up a river and catch a great number of logs. The act must be shown to be negligent; not merely stated to be. The case is different from that of running a locomotive onto a horse. *Robbins v. Railroad Co.*, 62 W. Va. 535, 59 S. E. 512. That case, relied on by plaintiff, is not in point here. Facts must be averred to take the act out of its ordinary harmless phase. The additional circumstances, making the stopping up of the river and the great accumulation of logs unlawful and negligent, must be shown. Did defendant undertake to stop up the river and hold logs to an extent that the strength and construction of the boom did not reasonably warrant? If it did that knowingly, then it was negligence towards those liable to injury by the breaking of the boom. Did it operate a boom that was not reasonably sufficient for the ordinary exigencies of rises in the river? Did it do anything in negligent disregard of plaintiff's rights? These counts aver no facts constituting a use of the river in disregard of the rights of plaintiff. They are predicated wholly on the theory that it was unlawful to boom the river entirely. The boom act grants that right. Code 1906, c. 54a, § 21; *Ironton Lumber Co. v. Guyandotte Timber Co.*, 68 W. Va. 358, 69 S. E. 815.

[2] The third count claims damages because the defendant occupied the entire width of the river opposite plaintiff's mill for thirty days in rafting out an immense gorge of logs that rested against the railway bridge after the breaking of the boom, so that plaintiff could not get logs to his mill by means of river transportation. The count is not definitely and directly pleaded. It may, however, be sufficient wherein it avers, in substance, such a wrongful use of the river by the defendant in rafting out the logs that plaintiff was excluded from the use of the river. The count, however, leaves so much to implication in this particular, and has so much surplusage in other particulars, that it should be amended before another trial. Defendant under ordinary circumstances would have no right to use all of the river for rafting purposes in taking out the gorge. It has by the very terms of the statute the right to use the surface of the

water for two miles below the boom for assorting and bunching logs, but this right must be exercised consistently with rights of others to the use of the stream. The count crudely makes a showing that defendant unlawfully and negligently excluded plaintiff from his lawful right to use the river.

[3] Much of the evidence adduced at the trial was admissible only under the faulty counts of the declaration. Damages for loss of plaintiff's logs were proved thereunder. None of this evidence was admissible under the third count. The demurrer as to the first and second counts must be sustained. And since the evidence was not all admissible under the good count, we must reverse the judgment. Plainly the damages awarded show recovery under the faulty counts. Those damages are greatly in excess of any proved under the good count. *Hood v. Bloch*, 29 W. Va. 244, 11 S. E. 910; *Robrecht v. Marling*, 29 W. Va. 765, 2 S. E. 827; *Duty v. Railway Co.*, 73 S. E. 331. It is assuredly true that damages for the loss of logs were not provable under the third count which claimed nothing on that score.

The trial mainly proceeded on the erroneous theory that *prima facie* it was unlawful for defendant to boom the river wholly at any time. This error was not only sanctioned in overruling the demurrer to the counts embodying it, but it was carried into the admission of testimony and the giving and refusing of instructions. We deem it unnecessary, however, to discuss further this feature of the case. An amendment to the declaration will, of course, eliminate it. That a "corker" may be used in booming, so as to close the river wholly, when the exigencies of the occasion reasonably demand it, is settled. It may be used if used lawfully, and not in negligent disregard of the rights of others. *Ironton Lumber Co. v. Guyandotte Timber Co.*, *supra*.

[4] We find no fault with the instruction given for plaintiff in relation to damages claimed under the third count. But the instruction asked for defendant on this score was also fitting a proper trial under that count. It is certainly true that if defendant worked diligently and skillfully in rafting out the gorge, rafted the same away as rapidly as practicable, and did not exclude plaintiff from the use of the river any longer than was reasonably necessary to break up and raft away the logs, the defendant is not liable for the temporary interruption of plaintiff's use. Both have rights on the river. One must give way reasonably to the other, when those rights conflict. All this depends on the circumstances and conditions of the particular case. One may block a highway and delay another in the use of it, if he does it reasonably out of the very condition of things which he has not himself negligently caused.

Whatever may be a proper interpretation of section 28 of the boom act as to damages

to the corpus of mill properties and lands, a question heretofore discussed in *Pickens v. Boom Co.*, 51 W. Va. 445, 41 S. E. 400, 90 Am. St. Rep. 819, and 66 W. Va. 10, 65 S. E. 865, 24 L. R. A. (N. S.) 354, that section was never meant to insure damages without negligence or unlawful act in the use of the boom to others using the river for the same purposes the boom company is using it. The boom company by its charter has a lawful right to use the river as a highway; others by the common law have the same right. Those rights are mutually dependent. The lawful use by one cannot be a basis of damages to the other. For one to be entitled to damages from the other, that other must have wantonly or negligently deprived the one of the use to which he was entitled. Plaintiff's claims are wholly founded on alleged loss as a user of the river. He must allege and prove negligence or unlawful disregard of his rights on the part of the boom company. He must overcome the lawful right that defendant also has on the river. He cannot recover simply because he would not have been injured if the boom had never been built, no more than the boom company can recover for an injury to it by him in the use of the river solely on the ground that the injury would not have occurred if he had never used the river.

[6] Defendant was not permitted to inquire as to what rental plaintiff paid for the saw mill. The question was a proper one. Rental value is a proper measure in ascertaining damages for loss by delay in the operation of a mill. *Pickens v. Boom Co.*, 51 W. Va. 445, 41 S. E. 400, 90 Am. St. Rep. 819; *Hurxthal v. Boom Co.*, 65 W. Va. 846, 64 S. E. 355.

The judgment will be reversed, the verdict set aside, the demurrer sustained as to the first and second counts of the declaration, leave given plaintiff to amend, and a new trial awarded.

(70 W. Va. 618)

MORRIS v. TAYLOR et al.

In re INCORPORATION OF TOWN OF STEALEY HEIGHTS.

(Supreme Court of Appeals of West Virginia. April 9, 1912.)

(Syllabus by the Court.)

1. CONSTITUTIONAL LAW (§ 61\*)—DEPARTMENTS OF GOVERNMENT—JUDICIARY—INCORPORATION OF CITIES.

In authorizing circuit courts to perform the duties prescribed for them in sections 2 and 9 of chapter 47 of the Code of 1906, respecting the incorporation of cities, towns, and villages, the Legislature did not violate article 5 of the Constitution of this state, requiring the legislative, executive, and judicial departments to be kept separate and distinct and forbidding the exercise of the powers of more than one of them at the same time by any person, except justices of the peace.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 103-107; Dec. Dig. § 61.\*]

2. CONSTITUTIONAL LAW (§ 61\*)—JUDICIAL QUESTIONS—INCORPORATION OF CITIES.

The discretion vested in such courts by said sections is administrative and judicial, not legislative.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 103-107; Dec. Dig. § 61.\*]

3. MUNICIPAL CORPORATIONS (§ 12\*)—PROCEEDINGS TO INCORPORATE—JUDICIAL POWER.

Under the authority vested in it by section 2 of said chapter, a circuit court may exclude from the territory, included in the incorporation proposition adopted by a vote of the inhabitants thereof, such portion thereof as in its opinion makes the territory unreasonably disproportionate to the number of residents therein, and award the certificate of incorporation limiting the territory to the residue, over the protest of a majority of the voters by petition and remonstrance against such exclusion and against incorporation of the residue after the exclusion.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 22-32; Dec. Dig. § 12.\*]

Error to Circuit Court, Harrison County.

Information by Will E. Morris, Prosecuting Attorney of Harrison County, against E. Otis Taylor and others to have the incorporation of the Town of Stealey Heights declared null and void. From a judgment dismissing the information and quashing the writ, the informant brings error. Affirmed.

Edward G. Smith and Felix O. Sutton, both of Clarksburg, for plaintiff in error. Davis & Davis and Millard F. Snider, all of Clarksburg, for defendant in error.

POFFENBARGER, J. At the relation of certain citizens, Will E. Morris, prosecuting attorney of Harrison county, filed an information in the nature of a writ of quo warranto against certain persons as mayor, recorder, and councilmen of the town of Stealey Heights, incorporated under the provisions of chapter 47 of the Code, the object of which proceeding was to have the incorporation of said town declared null and void upon two grounds: (1) Alleged unconstitutionality of said chapter 47 of the Code, purporting to authorize such incorporation; and (2) noncompliance with the requirements of said statute. Upon the hearing, the court dismissed the information and quashed the writ.

[1] Since the decision in *Re Union Mines*, 39 W. Va. 179, 19 S. E. 398, and *Elder v. Central City*, 40 W. Va. 222, 21 S. E. 738, holding said statute constitutional, some alterations have been made in it, necessitating, it is said, a different conclusion. Section 2 provides as follows: "Any part of any district or districts not included within any incorporated town, village or city, and containing a resident population of not less than one hundred persons and if it shall include within its boundaries a territory of not less than one-quarter of one square mile in extent and not more than a reasonable



amount of territory proportionate to the number of residents therein (the exact extent of the territory to be included therein, to be within the discretion of the circuit court granting the charter), may incorporate as a city, town or village under the provisions of this chapter." Section 9 provides that upon the filing of a certificate, prescribed by section 8, and satisfactory proof that all the provisions of the foregoing sections of the chapter have been complied with, the circuit court may, at its discretion, by an order entered of record, direct the clerk of the said court to issue a certificate of incorporation of such city, town, or village, in the form prescribed by that section, and then declares "from and after the date of such certificate, the territory embraced within the boundary mentioned in said certificate shall be an incorporated city (town or village) by the name specified in the said notice and certificate."

The element of discretion committed to the court by these two sections is the ground of the charge of unconstitutionality. This power in the court is a mere condition annexed by the Legislature to its grant, to the people of any community, not already included in some city, town, or village, of the right to incorporate themselves and the territory in which they reside into a city, town, or village. Unrestrained by any constitutional limitation, the Legislature could have made this grant unconditionally. By its sovereign power, it could have ordained that the people of that certain territory should constitute such a corporation. A provision of the Constitution has laid restraint upon this power of inhibiting the creation of a corporation with less than 2,000 population by a special act, and requiring provision to be made therefor by a general law. Thus restrained by an organic provision, the Legislature could have prescribed certain conditions, the existence of which would *ipso facto* create a corporation. It could have said that a certain number of inhabitants of a certain area of land, laid out in a certain way, should constitute a municipal corporation. In adopting a different plan, and requiring certain preliminary inquiries to be made and acts to be performed, as conditions upon which this grant of the right to be a corporation shall vest, it does not change the principle of its action. In requiring the approval of the grant by the circuit court, it has not destroyed the nature of that grant, nor delegated its power to a subordinate.

The statute is a grant of a right to such people as are able to bring themselves within the conditions annexed to it and actually do so. It is not an unconditional grant, nor is the statute self-executing, but it is a grant to the people, to become effective upon their bringing themselves within

its terms and conditions and without any further action on the part of the Legislature. It is a general law under which rights vest or can be made to vest, like the laws of descents and distributions, the law providing for the incorporation of private joint-stock companies, and the law providing for the alienation of property by deed and will. No person can inherit or take under the statute of descents and distributions until he comes within the conditions annexed to the grant of the right of inheritance. These statutes vest no rights to property in persons who are not born. As to such persons, as well as to those now in being, the rule declared by law exists, and the rights vest, when the persons come within the conditions. Under other laws, something must be done by the beneficiaries of the grant to vest the rights granted; but the principle is the same—the right emanates from the sovereign. Private corporations can be organized under the general laws, but they do not exist until after organization, and in the organization of them the Legislature does not participate. It has performed its function, by prescribing the rule and laying down the conditions, to be complied with by those who desire to avail themselves of the right to be a corporation, conditionally given by it. Certain things must be done and a certain agreement filed with the Secretary of State. This officer does not create the corporation nor organize it. His issuance of the certificate is only the consummation of one of the conditions upon which the Legislature has said the right shall be dependent. Private corporations are always organized by agreement, because the formation of such an institution brings its members into a contractual relation. Recognizing this relation, the Legislature made the agreement the principal condition in the grant. Such an agreement is not contemplated in the case of a public corporation, for the reason that such corporations are not ordinarily formed by agreement, and there is no element of contract in them. In providing by general law for the organization of public corporations, therefore, the Legislature, suiting its action to the nature of the subject-matter, required a vote by ballot to ascertain the will of the majority, instead of an agreement. But this does not alter the principle underlying its action. There is a grant of a right in this instance as in the other. The difference lies simply in the mode prescribed for taking the benefit of it. It is simply the requirement of compliance with different and additional conditions, annexed to the grant, because, from the very nature of the thing granted, it was necessary to prescribe different and further conditions, all of which are enumerated in the statute.

Whether these things have been done in a

given case are mere questions of fact, and it was apparent to the Legislature that there may be disagreement as to the state of facts, and attempts on the part of the minority to defeat the will of the majority by fraud and trickery. Hence the necessity of authorizing some person or tribunal to settle such disagreements and ascertain, in an authoritative manner, the facts and the will of the majority. The investigation and determination of such questions are functions peculiar to courts. Hence it was most natural and consistent with the principles of government to call upon the courts to make such investigations and clothe them with power to do so. Whether this power is strictly judicial or not, the thing ultimately determined by the court is not whether the people of the territory have a right to be a corporation. The Legislature has granted that right to all of the people of the state, who put themselves within the conditions annexed. What the court determines is whether the people desiring to form such a corporation have put themselves within those conditions, just as it determines whether a man is within the conditions which the law says make him an owner of property. Having ascertained that, the court awards a certificate of incorporation, just as the Secretary of State issues the certificate of incorporation to a joint-stock company upon the filing of a proper agreement and payment of the license tax and fees.

[2] The discretion vested in the court is not a discretion to grant a charter, but only to withhold or refuse it, upon finding some substantial reason for so doing. The court has no initiative. Its sole power is to veto, and this power is perhaps not arbitrary. Certainly the Legislature never intended a refusal of the certificate by a court without any reason for such action. The grant is general and intended to become effective, unless something peculiar and abnormal in the situation makes it unreasonable and unjust to allow it to do so. The Legislature certainly had the power to say this grant should not become effective under certain conditions, naming them; but the difficulty and impossibility of foreseeing and providing for all of the conceivable variety of circumstances under which people might endeavor to take the benefit of the grant, some of which would render it unjust and unreasonable, is perfectly obvious. Having the power to say, notwithstanding the general grant, that no incorporation should occur under given circumstances, working injustice and unreasonable hardship, the Legislature could adopt a standard, measure, or criterion by which to determine what circumstances would bring forth such results under the unrestrained operation of the law, and did adopt the judgment and opinion of the circuit courts of the state. There are many instances in which the reasonableness and justice of things are

referred to the courts as judicial questions. It may have occurred to the Legislature that there are communities in which, owing to the illiteracy or viciousness of the inhabitants, contrary to the normal conditions prevailing in the state, the power of local self-government would be dangerous and productive of evil results, and ought not to be allowed. It may have assumed that, contrary to the usual conditions, under which the court would have no hesitancy, or ought not to have, in complying with the expressed will of the majority, there might be an application for incorporation by a large and vicious population, inhabiting the particular territory only temporarily and by whom local self-government would be abused and prostituted to improper ends and purposes, injurious to the public. Whether such conditions exist is a question of fact, ordinarily falling within the scope of judicial inquiry. In ascertaining it and refusing the certificate, the court would merely construe the statute as not intended to confer the right of incorporation under such circumstances and declare accordingly. The function performed by it would be the administration of the law, not the granting of rights as a sovereign. That such a function is judicial has been necessarily determined by the decisions of this court in *Ferry Co. v. Russell*, 52 W. Va. 356, 43 S. E. 107, and *Williamson v. Hays*, 25 W. Va. 609. In these cases, the right to establish a ferry was involved. The Legislature had delegated to the county court, as a police and fiscal board, the power "to determine whether the ferry ought to be established or not." The statute allowed an appeal to the circuit court, and thence to this court. The elements of reasonableness and justice were involved and treated by this court as judicial questions. Judge Brannon, delivering the opinion in the former case, said: "The evidence does not show that the travel will support three; it shows that it will not. \* \* \* Another element in the question is that Russell had a ferry granted by authority, and it is property, and the report and evidence show that it will be injured by the proposed ferry. You will say that his property cannot bar the public need. I say so too; it cannot bar it, but it goes into the scales." Here is an instance in which the court, acting in rather an administrative capacity, took cognizance of the reasonableness and justice of a claim to a legislative grant as judicial questions. The function performed under this corporation statute is very similar and the general principle underlying it the same.

The word "discretion," used in these provisions, does not necessarily signify legislative discretion. Discretion does not belong exclusively to the Legislature. Many discretionary powers are vested in executive officers, and all courts possess and exercise some discretionary powers. Discretion is

essential to the due and effective execution of the powers of each of the three great departments, and all possess it in a greater or less degree. The exercise of discretion by a legislative body does not make its function judicial, nor does the exercise of discretion by the executive make his function either legislative or judicial. So the exercise of discretion by a court does not make its function either executive or legislative. In short, it is neither a criterion, nor a determining factor.

If the vesting such discretion as we are discussing in a court carried with it a modicum of legislative power, it would not amount to inhibited delegation thereof. The separation of the powers of the state into executive, legislative, and judicial departments is not so absolute as to make them wholly independent. They are co-ordinate, working together and carrying into effect conjointly the whole power of the state. Though touching one another at all points and united as are all parts of the human body, each performing its peculiar function, all three must be in constant operation and to some extent connected and interdependent. Story on Constitutions, at section 525, defines more clearly and accurately than any other writer the true meaning and effect of the separation of powers, contemplated by the Constitution, saying: "When we speak of the separation of the three great departments of the government and maintain that that separation is indispensable to public liberty, we are to understand this maxim in a limited sense. It is not meant to affirm that they are to be kept wholly and entirely separate and distinct, and have no common link of connection or dependence, the one upon the other, in the slightest degree. The true meaning is that the whole power of one of these departments should not be exercised by the same hands which possess the whole power of either of the other departments, and that such exercise of the whole would subvert the principles of a free Constitution. This has been shown with great clearness and accuracy by the author of the *Federalist*." This doctrine has been adopted by this court. "But the Constitution, within itself, after the declaration of this general doctrine, proceeds to make many laps of the various departments, so as to make them mutually dependent upon and supporting each other; thus welding them into an harmonious whole or three distinct departments in one, for the preservation, at the smallest expense possible, of the largest freedom of individual rights consistent with the general welfare. Were it practicable to keep these three departments wholly distinct, the increase of the necessary offices and officers would be so great, and the expense thereof so burdensome, as to render the cost of the administration of the government unbearable, especially to the citizen taxpayer who must con-

tribute and yet not share in the distribution of the taxes. So that, while we find that the Constitution, as much as it keeps the three heads of the three departments comparatively distinct and independent of each other, yet as we move down the scale these several powers become more complicated and interwoven with each other, until we find the common council of every village exercising legislative, executive, and judicial functions, indiscriminately, by authority of the same Constitution which declares that these functions shall be kept distinct." *Bridge Co. v. Paull*, 39 W. Va. 142, 19 S. E. 551.

Under this statute the court does not exercise the whole legislative power, respecting the incorporation of towns, and the delegation of authority, if any, is therefore not inhibited by the Constitution, if Story's theory is correct. The court has no power of initiation. The inhabitants of the territory must move before it can do so. But for the legislative act, they could not move so as to set the court in motion. Hence the Legislature moves all. The functions performed by the court are of minor and secondary importance and would be wholly ineffective and futile but for the grant made by the Legislature. The statute gives it no power to impose the organization of a corporation upon people who do not desire it. It has no power to grant a certificate of incorporation, but only to refuse it. It simply hears the interested parties, those who come forward professing to represent a majority of the voters of the community, demanding as against the minority a right which the Legislature has given, and the remonstrances of the minority, asserting nonexistence of the conditions essential to the vesting of the right. The latter may show fraud in the certificate, the census, the survey, or all of them, and thus defeat the claim. They may show that the whole population of the community, with the exception of one man, are tenants of that man under a lease, which will expire in a year or less time, and that the sole purpose of the application is to burden that one man's property with taxes for the benefit of the petitioners in the form of salaries of officers provided and otherwise. May not the Legislature have intended the withholding of a charter under such circumstances, because the grant thereof would be unreasonable and unjust? And in refusing it, would not the court simply administer and apply the statute, in accordance with the legislative intent, as in the case of the administration of other statutes?

In performing this function the courts exercise powers very similar to those required in the administration of many other statutes. The work of the courts in the appropriation of private property for public use is very similar. The taking of such property is not an ordinary adversary proceeding or controversy between man and man, to settle con-

flicting claims of title or right. The sovereign power of the state gives the right to a citizen or a corporation to take the property of another person or corporation for public use on payment of compensation, and the Legislature commits to the courts the administration and effectuation of that grant, not as a granting agent, but as one for determination of questions of law and fact arising upon the claim made under the grant. The power of the court is interposed for no other purpose than to determine judicially whether the applicant has put himself within the conditions annexed to the legislative grant to one man of the right to take and use the property of another for the particular purpose. The court determines whether the use for which it is to be taken is public, and whether it is necessary to take the property and ascertains its value. Here, as in the other case, the court has no power of initiation. It makes no grant. It creates nothing, ordains nothing. It merely determines questions of law and fact arising in the execution and carrying into effect the grant made by the Legislature. The statute authorizes courts to appoint trustees to take and hold legal title to church property. The object of this statute was to enable religious congregations to have a means of preserving the record of the legal title to their property and vest that title in somebody, clothed with power to protect the property by legal proceedings. It was a grant to these congregations by the Legislature of rights they did not otherwise possess. Upon the application for the benefit of this grant, preliminary questions arise. Conditions annexed must be complied with to obtain the appointment of the trustees. The applicants must be such bodies as the statute contemplated, and the court must determine these preliminary questions. The same jurisdiction is vested in the courts to appoint trustees for secret orders, colleges, high schools, Sons of Temperance, orphans' asylums, children's homes, and other beneficial associations. A similar power is vested in them, respecting the real estate of infants. The right is granted to convert their real estate into money under certain conditions, to be ascertained by the courts. In none of these instances does the court perform its ordinary function of determining conflicting claims. They are all administrative, not adversary, proceedings; but they involve the exercise of judicial power.

The authorities upon this question are by no means uniform, and it would be difficult to determine whether the weight of authority is for or against the position here taken. However that may be, I am confident our conclusion is fully sustained by legal principles, and that there is no delegation of legislative authority in violation of the Constitution. It would be useless to analyze all of the conflicting decisions. Some of those sustaining the conclusion here stated are *Calien v. Junction City*, 43 Kan. 632, 23 Pac.

652, 7 L. R. A. 736; *Zanesville v. Telegraph & Telephone Co.*, 64 Ohio St. 67, 59 N. E. 781, 52 L. R. A. 150, 83 Am. St. Rep. 725; *Cooper's Case*, 22 N. Y. 84; *Kayser v. Bremen*, 16 Mo. 88; *Blanchard v. Bissell*, 11 Ohio St. 96; *Borough of Little Meadows*, 35 Pa. 335; *Wahoo v. Dickenson*, 23 Neb. 426, 36 N. W. 813; *Burlington v. Leebrick*, 43 Iowa, 252. Some of the cases to the contrary are *State v. Simons*, 32 Minn. 540, 21 N. W. 752; *State v. Young*, 29 Minn. 474, 9 N. W. 737; *In re North Milwaukee*, 93 Wis. 616, 67 N. W. 1033, 33 L. R. A. 638; *Territory v. Stewart*, 1 Wash. 98, 23 Pac. 405, 8 L. R. A. 106; *Galesburg v. Hawkinson*, 75 Ill. 152; *People v. Bennett*, 29 Mich. 453, 13 Am. Rep. 107. Some of these are analyzed and their reasoning criticised in my opinion in *State v. Harden*, 62 W. Va. 313, 378, 58 S. E. 715, 60 S. E. 394.

[3] After the survey, census, and election and presentation of the result of the election to the court, certain property owners came in by petition and asked that their property be excluded from the territory of the proposed corporation. A number of citizens also came in protesting against the exclusion and against the grant of a certificate of incorporation in case the exclusion should be made. The court, however, excluded a portion of the territory and then directed the certificate to be issued. It is said a majority of all the voters in the territory protested against the issuance of the certificate after the exclusion of a portion of it. This is immaterial and does not invalidate the certificate. The vote to incorporate was taken with knowledge of the power of the court to determine the extent of the territory on the basis of reasonableness in the proportion of inhabitants to territory. In voting to incorporate, they knew the incorporation was subject to this power and authority in the court to reduce the area and exclude territory from that embraced by the survey. The statute contemplates all these steps in advance of any demand upon the court for its action. Nevertheless it confers upon the court the power to determine the extent of the territory, and there is no provision for a resubmission of the question of incorporation to the voters, after an alteration of boundaries by the court. The extent of the territory is a question for the voters in the first instance, but ultimately for the court. Those who voted to incorporate did so with full knowledge of the possibility of a reduction of the area and must be deemed to have assented to it. As no mode of revocation or recall of their assent is provided by the statute, the Legislature must have intended it to be irrevocable, except by annulment of the charter by an election, after incorporation, in accordance with the provisions of section 44a of chapter 47 of the Code.

For the reasons stated, the judgment will be affirmed.

(70 W. Va. 636)

STANDARD HOME CO. v. REED, Secretary of State.

(Supreme Court of Appeals of West Virginia. April 9, 1912.)

*(Syllabus by the Court.)*1. BUILDING AND LOAN ASSOCIATIONS (§ 46\*)  
—FOREIGN CORPORATIONS—CERTIFICATE TO DO BUSINESS.

A foreign building and loan association, before it can get from the Secretary of State a certificate to do business in this state, must have a certificate of authority from the commissioner of banking under Acts of 1907, c. 79, § 78, subd. V-c (Code Supp. 1909, c. 54, § 78, subd. V-c).

[Ed. Note.—For other cases, see Building and Loan Associations, Cent. Dig. §§ 6, 69, 82; Dec. Dig. § 46.\*]

2. BUILDING AND LOAN ASSOCIATIONS. (§ 46\*)  
—WHAT CONSTITUTES.

The corporation in question in this case is a building and loan association, within the meaning of chapter 79, § 78, subd. V-c, Acts of 1907 (Code Supp. 1909, c. 54, § 78, subd. V-c).

[Ed. Note.—For other cases, see Building and Loan Associations, Cent. Dig. §§ 6, 69, 82; Dec. Dig. § 46.\*]

For other definitions, see Words and Phrases, vol. 1, pp. 899-901.]

Petition of the Standard Home Company for writ of mandamus against Stuart F. Reed, Secretary of State. Writ denied.

O'Brien & O'Brien, of Wheeling, Mollohan, McClintic & Mathews, of Charleston, and E. N. Hamill, of Birmingham, Ala., for petitioner. Frank Lively, Asst. Atty. Gen., for respondent.

BRANNON, J. The Standard Home Company is a corporation under a charter granted by the state of Delaware. Desiring to transact business in this state, it applied to Stuart F. Reed, Secretary of State, to grant it a certificate under Code of 1906, c. 54, § 30, showing compliance with the requirements of that section, and authorizing it to do business in this state. The Secretary refused to grant such certificate; and the Standard Home Company asks from this court a writ of mandamus to compel said Secretary to receive the papers which that section requires a foreign corporation to file and the fees which it is required to pay, to enable it to obtain such certificate, and to compel the Secretary to issue such certificate.

[1] That section 30 provides that a foreign corporation may, "unless it be otherwise expressly provided," hold property and transact business in this state upon complying with the provisions of that section, and not otherwise. We note that the right to this certificate under that section is qualified by the proviso, "unless it be otherwise expressly provided." We must therefore inquire whether there is any other provision in our statute law which will exclude the plaintiff from the benefit of such section, or require

anything further of it than that section requires. That section only requires it to file with the Secretary of State a copy of its certificate of incorporation to obtain such certificate. This case turns on this question. Does the Standard Home Company come under chapter 79, Acts of 1907, Regular Session, § 78, subd. V-c? That section says that "It shall not be lawful for any foreign building and loan association or trust company to transact business in this state directly or indirectly without first procuring a certificate of authority from the commissioner of banking." And to get that certificate the section requires the foreign corporation to make a statement to the commissioner of banking of its financial condition and such further information touching its affairs as he may require, under oath; and it must file a copy of the laws of the state incorporating it, and other papers.

The section provides that if, after examination of such statements and papers, and the corporation shall have appointed an attorney, the commissioner shall be satisfied that the association is solvent, and that its capital and investments are secure, and that the laws, charters, articles of incorporation, constitution, and by-laws governing it afford as ample protection to the interests of its members as is afforded by the laws of this state to members of associations chartered by this state, he may grant such association a certificate of authority to transact business in this state until the 31st day of next December. Is this corporation a building and loan association? If it is, it must have the certificate required by the last-named statute from the commissioner of banking before it can get the certificate from the Secretary of State, because section 30 says that the Secretary of State shall not issue a certificate upon compliance merely with that section, but can only issue it when requirements of other statute law have been met, if there be any.

We hold that the Standard Home Company is a building and loan association, within the meaning of said act of 1907. It possesses many of the salient features of such associations. One dominant feature is strong to classify it as a building and loan association; that is, the fact that its main purpose is to enable persons of small means to obtain loans with which they can secure homes. Its very name so imports. The contract which, as its petition states, is the contract which it proposes to sell to persons on its face says that its loan is "to purchase a home." It requires a payment of \$6 as an entrance fee, like a building association. After a certain number of monthly payments, a person may obtain a loan out of a fund, called the "Loan or Reserve Fund," coming from payment of the monthly sums. After a certain number of monthly payments, the loan is paid, as in the case of

a regular building association. And the loan is secured by deed of trust on the home acquired with the loan or other realty. These are features of the ordinary building association. I shall not detail the very many provisions of this very prolix contract; but a close analysis would doubtless reveal other similarities with the ordinary building association. We cannot say that it has all the characteristics of a building association under our statute; but it is still a building association in substance. It is not essential that it possess all such features, if it have material features in common with them to give the cast or quality of the ordinary building association. It has enough of these earmarks to classify it with them. We know not where else to place it. Its outlines, its object, as its contract discloses, so characterize it. It is suggested that it issues no stock, and its patrons are not stockholders, share no profit, bear no losses, and that there is no mutuality between the corporation and its patrons, or members, as I would call them. Those contracting with it may not be strictly stockholders; but they are members of the association, have pecuniary interest in it, and are substantially stockholders. In case of insolvency, they lose their payments. And there are provisions in the contract entitling the borrower to pro rata share of lapses, cash surrenders, and other sources of income. It cannot be said that there is entire want of mutuality between the corporation and its members. They have mutual interest in the welfare of the organization.

[2] In *Parker v. Building Association*, 19 W. Va. 744, and *Building & Loan Association v. County Court*, 42 W. Va. 818, 26 S. E. 203, the characteristics of building associations are discussed; and we think that what is there said of them will place this corporation in the category of a building association. And, indeed, reference to our Code, c. 54, §§ 25, 26, 27, 28, 29, will reveal that this association has features in common with our domestic associations. If the Standard Home Company is not in all respects like some building associations, it is none the less a species of the building association genus. And we cannot avoid the opinion that it falls within the spirit, object, and purpose of said section 78, subd. V-c, c. 79, Acts of 1907, and that it is a corporation of such character as should be under the safeguards therein carefully provided for the protection of the public. The suggestion has been made that chapter 33, Acts of 1911, applies to this corporation. It provides that no person, association, or corporation shall engage in the business of soliciting or receiving deposits or payments on any annuity contract or certificate or annuity bonds without obtaining from the insurance commissioner a permit to do business in this state. If that is so, the plaintiff

would have to get a permit from the auditor. But we do not think that the act of 1911 applies.

For these reasons, we refuse the mandamus.

(70 W. Va. 629)

### HAMILTON v. CANFIELD.

(Supreme Court of Appeals of West Virginia.  
April 9, 1912.)

(Syllabus by the Court.)

#### 1. JUSTICES OF THE PEACE (§ 174\*)—APPEAL—ANSWER—JURISDICTION.

A defendant, in an action before a justice of the peace, who has allowed judgment to be rendered against him by the justice, and taken an appeal to the circuit court, cannot file, in the appellate court, the answer, prescribed by clause 12 of section 50 of chapter 50 of the Code of 1906, showing the title to real estate is involved in the action or will be drawn in question. To avoid the jurisdiction, he must file such answer while the case is in the justice's court.

[Ed. Note.—For other cases, see *Justices of the Peace*, Cent. Dig. §§ 665-693; Dec. Dig. § 174.\*]

#### 2. JUSTICES OF THE PEACE (§ 173\*)—APPEAL—JURISDICTION.

On an appeal from the judgment of a justice, the jurisdiction of the appellate court is no broader than that of the justice, as regards the subject-matter of the action. On such an appeal, questions of title to real estate cannot be heard and determined further than the justice was authorized to hear and determine them.

[Ed. Note.—For other cases, see *Justices of the Peace*, Cent. Dig. §§ 660-664; Dec. Dig. § 173.\*]

Error to Circuit Court, Randolph County.

Action by John Hamilton against J. C. Canfield. Judgment for defendant, and plaintiff brings error. Reversed and remanded.

Taylor & Allen, of Elkins, for plaintiff in error. W. B. & E. L. Maxwell, of Elkins, for defendant in error.

POFFENBARGER, J. Plaintiff in error acquired two judgments against the defendant in error in a justice's court for the respective amounts of two negotiable notes, executed by the former to the latter for purchase money of standing timber and subsequently paid by him to third parties, bona fide holders thereof without notice, only a day or two after maturity; one having been made payable 60 days after date, and the other 9 months after date. The judgment for the money paid on account of the first one was recovered before the second became due or was paid. These recoveries were had on the theory of right to restoration of purchase money for the timber, since the defendant failed and refused to convey the same by deed, as stipulated in the written contract of purchase. In each action, a claim for damages was added and some damages recovered. Appeals were taken

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

from both judgments to the circuit court, and consolidated for trial together. There the defendant tendered, and was permitted to file, over the objection of the plaintiff, a plea or answer, verified by his affidavit, in each case, incorporating the contract of sale, showing the note representing the money sued for had been given for purchase money thereunder and claiming the trial would necessarily involve an issue as to the title to the timber and the land upon which it was growing. Thereupon the plaintiff filed an affidavit in each case denying material and essential averments of fact set forth in the plea, and, at the conclusion of his testimony, detailing the facts already stated and showing the refusal and inability of the defendant to execute a deed, conveying title to the timber, pointed out as sold, because he was not the owner of it, the court dismissed the actions, without prejudice, upon the theory of lack of jurisdiction, due to an issue of title.

Two grounds of objection to the filing of the plea or answer are urged: (1) It came too late; and (2) it fails to show a question of title.

[1] Jurisdiction in justices to try cases in which title to land is involved is not wholly denied or withheld. It is only qualified and the effect of judgments of justices on titles limited. Section 10 of chapter 50 says a justice shall not have jurisdiction of any suit in which the title to real estate is sought to be recovered, or is drawn in question, except as in the chapter otherwise provided, and declares judgments of justices in actions for trespass or damages to real property or in cases of unlawful detainer shall not bar the title of any party or remedy therefor. Clause 12 of section 50 of that chapter gives the justice jurisdiction of such cases and precludes the defendant from disputing the title of the plaintiff to the premises in question, on his failure to file such an answer as is therein prescribed. This confers no jurisdiction to try questions of title. It only compels a defendant, having the right to a trial of such a question, to elect whether he will allow the justice to try the case in which he could raise it in a competent tribunal. His failure to interpose an answer of title is a waiver of his right to prevent such trial and precludes him from raising the question of title on the trial. His defenses are thus limited to other grounds, and the justice does not try that question. Sections 9 and 10 of the chapter expressly confer jurisdiction to try certain classes of cases, involving possessory rights, respecting real estate. These are actions of unlawful detainer and for trespass on real estate or damages to it or to rights pertaining thereto, but the judgments in such actions are not permitted to bar title or remedy therefor.

As to whether the defendant's election

must be made once for all in the justice's court, we have no decision in this state; but it seems to have been so held elsewhere. *Lauchner v. Rex*, 20 Pa. 464, seems to say the objection cannot be made, nor the question of title tried, in the appellate court. The later New York cases hold the action cannot be abated or dismissed on an objection of title in the appellate court, but that the question of title may there be raised and determined, though not set up in the trial before the justice. *Gould v. Patterson*, 63 Hun, 575, 18 N. Y. Supp. 332; *Gould v. Patterson*, 87 Hun, 533, 84 N. Y. Supp. 289. To the same effect is *Douglass v. Easter*, 32 Kan. 496, 4 Pac. 1034. The older New York cases agree with the Pennsylvania case, saying the election must be made in the justice's court once for all, and failure there to elect bars the issue of title in the appellate court.

If the appeal broadens the case, allowing questions of title to be tried in the appellate court, of course, the answer of title comes too late to prevent the jurisdiction of that court. To say the jurisdiction of a court may be defeated, or it may be precluded from trying a case, by showing it has power to try it, would be a contradiction in terms and logic. If the appeal does not broaden the case, the allowance of such an answer to defeat jurisdiction would also run into contradiction and absurdity. On failure to file it before the justice, his jurisdiction is expressly declared and fixed by the statute, and the issue of title barred. The consequence of such failure is, by legislative declaration, that "the defendant shall not be permitted, in his defense, to dispute the title of the plaintiff to the premises in question." To allow this jurisdictional plea after appeal would be plainly inconsistent with these terms. It would also defeat a judgment recovered in strict pursuit of the statute. Although such an appeal is tried *de novo*, the judgment of the justice is valuable. It gives security for the debt by liens or an appeal bond. The construction here contended for would work serious detriment to that right of the creditor, as it would destroy the security for the time being and, in some cases, forever. Nor does it accord with settled rules of construction. Allowing an election to the defendant, and not withholding jurisdiction, except upon condition, the statute, in strict and definite terms, fixes the time, place, and manner of defeating it by such election. Having thus expressed one thing, can the Legislature be supposed to have intended other and additional things of similar kind? The authorities answer this in the negative. *Expressio unius est exclusio alterius*. As a plea to the jurisdiction, the answer should have been rejected.

[2] As setting up a defense of title, it could properly have been filed, provided the appeal broadened the case and conferred

upon the appellate court jurisdiction to try the question of title. This, too, would conflict with the terms of the statute, saying the defendant shall not be permitted, in his defense, to dispute the title of the plaintiff to the premises in question. That this inhibition extends only to his defense in the justice's court is not sustained by the legislative terms, nor in accord with their letter, and they are comprehensive and positive, obviously intended to fix the nature of the controversy and define its limits. And this harmonizes with the general legislative scheme, plainly inhibiting the starting of a title issue in a justice's court. That the circuit courts to which appeals are taken from justices are courts of general jurisdiction, clothed with power to hear and determine questions of title, signifies nothing. The mode of calling their jurisdiction into activity is carefully prescribed by common and statutory law, and does not include entry for such purpose by an appeal from the judgment of a justice, except in cases falling within the jurisdiction of justices, and, from these, all issues of title are carefully excluded, except in certain cases, and there the judgment on such a question is expressly limited to certain purposes and not permitted to bar title or remedy therefor. The general scope and theory of our practice law, common and statutory, negatives the idea of use of the justice's court as a door for entry to the circuit courts for trial of issues not cognizable by the justices, and nothing in chapter 50 expressly or impliedly authorizes it. The provisions in section 169, authorizing amendment of the pleadings after the appeal, to meet the requirements of substantial justice, admission of all lawful evidence in relation to the matter in difference between the parties, whether produced before the justice or not, and determination without reference to the judgment of the justice on principles of law and equity, contain no intimation of intent to alter the nature or scope of the controversy. Every word found in them has ample

room for operation and effect without alteration of the general character of the case after appeal. This gives vitality and force to the words used without innovation upon positive rules of practice and the general judicial scheme, and a construction that does so innovate is not permissible. The meaning of words will be restrained to avoid such a result, unless the legislative intent is so plain as to leave no room for doubt. *Reeves v. Ross*, 62 W. Va. 7, 57 S. E. 284; *Coal & Coke Ry. Co. v. Conley*, 67 W. Va. 129, 67 S. E. 613. Limitation of the case on appeal to its general scope before the justice harmonizes also with the following decisions, declaring lack of jurisdiction on appeal, consequent upon lack thereof in the justice's court. *Richmond v. Henderson*, 48 W. Va. 389, 37 S. E. 653; *Hughes v. Mount*, 23 W. Va. 130, affirming a dismissal by the circuit court in a case in which the justice should have done so.

The statutes governing the practice in Kansas and New York differ from ours. In the former state, cases in which questions of title arise are certified by the justice, under express statutory authority, to the appellate court for trial. The New York statute now provides that the proceedings in the appellate court shall be the "same as if the action had commenced in the appellate court," except as otherwise provided.

As there were two separate and distinct causes of action, when these proceedings were begun before the justice, there was no splitting of a single cause for two actions. The action for the amount of the first note was commenced before any right of action on account of the second accrued. The small claim for damages seems to have been made twice, rather than split into two parts. At any rate, there was no splitting of a single demand beyond the jurisdiction of the justice.

The judgment of dismissal will be reversed, the objection to the answer of title sustained, said answer stricken out, and the cases remanded for trial.



(156 N. C. 348)

**ABELL v. THORNTON LIGHT & POWER CO.**

(Supreme Court of North Carolina. May 8, 1912.)

**JUSTICES OF THE PEACE (§ 161\*)—APPEAL—DOCKETING CASE OR APPEAL.**

Where the judgment of a justice of the peace is rendered more than 10 days before the term of the superior court to which an appeal is taken, the return must be made to that term, and appellant must use proper diligence to see that the case is properly entered on the docket, and, where it is not, he loses his appeal, unless he takes such steps as are necessary to have it done at that term, and where appellant, who paid the justice his fees, but who did not tender the fee for docketing, was informed by the clerk that the appeal had not been docketed, he must take steps to procure a docketing, though the clerk erroneously informed him that the return was not in his office.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 592-599, 601, 602, 604; Dec. Dig. § 161.\*]

Brown, J., dissenting.

Appeal from Superior Court, Catawba County; Foushee, Judge.

Action by Louis R. Abell against the Thornton Light & Power Company. From a judgment dismissing an appeal from a judgment rendered by a justice of the peace for plaintiff, defendant appeals. Affirmed.

Chas. L. Sykes, for appellant. A. A. Whitener, for appellee.

**WALKER, J.** Action for goods sold and delivered, tried before a justice of the peace, May 16, 1911, when judgment was rendered for the plaintiff. Notice of appeal given at once by defendant, and, as defendant alleges, the fee for docketing appeal was paid. On July 7, 1911, defendant inquired of justice if case had been sent up and docketed, who answered that it had not been returned to court because fees were not paid. The fee was then paid, with a request that return be sent up and docketed, so that the case would stand for hearing at the next term, which commenced on July 10, 1911. The justice immediately made out the return, and delivered it to the clerk of the superior court, who, by inadvertence, misplaced it, so that it could not be found at July term. The case was not docketed at that term, nor was there any motion to docket, nor any application for a recordari. No action was taken at July term. The return of the justice to the appeal was found by the clerk about October 1, 1911, and the case was then docketed; the next term being the one which commenced on the 30th day of that month, at which term the plaintiff moved to dismiss the appeal. The motion was granted and defendant appealed. There is no error in this ruling. *Ballard v. Gay*, 108 N. C. 544, 13 S. E. 207. The case is governed in every respect by *Peltz v. Bailey*, 157 N. C. 166, 72 S. E. 978, and the

cases therein cited. This court referred in the opinion delivered by the Chief Justice in *Peltz v. Bailey* to the case of *Davenport v. Grissom*, 118 N. C. 38, 18 S. E. 78, and held, under the authority of that case and others, that "an appeal from the judgment of a justice of the peace, rendered more than 10 days before the next ensuing term of the superior court, should be docketed at that term, and an attempted docketing at a subsequent term is a nullity; hence that such appeal was not in the superior court, and the plaintiff could not take a nonsuit. The judge properly held that he 'had no discretion to permit the appeal to be docketed at a subsequent term to the one to which it should have been returned. The appellant had his remedy (if in no default) by an application for a recordari at the first ensuing term of the superior court after appeal taken. *Boing v. Railroad*, 88 N. C. 62.' This case has been cited since with approval. *Pants Co. v. Smith*, 125 N. C. 588 [34 S. E. 552]; *Johnson v. Andrews*, 132 N. C. 380 [43 S. E. 926]; *Johnson v. Reformers*, 135 N. C. 386 [47 S. E. 463]; *Blair v. Coakley*, 136 N. C. 407 [48 S. E. 804]; *MacKenzie v. Development Co.*, 151 N. C. 278 [65 S. E. 1003]." The case of *Davenport v. Grissom*, 118 N. C. 38, 18 S. E. 78, seems to be directly against the contention of the appellant.

It is supposed that this case bears a close resemblance to *Johnson v. Andrews*, 132 N. C. 380, 43 S. E. 926, but we do not think so. The facts of the two cases are materially different. *Johnson v. Andrews* is distinguished by the Chief Justice in *MacKenzie v. Development Co.*, supra, and *Peltz v. Bailey*, supra, from those cases and the others we have cited. It rests upon its own peculiar facts. In that case the appellant had done all that the law required of him, and he was misled by a statement of the clerk, made, as it turned out, inadvertently, but not less positively, that the appeal had been docketed, when, in fact, it had not been. We held this to be excusable, as the failure to docket was the fault of the clerk, and appellant proceeded thereafter without laches in ignorance of the true situation. But no such case is presented here. The appellant, it is true, paid the justice his fee, and requested him to make return to the appeal, which he did. Appellant did not tender the fee for docketing to the clerk. He inquired of him if he had docketed it, and was told that it had not been, nor had the return been received. This was both before the July term and during the term, and appellant had ample time to supply the missing document. The clerk was mistaken as to the fact, and the return was in his office, but he was not mistaken when he told the appellant that the appeal had not been docketed, and, when informed of the fact, it was the plain duty of the appellant to see

that it was docketed at that term. But he took no steps by applying to the justice for another return, or by filing a verified copy, under leave of the court, or by application for a recordari, or in any other way. This was not such diligence on his part as the law required of him. In *Johnson v. Andrews* the appellant believed that the appeal had been docketed, as he had been so informed by the clerk, while in this case the appellant knew that his appeal had not been docketed, and was not likely to be, as the clerk had so told him, and he did not move in the matter. These facts differentiate the two cases. In *Johnson's Case* the appellant did all that prudence required of him, but in this case he failed to do so.

The result of the decisions is that where the judgment is rendered by the justice more than ten days before the term of the superior court, to which the appeal is taken, the return must be made to that term, and it is the duty of the appellant in the use of proper diligence to see that the case is properly entered upon the docket, and, if it is not, he loses his appeal, unless he applies at that term for a recordari, or takes such other steps as are necessary to have it done. After the return term, the judge has no discretion, which he can exercise in his favor. *Johnson v. Andrews* was an exceptional case, but this is not.

No error.

**BROWN, J. (dissenting).** I differ with my Brethren in the conclusion that the defendant appellant has been guilty of any laches by which he has forfeited the right to have his appeal docketed in the superior court of Catawba county and tried de novo. The cause was tried by a justice of the peace on the 16th of May, 1911. The defendant appealed to the superior court. On the 7th of July, 1911, the defendant's attorney, having duly appealed in open court and given notice of appeal, paid the justice of the peace his fee of 30 cents for sending up the transcript of appeal. The justice of the peace on the 7th day of July, 1911, made his return to the notice of appeal, and delivered the transcript to the clerk of the superior court. It is admitted that the said transcript was in the clerk's hands on the said date, and that by inadvertence he failed to place it upon the trial docket, or calendar, in time to be heard at the court which convened on the 10th day of July.

I do not think that this case is governed by the rule laid down in *Peltz v. Bailey*, 72 S. E. 978. In this case the defendant could not properly apply for recordari at the July term of Catawba superior court for the reason that the justice of the peace had already filed the record and transcript with the clerk of the court, and the defendant had a right to suppose that the clerk had discharged his duty and entered it upon the trial calendar.

I am of opinion that when the appellant discharges every duty required of him by law, and causes the transcript of the appeal to be delivered to the clerk of the superior court, and pays all of the legal fees, the appeal is to all intents and purposes then and there docketed in contemplation of law, and the court will not permit a litigant to be prejudiced by the inadvertence of the clerk in failing to place the appeal upon the trial calendar.

It is found as a fact that if the appeal had been placed upon the trial calendar at the July term, 1911, it could not have been tried on account of the crowded condition of the docket, and that it could not have been reached for a hearing at that term. The defendant was, therefore, excusable in not examining the trial calendar to see if his appeal had been placed upon it, for he had a right to suppose that the clerk had performed his duty in all respects. I think that the disposition of this case is directly antagonistic to the decision of this court in *Johnson v. Andrews*, 132 N. C. 377, 43 S. E. 928, in which it is held that, where an appellant pays the fees for the return and docketing of an appeal from a justice of the peace, the appeal will not be dismissed for the failure of the clerk of the superior court to docket the same. In that case Mr. Justice Walker well says: "It appears that the counsel for the defendant did everything that the law requires of him or his client. He caused the return to the notice of appeal to be made by the justice, and paid the fee therefor within the time fixed by law. The return was immediately filed with the clerk. His fee for docketing the appeal was paid, and he was requested to docket it. What more could counsel have done, or was he required to do, in order to protect the interests of his client, and save his right to have the case heard de novo in the superior court? When he caused the return to be filed with the clerk, and paid the fee for docketing, it became the duty of the clerk to docket the appeal, and surely the law will not permit the defendant to be prejudiced or deprived of his right to have a trial in the superior court by any fault or neglect of the clerk, when the counsel has been vigilant at every stage of the case, up to the very point where his duty ended, and that of the clerk began." I know of no precedent or statute which requires the defendant in this case to examine the trial calendar or docket at the July term to ascertain if the clerk had done his duty and docketed the appeal there. The defendant had a right to suppose that the clerk had discharged his duty, and that, if the case was reached upon the call of the docket, it would be tried in its order. I do not think a technicality like the one insisted on in this case should be permitted to defeat the purposes of justice.

• While the facts of this case are nearly,

but not exactly, identical with *Johnson v. Andrews*, it is apparent that the principle of practice stated by Justice Walker is broad enough to cover this case to the extent that the attorney or his client should not be held responsible for the oversight of the clerk.

(159 N. C. 345)

**BENNETT v. NORTH CAROLINA R. CO.**  
(Supreme Court of North Carolina. May 8, 1912.)

**1. DEATH (§ 31\*)—RIGHT OF ACTION—RIGHT OF WIDOW.**

A widow, individually, has no cause of action for the negligent death of her husband.

[Ed. Note.—For other cases, see *Death*, Cent. Dig. §§ 35-46, 48; Dec. Dig. § 31.\*]

**2. DEATH (§ 51\*) — PLEADING — COMPLIANCE WITH STATUTE.**

The provision of Revisal 1905, § 59, requiring a suit for death by wrongful act to be brought within a year after decedent's death, need not be pleaded by defendant as a statute of limitation; plaintiff being required to plead that the action was brought within the time required.

[Ed. Note.—For other cases, see *Death*, Cent. Dig. § 68; Dec. Dig. § 51.\*]

**3. PARTIES (§ 59\*) — AMENDMENTS — NEW CAUSE OF ACTION.**

Where a widow originally sued individually for damages for the negligent death of her husband, she could not amend the summons so as to sue as administratrix; the allowance of such amendment changing the entire character of the action and being beyond the court's power.

[Ed. Note.—For other cases, see *Parties*, Cent. Dig. §§ 90-94, 165; Dec. Dig. § 59.\*]

Appeal from Superior Court, Mecklenburg County; Lyon, Judge.

Action by Mary E. Bennett against the North Carolina Railroad Company. From an order allowing an amendment to the summons, defendant appeals. Reversed, and action dismissed.

O. F. Mason and Shannonhouse & Jones, for appellant. E. R. Preston, for appellee.

**BROWN, J.** This action was commenced on the 4th day of July, 1910, by the issuing of a summons in the individual name of "Mary E. Bennett, Plaintiff, v. North Carolina Railroad Company, a Corporation, Defendant." The amendment made at spring term, 1912, converted the action into one brought by the plaintiff in her capacity as administratrix of J. A. Bennett, and it appears from the affidavit upon which the said amendment was allowed that the purpose of amending the summons is to recover for the alleged negligent killing of one J. A. Bennett, the plaintiff's intestate and husband.

[1] It is well settled that the plaintiff individually had no cause of action against the defendant for the alleged death of her husband by reason of the defendant's negligence. This cause of action arises solely out of the

statute commonly called "Lord Campbell's Act." Revisal 1905, § 59.

[2] Under this statute, giving a cause of action on account of the wrongful killing of another, the provision that suit shall be brought within one year after death is a condition annexed, and must be proved by the plaintiff to make out a cause of action, and is not required to be pleaded as a statute of limitation. This matter is fully discussed in *Gulledge, Administrator, v. S. A. L. Ry.*, 147 N. C. 234, 60 S. E. 1134, 125 Am. St. Rep. 544; *Id.*, 148 N. C. 568, 62 S. E. 732.

[3] It is plain to us that the effect of the amendment is to change the entire character of the action, and to convert that which was the individual action of Mary E. Bennett into one by her in her representative capacity as administratrix, brought under the provisions of section 59 of the Revisal. As the surviving widow cannot maintain an action for the recovery of damages for the negligent death of her husband, it was necessary that she should sue in her capacity as administratrix. *Howell v. Commissioners*, 121 N. C. 362, 28 S. E. 362.

While courts are liberal in permitting amendments, such as are germane to a cause of action, it has been frequently held that the court has no power to convert a pending action that cannot be maintained into a new and different action by the process of amendment. *Best v. Kinston*, 106 N. C. 205, 10 S. E. 997; *Merrill v. Merrill*, 92 N. C. 657; *Clendenin v. Turner*, 96 N. C. 416, 2 S. E. 51. In the last case it is said: "The court has no power, except by consent, to allow amendments either in respect to parties or the cause of action, which will make substantially a new action, as this would not be to allow an amendment, but to substitute a new action for the one pending."

In *Hall v. Railroad Co.*, 146 N. C. 345, 59 S. E. 879, this question is discussed very fully by Mr. Justice Walker, and the court refused to permit an amendment, whereby an administrator who had qualified in North Carolina should be permitted to come in and take the place of one who had qualified in Virginia. The court said: "The action by the plaintiff as administrator, qualified in this state, is deemed to have been commenced when he was made a party to the action as such and joined in the amended complaint. *Hester v. Mullen*, 107 N. C. 724 [12 S. E. 447]. *Indeed, the court should not have allowed the amendment; but the plaintiff, under his qualification as administrator in this state, should have been required to bring a separate and independent action.*"

We are of opinion, upon well-settled authority, that the amendment allowed by his honor changed the entire character of the action, and was beyond the power of the court to allow. *Ely v. Early*, 94 N. C. 1, and cases therein cited.

Reversed, and action dismissed.

(159 N. C. 141)

**NORTH STATE COTTON CO. v. WILSON et al.**

(Supreme Court of North Carolina. May 8, 1912.)

**WEIGHTS AND MEASURES (§ 8\*)—PUBLIC WEIGHER—LOSS OF PROPERTY—LIABILITIES.**

Where a town ordinance merely required that an owner of cotton must carry it to the town cotton weigher to be weighed, a delivery of cotton to such weigher was not a bailment; and, though it was lost after being weighed, and the weigher had placed it with other cotton on a platform, he was chargeable with no liability, as bailee, which would render him or the town liable to the owner for such loss of the cotton.

[Ed. Note.—For other cases, see *Weights and Measures*, Cent. Dig. § 10; Dec. Dig. § 8.\*]

Appeal from Superior Court, Gaston County; Biggs, Judge.

Action by the North State Cotton Company against R. N. Wilson and another. From a judgment for defendants, plaintiff appeals. No error.

A. G. Mangum, for appellant. G. W. Wilson and Jones & Timberlake, for appellees.

**CLARK, C. J.** The plaintiff carried two bales of cotton to the defendant Wilson, who was cotton weigher of the town of Gastonia, duly appointed. The town ordinances required all cotton to be weighed. A short while after Wilson had weighed the cotton, he notified the plaintiff that the two bales were missing. The complaint does not allege that either of the defendants converted the said cotton, but avers that they negligently handled and dealt with the cotton, so that it was lost.

The town ordinances are set out in the complaint; and it appears therefrom that the cotton was not required to be delivered to the custody of the cotton weigher nor to the town, but merely that the owner thereof should carry cotton to the weigher to be duly weighed. There was no bailment of the cotton, and none was necessary. Neither the weigher nor the town assumed custody of the cotton, or in any wise became bailees thereof. The plaintiff might well have stood by while his cotton was being weighed, and immediately have taken it away. Neither the weigher nor the town held itself out as bailee, nor agreed to furnish warehouse facilities. Their entire duty was done when the cotton was weighed. It was the plaintiff's fault, and at his own risk, that he left the cotton on the platform, instead of taking it away.

It is true it is averred in the complaint that it was the custom of the weigher to tag the cotton. But there was no requirement in the ordinances to that effect; and Wilson testifies that he did in fact tag the cotton, and at once rolled it back into line with the other cotton. However that may be, there is nothing in the ordinances or in the nature of the transaction which made

the defendants bailees, either gratuitous or otherwise, of the cotton. The sole duty of Wilson was to weigh it. The plaintiff left the cotton on the platform for his own convenience, and, as there was neither charge nor proof that the defendants, or either of them, converted the cotton, there was no cause of action stated, and a nonsuit should have been directed. It is found in the issues submitted that the cotton was received solely for the purpose of being weighed; that it was weighed and tagged and placed back in the plaintiff's row of cotton; and that neither of the defendants have converted the cotton.

If there was any conflict in the instructions to the jury, it is immaterial to consider it, inasmuch as upon the complaint and evidence a nonsuit should have been directed.

No error.

(159 N. C. 157)

**FORNEY v. BLACK MOUNTAIN R. CO.**

(Supreme Court of North Carolina. May 8, 1912.)

**RAILROADS (§ 22\*)—ACTIONS AGAINST RAILROAD—VENUE—PERSONAL INJURIES.**

Under Revisal 1905, § 424, providing that an action against a railroad may be tried in a county adjoining the county in which the cause of action arose, plaintiff could bring his action for personal injury in a county adjoining that in which he resided and in which his injury occurred; and a motion to remove the cause to another county was properly denied.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 46-50; Dec. Dig. § 22.\*]

Appeal from Superior Court, Mitchell County; Foushee, Judge.

Action by Gus Forney against the Black Mountain Railroad Company. From a refusal of defendant's motion to move the cause to another county, defendant appeals. Affirmed.

J. Bis Ray, Gillis E. Gardner, and A. S. Barnard, for appellant. J. W. Pless, for appellee.

**CLARK, C. J.** This is an appeal from a refusal of a motion to remove the cause from Mitchell county to Yancey. The plaintiff is a resident of Yancey county. The defendant is a railroad company, having its principal place of business in Yancey, with its line partly in Mitchell and partly in Yancey. The cause of action is a personal injury, which occurred in Yancey county.

This case falls directly under the proviso in Revisal, § 424, that an action against a railroad shall be tried either in the county where the cause of action arose, or in the county where the plaintiff resided at the time the cause of action arose, "or in some county adjoining the county in which the cause of action arose," subject to the power of the court to change the place of trial.

This application for the change of venue was not made on the ground of the convenience of witnesses or on account of local prejudice, which are matters within the irrevocable discretion of the presiding judge, but upon the ground that the proper venue was in Yancey county. Mitchell adjoins Yancey, and under the proviso in Revisal, § 424, above quoted, the plaintiff had his election to bring the action either in Yancey or in any adjoining county. In Propst v. Railroad, 139 N. C. 397, 51 S. E. 920, the proviso was construed, and it was held that this section of the Revisal applied to all railroads, both domestic and foreign.

Under the preceding section 419 (1), an action against a railroad for setting out fire must be brought in the county where the land lies. Perry v. Railroad, 153 N. C. 117, 68 S. E. 1060. Section 424 provides for venue "in all other cases," with the proviso as to railroads, which must be construed as applying to all cases not provided for in the preceding sections. Propst v. Railroad, 139 N. C. 399, 51 S. E. 920.

Affirmed.

(159 N. C. 337)

# ALLEY v. CHARLOTTE PIPE & FOUNDRY CO.

(Supreme Court of North Carolina. May 8, 1912.)

## 1. MASTER AND SERVANT (§§ 101, 102\*)—INJURIES TO SERVANT—DUTY OF MASTER.

A master must furnish his servant a reasonably safe place in which to work, and reasonably safe and properly constructed appliances with which to perform his duties.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 135, 171, 172, 180-184, 192; Dec. Dig. §§ 101, 102.\*]

## 2. MASTER AND SERVANT (§ 185\*)—INJURIES TO SERVANT—FELLOW SERVANTS—DUTIES OF MASTER.

A pipe moulding company is liable for injuries received by servants owing to an explosion of an imperfect core made by a fellow servant, for the core maker represented the master, and discharged a duty it owed to its servants.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 385-421; Dec. Dig. § 185.\*]

## 3. MASTER AND SERVANT (§ 271\*)—INJURIES TO SERVANT—ACTIONS—EVIDENCE.

In an action by a pipe moulder injured by the explosion of a defective core, evidence of the reputation of the master's core maker showing him to be incompetent is admissible.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 928-931; Dec. Dig. § 271.\*]

## 4. EVIDENCE (§ 528\*)—EXPERT TESTIMONY—PERSONAL INJURY.

In an action by a servant for injuries to his foot, testimony by his attending physician that the wound was such that an eating cancer was liable to ensue is admissible; that statement being equivalent to a statement that such cancer was the probable result of the wound.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2335-2337; Dec. Dig. § 523.\*]

## 5. DAMAGES (§ 178\*)—PERSONAL INJURIES—EVIDENCE.

In an action by an injured servant whose foot was badly burned by molten metal, testimony by a physician that an eating cancer was liable to ensue is admissible as tending to prove acute mental suffering which would necessarily follow that possibility.

[Ed. Note.—For other cases, see Damages, Cent. Dig. § 472; Dec. Dig. § 178.\*]

## 6. DAMAGES (§ 95\*)—PERSONAL INJURIES—MEASURE OF DAMAGES.

A servant who sustained personal injuries through the negligence of his master is entitled to recover for loss of bodily or mental powers, or for actual suffering, both of body and mind, which are the immediate and natural consequences of the injury.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 222-229; Dec. Dig. § 95.\*]

## 7. APPEAL AND ERROR (§ 1033\*)—REVIEW—HARMLESS ERROR.

In an action by a servant for personal injuries, the court charged that, if from the evidence the jury found plaintiff was injured by an explosion of a defective core furnished him by the defendant, and that the core was constructed by an incompetent and inefficient core maker who the master knew was incompetent or inefficient or who ought to have known that fact, and that, if they found that this was negligence, then they should find for the plaintiff, while erroneous in allowing the jury to decide whether the acts stated constituted negligence instead of charging them that they did constitute negligence, was not prejudicial to the master.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4052-4062; Dec. Dig. § 1033.\*]

Appeal from Superior Court, Mecklenburg County; Lyon, Judge.

Action by F. W. Alley against the Charlotte Pipe & Foundry Company. From a judgment for plaintiff, defendant appeals. Affirmed.

These issues were submitted:

"(1) Was the plaintiff injured by the negligence of the defendant, as alleged in the complaint?" Answer: "Yes."

"(2) Did the plaintiff voluntarily assume the risk and danger of being injured in the manner in which he was injured as an incident of his employment?" Answer: "No."

"(3) Did plaintiff, by his own negligence, contribute to his injuries, as alleged in the answer?" Answer: "No."

"(4) What damages, if any, is the plaintiff entitled to recover of the defendant?" Answer: "\$6,000."

From the verdict and judgment the defendant appealed.

Burwell & Cansler and Davis & Davis, for appellant. T. L. Kirkpatrick, Osborne, Lucas & Cocke, and Mr. Miller, for appellee.

BROWN, J. The plaintiff was a pipe moulder for several years in defendant's foundry. On November 28, 1910, while engaged in moulding, he was injured by the explosion of a core, which caused a stream of molten iron from the arbor to strike plain-

tiff's foot, set his trousers afire, and seriously burn him. This core had been made by a core maker named Nance, and furnished to plaintiff for use in connection with the arbor in moulding. The principal negligence alleged is in providing an imperfect core, the defects in which were not apparent, and in providing an unskillful and deficient workman to make the core supplied to plaintiff. There are 21 assignments of error set out in the record and discussed in the briefs. We deem it unnecessary to review them all.

1. The motion to nonsuit was properly denied. It is unnecessary to discuss the doctrine of *res ipsa loquitur* as applicable to this case. The plaintiff need not rely on it. There is substantive evidence of negligence for which the defendant may properly be held liable. There is evidence tending to prove that plaintiff was injured by an explosion of gas which drove the molten iron out of the arbor on plaintiff; that this arbor was made by defendant; that the explosion was caused by a defective core furnished plaintiff by defendant; that plaintiff could not well have discovered the defect; that the core was made by Sam Nance, an incompetent and unskillful core maker, and there was evidence that defendant had full knowledge of Nance's incompetency and continued him as core maker notwithstanding. There is evidence from which it may be clearly inferred that the core was defective when it left Nance's hands.

[1] It is now elementary learning that the master must furnish the servant a reasonably safe place to work in, and reasonably safe and properly constructed appliances to work with, consistent with the character of the work.

[2] And it is likewise true that if the defendant, with full knowledge of Nance's incompetency, continued to permit him to make cores for the use of other workmen employed in a dangerous business, the defendant is liable for Nance's negligence, for in that particular Nance represented the master, and was discharging a duty the defendant itself owed to its servants. *Tanner v. Lumber Co.*, 140 N. C. 475, 53 S. E. 287; *Barkley v. Waste Co.*, 147 N. C. 585, 61 S. E. 565.

[3] 2. It is contended that the court erroneously received evidence relating to Nance's reputation as a core maker. Three witnesses, found by the court to be experts, declared that Nance was an incompetent core maker. One said that he ripped through his work, and did not half make his cores, rings in them, and soft places. We think it was proper to admit the opinion of experts upon that disputed question, as well as to put in evidence Nance's general reputation in his particular specialty. *Ives v. Lumber Co.*, 147 N. C. 306, 61 S. E. 70. In *Lamb v. Littman*, 132 N. C. 978, 44 S. E. 646, it is held competent to prove the reputation of a man's special fitness for any employment in which

he is engaged. *Railroad v. Jewel*, 46 Ill. 99, 92 Am. Dec. 240. Mr. Wigmore says (section 1894, *Work on Evidence*): "Testimony to professional skill concerning professional persons qualified to know is generally regarded as receivable." As one or several acts of negligence would not necessarily make a workman an incompetent servant, we think the best rule is that a servant who is familiar with the servant complained of, and who is competent to judge of his competency and the character of his work, should be permitted to give his opinion of it.

[4] 3. It is assigned as error that the court permitted the physician to state that the character of the plaintiff's wound was such that a sarcoma, or eating cancer, was liable to ensue. We recognize the general rule that an expert physician testifying to the consequences of a personal injury should be confined to probable consequences, but in this instance we do not think the physician indulged in pure speculation. *Jones on Evidence*, § 378. The word "liable" is defined as "exposed to a certain contingency more or less probable." *Webster's Dictionary*. The word was used by the witness in the sense of probable, and was doubtless so understood by the jury. The identical phrase was used in *Montgomery v. Scott*, 34 Wis. 339, and upheld as a legitimate expression of opinion by a medical expert. In *Kansas City v. Stoner*, 49 Fed. 209, 1 C. C. A. 231, the court held that the plaintiff was entitled to recover for the probable effects of the injury, even though at the time not apparent.

[5] We think the evidence competent, also, as tending to prove acute mental suffering accompanying a physical injury. The liability to cancer must necessarily have a most depressing effect upon the injured person. Like the sword of Damocles, he knows not when it will fall.

[6] This exception relates only to the issue of damages, and, if erroneous, it was of little consequence, as his honor laid down clearly the correct rule of damage, as follows: "Plaintiff is to have a reasonable satisfaction, if he is entitled to recover, for loss of bodily or mental powers, or for actual suffering, both of mind and body, which are the immediate and necessary consequences of the injury."

[7] 4. The defendant excepts to the following charge: "Now, if you find from the evidence, gentlemen of the jury, that the plaintiff was injured by an explosion throwing molten iron against his foot, and that said explosion was caused by a defective core, and you further find that said defective core was furnished to the plaintiff by the defendant, and you further find that said core was defective in its construction, and that it was constructed by Sam Nance, the core maker, and you further find that Sam Nance was an incompetent and inefficient core maker, and you further find from the

evidence that the defendant knew that Sam Nance was an incompetent and inefficient core maker, or that it ought to have known that fact, and you find that this is negligence, under the definition of negligence that I have given you, you will answer the first issue 'Yes,' otherwise you will answer it 'No.'" The only fault to be found in this charge is that his honor left to the jury to decide whether or not all of these facts constituted negligence, when he ought to have charged that, if the jury found these facts to be true, the defendant was guilty of negligence. This is an error of which the defendant has no reason to complain. The charge put the burden of proof squarely on the plaintiff, and eliminated entirely from the case any evidence of negligence arising from the mere fact of an explosion under the *res ipsa loquitur* doctrine.

We think it useless to discuss the remaining assignments of error. We have examined them, and find them without merit. The charge of the court was a full and clear presentation of the case to the jury, and as favorable as the defendant could reasonably expect.

No error.

(159 N. C. 131)

MURDOCK v. CAROLINA, C. & O. R. CO.  
(Supreme Court of North Carolina. May 8, 1912.)

1. EVIDENCE (§ 471\*)—OPINION EVIDENCE—EXPERT TESTIMONY.

In an action for injuries to an employé, caused by the bouncing of a rail which he, with other employés, was carrying with his hands, the plaintiff was properly permitted to state whether or not, in carrying such a rail with tongs, which he alleged should have been furnished, it would bounce as it did, as it was a statement from his knowledge and experience, rather than an expression of opinion.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2149-2185; Dec. Dig. § 471.\*]

2. MASTER AND SERVANT (§ 270\*)—INJURIES TO SERVANT—APPLIANCES—EVIDENCE.

In an action for injuries to a servant, caused by the bouncing of a steel rail, for the carrying of which the plaintiff alleged tongs should have been furnished, the plaintiff was properly permitted to testify that railroad tongs were approved and in general use.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 913-927, 932; Dec. Dig. § 270.\*]

3. NEW TRIAL (§ 168\*)—MOTION IN APPELLATE COURT—MISCONDUCT OF JUROR.

While a motion to set aside a verdict for misconduct of a juror must ordinarily be made before the trial court, it may, in a civil cause, be made for the first time on appeal, where the knowledge did not come to the appellant until after the court below had adjourned.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 7, 232, 245, 252, 253, 266, 280, 284, 286, 291, 292, 294, 296, 303, 306, 318; Dec. Dig. § 168.\*]

4. NEW TRIAL (§ 144\*)—MISCONDUCT OF JUROR.

A court will not set aside a verdict for misconduct of a juror, where the affidavits of

the juror himself, filed by the opposite party, expressly deny the affidavits filed in support of the motion and fully explain declarations imputed to the juror.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. § 298; Dec. Dig. § 144.\*]

Appeal from Superior Court, Mitchell County; Foushee, Judge.

Action by Job Murdock against the Carolina, Clinchfield & Ohio Railroad Company. From a judgment for plaintiff, defendant appeals. No error.

J. C. Biggs, for appellant. Charles E. Greene and Black & Wilson, for appellee.

CLARK, C. J. This is an action for personal injury. There was evidence that the plaintiff and others were engaged in carrying, with their hands, heavy steel rails, weighing about 850 pounds each. Under the direction of a foreman, they were required to do this, causing them to walk sideways. The plaintiff alleges that if steel tongs had been furnished the rails could have been carried much more conveniently, and when laid down would not have bounced and have injured him; this being the manner in which he was hurt.

[1] The first exception is that the plaintiff was allowed to state whether or not, in placing a rail with tongs, the rail would bounce. This was not an opinion of the witness, but a fact which he stated from his own knowledge and experience; and the question was competent. *Burney v. Allen*, 127 N. C. 476, 37 S. E. 501; *State v. McDowell*, 129 N. C. 523, 39 S. E. 840; *Britt v. Railroad*, 148 N. C. 37, 61 S. E. 601.

[2] The second and third exceptions are because the plaintiff was allowed to testify that railroad tongs were approved and in general use. *Orr v. Telegraph Co.*, 130 N. C. 627, 41 S. E. 880; *Rushing v. Railroad*, 149 N. C. 160, 62 S. E. 890. In *Bailey v. Meadows Co.*, 154 N. C. 72, 69 S. E. 747, Brown, J., says: "It is not necessary that the plaintiff should prove that such tongs are used on every railroad; but the fact that they are in use on three railroad systems is sufficient evidence to justify the jury in finding that they were in general use." Indeed, it ought hardly to call for proof that it was negligence not to furnish an appliance so long in use and so well known. *Orr v. Telegraph Co.*, 132 N. C. 691, 44 S. E. 401. The exceptions for refusal to nonsuit do not need to be discussed.

[3, 4] The defendant moved in this court to set aside the verdict for misconduct of a juror. This motion, like that for a new trial for newly discovered testimony, must ordinarily be made before the trial court; but there is an exception, though in civil cases only (*State v. Lilliston*, 141 N. C. 865, 54 S. E. 427, 115 Am. St. Rep. 705), when the knowledge does not come to the appellant till after the court below has adjourned.

ed. *Turner v. Davis*, 132 N. C. 187, 43 S. E. 637, and cases there cited. It is true those cases were where the new trial was asked on the ground of newly discovered testimony; but the same principle must apply in a case of this kind. Upon reading the affidavits, we find that the affidavits of the appellant are denied and the declarations imputed to the juror are fully explained in the affidavit of the juror himself, which is filed by the appellee. As in motions for newly discovered testimony, it would serve no purpose to discuss the evidence, but the court will simply render its decision. *Brown v. Mitchell*, 102 N. C. 367, 9 S. E. 702, 11 Am. St. Rep. 748; *Herndon v. Railroad*, 121 N. C. 498, 28 S. E. 144, and cases there cited; *Crenshaw v. Railroad*, 140 N. C. 193, 52 S. E. 731. The motion is denied.

No error.

(159 N. C. 123)

#### IN RE MILLER'S WILL.

(Supreme Court of North Carolina. May 8, 1912.)

#### 1. WILLS (§ 647\*)—DEEDS—CONDITIONS IN RESTRAINT OF MARRIAGE.

A condition subsequent annexed to an estate or interest definitely conveyed in general restraint of marriage, without limitation as to time or person will, as a general rule, be disregarded.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1533-1538; Dec. Dig. § 647.\*]

#### 2. WILLS (§ 647\*)—DEEDS—CONDITIONS IN RESTRAINT OF MARRIAGE.

Where an estate by the terms of its creation is so limited as to terminate on the marriage of the devisee without any entry or other action by the grantor, the limitation is ordinarily not void as being in restraint of marriage.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1533-1538; Dec. Dig. § 647.\*]

#### 3. WILLS (§ 647\*)—DEVISE—CONDITIONS OR LIMITATIONS.

In determining whether a provision terminating a devise upon the devisee's marriage is a condition in restraint of marriage or a limitation, the fact that there was a limitation over to some third person should be given full weight.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1533-1538; Dec. Dig. § 647.\*]

#### 4. WILLS (§ 647\*)—CONDITIONS IN RESTRAINT OF MARRIAGE OR LIMITATION.

Testator, owning a small tract of land on which he and his wife and daughter lived, devised it to the wife and daughter during their natural lives, with a provision that, if either or both married, the devise should become void. On the death or marriage of both, the property was devised to a son. Held that, although testator had used apt words of condition, his purpose and intent was to provide a home for the widow and daughter while they lived or remained unmarried, and not to prevent their marriage; and hence the limitation over in case of their marriage was not a condition subsequent in restraint of marriage, but a valid limitation.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1533-1538; Dec. Dig. § 647.\*]

Appeal from Superior Court, Mecklenburg County; Lyon, Judge.

Action for the construction of the will of R. C. Miller. From a judgment for Mary E. Miller, John Miller and wife appeal. Reversed.

It was made to appear that R. C. Miller died in said county on the 5th day of October, 1902, having duly made his last will and testament, leaving him surviving his widow, Margaret E. Miller, a daughter, Mary E. Miller, and a son, John L., who had a wife, Lucy, living and several children, all of whom are parties; that the widow of the testator, Margaret E., died August 22, 1908, without having remarried; that the daughter, Mary E., lived with her father and mother on the tract of land until they died, and afterwards, until 18th of April, 1911, when she was married to Charles F. Smith, with whom she is now living as his wife; that Mary E. Miller, now Smith, continued in possession of the tract of land, receiving the rents and profits until May 1st, when John L. Miller went into possession and control and received rents and profits until January 1, 1912, and holds same to the amount of \$70, and since January 1, 1912, the property has been leased and the lessees withhold the rents pending the controversy.

In his last will and testament R. C. Miller made disposition of this property as follows:

"I, R. C. Miller, of the State and County above mentioned, being in sound mind, and knowing the uncertainty of all earthly affairs, do herein publish and declare this my last Will and Testament, viz.: I direct my Executor hereinafter mentioned to give me fitting burial and pay all my just debts.

"Art. 1. I give and bequeath to my wife, Margaret E. Miller, and my daughter, Mary E. Miller, the place where I now live, being my entire landed estate, to hold with all the rights and privileges pertaining thereto, during their natural lives, but in case either or both marry again this becomes void. In case of the marriage of one, the remaining one will hold until her death or marriage.

"Art. 2. I further direct that at the death or marriage of both, the above mentioned estate shall go to my son John L. Miller, and at his death to his wife, Lucy Miller, during her life or widowhood, in case of marriage or death the property must be equally divided between their children.

"Art. 3. After the payment of my debts I further direct that my entire personal property remain as it is in possession of my wife, Margaret E. Miller, and at her death or marriage it shall be equally divided between my children W. O. Miller, Elsie Houston, Annabella Gillespie and Mollie Miller.

"Art. 4. I appoint my son, John L. Miller, my Executor to this my last Will and Testament, and direct him to see that every clause



in the above mentioned be carried out to the full letter of the law.

"[Signed] R. C. Miller."

The controversy is concerning the real estate and the rents arising therefrom since the marriage of Mary E. Miller; John L. and his wife and children, devisees, contending that on the marriage of Mary E. the land in question passed to them under the terms of the will, and Mary E. contending that the conditions annexed to the devise to her were contrary to public policy and void as being in general restraint of marriage. The court, being of this opinion, entered judgment declaring Mary E. Miller entitled to the life estate and the rents during said term, whereupon John L. Miller, etc., excepted and appealed.

Shannonhouse & Jones, for appellants.  
Stewart & McRae, for appellee.

HOKE, J. (after stating the facts as above). The question chiefly presented on this appeal has been very much discussed by the courts, and there seems to be a great contrariety of decisions concerning it.

[1] Without attempting to explain or even refer to many of the cases on the subject, we consider it as established, certainly by the weight of authority, that where an estate or interest is definitely conveyed, with a condition subsequent annexed in general restraint of marriage—that is, without limitation as to time or person—the condition, as a rule, will be disregarded. *Watts v. Griffin*, 137 N. C. 572, 50 S. E. 218; *Otis v. Prince et al.*, 10 Gray (Mass.) 581; *Harmon v. Brown*, 58 Ind. 207; *Hopkins on Real Property*, p. 173.

[2] The principle does not ordinarily obtain in the case of an estate upon limitation or a conditional limitation, where, by the terms of its creation, an estate is so defined and limited that it terminates of itself on the happening of the contingent event without entry or other action on the part of the grantor or his proper representative, an estate not infrequently instanced where a testator has made a devise or bequest in favor of his widow while she remains unmarried. *Bostick v. Blades*, 59 Md. 231, 43 Am. Rep. 548; *Coppage v. Alexander Heirs*, 2 B. Mon. (Ky.) 313, 38 Am. Dec. 153; *Hibbitts v. Jack*, 97 Ind. 570, 49 Am. Rep. 478; *Hotz's Estate*, 38 Pa. 422, 80 Am. Dec. 490; *Pringle v. Dunkley and Wife*, 14 Smedes & M. (Miss.) 16, 53 Am. Dec. 110; *Mordecai's Law Lectures*, pp. 521, 522; 4 Kent's Commentaries, pp. 125, 126.

[3] Even though the words used may in strictness be those of condition subsequent, if there be a limitation over to a third person, the courts are inclined to consider it as an estate upon limitation rather than one upon condition. It seems that this fact of a limitation over is only allowed as controlling

in cases of bequests of personalty. See notes to case of *Coppage Heirs*, supra, reported in 38 Am. Dec. 159, but both Blackstone and Kent speak of it as prevailing in devises of realty also (4 Kent, p. 126; 2 Blackstone, p. 155); but whether made determinative in cases of real property or otherwise, and whether the facts bring the present case within the principle or not, and we are inclined to think they do (see *Stillwell v. Knapper*, 69 Ind. 558, 35 Am. Rep. 240), the fact that there is such a limitation over should always be given full and proper weight in arriving at the mind and will of the testator and determining whether the disposition made of the property shall be considered an estate upon limitation or a condition in terrorem, void as being in general restraint of marriage.

[4] Pursuing this suggestion, there is well-considered authority to the effect that, although the terms used may ordinarily import a condition, if, from a perusal of the entire will and the facts and circumstances permissible in aid of a proper interpretation, it appears that the testator intended to make provision for a beneficiary while she remained single, and that the words were not used and intended as a restraint upon marriage, the qualifying words will be given effect according to testator's devise as intended and expressed in the will. *Chapin v. Cook*, 73 Conn. 72, 46 Atl. 282, s. c., reported and annotated in 84 Am. St. Rep. 139-149; *Mann v. Jackson*, 84 Me. 400, 24 Atl. 886, 16 L. R. A. 707, 30 Am. St. Rep. 358; *Estate Margaretta R. Holbrook*, 213 Pa. 93, 62 Atl. 868, 2 L. R. A. (N. S.) 545, 110 Am. St. Rep. 587, 5 Ann. Cas. 137, a position approved in 2 Jarman on Wills, p. 572, making citations from *Jones v. Jones*, 1 Q. B. D. 279; 1 Underhill on Wills, § 506; *Tiedeman on Real Property*, § 281. In the citation to Underhill the author says: "The authorities distinguish between a provision for a legatee 'until he or she shall marry,' or 'while she is unmarried,' and an estate upon condition subsequent terminating by the marriage of the legatee. The distinction is largely technical, depending upon the exact language used; but the test is, 'What was the purpose of the gift? What did the testator intend to accomplish?' If it is apparent from the will that he did not intend to prevent a marriage or to condemn the legatee to a life of celibacy, but that he intended solely to provide for her support while unmarried, and that, as soon as she was in a position to be supported by her husband, he desired the provision to cease and the property to be devoted to others, it is valid. The law will regard it as an estate upon limitation, not as an estate upon condition, and the gift over will go into effect as a conditional limitation."

Applying this, in our opinion the controlling principle on the facts presented, we hold

the devise in question to be an estate upon limitation, and, on the marriage of the daughter, the estate passed to the son and his wife and their children as expressed in the will. Here was a testator, owning a small tract of land, on which he and his wife and daughter had lived, and, from a consideration of the circumstances and a perusal of the entire will, it was his desire and intent to provide a home for his widow and daughter while they lived or remained unmarried, and, in case either married, the survivor was to hold, and on the death or marriage of both the estate should go to the son, his wife and their children; the design evidently being that, if the widow or daughter married, they should thereafter look to the husband for support. True, the testator at first uses apt words of condition, "But, in case either or both marry again, this becomes void," but he immediately adds, "In case of the marriage of one, the remaining one will hold till her death or marriage," showing that an estate upon limitation was meant, and this in connection with the devise over to his son for life and then to his wife for her life or widowhood, and then to their children as purchasers, on principle and authority, gives clear indication that the qualifying words may not be properly construed as words in terrorem, void because intending to restrain marriage, but as a provision for the support of the devisees until the marriage occurred. The case is very similar to that of *Jones v. Jones*, supra, cited by Mr. Jarman; and finds support, also, in *Martin v. Seigler*, 32 S. C. 267, 10 S. E. 1073.

There is error, and this will be certified that judgment be entered for the ultimate devisees.

Reversed.

(159 N. C. 340)

**ABERNATHY v. SOUTH & W. RY. CO.**

(Supreme Court of North Carolina. May 8, 1912.)

**1. LIMITATION OF ACTIONS (§ 177\*)—STATUTES—CONSTRUCTION—INTENTION OF LEGISLATURE.**

Revisal 1905, § 394, subd. 1, provides that no action for damages or compensation for right of way or occupancy of lands by a railway shall be brought, unless commenced within five years after an entry, or within two years after the road shall be in operation. When passed as Acts 1893, c. 152, the statute contained a saving clause as to persons under disability, and, in the Revisal, is included in the division dealing with limitations. *Held*, that the Legislature intended the section to be a statute of limitations, rather than a condition annexed to the cause of action given by Revisal 1905, § 2580, for compensation for a right of way taken; and it is not necessary for the plaintiff, in such an action, to allege the commencement of the proceeding within five years after the taking of the land.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 663-666; Dec. Dig. § 177.\*]

**2. LIMITATION OF ACTIONS (§ 182\*)—PLEADING—NECESSITY.**

Under Revisal 1905, § 360, which provides that the objection that an action was not commenced within the time limited can only be taken by answer, the objection that an action for compensation for lands taken for railroad purposes was not commenced within five years, as required by Revisal 1905, § 394, is not available, where not pleaded.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 676-680, 695, 705; Dec. Dig. § 182.\*]

**3. EMINENT DOMAIN (§ 148\*)—DAMAGES—INTEREST.**

In assessing damages for land taken by a railroad company for a right of way, the court properly considered the interest on the amount of compensation from the time the railroad was constructed as damages, in order to ascertain the amount justly due the plaintiff.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 397-399½; Dec. Dig. § 148.\*]

**4. INTEREST (§ 39\*)—JUDGMENTS.**

Under Revisal 1905, § 1954, which provides that the amount of any judgment or decree, except the costs, rendered or adjudged in any kind of an action shall bear interest till paid, a court properly allowed interest from the date of judgment upon an allowance for lands taken for a right of way of a railroad.

[Ed. Note.—For other cases, see Interest, Cent. Dig. §§ 83-89; Dec. Dig. § 39.\*]

**5. EMINENT DOMAIN (§ 153\*)—DAMAGES—RECOVERY OF ENTIRE AMOUNT—DISPOSAL OF INTEREST IN SUBJECT-MATTER.**

Under Revisal 1905, § 2594, which provides that when any proceedings of appraisal shall have been commenced no change of ownership by a voluntary conveyance or transfer of the real estate, or any interest therein, or of the subject-matter of the appraisal, shall, in any manner, affect the proceedings, a plaintiff, in an action to recover for land taken by a railroad for its right of way, may recover the entire amount of damage sustained, though, since the institution of the proceedings, he has disposed of an interest therein.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 407-416; Dec. Dig. § 153.\*]

Appeal from Superior Court, Mitchell County; Foushee, Judge.

Action by P. H. Abernathy against the South & Western Railway Company. From a judgment on a report of referees, defendant appeals. Affirmed.

This is an action which was heard on exceptions to the report of referees. The defendant railway company, without purchasing or condemning the same, entered upon the land of the plaintiff, appropriated the same to its own use as a right of way, and constructed and is now operating its railroad across said land, without ever having compensated the plaintiff therefor. This action was instituted by the plaintiff before the clerk of the superior court, under Code, § 1944 (Revisal, § 2580), for the purpose of having assessed the compensation for the right of way taken by the defendant. The construction of the road, as located by defendant, not only deprived plaintiff of a part

of his land, but, it is alleged, destroyed and rendered worthless a valuable mica mine on the property. The clerk duly appointed commissioners, as provided by the statute, who viewed the property and filed their report, as shown in the record. To this report, both parties excepted and demanded a jury trial on appeal to the superior court. The defendant, by leave of court, amended its answer, after the cause reached the superior court, and denied the title of the plaintiff, alleging title in the heirs of one J. L. Rorison. The issues were then tried before his honor, Judge Moore, and a jury, and from a verdict and judgment for plaintiff the defendant appealed to this court, and obtained a new trial upon the ground that the court below had committed error in excluding certain testimony, tendered by defendant on the issue of title.

The cause again came on to be heard in the superior court, and upon plaintiff's demand for a trial by jury the defendant moved that the cause be referred. The court, over objection of plaintiff, allowed the motion, and entered the order set out in the record, referring the cause. Upon the coming in of the report of referees, both excepted, and the matter was heard before Judge Foushee, who, after consideration of the evidence and argument of counsel, modified and confirmed the report of referees, and from this judgment the defendant now appeals.

J. Crawford Biggs, W. L. Lambert, Jas. J. McLaughlin, and J. Norment Powell, for appellant. Erwin & Newland and Merrimon, Adams & Adams, for appellee.

WALKER, J. (after stating the facts as above). [1, 2] The defendant contended that plaintiff was not entitled to recover, because he had not alleged and shown that this proceeding was commenced within five years after the land had been taken or entered upon by the defendant, or within two years after the road was first operated; and reliance was placed upon Acts 1893, c. 152, brought forward in the Revisal as section 394 (1), which provides as follows: "No suit, action or proceeding shall be brought or maintained against any railroad company owning or operating a railroad for damages or compensation for right of way or occupancy of any lands by said company for use of its railroad, unless such suit, action or proceeding shall be commenced within five years after said lands shall have been entered upon for the purpose of constructing said road, or within two years after said road shall be in operation." It was argued that this section should be read in connection with section 2580 of the Revisal, as the two relate to the same subject-matter, and, as thus considered, the provision as to the time within which the proceeding must be commenced is not a statute of limitations, but a condition annexed to the cause

of action; and therefore it was incumbent upon the plaintiff to show affirmatively that this proceeding was commenced within the said period so fixed by the statute. We cannot assent to this proposition. The act of 1893 (chapter 152), now Revisal, § 394, contains a saving clause as to persons under disability, which shows, though perhaps not conclusively, that the Legislature intended that it should be a statute of limitations. In addition to this, similar provisions have been so construed by this court. The section is not materially unlike that to be found in the charter of the North Carolina Railroad Company, which was construed in *Vinson v. Railroad*, 74 N. C. 513, and in which the following language was used: "This is a positive statute of limitations; and it clearly bars the plaintiff's action, unless it be saved by the special circumstances relied upon by the plaintiff for that purpose, which are stated in the case agreed, and which the reporter will set forth in full. The plaintiff has not been vigilant; and if he has lost anything by sleeping on his rights we can only say the law is so written." That decision has been since followed in many cases. *Railroad v. McCaskill*, 94 N. C. 746; *Gudger v. Railroad*, 106 N. C. 481, 11 S. E. 515; *Dargan v. Railroad*, 181 N. C. 623, 42 S. E. 797. The provision is not like that contained in Lord Campbell's Act (Revisal, § 59), which was construed in *Gulledge v. Railroad*, 148 N. C. 567, 62 S. E. 732. As it is a statute of limitations, it should have been pleaded; and, as it was not, the defendant cannot now have the benefit of it. Revisal, § 360; *Insurance Co. v. Edwards*, 124 N. C. 116, 32 S. E. 404; *Boone v. Peebles*, 126 N. C. 824, 36 S. E. 193.

[3, 4] The defendant assigned as error the fact that the judge, in reducing the assessment of damages, as made by the referee, to \$3,000, stated that, in fixing this amount, he had considered the interest on the amount of compensation from the time the railroad was constructed, and also allowed interest from the date of the judgment on said sum of \$3,000. But the court may consider the interest as part of the damages, or in order to ascertain the amount justly due the plaintiff. *Patapsco v. McGee*, 86 N. C. 350; *Devereux v. Burgwin*, 83 N. C. 490. Hale on Damages (section 68, p. 167) states the rule very broadly, and cites numerous cases to sustain it: "The taking of property under the right of eminent domain is analogous to a sale. If not agreed on, the damages are assessed as of the time of the taking, and interest on the amount ascertained is allowed as compensation for the detention of the money from that time. The reason for the rule was well stated in a Pennsylvania case: 'If the plaintiff was entitled to compensation by reason of her property being taken at a particular time, she was certainly entitled to interest as compensation for its wrongful detention. The company, as well

as the plaintiff, could have had the damages assessed as soon as they pleased after locating the road; and it was no reason for withholding compensation that its amount was unknown or unascertained. As the company was the party to pay, it ought to have had the amount ascertained, and paid it. Failing to do so, it has no right to complain at having to meet an incident of the delay in the shape of interest.' It is not necessary that we should go all the way with him, and hold that interest is recoverable as of right. We only hold that it was within the judge's discretion to consider interest in estimating the damages. Hale on Damages, § 67; Frazer v. Carpet Co., 141 Mass. 126, 4 N. E. 620; Lincoln v. Clafin, 7 Wall. 132, 139, 19 L. Ed. 106. In the case last cited, the court held that in cases of tort, as trover, trespass, and other like actions, the allowance of interest as damages rests in the sound discretion of the jury. Stephens v. Koonce, 103 N. C. 266, 9 S. E. 315. The judgment bears interest by express provision of the statute, whether the cause of action was in tort or contract. Revisal, § 1954; Stephens v. Koonce, supra.

[5] The defendant assigned as error the ruling of the referees and the judge, in approval thereof, upon the finding of fact that the plaintiff, Abernathy, since the institution of the proceeding, had conveyed one-third interest in the land to L. A. Berry, and insisted that plaintiff should therefore be permitted to recover only two-thirds of the compensation awarded for the land taken by it for a right of way. Counsel for defendant relied upon Livermon v. Railroad, 109 N. C. 52, 13 S. E. 734, Phillips v. Telegraph Co., 130 N. C. 513, 41 S. E. 1022, 89 Am. St. Rep. 868, and Beal v. Railroad, 136 N. C. 298, 48 S. E. 674, as authorities sustaining their contention; but an examination of those cases will disclose that in all of them the transfer of title occurred before the proceeding for an appraisal or for condemnation had commenced. Our statute (Code, § 1950 [Revisal, § 2594]), provides as follows: "When any proceedings of appraisal shall have been commenced, no change of ownership by voluntary conveyance or transfer of the real estate or any interest therein or of the subject-matter of the appraisal shall in any manner affect such proceedings, but the same may be carried on and perfected as if no such conveyance or transfer had been made or attempted to be made." Our case is governed by this section, as the conveyance of title to Berry was not made until after the proceeding had been started. We are not required to consider what claim Berry may have upon the plaintiff, as that matter is not before us. L. A. Berry is not a party to this suit.

The other exceptions have either been abandoned, or are without merit.

Affirmed.

(91 S. C. 339)

**HUMPHRIES v. SETTLEMAYER et al.**  
(Supreme Court of South Carolina. May 6, 1912.)

**1. WILLS (§ 17\*)—BASTARDS—RIGHT TO TAKE UNDER WILL OF FATHER—STATUTES.**

Civ. Code 1902, § 2487, providing that if one, being an inhabitant of or having an estate in the state, beget a bastard, and having a wife or lawful children living, shall devise or bequeath for the use and benefit of the bastard more than a fourth of his estate, the gift shall be void as to the excess, deals only with property in the state; so that the part of the father's estate within the state which the bastard can take under his will is unaffected by what estate he has out of the state, or how the will disposes of it.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 40-42; Dec. Dig. § 17.\*]

**2. WILLS (§ 17\*)—RIGHT TO TAKE UNDER FATHER'S WILL—VALUE OF DEVISE.**

As regards the question of the value of the devise to testator's bastard child, within Civ. Code 1902, § 2487, declaring void, as to the excess, a devise for the use or benefit of one's bastard child of more than a quarter of his estate, where he has a wife or lawful child living, the devise being to the bastard, with provision that, if she dies before she is 21 years old, the devised property shall go to the testator's nephew,  $\frac{1}{32}$  of the value of the fee simple of the property is the value of the interest devised to her, she being 12 years old at the time of the decree, there being no evidence of the greater danger of death during the early years of infancy.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 40-42; Dec. Dig. § 17.\*]

Appeal from Common Pleas Circuit Court of Spartanburg County; R. C. Watts, Judge. "To be officially reported."

Action by Mary Humphries against Nellie G. Settlemyer and her guardian. From the judgment, both parties appeal. Affirmed.

Butler & Hall, of Gaffney, for plaintiff. Stanyarne Wilson, of Spartanburg, for defendants.

**WOODS, J.** [1] S. R. Humphries, a resident of North Carolina, died in 1909, leaving valuable lands and considerable personal property in that state and several tracts of land in this state. By his will he devised and bequeathed his property to Mary Humphries, his wife, Nellie G. Settlemyer, his illegitimate child, and V. A. Humphries, his nephew. His heirs were his wife and a number of brothers and sisters. This action was instituted by the widow to have declared null and void all devises to the bastard child, Nellie G. Settlemyer, in excess of one-fourth of the value of the lands devised, under the following statute of the state: "If any person who is an inhabitant of this state, or who has any estate therein, shall beget any bastard child, or shall live in adultery with a woman, the said person having a wife or lawful children of his own living, and shall give, by legacy or devise, for the use and benefit of the said woman with whom he lives in adultery, or of his bastard child or children, any larger or greater proportion

of the real clear value of his estate, real or personal, after paying of his debts, than one-fourth part thereof, such legacy or devise shall be null and void for so much of the amount or value thereof as shall or may exceed such fourth part of his real and personal estate." Civil Code 1902, § 2487.

The referee and the circuit judge concurred in holding that the statute affected only the lands in this state, and that in enforcing it the lands in North Carolina were not to be taken into the account. There can be no doubt of the correctness of this conclusion. The rule is well established that the *lex rei sitæ* controls the descent and testamentary disposition of real property, and, in view of this rule, it must always be considered that there is a very strong presumption against any attempt by one state or nation to legislate with respect to the rights of even its own citizens in or concerning lands situated in another state or country. A child may be legitimate under the law of one state or country, and be illegitimate under the laws of another. As his right to take real estate depends upon the *lex rei sitæ*, he may take land by devise as a legitimate in one state, and as an illegitimate be deprived of land devised to him in another state or nation. Even where the test of legitimacy is the same in both states or nations, the extent to which an illegitimate may take property devised varies widely in different jurisdictions. The public policy of this state, as expressed in its statute law is to restrict an illegitimate's capacity to take by devise to one-fourth of the estate of his father, but not to extend the disability further. The public policy of another state may be to allow the illegitimate to take the entire property devised to him without limitation, or to prohibit him from taking any property devised. Whether the policy of another state with respect to property subject to its laws is wise or not, or whether it accords with the public policy of this state, are questions not to be discussed or considered in the courts of this state. If in ascertaining the rights of an illegitimate under the laws of this state the value of land in another state devised to the illegitimate, and which he may take under the law of that state, is to be added to the value of the devised land in this state, and then subtracted from the one-fourth of the aggregate, it is obvious that an illegitimate might be deprived of all the property devised to him in this state, when the statute contemplates that he may take one-fourth; and, on the other hand, he might take by devise the entire land of his father in this state, if the value of land in another state be added to the value of lands in this state, and the illegitimate be allowed to take in this state land not exceeding in value one-fourth of the whole. It seems, therefore, perfectly evident that the statute of this state should be

construed to deal only with property in this state, and that the courts of this state have no concern with lands in North Carolina. *Blount v. Walker*, 28 S. C. 545, 6 S. E. 558.

[2] Another question made by the appeal is as to the method of valuation of the interest devised to the illegitimate child in the following clause of the will, devising a tract of 335 acres: "The aforementioned Nellie G. Settlemyer to have possession of said lands, tract No. 4 upon the death of the testator, and if I die before she is 21, my nephew V. A. Humphries is to have control of said lands for her, to rent and lease the same and apply the proceeds of said land to the educating and support of her, the said Nellie G. Settlemyer, who is at this date, one year, eight months and thirteen days old, and should she die before 21 years of age, the foregoing bequeathed property shall go to V. A. Humphries, my nephew." At the date of the decree Nellie G. Settlemyer was about 12 years of age, and her title will fail if she should die before attaining the age of 21 years. The referee and the circuit judge adopted 21 years from birth as representing the full fee-simple value of the land, and we think this was correct, because the estate became absolute upon the completion of 21 years of her life. Nellie having passed 12 years—that is  $\frac{12}{21}$  of the time, there remained to her the risk of not living the remaining 9 years,  $\frac{9}{21}$  of the period. The circuit judge on this basis took  $\frac{12}{21}$  of the value of the fee simple as the value of the devise of tract No. 4. Against this finding counsel for the plaintiff argued that the danger of death before reaching 21 years was greater in infancy, and had decreased every year up to the date of the decree, and therefore the value of the interest in tract No. 4 devised was at the date of the decree greater than  $\frac{12}{21}$  of the fee-simple value. This may be true, but there was no evidence before the court on the subject. The mortuary tables adopted by statute (24 St. at Large, p. 96) commence with the age of 10, and afford no basis of ascertaining the rate of decrease of risk of death from infancy to 12 and from 12 to 21 years of age. As the evidence on the subject did not extend beyond the ascertainment of the age of Nellie, and of the age at which, if she survived, the uncertainty of her taking would end, and the estimate of the value of the fee simple, the circuit court had no basis for any other conclusion than that the value of the estate devised was equal to  $\frac{12}{21}$  of the value of the fee simple.

The judgment of this court is that the judgment of the circuit court be affirmed, with leave to the parties to apply to the circuit court for such orders as may be necessary for protection of their interests.

GARY, C. J., and HYDRICK, and FRA-SER, JJ., concur. WATTS, J., disqualified.

(11 Ga. App. 151)

**WARTHEN v. STATE.** (No. 4,105.)  
(Court of Appeals of Georgia. May 7, 1912.)

(Syllabus by the Court.)

**1. WITNESSES (§ 40\*)—COMPETENCY—INFANTS.**

The Code of this state (Civ. Code 1910, § 5862) declares that "children who do not understand the nature of an oath are incompetent witnesses," and wherever a child is offered as a witness, it is the duty of the trial judge to have a preliminary examination made of the child, for the purpose of deciding its competency according to this test, and where, on such examination, it manifestly and clearly appears that the child was only eight years old, had no moral instructions whatever, did not know what it was doing when sworn as a witness in the case, and had no knowledge whatever of the nature of an oath, it was error to permit the child to testify as a witness, over the objection of the accused.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. §§ 97, 98; Dec. Dig. § 40.\*]

**2. CRIMINAL LAW (§ 562\*)—EVIDENCE—SUFFICIENCY—COMPETENCY OF WITNESS.**

The conviction in the present case resting solely upon the evidence of a child whose preliminary investigation proved that it was wholly incompetent as a witness, because it had no knowledge of the nature of an oath, the verdict was unauthorized, and a new trial must be granted.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 1263; Dec. Dig. § 562.\*]

Error from City Court of Sandersville; E. W. Jordan, Judge.

Macon Warthen was convicted of crime, and brings error. Reversed.

J. J. Harris, of Sandersville, for plaintiff in error. J. E. Hyman, Sol., of Sandersville, for the State.

**HILL, C. J.** [1] The conviction of the plaintiff in error rests solely upon the evidence of a little negro child, eight years of age. On the preliminary examination for the purpose of testing her competency, she testified that she was eight years old, that it was right to tell the truth and not a lie, and that she was going to tell the truth, and that she knew the difference between the truth and a lie. She further testified, on cross-examination, that she had never been to school or Sunday school, that she did not know what it was to swear, that she did not know what an oath was, that she did not know what she held up her hand for when she was sworn, and did not know that she could be put in jail for not swearing the truth, that her mother had never told her about the devil or "bad man," and that she did not know anything about an oath or what was meant by it. She was allowed to testify, over the objection of the accused, who insisted that the preliminary examination showed conclusively that she was not competent, because she did not understand the nature of an oath, and the ruling of the court permitting her to testify as a witness is the only exception relied upon before

this court. Section 5862 of the Civil Code of 1910 provides that "persons who have not the use of reason, as idiots, lunatics during lunacy, and children who do not understand the nature of an oath, are incompetent witnesses." The test, therefore, which the law prescribes as to the competency of a child of tender years to be a witness, is knowledge by the child of the nature of an oath; and if the preliminary examination of the child offered as a witness shows that she has no knowledge whatever of the nature of an oath, the Code declares that she is incompetent as a witness.

[2] This is one of the safeguards which the law provides in the trial of criminal cases. It is not a technicality. But, even if it was, it is a positive declaration of the statute, and cannot be disobeyed. No conviction can be legally had, except upon the testimony of a competent witness, and the law declares who are competent witnesses, and the orderly administration of justice demands that there shall be no relaxation of the rules of law on this subject. In this case the law declared that the child was incompetent as a witness to testify against the accused, unless she was shown by the preliminary examination to know the nature of an oath. Her examination on this subject shows, beyond question of a doubt, that she had no knowledge whatever on the subject. On the preliminary examination she testified that she knew the difference between the truth and a lie, and that it was wrong to tell a lie; but this is not the test which the law makes as to the competency of witnesses. The test on this ground is knowledge of the nature of an oath, and on this controlling question she evinced no knowledge whatever. It is true that this question is largely in the discretion of the trial judge. He sees and hears the child whose competency is tested, and is therefore in a much better position to form an opinion on the subject than the reviewing court, which only has before it the written answers of the child, and this court would not be authorized to reverse the judgment of the trial court on this question, unless there was manifest error or abuse of discretion. *Webb v. State*, 7 Ga. App. 35, 66 S. E. 27. According to moral philosophy, truth is a natural instinct, and children are more apt to tell the truth than a falsehood; and it has been held that the jury, who see the child, are the best judges as to whether her testimony is entitled to credit. *Young v. State*, 122 Ga. 726, 50 S. E. 996. Nevertheless the courts must follow the mandate of the statute, and trial judges cannot legally permit children to testify who, according to the test prescribed by the statute, are incompetent as witnesses.

The preliminary investigation in the present case proved beyond question that the child was incompetent; that she had no

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

knowledge of the nature of an oath. It is difficult to conceive how there could be clearer and stronger proof of total ignorance of moral responsibility or of the nature of an oath than was disclosed by the examination of the child in this case. We are therefore compelled, if we give the statute in question any meaning at all, to hold that the trial judge erred in allowing the child to testify. We do this all the more willingly in the present case because the child's testimony was the only evidence implicating the accused, and even by her testimony the identity of the accused was not clearly established. She first told the prosecutor that another one of the men who was present on the night of the larceny, and who had equal opportunity with the accused to commit the offense, was the guilty person; that she saw this person take his watch from his vest pocket. Subsequently she told the prosecutor that she was mistaken as to this, and that the person who did take his watch from his pocket was the accused. If the child had been a competent witness, this question would have been exclusively for the jury; but, since it was shown by the preliminary examination that she was not a competent witness, her testimony was manifestly without any probative value at all.

Judgment reversed.

(11 Ga. App. 127)

HARRIS v. STATE. (No. 4,093.)

(Court of Appeals of Georgia. May 7, 1912.)

(Syllabus by the Court.)

1. CRIMINAL LAW (§ 262\*)—ARRAIGNMENT—WAIVER.

One placed on trial in a criminal case will be held to have waived formal arraignment, unless, at the time of entering his plea of not guilty, he calls the attention of the court to the fact that he did not intend to waive arraignment. Merely striking from the printed waiver on the back of an accusation or indictment the words, "waives formal arraignment," will not entitle the accused, after verdict, to take advantage of the fact that he was not formally arraigned, when at the time the plea was entered and before the trial was begun the attention of the court was not called to the fact that the accused had not waived arraignment.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 614, 615; Dec. Dig. § 262.\*]

2. INDICTMENT AND INFORMATION (§ 15\*)—ABATEMENT—FORMER SUIT PENDING.

The plea of former suit pending is not applicable to an accusation in a criminal case. A trial and conviction or acquittal under one accusation is a bar to a trial under any other accusation charging the same offense, even though such accusation may have been pending at the time the trial was had.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 83-88; Dec. Dig. § 15.\*]

3. CRIMINAL LAW (§ 216\*)—WARRANT FOR ARREST—NECESSITY.

One present in court for the purpose of being tried under a criminal accusation may be placed on trial under another accusation

charging an offense growing out of the same transaction and based upon a new affidavit, even though no warrant for the arrest of the accused was issued based upon the second affidavit.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 435-438; Dec. Dig. § 216.\*]

4. SUFFICIENCY OF EVIDENCE—GROUNDS FOR NEW TRIAL.

The evidence warranted the verdict, and no sufficient reason appears for granting a new trial.

(Additional Syllabus by Editorial Staff.)

5. CRIMINAL LAW (§§ 1172, 1169\*)—WRIT OF ERROR—REVIEW—HARMLESS ERROR.

Where a verdict finds accused guilty under the second count, having the effect of acquitting him under the first count, assignments of error in the admission of evidence and instructions relating to the first count are immaterial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3128, 3154, 3157, 3159-3163, 3088, 3137-3143; Dec. Dig. §§ 1172, 1169.\*]

Error from City Court of Athens; H. S. West, Judge.

Sam Harris was convicted of being intoxicated in a church, and brings error. Affirmed.

John B. Gamble, of Athens, for plaintiff in error. S. C. Upson, Sol., and Chas. E. Smith, both of Athens, for the State.

POTTLE, J. On May 1, 1911, Lewis Richardson made affidavit that the accused did on the 30th day of April, 1911, commit the offense of a misdemeanor by being intoxicated at Mt. Sinai church in Clarke county, Ga. Upon this affidavit a warrant was issued, and the accused was arrested and bound over by the committing magistrate to the next term of the city court of Athens. On November 21st the accusation was filed, based upon the aforesaid affidavit, and charged that the accused disturbed a congregation of persons lawfully assembled for divine service at Mt. Sinai church by using profane language and by being intoxicated, and that the accused did at the same time wrongfully appear at Mt. Sinai church intoxicated when divine services were being held. The accused was not tried upon this accusation, but on November 22d, while the accused was in court, another affidavit was made by Lewis Richardson, charging that the accused did on April 30, 1911, commit the offense of a misdemeanor by disturbing divine services and appearing at Mt. Sinai church, in Clarke county, in an intoxicated condition and under the influence of intoxicating liquor. Upon this affidavit another accusation was framed, containing two counts; the first charging that the accused wrongfully disturbed a congregation of persons lawfully assembled for divine worship at Mt. Sinai church, in Clarke county, by cursing and using profane language and by being intoxicated; and secondly, that the accused also committed the offense of a misdemeanor by appearing at Mt. Sinai

Church when people were assembled for divine services on April 30, 1911, intoxicated and under the influence of intoxicating liquor. No second warrant was issued, nor was any further arrest made, but the accused was put on trial on the second accusation. The bill of exceptions recites that the accused was forced to plead to the second accusation, and that through his attorney he did appear and enter a plea of not guilty, "without having waived formal arraignment." Before pleading, however, the accused filed a plea in abatement raising the objection that he could not properly be put upon trial upon the second accusation, for two reasons: First, that the solicitor was without authority to draw a second accusation charging an offense founded upon the same transaction as that referred to in the first accusation, when that accusation was still undisposed of; and, second, that, no warrant based upon the second affidavit having been issued, the accused was not legally in the custody of the court, and the court had no power to force him to trial upon the second accusation before he had been arrested and committed or had waived commitment in the manner provided by law. The plea in abatement was stricken, and a verdict was returned, finding the accused guilty under the second count in the accusation; that is, the count charging that he appeared at the church in an intoxicated condition. His motion for a new trial was overruled, and he has sued out a bill of exceptions complaining of this judgment and also of the judgment striking his plea in abatement.

[1] 1. The judge of the city court attaches to the bill of exceptions a supplemental certificate, made after the bill of exceptions was certified, setting forth certain facts bearing upon the point, made by the accused, that he was forced to trial without having waived formal arraignment. Under well-established practice this court cannot consider this additional certificate of the trial judge; for, when he signed the first certificate to the bill of exceptions, he lost jurisdiction to make any further certification in reference to the facts of the case or his rulings during the progress of the trial, except in those instances provided for in section 6149 of the Civil Code (1910). But, without reference to the statement of facts made in the supplemental certificate, we do not think there is any merit in the point that the accused was forced to trial without having waived formal arraignment. Indeed, there is really no exception made in reference to this point with which this court can properly deal; but, since it is argued at length in the brief of counsel for plaintiff in error, we briefly dispose of it. Arraignment of a prisoner consists of nothing more than reading the indictment to him, and asking him in open court whether he is guilty or not guilty. It affirmatively appears from the bill of excep-

tions that the accused was asked to plead guilty or not guilty to the accusation, and that he did through his counsel enter a plea of not guilty. It does not appear that, when he was required to plead, he called the attention of the court to the fact that he had not waived arraignment, or that anything was said to advise the court of the fact that the printed words, "waives formal arraignment," had been stricken from the printed waiver on the back of the accusation before the plea of not guilty was entered. These facts, we think, bring the case clearly within the rule laid down in *Hudson v. State*, 117 Ga. 704, 45 S. E. 66, to the effect that one will be held to have waived formal arraignment if by his silent acquiescence, before the case is submitted to the jury on its merits, he does not bring to the attention of the court that he has not been formally arraigned. This decision was followed by this court in *Waller v. State*, 2 Ga. App. 636, 58 S. E. 1106, wherein it was held: "The right of formal arraignment and plea will be conclusively considered as waived, where the defendant goes to trial before the jury on the merits, and fails, until after verdict, to bring to the attention of the court that he has not been formally called upon to enter a plea to the indictment." The whole object of the proceeding is to identify the defendant, acquaint him with the accusation, and obtain his plea; and, if the prisoner voluntarily tenders his plea and the court accepts it, nothing more is required. 1 Bishop, Criminal Procedure, 733. It is true that the bill of exceptions recites that the defendant was forced to plead to the accusation, but there is no recital in the bill of exceptions, nor does it appear anywhere from the record, that the court's attention was called to the fact that the accused had not waived formal arraignment, nor that the right to formal arraignment was expressly denied him. The almost universal practice, especially in misdemeanor cases, is for the accused to waive arraignment, and, if he desires formal arraignment by having the accusation read over to him and the formal inquiry made, "Are you guilty or not guilty?" he should, when required to plead, call the court's attention to the fact that he has not waived his right to be formally arraigned.

[2] 2. The further point is made that it was not competent to place the accused upon trial under the second accusation while the first one was still pending. There is no merit in this contention. The state may have as many indictments or accusations as it pleases charging the same offense, and may place the accused upon trial under any one of them, and a conviction or acquittal under any of the indictments or accusations will be a bar to a prosecution under any of the others. *Irwin v. State*, 117 Ga. 706, 45 S. E. 48.

[3] 3. The point that the accused could not be put on trial because a warrant was



not issued upon the second affidavit is also without merit. The accused was in court under a commitment upon a warrant issued upon the first affidavit. It has been held that the fact that one accused of crime may have been illegally arrested constitutes no reason why he should not be put on trial when actually brought into court for that purpose. The second affidavit was made in open court before the judge of the city court, and an accusation immediately drawn and filed. It was not necessary that a second warrant should have been issued or that the judge of the city court or any other magistrate should have gone through the formality of committing the accused a second time to be tried. He was present in court in the custody of the court, and there was no reason why he could not be put upon his trial.

[4] 4. The evidence amply warranted the conviction under the second count of the accusation.

[5] Since the effect of the verdict finding the accused guilty under the second count in the accusation was to acquit him of the charge contained in the first count of disturbing public worship, it is not necessary to notice any of the assignments of error complaining of admission of evidence and instructions of the trial judge relating to the first count in the accusation. The evidence was amply sufficient to authorize the conviction of the accused of a violation of section 439 of the Penal Code (1910), and none of the assignments of error are meritorious.

Judgment affirmed.

(11 Ga. App. 114)

**SMALL GRAIN DISTILLING CO. v. DAVIS.**  
(No. 3,906.)

(Court of Appeals of Georgia. May 7, 1912.)

*(Syllabus by the Court.)*

**1. INTOXICATING LIQUORS (§ 329\*)—SALES—ACTION FOR PRICE.**

One cannot recover for the price of intoxicating liquor sold in violation of law. An act done in disobedience of the law creates no right of action which a court of justice will enforce.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. §§ 474-481; Dec. Dig. § 329.\*]

**2. INTOXICATING LIQUORS (§ 329\*)—SALES—ACTION FOR PRICE.**

A dealer in intoxicating liquors residing in Louisville, Ky., without an order, shipped by a common carrier whisky consigned to a person living in the state of Georgia. The shipment of liquor was followed by a letter from the consignor to the consignee, proposing to sell to him the liquor on credit for a specified price. The consignee, under the impression that the liquor was a gift, took it from the express office and used it, and, having subsequently received the letter from the consignor, proposing to sell, refused to buy or to pay for the whisky. *Held*, the delivery of the whisky was made to the consignee in the state of Georgia, and if there arose under the facts, an implied assumpsit on his part to pay for the whisky, the implied contract was completed in

the state of Georgia, where the sale of liquor is illegal, and the seller cannot recover the value thereof.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. §§ 474-481; Dec. Dig. § 329.\*]

Error from Superior Court, Jones County; Jas. B. Park, Judge.

Action by the Small Grain Distilling Company against Mack Davis. Judgment for defendant, and plaintiff brings error. Affirmed.

The undisputed facts in this case are as follows:

The Small Grain Distilling Company, of Louisville, Ky., without having received any order, delivered to the Southern Express Company, at Louisville, one case, containing 12 quarts, of "Four Star" whisky, consigned to Mack Davis, of Wayside, Jones county, Ga. Davis was notified by the express agent of Wayside that a package was in the office, addressed to him; and Davis, not knowing what the package contained, receipted for it, and took it out of the express office. He opened the package, and ascertained that it contained whisky. He subsequently gave away all except 4 quarts of this whisky. After the receipt of the whisky, he received from the Small Grain Distilling Company the following letter: "Mr. Mack Davis, Wayside, Ga.—Dear Sir: Hospitality is the gentle art of making folks feel good. The beverage refreshment has always been accepted as the symbol of Southern good cheer. Fine old whisky, temperately used, soothes and satisfies—fills the void. One of our mutual friends advises us that you are in the market for beverage refreshment, and, knowing your responsibility, we are taking the liberty of sending you, express prepaid, a case of 10 year old Paul Jones, on open account, terms 30 days, price delivered \$14.50, though the value is more. In the event we have overstepped your wishes, kindly drop us a line, and we will have the shipment brought back, or turn over to one of our other customers in your vicinity. We hope, however, that you may find it expedient to use the shipment on invoice terms. Awaiting a reply, and thanking you in anticipation, we remain."

In reply to this letter, Davis wrote as follows: "Small Grain Distilling Co., Louisville, Ky.—Gentlemen: I am in receipt of your circular of the 23d, inclosing bill for \$14.50 for 12 quarts of 'Paul Jones Four Star.' About 12 hours before receiving your bill, an express package was delivered to me, express prepaid, and, believing thoroughly in your axiom, 'Hospitality is the art of making folks feel good,' I concluded that some of my good friends in Louisville had made me a present, and immediately began to put the axiom in practice among my local friends. As a result, a good part of the shipment, which I supposed to be a present, had been disposed of. The rest is here in my posses-

sion, but I do not feel that I have any money to spend for refreshments. If you will advise disposition, you may do so. Inclosed find your bill for \$14.50."

In reply to this the Distilling Company wrote as follows: "Mr. Mack Davis, Wayside, Ga.—Dear Sir: Answering your favor of the 24th, the drinks are evidently on us, and we are perhaps overpresumptuous in sending on the goods without first obtaining your permission. Our records show that we wrote you and inclosed invoice several hours before the goods went forward, and the letter must have been delayed in transit. Will ask that you kindly return the goods, at our expense, and advise when same goes forward, so that we can be on the lookout for it."

Davis did not comply with this request, retained all of the whisky, and refused to pay the Distilling Company for it. Whereupon the company brought a suit against Davis in a justice's court for \$14.50, the value of the whisky. Davis defended, on the ground that the sale of the whisky was made in Georgia, and that, as it was contrary to the law of the state of Georgia to sell whisky in the state, the Distilling Company could not recover. On certiorari, the superior court affirmed the judgment of the justice, and overruled the certiorari; and this is the error assigned.

Johnson & Johnson, of Gray, for plaintiff in error. R. N. Hardeman, of Gray, for defendant in error.

HILL, C. J. (after stating the facts as above). [1] The controlling question in the case is: Was the sale of the whisky made in the state of Georgia? If it was, the sale was illegal, and the plaintiff would have no right to recover its value. One cannot recover for the price of intoxicating liquor sold in violation of law. An act done in disobedience of law creates no right of action which a court of justice will enforce. *Miller v. Ammon*, 145 U. S. 421, 12 Sup. Ct. 884, 36 L. Ed. 759. The general rule of law is that a contract made in violation of a statute is void, and that, when a plaintiff cannot establish his cause of action without relying upon an illegal contract, he cannot recover; or, as otherwise tersely expressed: "There can be no civil right where there can be no legal remedy; and there can be no legal remedy for that which is in itself illegal." This rule is so well established that any further citation of authority is deemed unnecessary. There may be some exceptions to this general rule; but the facts of the instant case do not bring it within any exception.

[2] We come directly to the question whether, under the admitted evidence, the sale was made in Georgia. Section 4125 of the Civil Code of 1910 declares that "delivery of goods is essential to the perfection of a sale, \* \* \* and until delivery is made, or dispensed with, the goods are at the risk

of the seller." Another general rule pertinent to the question now under consideration is that delivery to a common carrier is delivery to the consignee. *Newsome v. State*, 1 Ga. App. 793, 58 S. E. 71; *Falvey & Company v. Richmond*, 87 Ga. 99, 13 S. E. 261; *Mann & Melton v. Glauber & Isaacs*, 96 Ga. 795, 22 S. E. 405. This proposition of law, however, is based upon the fact that the consignee gives to the consignor or shipper an order for the shipment of the goods. If Davis had ordered the whisky from the Distilling Company to be shipped to him by way of the express company, or by any common carrier, the delivery to the common carrier would have been in law a delivery to Davis, and the title to the whisky would have been in Davis, and the sale would have been consummated in the state of Kentucky. Here there was no order given by Davis to the Distilling Company for the whisky. Davis knew nothing about the whisky until after it had reached Wayside. The seller could not, by its unauthorized act in not only selecting Davis as the consignee, but also in selecting the carrier to make the transportation, put the title of the whisky in Davis. Where the seller undertakes to deliver the goods himself at the buyer's place of business, and selects his own carrier, the carrier is usually regarded as an agent of the seller, who thus assumes the risk of carriage. And so, where the sale is conditional upon payment on or before delivery, or the like, the mere delivery to the carrier before the condition precedent is performed will not ordinarily pass the title to the purchaser. 4 *Elliott on Railroads*, § 1414.

Under the facts of this case, the Distilling Company not only assumed the risk of carriage, but also assumed the risk that Davis would accept and pay for the whisky. The proposed seller took the chance, probably relying upon the information, which it states it had received from some of Davis' friends, that he "was in the market for beverage refreshment." Indeed, the whole conduct of the Distilling Company clearly shows, not a contract of sale, but a mere offer to sell, which was not accepted by Davis. The title to the whisky never got out of the Distilling Company. In fact, no sale was consummated. It would have been consummated if Davis had paid for the whisky, and in that event the contract of sale would have been made in Georgia, where it was delivered to Davis, and would have been governed by the law of Georgia. The plaintiff can recover only on the theory that the sale was made to Davis, and the sale could not have been made, under the facts of this case, anywhere except in the state of Georgia. Now, Davis refused to pay for the whisky. He first treated the shipment as a gift from some unknown friend, and, when he was informed that it was an effort to sell him the whisky, he refused to buy, but nevertheless retained

the liquor. If keeping the whisky and using it, after having been notified that it was not a gift, but was intended as a sale, raised an implied assumpsit on the part of Davis to pay for the whisky, the contract was completed in Georgia. Probably, from a moral standpoint, Davis should have paid for the whisky after having used it; but courts have nothing to do with such questions, but are bound by rules of law. The Distilling Company knew that it was a violation of law to sell whisky in the state of Georgia, and, in thus endeavoring to evade the law of this state, the loss of both the whisky and the value thereof was only what it justly deserved.

It is insisted by counsel for plaintiff in error that this shipment was protected by the interstate commerce provision of the federal Constitution. He relies upon the case of *Rose v. State*, 133 Ga. 353, 65 S. E. 770. The *Rose Case* is distinguished on the facts from the present case. In that case the Supreme Court held that a liquor dealer in Chattanooga, Tenn., who solicited orders for the sale of intoxicating liquors by a circular, sent through the United States mail from Chattanooga to a person in this state, where the sale of intoxicating liquors is prohibited, did not violate the criminal statutes of this state. In the present case there was no soliciting of orders by the plaintiff, but it shipped the liquor directly into this state without any order from the consignee, where, if a sale had been made, it would have been in palpable violation of the law of this state. Dealers in intoxicating liquors outside of this state cannot in this manner create interstate commerce and expect to be protected under the provisions of the federal Constitution. *Cureton v. State*, 136 Ga. 91, 70 S. E. 786.

Judgment affirmed.

(11 Ga. App. 133)

**RODGERS v. HILL-WILLIAMSON CO.**  
(No. 4,026.)

(Court of Appeals of Georgia. May 7, 1912.)

(Syllabus by the Court.)

**1. NEW TRIAL (§ 18\*)—PROCEEDINGS—ASSIGNMENT OF ERROR.**

Assignment of error upon a judgment overruling a demurrer to a plea cannot properly be made in a motion for a new trial.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 24-29; Dec. Dig. § 18.\*]

**2. SUFFICIENCY AND ADMISSIBILITY OF EVIDENCE—CHARGE OF COURT—NO ERROR.**

The evidence was conflicting, and authorized the verdict in the defendant's favor. There was no error in the admission of evidence. In the light of the entire charge, the extracts therefrom upon which error is assigned are free from substantial error. No sufficient reason has been shown for reversing the judgment refusing a new trial.

Error from City Court of Oglethorpe; R. L. Greer, Judge.

Action by Homer L. Rodgers against the Hill-Williamson Company. Judgment for defendant, and plaintiff brings error. Affirmed.

J. J. Bull and Jared J. Bull, both of Oglethorpe, for plaintiff in error. Jule Felton, of Montezuma, for defendant in error.

POTTLE, J. Judgment affirmed.

(11 Ga. App. 134)

**EASTERLING v. STATE.** (No. 4,090.)

(Court of Appeals of Georgia. May 7, 1912.)

(Syllabus by the Court.)

**1. CRIMINAL LAW (§ 1023\*)—WRIT OF ERROR—DECISIONS REVIEWABLE—"JUDGMENT."**

A judgment is a decision or sentence of the law, pronounced by the court and entered upon its docket, minutes, or record. A mere oral decision is not a "judgment," from which an appeal can be entered, until it has been put in writing and entered as such (citing 4 Words and Phrases, 3832).

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2583-2598; Dec. Dig. § 1023.\*]

**2. CRIMINAL LAW (§ 1181\*)—WRIT OF ERROR—DISMISSAL—EFFECT.**

While the dismissal of a writ of error, by the Supreme Court or the Court of Appeals, operates as an affirmance of the judgment rendered by the court below, yet where no judgment has been rendered by the court below, the dismissal is a mere nullity, since there is no judgment to be affirmed.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2971-2979, 2985; Dec. Dig. § 1181.\*]

**3. CRIMINAL LAW (§ 1083\*)—WRIT OF ERROR—EFFECT OF TRANSFER OF CAUSE.**

Where no judgment overruling a motion for a new trial has in fact been rendered, the mere prosecution of a writ of error to this court, seeking to have reviewed an alleged judgment overruling the motion for a new trial in a criminal case, will not preclude the plaintiff in error from thereafter showing, from the record, that no judgment overruling the motion had been in fact rendered by the court below, and from insisting that the motion for a new trial, which had been duly filed, approved, and considered by the court below, be there heard and determined.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2732; Dec. Dig. § 1083.\*]

Error from Superior Court, Tattnall County; W. W. Sheppard, Judge.

Boy Easterling was convicted of a violation of the prohibition law, and brings error. Reversed, with directions.

See, also, 9 Ga. App. 464, 71 S. E. 774.

Hines & Jordan, of Atlanta, and H. H. Elders, of Reidsville, for plaintiff in error. N. J. Norman, Sol. Gen., of Savannah, for the State.

At the October term, 1910, of Tattnall superior court, Boy Easterling was convicted of a violation of the prohibition law, and he made a motion for a new trial, which was heard by the presiding judge, and at the conclusion of the hearing the judge announced orally that he would overrule the

motion. A written order overruling the motion was prepared, to be signed by the judge; but, through some inadvertence, this order was never signed, and there was no judgment overruling the motion for a new trial, and no record showing that such an order had been passed. Subsequently the movant prepared a bill of exceptions, reciting that the judge had passed an order overruling his motion for a new trial, and excepting to such order. After the bill of exceptions had been certified and served, the attorney for the movant discovered that no order had been passed and no judgment entered overruling the motion for a new trial, and he thereupon instructed the clerk not to send up to the Court of Appeals the bill of exceptions, stating that he proposed to withdraw it. The solicitor general, however, directed the clerk to send up to the Court of Appeals the bill of exceptions, with a certificate that the delay in the transmission of the record was due to the above instructions of the attorney for the plaintiff in error. In the Court of Appeals, when the case was called, the solicitor general made a motion to dismiss the writ of error, because of the delay in sending up the record, which had been caused by the attorney for the plaintiff in error. In answer to this motion counsel for the plaintiff in error asked the Court of Appeals for leave to withdraw the bill of exceptions, without prejudice, on the ground that no judgment had been rendered overruling his motion for a new trial. The request for leave to withdraw was refused by the Court of Appeals, and the writ of error was finally dismissed because of the delay in the transmission of the record. *Easterling v. State*, 9 Ga. App. 464, 71 S. E. 774. This judgment of the Court of Appeals was made the judgment of Tattnall superior court, and thereupon the solicitor general made a motion to have the sentence of the court theretofore imposed upon the accused carried into effect. The accused resisted this motion, on the ground that his motion for a new trial had never been disposed of and was still pending, and requested the trial judge to give him a hearing thereon. The trial court refused to hear the motion for a new trial, and ordered the sheriff to execute the sentence imposed upon the accused, and this is the error complained of.

HILL, C. J. (after stating the facts as above). [1] The first question is whether the oral announcement of the trial judge on the hearing of the motion for a new trial amounted to a judgment, from which an appeal could be entered. A judgment is a decision or sentence of the law, pronounced by the court and entered upon its docket, minutes, or record. A judgment of a court of record can only be shown by its records. Where there is no record, there is no judgment. *Plant v. Gunn*, 19 Fed. Cas. 800; *Tidd's Practice*, 930. Another definition is

that a judgment is that final determination from which an appeal may be taken, and which is evidenced by the formal entry made by the clerk of the court. 4 Words and Phrases Judicially Defined, 3832. In *Lytle v. De Vaughn*, 81 Ga. 228, 7 S. E. 281, the court announced orally that the motion to dismiss an illegality was granted. No order of dismissal was entered on the original papers, or on the minutes of the court, or signed by the judge, and it was held that, as the court was a court of record, the mere announcement by the judge of his judgment did not terminate the case, but it remained pending in court to await the preparation and entry of the final order or judgment, and that the pleadings were amendable even after the oral announcement of judgment by the court and before any final order or judgment had been signed or entered on the minutes. And in *Freeman v. Brown*, 115 Ga. 27, 41 S. E. 385, it was held that what the judge orally declares is no judgment, until it has been put in writing and entered as such, and the decision in *Lytle v. De Vaughn* was referred to as authority directly in point. The two decisions cited from the Supreme Court were on the question as to whether or not the pleadings were amendable after an oral decision had been announced, but before such decision had been signed or entered, and they both held that before the signing or entry of the decision the pleadings were amendable. We conclude from these decisions, as well as from the other authorities above cited, that the mere oral announcement by Judge Seabrooke, on the hearing of the motion for a new trial, that the motion would be overruled, was not a judgment. It was not signed by the judge, and no judgment was entered on the minutes of the court. If the judgment had been written on the original pleadings and signed by the judge, it would have been a valid judgment; or if the oral decision had subsequently been entered on the minutes in writing by the clerk, and the minutes had been approved by the judge, this, we think, would also have amounted to a judgment.

[2] There having been no judgment overruling the motion for a new trial, there was nothing from which to except, and the writ of error which was subsequently sued out was a mere nullity. If there had been a judgment in the court below, the dismissal would have operated as an affirmation of the judgment; for there can be no doubt about the proposition that when a case is taken to the Court of Appeals, and the writ of error is there dismissed for any cause, the judgment of the court below is affirmed as effectually as if the case had been heard on its merits and the judgment of the court announced thereon. *Rice v. Carey*, 4 Ga. 569. But the Court of Appeals, in dismissing the writ of error, could not make a judgment in the court below. It could only affirm the

judgment rendered by that court, and in this case no judgment had been entered. None was signed by the judge, and none placed upon the minutes, and consequently there was no judgment to be affirmed. It necessarily follows from this that the motion for a new trial is still pending in the court below, and should be heard and determined.

[3] When counsel for plaintiff in error first discovered that there had been no judgment rendered on his motion for new trial, and that the recital in the bill of exceptions was a mistake, he probably should have applied to the presiding judge to then perfect the record by embodying his oral decision into a judgment. *Merritt v. State*, 122 Ga. 752, 50 S. E. 926; *Tyler v. State*, 125 Ga. 46, 53 S. E. 818. We do not think the mere recital in the bill of exceptions, that a judgment had been rendered overruling the motion for a new trial operates, under the facts of this case, as an estoppel against the plaintiff in error. The record disclosed that no such judgment had been entered. Besides it was conceded that none had been rendered. Even in civil cases estoppels are not favored, and in a case where liberty is involved this court is even less willing to invoke the doctrine.

For the foregoing reasons, the judgment of the lower court is reversed, with direction to hear and determine the pending motion for a new trial.

Judgment reversed, with direction.

(11 Ga. App. 132)

WEAVER et al. v. THOMPSON. (No. 4,023.)

(Court of Appeals of Georgia. May 7, 1912.)

(Syllabus by the Court.)

1. HABEAS CORPUS (§ 113\*)—PROCEEDINGS—APPEAL.

Under the provisions of Penal Code 1910, § 1316, judgments in "habeas corpus cases" can be reviewed in this court only upon a bill of exceptions sued out within 20 days from the date of the judgment complained of. This rule is applicable to all cases wherein the writ of habeas corpus is issued, and applies as well to a case involving the detention of a minor child, to the custody of which the applicant claims to be entitled, as it does to any other case where one is alleged to be restrained of his liberty without warrant or authority of law. The policy of the law is to require a speedy determination of all habeas corpus cases, and, under the statute, they are placed in the same class as criminal and injunction cases.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. §§ 102-115; Dec. Dig. § 113.\*]

2. HABEAS CORPUS (§ 113\*)—PROCEEDINGS—APPEAL—"CERTIORARI."

The writ of certiorari is simply the medium through which the judgment in a case pending before an inferior judiciary may be reviewed in the superior court. Where the judgment of a judge of a city court, awarding the custody of a minor child, is carried to the superior court by "certiorari," the case is

still "a habeas corpus" case in the latter court, and the judgment of that court can be reviewed in this court only upon a "fast" bill of exceptions. The decision in *Mansfield v. State*, 94 Ga. 74, 20 S. E. 249, is in principle controlling.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. §§ 102-115; Dec. Dig. § 113.\*]

For other definitions, see Words and Phrases, vol. 2, pp. 1035-1041; vol. 8, p. 7598.]

3. HABEAS CORPUS (§ 113\*)—PROCEEDINGS—APPEAL.

The writ of error, not having been sued out within 20 days from the judgment complained of, must be dismissed.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. §§ 102-115; Dec. Dig. § 113.\*]

Error from Superior Court, Dooly County; U. V. Whipple, Judge.

Habeas corpus proceedings between Flora Weaver and others and A. E. Thompson. From the judgment, Flora Weaver and others bring error. Dismissed.

R. L. Greer, of Oglethorpe, and Jule Felton, of Montezuma, for plaintiffs in error. L. L. Woodward, of Vienna, and Crum & Jones, of Cordele, for defendant in error.

POTTLE, J. Writ of error dismissed.

(11 Ga. App. 150)

REDDICK v. STATE. (No. 4,104.)

(Court of Appeals of Georgia. May 7, 1912.)

(Syllabus by the Court.)

1. CRIMINAL LAW (§ 824\*)—TRIAL—INSTRUCTIONS—NECESSITY FOR REQUEST.

In the absence of a request to charge to that effect, a new trial is not required by the omission of the court to charge the jury in a criminal case that they are the judges of the law and the facts, or that they are to ascertain the facts from the evidence and the defendant's statement, and are to take the law as given them in charge by the court, and, by applying the law thus given to the facts so ascertained, make up their verdict. The fact that the jury are not specially instructed that they are the judges of the law and the facts in criminal cases (there being in the charge no reference whatever to this subject) does not deprive the accused of the right granted to him by article 1, § 2, par. 1, of the Constitution of the state of Georgia (Civil Code, § 6382).

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1996-2004; Dec. Dig. § 824.\*]

2. HOMICIDE (§ 310\*)—TRIAL—INSTRUCTIONS—ELEMENTS OF OFFENSE.

An instruction that, "to constitute the offense of assault with intent to murder, there must be made an assault by one person upon another, with a weapon likely to produce death in the manner used, the assault must be actuated by malice, either express or implied, and made by a person making the assault with the specific intent to kill the person assaulted," is not error, either for the reason that it tended to confuse the jury or for any other reason.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 657-661; Dec. Dig. § 310.\*]

### 3. CRIMINAL LAW (§ 824\*)—INSTRUCTIONS—REQUESTS—CIRCUMSTANTIAL EVIDENCE.

When the facts from which the inference of guilt or innocence is to be drawn are all established by direct proof, and only the intent with which the alleged criminal act was committed, or the degree of criminality, must be inferred, the trial judge, in the absence of a timely request, is not required to give in charge to the jury the usual rule applicable to circumstantial evidence, to the effect that if the proved facts are consistent with innocence the defendant should be acquitted, and this for the reason that every one is presumed to intend the natural and legitimate consequences of his acts.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1996-2004; Dec. Dig. § 824.\*]

### 4. CRIMINAL LAW (§ 778\*)—TRIAL—INSTRUCTIONS—PRESUMPTION OF INNOCENCE.

It is error to fail to charge the jury in a criminal case substantially to the effect that the defendant enters upon his trial with the presumption of innocence in his favor, and that this presumption of innocence remains with him throughout the trial and until his guilt is established by proof.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1846-1852, 1854-1857, 1960, 1967; Dec. Dig. § 778.\*]

### 5. HOMICIDE (§ 112\*)—JUSTIFICATION—SELF-DEFENSE—PROVOCATION.

The law will not hold him guiltless who creates the necessity to kill another by provoking an attack in order to afford himself a pretext for slaying his assailant; but one who has provoked a difficulty may defend himself against violence on the part of the one provoked, if the violence against which he defends is disproportionate to the seriousness of the provocation, or greater in degree than the law recognizes as being justifiable under the circumstances.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 145-150; Dec. Dig. § 112.\*]

Error from Superior Court, Early County; W. C. Worrlill, Judge.

Tony Reddick was convicted of an assault with intent to murder, and brings error. Reversed.

Rambo & Wright, of Blakely, for plaintiff in error. J. A. Laing, Sol. Gen., of Dawson, and R. R. Arnold, of Atlanta, for the State.

RUSSELL, J. Judgment reversed.

(11 Ga. App. 151)

WILLIAMS v. STATE. (No. 4,103.)

(Court of Appeals of Georgia. May 7, 1912.)

(Syllabus by the Court.)

#### 1. SUFFICIENCY OF EVIDENCE.

The evidence authorized the verdict.

#### 2. CRIMINAL LAW (§ 824\*)—TRIAL—INSTRUCTIONS—SUFFICIENCY.

In the absence of a request, it is not error to omit to charge the jury that they are judges of the law and facts in criminal cases. The special assignments of error are controlled by the ruling of this court in Reddick v. State, 74 S. E. 901 (paragraph 1), this day decided.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1996-2004; Dec. Dig. § 824.\*]

Error from Superior Court, Early County; W. C. Worrlill, Judge.

Hope Williams was convicted of crime, and brings error. Affirmed.

Rambo & Wright, of Blakely, for plaintiff in error. J. A. Laing, Sol. Gen., of Dawson, and R. R. Arnold, of Atlanta, for the State.

RUSSELL, J. Judgment affirmed.

(11 Ga. App. 142)

KIRKSEY v. STATE. (No. 4,098.)

(Court of Appeals of Georgia. May 7, 1912.)

(Syllabus by the Court.)

#### 1. INDICTMENT AND INFORMATION (§ 137\*)—GRAND JURY (§ 17\*)—IMPANELING—STATUTORY PROVISIONS.

The statutory provisions in reference to the making up of jury lists and the selecting and summoning of juries are in the main directory only. The question of the equalization and distribution of jury service concerns the public and the citizens generally more than it does an individual accused of crime. The fact that the jury commissioners may place in the grand jury box a list of names containing more than two-fifths of the whole list of jurors selected by the commissioners, and that from this grand jury box a grand jury is selected, impaneled, and sworn, which returns an indictment against one accused of crime, is no ground either for challenge to the array of the grand jury before indictment or for quashing the indictment; it appearing that all of the grand jurors whose names were placed in the grand jury box were selected from the jury list made up in the manner required by law, and that each of such grand jurors was qualified to serve as such.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 480-487; Dec. Dig. § 137.\* Grand Jury, Cent. Dig. §§ 42-47; Dec. Dig. § 17.\*]

#### 2. CRIMINAL LAW (§ 422\*)—EVIDENCE—ACTS AND DECLARATIONS OF CONSPIRATORS.

Where two or more persons conspire to commit, and actually engage jointly in the commission of, a crime, the act of one is the act of all, and the sayings and conduct of all of the conspirators pending the conspiracy, and in furtherance of it, are admissible in the trial of each of them.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 984-988; Dec. Dig. § 422.\*]

#### 3. CRIMINAL LAW (§ 333\*)—TRIAL—INSTRUCTIONS—BURDEN OF PROOF.

Following numerous decisions of the Supreme Court, it is not error to charge that "the onus is on the accused to verify the alleged alibi, not beyond a reasonable doubt, but to the satisfaction of the jury. While the burden is placed upon the defendant to verify the truth of a defense of an alibi, it is not incumbent upon him to establish it by any greater degree of proof than to establish any other facts set up in his defense." This court declines to request the Supreme Court to review and overrule the decisions announcing the rule laid down in this instruction.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 751; Dec. Dig. § 333.\*]

#### 4. SUFFICIENCY OF EVIDENCE—NO ERROR.

The evidence fully warranted the verdict, and no error of law was committed.

Error from Superior Court, Miller County; W. C. Worrlill, Judge.

Will Kirksey was convicted of assault with intent to murder, and brings error. Affirmed.

W. I. Geer, of Colquitt, for plaintiff in error. J. A. Laing, Sol. Gen., of Dawson, and R. R. Arnold, of Atlanta, for the State.

POTTLE, J. The accused was convicted of the offense of assault with intent to murder one Coon Oliver. His motion for new trial having been overruled, he has sued out a bill of exceptions to this court, complaining of this judgment, and also of the refusal of the court to sustain a challenge to the array of the grand jury, and a plea in abatement to the indictment, based upon the ground that the jury list from which the grand jury was selected exceeded two-fifths of the whole number of persons selected by the jury commissioners to serve as jurors.

[1] 1. The Constitution of this state requires the General Assembly to provide for the selection of the most intelligent, experienced, and upright men to serve as grand jurors. Penal Code 1910, § 855. The statute passed in pursuance of this constitutional mandate provides that the jury commissioners shall revise the jury list from time to time, and select from the books of the tax receiver upright and intelligent men to serve as jurors. The names of the persons so selected shall be placed on tickets, and from this number "a sufficient number, not exceeding two-fifths of the whole number, of the most experienced, intelligent and upright men to serve as grand jurors," are to be chosen. Penal Code 1910, § 819. At common law grand jurors were selected, as well as summoned and returned, by the sheriff; but in most of the states statutory provisions have been enacted prescribing the method of making up jury lists and selecting and summoning jurors. In many of the states it is provided expressly by statute that the method prescribed for making up jury lists and selecting both grand and traverse jurors is directory only. See *Head v. State*, 44 Miss. 731; *State v. Krug*, 12 Wash. 288, 41 Pac. 126; *State v. Fidler*, 23 R. I. 41, 49 Atl. 100; *Huling v. State*, 17 Ohio St. 583. But even in those states where the method of selecting jurors has not been expressly made directory by statute, it is generally held that mere irregularities in connection with the method of making up jury lists and selecting and summoning and impaneling jurors do not afford sufficient reason for quashing an indictment or setting aside a verdict of guilty. See 20 Cyc. 1306; *Sage v. State*, 127 Ind. 15, 26 N. E. 667; *Commonwealth v. Brown*, 147 Mass. 585, 18 N. E. 587, 1 L. R. A. 620, 9 Am. St. Rep. 736; *Thompson on Trials*, § 37 et seq.

In *Williams v. State*, 69 Ga. 12, the Supreme Court of this state questioned whether the mode of equalizing jury duty, which does not affect the impartiality of those sum-

moned, is a proper matter for plea in abatement. In *Stevenson v. State*, 69 Ga. 68, it was held: "That 32, instead of 30, grand jurors were drawn, is not such an irregularity as would quash an indictment, much less arrest a verdict." In *Roby v. State*, 74 Ga. 812, the court said: "Where the law is substantially complied with, and upright and intelligent men form the grand jury, whose duty it is to charge crime, not to try parties in the last resort, the courts should not set aside proceedings by such an inquest on mere technicalities." In *Turner v. State*, 78 Ga. 174, it was ruled: "The provisions of the Code as to the number of grand jurors to be drawn is directory, and not mandatory upon the court." The statute in reference to the number of grand jurors to be drawn provides that the judge shall cause to be drawn "not less than eighteen, nor more than thirty names, to serve as grand jurors." Penal Code 1910, § 823. In *Governor v. State*, 5 Ga. App. 357, 63 S. E. 241, this court had occasion to discuss the general subject, and held that the statute regulating the drawing of jurors was generally to be regarded as directory, and that, where there had been a substantial compliance with legal requirements, any irregularities in the drawing which could not have affected the right of trial by a fair and impartial jury furnished no ground for challenging the array. The question of distribution and equalization of jury service, and of the number of jurors to be selected, are questions which concern the public and the citizens generally more than they do a particular individual who may be charged with crime.

There is no pretense in this case that the grand jury which returned the bill against the accused was not an impartial grand jury. The Constitution of this state guarantees to one accused of crime a speedy trial by an impartial jury. There is no claim that a single person who served on the grand jury was not a qualified grand juror. The sole question is that, because the jury commissioners happened to put into the grand jury box 12 or 15 more names than made up an aggregate of two-fifths of the whole list of jurors in the county, the indictment returned by the grand jury in this case was fatally defective, and should have been quashed upon the ground that it was not found by a qualified grand jury. The statute of this state says that the judge shall not draw more than 30 names from the grand jury box to serve as grand jurors, and yet the Supreme Court has twice held that this was directory merely, and that it afforded the accused no cause for complaint, though more than 30 names were drawn from the box and were summoned to serve as grand jurors. Irrespective of other considerations, the principles of these decisions would seem to be controlling here. The accused has not been substantially injured. His case was in-

vestigated by a qualified grand jury, and an impartial grand jury, so far as the record discloses. It may be that the judge could, and that upon a proper showing it would be his duty to, mandamus the jury commissioners and compel them to re-revise the jury list in accordance with the direction contained in the statute; but certainly the mere accidental, or even intentional, insertion in the grand jury box of a few more names than the statute directed, would not have the effect of vitiating every indictment returned by a grand jury selected from this list. We think the judge was clearly right in overruling the challenge to the array before indictment, and in refusing to quash the indictment after it was found.

[2] 2. Complaint is made, in the motion for new trial, of the admission of evidence in reference to the conduct and sayings of other persons, not on trial, and of the record of the convictions of such persons of assault with intent to murder the prosecutor, in connection with the same transaction for which the accused was indicted. The evidence shows that the accused and these other persons, together with several others, went one night to the house of an inoffensive old negro, took him out in the public road in his nightclothes, shot him a number of times with pistols, and beat him over the head and body with a trace chain, after which they went back to the house and got the prosecutor's wife and severely whipped her. They left the old negro dead, as they supposed, in the road, where he remained all night, until he was rescued next morning and carried to a physician for treatment. The prosecutor testified that, when these men came to his house, he inquired their reason for attacking him, and the reply they gave was that, while they recognized that he was a good negro, at the same time they were not going to permit negroes to live in that neighborhood, and that they proposed to kill him on the night in question, and kill the others who resided in that community, from time to time, as the opportunity presented itself. We are at a loss to understand how it can be contended that the sayings and conduct of these co-conspirators were not admissible in evidence. They formed the conspiracy to kill this old man, they went to his house together for this purpose, and all of them participated in the criminal act. Under such circumstances, the act of one was the act of all, and each is equally responsible for the conduct of all. For the same reason it is very clear that the record of the conviction of these co-conspirators was also admissible in evidence.

[3] 3. The court charged as follows: "Alibi, as a defense, involves the impossibility of the defendant being present at the scene of the offense at the time of its commission, and the range of the evidence in respect to time and place must be such as reasonably

to exclude the possibility of presence. The onus is on the accused to verify the alleged alibi, not beyond a reasonable doubt, but to the satisfaction of the jury. While the burden is placed upon the defendant to verify the truth of a defense of an alibi, it is not incumbent upon him to establish it by any greater degree of proof than to establish any other fact set up in his defense." Counsel for the plaintiff in error concede that this charge is in harmony with a number of decisions of the Supreme Court, which they cite in their brief. They argue, however, that these decisions are wrong, and base their contention upon a dictum of Judge Powell in *Smith v. State*, 3 Ga. App. 806, 61 S. E. 739, to the effect that "in truth the burden of proving an alibi is never on the defendant." Upon the authority of this dictum counsel request us to certify this question to the Supreme Court, with a view to having that court review and overrule its numerous decisions to the contrary of the dictum just referred to. We must decline to grant this request. The proposition is settled by a long line of Supreme Court decisions, and we would not be justified in asking that court to overturn and set aside a rule of evidence which has been in force in this state from the time of 34 Ga. down to the present time. Nor have we any reason to believe that that court would comply with the request, if we made it.

[4] 4. Other complaints are made of extracts from the charge of the court; but the assignments of error are clearly without merit, and do not require any elaborate discussion. The evidence was abundantly sufficient to show the guilt of the accused. The crime was an atrocious one, absolutely without mitigation, and it is creditable to the white jurors of Miller county that they so regarded it, and promptly convicted each one of these conspirators of the highest crime charged in the indictment. There is no merit in any of the complaints made in the motion for new trial.

Judgment affirmed.

(11 Ga. App. 147)

SMITH v. STATE. (No. 4,095.)

(Court of Appeals of Georgia. May 7, 1912.)

(Syllabus by the Court.)

REVIEW ON APPEAL.

On all material questions this case is controlled by the decision this day rendered in *Kirksey v. State*, 74 S. E. 902.

Error from Superior Court, Miller County; W. C. Worrill, Judge.

Jim Smith was convicted of crime, and brings error. Affirmed.

W. I. Geer, of Colquitt, for plaintiff in error. J. A. Laing, Sol. Gen., of Dawson, and R. R. Arnold, of Atlanta, for the State.

POTTER, J. Judgment affirmed.



(11 Ga. App. 148)

**GIBSON v. STATE.** (No. 4,096.)

(Court of Appeals of Georgia. May 7, 1912.)

*(Syllabus by the Court.)***CRIMINAL LAW (§ 371\*)—WITNESSES (§ 379\*)  
—EVIDENCE OF CONSPIRACY—IMPEACHMENT  
OF WITNESS.**

Evidence was admissible that, immediately after the assault upon the prosecutor, the persons who committed the offense, at about the same place and as a part of the common purpose to drive the prosecutor, his wife, and other negroes out of the community, assaulted and beat the wife of the prosecutor. The evidence of contradictory statements of one of the witnesses for the accused was admissible for the purpose of impeachment. On all other material questions the case is controlled by the decision this day rendered in *Kirksey v. State*, 74 S. E. 902.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 830-832; Dec. Dig. § 371;\* *Witnesses*, Cent. Dig. §§ 1209, 1220-1222, 1247-1256; Dec. Dig. § 379.\*]

Error from Superior Court, Miller County; W. C. Worrill, Judge.

Clayton Gibson was convicted of assault and battery, and brings error. Affirmed.

W. I. Geer, of Colquitt, for plaintiff in error. J. A. Laing, Sol. Gen., of Dawson, and R. R. Arnold, of Atlanta, for the State.

**POTTLE, J.** Judgment affirmed.

(11 Ga. App. 148)

**WIDNER v. STATE.** (No. 4,097.)

(Court of Appeals of Georgia. May 7, 1912.)

*(Syllabus by the Court.)***CHALLENGE TO GRAND JURY—EVIDENCE.**

On all material questions this case is controlled by the decision this day rendered in *Kirksey v. State*, 74 S. E. 902.

Error from Superior Court, Miller County; W. C. Worrill, Judge.

Remus Widner was convicted of crime, and brings error. Affirmed.

W. I. Geer, of Colquitt, for plaintiff in error. J. A. Laing, Sol. Gen., of Dawson, and R. R. Arnold, of Atlanta, for the State.

**POTTLE, J.** Judgment affirmed.

(70 W. Va. 634)

**PLASTER v. HARMAN.**

(Supreme Court of Appeals of West Virginia. April 9, 1912.)

*(Syllabus by the Court.)***1. TAXATION (§ 628\*)—TAX SALES—VERIFICATION OF DELINQUENT LIST.**

A list of delinquent lands must have the affidavit required by statute when acted on by the county court; otherwise a tax sale and deed resting on it are void. An affidavit made afterwards will not do.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. § 1281; Dec. Dig. § 628.\*]

**2. TAXATION (§ 734\*)—TAX SALES—VERIFICATION OF DELINQUENT LIST.**

Though an order of a county court approving a list of lands delinquent for taxes states that the list was verified by affidavit, yet, if that list itself shows that it was not verified when acted on by the court, such list and a tax deed under it are void. Such order of the court is not conclusive of the fact.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. §§ 1470-1473; Dec. Dig. § 734.\*]

Appeal from Circuit Court, Mercer County.

Bill in equity by Mary E. Plaster against F. A. Harman. From a decree for plaintiff, defendant appeals. Affirmed.

Hale & Pendleton, of Princeton, for appellant. Hugh G. Woods, of Princeton, for appellee.

**BRANNON, P.** A lot of land in Bluefield was returned delinquent for taxes for the year 1904, and sold for such delinquency in the name of W. T. Bailey, purchased by F. A. Harman, and he obtained from the clerk of the county court a deed under such tax sale. Bailey having conveyed the lot to Mary E. Plaster, she brought a suit against Harman to annul said tax deed, alleging it to be void, and a decree was pronounced setting it aside. The delinquent list describes the lot as No. 19 in section 308, whereas it is lot 10. This is alleged as a defect in the proceedings. The original delinquent list was not retained in the clerk's office of the county court, but was transmitted to the auditor's office. The delinquent list as recorded in the book in the county clerk's office containing delinquent lists shows that the sheriff's affidavit was made the 1st day September, 1905; whereas, the order of the county court shows that the list was presented and acted upon by it long before this affidavit was made, that is, on 31st day of July. The original delinquent list sent to the auditor's office was not sworn to by the sheriff until 9th day of December, 1905, and before a different notary than the one certifying the affidavit on the 1st day of September. The order of the county court, as it appears in the record of delinquent lists in the clerk's office, shows that the sheriff presented a list of delinquent lands "verified by affidavit thereto appended," and shows those words erased by ink marks drawn through them. No order of the county court approving the delinquent list is appended to the list in the auditor's office. The printed form is unfilled.

[1] It thus does not appear that when the delinquent list was before the county court it was verified. This case is governed by former cases. *Devine v. Wilson*, 63 W. Va. 409, 60 S. E. 351, holds that the statute requiring an affidavit to a delinquent list is mandatory, and when such affidavit is wholly wanting the list and deed resting on it are void. *Wilkinson v. Linkous*, 64 W. Va. 205, 61 S. E. 152, to same effect.

[2] It is claimed that, as the county court

order states that the list was verified, that is conclusive of the fact. The county court acting upon such a matter is not a court of record of general jurisdiction of suits between parties. A deed was unwarrantably spread on record, and the county court, at the time a court of record of general jurisdiction, certified that it had been duly admitted to record; but that order was held not conclusive or final. *Herring v. Lee*, 22 W. Va. 661. But in addition the record in this case is inconsistent, contradicts itself, because the delinquent list is referred to by it, is a part or exhibit as in a bill, and it itself shows that clause not true. The list itself is the better evidence, and denies the statement in the order that the list was verified. *Richardson v. Ebert*, 61 W. Va. 523, 56 S. E. 887, reiterated in opinion in *Broad v. Berry*, 62 W. Va. 436, 59 S. E. 169, 125 Am. St. Rep. 975, and *State v. McEldowney*, 55 W. Va. 2, 47 S. E. 653.

Again, the original list in the auditor's office shows no order of the county court approving the list. If this does not deny and disprove the county court order book, still it would tell the inquiring landowner that there was no approval of the list, and mislead him I think. It would be hard to find a more irregular proceeding on which to base a tax deed. Thus there was no affidavit at the time when the list was presented to the court. There were two affidavits before different persons. The taxpayer has a deep interest in the affidavits; that is, to have it sworn that no one had paid the taxes, and that diligence had been used to find property for levy to pay them. Anyhow, the statute requiring the affidavit is mandatory.

We hold the deed to be void, and affirm the decree.

(70 W. Va. 597)

#### BLOOM v. BENNETT.

(Supreme Court of Appeals of West Virginia.  
April 9, 1912.)

(Syllabus by the Court.)

#### VENDOR AND PURCHASER (§ 299\*)—REMEDIES OF VENDOR—RECOVERY OF LAND.

Section 20, c. 90, Code 1906, does not prevent a vendor from recovering in ejectment against his defaulting vendee land sold by a written contract expressly reserving the right of re-entry for such default.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. §§ 837-842; Dec. Dig. § 299.\*]

Error to Circuit Court, Hancock County.

Action by Selina Bloom against Joseph Bennett. From an order setting aside the verdict for plaintiff and granting a new trial, she brings error. Reversed and rendered.

John R. Donehoo, of New Cumberland, for plaintiff in error. E. A. Hart, of New Cumberland, for defendant in error.

WILLIAMS, J. Selina Bloom, a vendor, sued Joseph Bennett, her vendee, in ejectment and obtained a verdict. On motion of Bennett the court set the verdict aside, and granted a new trial. To that order Mrs. Bloom obtained this writ of error.

Defendant pleaded not guilty, and also gave notice that he would rely upon a written contract of sale for the land sued for, executed by plaintiff to him, and did present at the trial a written agreement for the purchase of the land sued for, signed by plaintiff.

Under the common law, as interpreted and applied by the courts of Virginia prior to the act of April 16, 1831 (Acts 1830-31, c. 11), permitting a defendant in ejectment to make certain equitable defenses, a vendee of land, holding only an equitable title, could not defend against his vendor, or one holding legal title under him. *Davis v. Teays*, 3 Grat. (Va.) 283; *Suttle v. Railroad Co.*, 76 Va. 290. Prior to that statute, no equitable defense was available, in ejectment, against the holder of the legal title. *Fulton v. Johnson*, 24 W. Va. 95; *Taylor v. King*, 6 Munf. (Va.) 358, 8 Am. Dec. 746; *Harris v. Harris*, 6 Munf. (Va.) 367.

In those states that have abolished the distinction between courts of law and courts of chancery, as such distinction formerly existed in England, a defendant is permitted, as matter of right, to make as many defenses as he may have to any suit or action, whether such defenses were formerly denominated as legal or equitable; and in those states a vendee of land in possession under a contract of purchase, and not in default, could not be ousted by his vendor. *Warvelle on Ejectment*, § 146; 15 Cyc. 73; *Tibeau v. Tibeau*, 19 Mo. 78, 59 Am. Dec. 329; *Love v. Watkins*, 40 Cal. 547, 6 Am. Rep. 624; *Traphagen v. Traphagen*, 40 Barb. (N. Y.) 537; *Cavalli v. Allen*, 57 N. Y. 508; *Geiger v. Kaigler*, 15 S. C. 262; *Williams v. Murphy*, 21 Minn. 534. But in Virginia and in this state, the original distinction between courts of law and courts of chancery is still retained. The respective jurisdictions of the two courts are sharply defined, and depend upon the nature of the relief demanded, or the defense set up. Hence, to overcome the rigid technical rule of the common law, and to permit certain equitable defenses to an action of ejectment, which the courts of law had held were not cognizable therein, the statute referred to was enacted by the Legislature of Virginia. Under that statute as it was originally, and as it is now in Virginia, a vendee of land, in order to avail himself of its benefits, must not be in default. His defense must be such as would entitle him, in a court of equity, to specific execution against his vendor. The verbiage of section 2741, Code of Virginia 1904, is the same as it was in the Revised Code of

1849, and we do not conceive that the legal effect of the original act is changed by the change in verbiage made by the revisors of the Code of 1849. But, in adopting the Revised Code of West Virginia, which went into effect April 1, 1869, the Legislature saw fit to make a very material alteration in the Virginia statute. The statute under consideration is section 20, c. 90, Code 1906, and it reads as follows: "A vendor, or any person claiming under him, shall not at law recover against a vendee, or those claiming under him, lands sold by such vendor to such vendee, when there is a writing stating the purchase, and the terms thereof, signed by the vendor or his agent." This statute is often spoken of as one of the equitable defenses in ejectment, which would seem to be a misnomer, for it will be observed that it contains no provision that the vendee shall have complied with the terms of his contract, in order to avail himself of its benefit. It simply says that the vendor shall not recover against his vendee in possession under a written contract of purchase, stating the terms thereof, signed by the vendor or his agent. The purpose and effect of this statute is to take away from the law court the right, which is conferred by the Virginia statute, to try and pass upon the equities of the parties in such case. The modification makes the statute almost the very opposite of the Virginia law, because, in that state, the law court may inquire into the equities between vendor and vendee and decide the case accordingly; but in this state the modified statute plainly makes such written contract of sale a complete bar to the vendor's action, and precludes the law court from making inquiry into the equities between him and his vendee. The vendee's default in the performance of any of his covenants under an ordinary contract of purchase are therefore immaterial questions in ejectment, in this state. The effect of our statute, which no doubt was also the legislative purpose, is to force a vendor, who has signed a written contract of sale reserving no right of re-entry, and who has placed his vendee in possession, to pursue his remedy in equity by a suit for specific enforcement, and to deny him the right to recover the land sold, by an action in ejectment, however much his vendee may be in default.

But we cannot imagine that the Legislature intended to forbid recovery in ejectment by a vendor if he has, in his contract of sale, expressly reserved the right of re-entry for covenants broken. Such an application of the statute would not be consistent with the constitutional right of parties to contract. The vendor, in this case, had reserved the right to re-enter for vendee's default in the performance of certain covenants, and it was proven that he was in default. How much he was in arrears is not material, as

the failure to pay any part constituted a breach of the contract, for which Mrs. Bloom had reserved the right of re-entry. We do not think the statute applies in this case, and the verdict should not have been set aside. The court should have rendered judgment upon it for the plaintiff.

The order setting aside the verdict and granting defendant a new trial will therefore be reversed, and judgment will be entered here for the plaintiff for the land in the declaration described, in fee simple.

(70 W. Va. 661)

ARMENTROUT et al. v. ARMENTROUT  
et al.

(Supreme Court of Appeals of West Virginia.  
April 16, 1912.)

(Syllabus by the Court.)

1. INJUNCTION (§ 26\*)—RESTRAINING ACTION AT LAW.

Infancy, fraud in the procurement of a note, and total failure of consideration, are available as defenses at law, independently of section 5, chapter 126, Code 1906, and furnish no grounds for equitable jurisdiction to enjoin an action at law on such note.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 24-49, 54-61; Dec. Dig. § 26.\*]

2. INJUNCTION (§ 199\*)—DISSOLUTION—DECREE FOR DEFENDANT.

Upon dissolution of an injunction and dismissal of plaintiff's bill, it is error for the court, without cross pleadings by defendant, to pronounce a decree in his favor against plaintiff for the money sought to be recovered in the action at law enjoined.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 419; Dec. Dig. § 199.\*]

Appeal from Circuit Court, Randolph County.

Bill by C. L. Armentrout and others against R. E. Lee Armentrout and others. From the decree C. S. Armentrout appeals. Affirmed in part, and reversed in part.

Cunningham & Stallings, of Elkins and Parsons, and Lloyd Hansford, of Parsons, for appellant. J. W. Harman, of Parsons, and J. F. Harding and W. E. Baker, both of Elkins, for appellees.

MILLER, J. The subject of controversy is the same as in *Lambert v. Armentrout*, 65 W. Va. 375, 64 S. E. 260, 22 L. R. A. (N. S.) 556. After the judgment below had been reversed and the case remanded for a new trial, the present bill was filed by defendants in the former suit, against Lambert therein, and R. E. Lee Armentrout, who had assigned the note in controversy to Lambert, charging, as the basis for enjoining the law action, fraud in the procurement of the note and total failure of consideration.

On the filing of the bill a preliminary injunction was awarded, which, on final hearing on bill, answer and proofs taken, was wholly dissolved and the bill dismissed. The

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

court below, however, did not stop at this, but proceeded, without cross-bill by defendant or other pleading calling for affirmative relief, to pronounce a money decree in favor of Lambert against the appellant, C. S. Armentrout, surety on the note, suit on which had been enjoined, but not against O. L. Armentrout, the principal in the note, who had pleaded infancy, for the full amount of the note and interest, and the costs in the present suit, and in the suit at law in that court expended. This is the decree we now have before us for review on the present appeal.

[1] The court below was substantially right in dismissing plaintiffs' bill, and to that extent as modified here the decree appealed from must be affirmed. Infancy as a defense is available at law; and so are fraud in the procurement of the note, and total failure of consideration, independently of section 5, chapter 126, Code 1906. *Mylius v. Massillon Engine & Thresher Co.*, 74 S. E. 728, decided at the present term, and authorities cited. In the case cited we held that a suit at law can not be enjoined and the litigation transferred to the equity side of the court, merely on the assertion of defenses pleadable at law.

The demurrer to the bill, found in the record, and endorsed by the clerk as filed in court, apparently on the date of the final decree, is not noted or passed upon by that or any other order or decree in the cause, and can not be considered here. But the answer filed, not replied to, not only denies the fraud and want of consideration relied on, but also pleads complete and adequate remedy at law. So jurisdiction in equity is denied and the question properly presented by the answer, and the prayer of the answer simply is that the bill be dismissed with costs; no other relief is sought thereby.

[2] The question then remains, did the court err in pronouncing the money decree? We think it did, clearly so. No rule is better settled than that there can be no decree for or against a party without proper pleadings. Pleadings are as essential as proof, the one being the foundation for the other, the one being unavailing without the other. *Roberts v. Coleman*, 37 W. Va. 143, 16 S. E. 482; *Vance Shoe Co. v. Haught*, 41 W. Va. 275, 23 S. E. 553; *Coaldale M. & Mfg. Co. v. Clark*, 43 W. Va. 84, 27 S. E. 294; *Lilly v. Claypool*, 59 W. Va. 130, 53 S. E. 22. Counsel for appellee rely on *Dunn v. Stowers*, 104 Va. 290, 51 S. E. 366. We do not regard that case in point. The court in that case had acquired jurisdiction for specific performance or rescission of a contract for the sale and purchase of land. The bill and answer justified the money decree. The concrete case we have here is covered by *Wright v. Delafield*, 25 N. Y. 266; *Andrus v. Scudder*, 120 Mich. 502, 79 N. W. 794; *Herndon v. Higgs*, 15 Ark. 389; *People v. Pacheco*, 27 Cal. 176, and

*Bourke v. Vanderlip*, 22 Tex. 221. These cases fully support the proposition that upon dissolution of an injunction, and dismissal of plaintiff's bill brought to enjoin an action at law, it is error for the court, without cross pleadings by defendant, to pronounce a decree in his favor against plaintiff for the money sought to be recovered in the action at law. These decisions are in harmony with the principles of our own cases cited above, and call for reversal of so much of the decree appealed from as gives affirmative relief in favor of defendant.

We, therefore, affirm the decree in so far as it dissolves the injunction and dismisses plaintiffs' bill, with costs, except that such dismissal is to be without prejudice to either party on the trial of the action at law enjoined, or on the trial of any action that may be brought on the note sued on. But in so far as said decree gives affirmative relief in favor of defendant against plaintiff C. S. Armentrout, it is reversed, and defendant is remitted to his action at law on the note sued on. And as plaintiff and appellant C. S. Armentrout has substantially prevailed here he will recover his costs in this court.

(70 W. Va. 554)

#### FOX v. CITY OF HINTON.

(Supreme Court of Appeals of West Virginia.  
April 16, 1912.)

(Syllabus by the Court.)

#### APPEAL AND ERROR (§ 670\*)—DISMISSAL—GROUNDS.

A final judgment of a circuit court dismissing a declaration on demurrer over the express exception of plaintiff, brought here for review on writ of error, can not by affidavits be shown to be a judgment by consent so as to effect a dismissal of the writ of error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2865, 2866; Dec. Dig. § 670.\*]

#### Error to Circuit Court, Summers County.

Action by J. A. Fox against the City of Hinton. Judgment for defendant, and plaintiff brings error. Reversed and remanded.

R. F. Dunlap, of Hinton, for plaintiff in error. T. N. Read, of Hinton, for defendant in error.

ROBINSON, J. The writ of error relates to a judgment sustaining a demurrer to the declaration in an action for damages to plaintiff's property by a change of street grade made by defendant city.

Concededly, the declaration is good. The question of its sufficiency is not contested. But, on a motion to dismiss the writ of error, defendant undertakes to show by affidavits that the judgment was entered by consent. It is claimed that a compromise of the litigation was agreed to by the attorneys, and the order dismissing the declaration on demurrer was entered for that reason. It

seems that the city did not ratify the act of its attorney in regard to the proposed settlement, and that plaintiff, therefore, proposes to go on with his action by reversing the erroneous judgment entered on demurrer to the declaration.

Subsequent to the award of the writ of error the attorneys for the city moved the circuit court to set aside the order appealed from, and the circuit court entered an order purporting to set aside that order and to re-instate the case in that court. Of course at that time the order undertaken to be set aside had become final by the expiration of the term at which it was entered. The court had no power to change it.

We must overrule the motion to dismiss the writ of error. The record on which that writ was awarded sustains the writ. We can not change the record of the judgment by reading the affidavits. The judgment is a verity. It can not be shown by affidavit to be other than what it purports to be. It shows itself to be a final judgment on demurrer, entered over the express exception of the plaintiff. It is anything but a judgment by consent. The judgment cannot be impeached and its character changed by affidavit. If it was a consent order the circuit court should not have given it another character when that court entered it. The court speaks by its record, not by affidavits in the country.

Since the declaration is sufficient, the judgment sustaining the demurrer and dismissing the action must be reversed, the demurrer overruled, and the case remanded to be further proceeded in.

(70 W. Va. 640)

#### EVANS v. HIGGINS.

(Supreme Court of Appeals of West Virginia.  
April 16, 1912.)

(Syllabus by the Court.)

#### HUSBAND AND WIFE. (§ 49½\*) — GIFT TO WIFE—DELIVERY.

In view of section 1, c. 71, Code 1906, a wife acquires no title to personal property given to her by her husband, not evidenced by deed or will, possession whereof was delivered to her at their place of residence. Such gift is void, and the husband may reclaim the property.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 249-255; Dec. Dig. § 49½.\*]

Error to Circuit Court, Marshall County.

Action by D. B. Evans, trustee, against Fannie B. Higgins. Judgment for plaintiff, and defendant brings error. Affirmed, and cause remanded.

McCamie & Clarke, of Wheeling, for plaintiff in error.

WILLIAMS, J. D. B. Evans, trustee, brought an action of detinue against Fannie

B. Higgins to recover possession of a piano and certain household furniture, which James Higgins, her husband, had conveyed to said trustee, after he separated from her. The jury found for defendant, and, on motion of plaintiff, the court set aside the verdict and granted a new trial. The writ of error goes to that interlocutory order, as provided by section 1, c. 135, Code 1906.

Defendant surrendered possession of some of the property conveyed by the trust deed before suit, but claimed other portions as a gift from her husband. The husband denies that it was a gift. But the jury evidently believed the wife, who testified that it was a gift. Hence, for the purpose of this review, we must accept that as a fact, because the jury so found on conflicting testimony of witnesses, and there is sufficient evidence to prove it.

The wife's testimony proves that some of the articles enumerated in the declaration were given to her by her husband before their marriage, and that others, including a piano, were given to her afterwards, when she and her husband were living together in the same house, and that delivery of possession was at their place of residence. The rights of creditors, existing at the time of the gifts, are not involved.

The case, therefore, turns upon a proper construction of section 1, c. 71, Code 1906, which reads in part as follows, viz: "And no gift of any goods or chattels shall be valid, unless by deed or will, or unless actual possession shall have come to and remained with the donee, or some person claiming under him. If the donor and donee reside together at the time of the gift, possession at the place of their residence shall not be a sufficient possession within the meaning of this section."

There was no writing evidencing the gift. It is seriously contended by counsel for defendant that the statute, above quoted, does not apply to defeat the gift, by a solvent husband, of goods and chattels, made in good faith to his wife, notwithstanding donor and donee were residing together, and possession was delivered at the place of their residence. But is not the statute almost too plain to admit of such construction? It expressly says that, in order to make valid a gift of goods or chattels, the gift must be by deed or will, or, if not by deed or will, then by actual delivery of the possession of the thing given to the donee, and adds a qualification to the delivery, which would seem to defeat the gift by one person to another, who reside together, if the possession be delivered at the place of their residence. The language of the statute is positive, plain, and unambiguous. It says no such gift shall be valid, which evidently means that no title passes to the donee by delivery of possession at the place of the joint residence of donor and donee, unless

evidenced by deed or will. Why the statute was enacted we need not stop to inquire, but it seems not to have been passed for the benefit of creditors alone. It would seem rather to be intended for the protection of distributees and personal representatives of decedents. But any person interested in the chattel alleged to have been given can claim the benefit of the statute. It would seem to permit either consort to rescind a gift and recover possession of the chattel, notwithstanding he, or she, should admit the gift, if delivery was made at their place of residence, and the gift was not evidenced by deed or will.

The act would apply with equal force to defeat the gift of a chattel by a wife to a husband, or by a father or mother to a child, provided the donor and donee were living together at the time the gift was made. It is a very old Virginia statute, and was copied bodily into the laws of West Virginia from that state. Originally, it applied only to a gift of slaves, but later on, when the Code was revised in 1849, there was added, after the word "slaves," the words "or of any goods or chattels." At that time the last sentence, or clause, of the section was added. Our statute is the same, except that the words "of a slave or" are stricken out.

Counsel rely upon the case of *First National Bank of Richmond v. Holland*, 99 Va. 495, 39 S. E. 128, 55 L. R. A. 155, 86 Am. St. Rep. 898. But that was the case of a gift by the husband to the wife of bank stock; and the court of Virginia construed the words "goods and chattels" not to include bank stock, and held bank stock to be a chose. Thus the court held the statute not to apply in that case. But this court has construed the words "goods and chattels," used in this statute, to include "moneys and every other kind of personal property, which may be the subject of a gift inter vivos or causa mortis." *Dickeschied v. Bank*, 28 W. Va. 340. But there is no question that the property here sued for falls within the description "goods and chattels."

We need not inquire whether a husband could make a valid gift of a chattel to his wife at the common law, or not, for, if he could, the statute in question has certainly determined the manner of making it.

In *Blankenship v. K. & M. Ry. Co.*, 43 W. Va. 140, 27 S. E. 355, cited by counsel, the statute really had no application, because *Blankenship*, although under age, was permitted by his father to work away from home and to earn wages. With the proceeds of his labor he bought a horse, which he brought home and traded to his father for a mule. He kept the mule on his father's place until it was killed by the railroad company. The mule was the animal for the loss of which he sued. It had not been given to him by his father, and there-

fore the statute could not apply to defeat his title.

In *Lowther v. Lowther*, 30 W. Va. 103, 3 S. E. 42, the statute did not apply for the same reason. In that case it appears that the father had given his daughter a colt, which she traded for a mare, which she kept on her father's place. The mare, thus acquired, was not the chattel which had been given her, and the statute did not apply.

We do not think the court gave proper effect to the statute in *Good v. Good*, 39 W. Va. 357, 19 S. E. 382, a case relied on by counsel.

In relation to the piano and such other goods and chattels as were given to the wife after marriage, and while she and her husband were living together at the place where possession was delivered, the wife acquired no title; the gift not being by deed or will.

The judgment of the lower court will therefore be affirmed, and the case will be remanded.

(70 W. Va. 676)

SHAW v. HAZEL-ATLAS GLASS CO.  
(Supreme Court of Appeals of West Virginia.  
April 16, 1912.)

(Syllabus by the Court.)

1. MASTER AND SERVANT (§ 153\*)—DANGEROUS MACHINERY—WARNING.

It is the duty of a master to give a minor servant, operating a dangerous machine, inexperienced in its use, notice and warning of danger in its operation, and such instructions as will enable the servant to realize the danger and avoid injury. If there is a peculiar or special danger, the warning and instruction must be definite as to it. Such warning and instruction must be more definite in the case of an inexperienced infant than in case of an adult.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 314-317; Dec. Dig. § 153.\*]

2. MASTER AND SERVANT (§ 185\*)—DUTY TO WARN SERVANT—DELEGATION OF AUTHORITY.

The duty of a master to give his servant, operating dangerous machinery, notice of danger and instructions as to the manner of operating the machinery to avoid hurt to the servant, is a duty resting on the master, and cannot be delegated to another, so as to relieve the master from liability to the servant for injury arising from the negligence of the agent to whom the duty was delegated. So as to the duty to furnish safe machinery. In such cases the law of fellow servant does not apply.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 385-421; Dec. Dig. § 185.\*]

Error to Circuit Court, Ohio County.

Action by Malky Shaw against the Hazel-Atlas Glass Company. Judgment for plaintiff, and defendant brings error. Affirmed.

J. B. Sommerville, of Wheeling, for plaintiff in error. Handlan & Reymann and J. B. Allison, all of Wheeling, for defendant in error.

BRANNON, P. Malky Shaw obtained a verdict and judgment for \$1,500 in an action against the Hazel-Atlas Glass Company, which has brought the case to this court.

Malky Shaw, a Russian girl between 17 and 18 years of age at the time of the accident involved in the case, was employed in the factory of the glass company in making from tin and other metals different articles, among them jar tops, jar caps, jar covers, can covers, and other things. Malky Shaw was put to working a machine or press driven by steam, known as a "trimmer," used for trimming off the edges of jar or can metal caps. This machine was so constructed that a part of it, called the "plunger," is forced into a part called a "die," and then drawn out of it by fast motion, as many as 135 times per minute. Sometimes the pieces of metal for making caps get fastened in the machine, preventing its operation. One of these caps became fastened, and Malky Shaw, in trying to loosen it with her fingers, lost the ends of two fingers by mashing, causing amputation.

One assigned error is for overruling the demurrer to the declaration. It is specified that it does not show negligence. It is prolix and elaborate in so doing. The first count alleges that the plaintiff, a Russian girl, was an infant of 18 years, uneducated, and had been in this country one year, and could neither speak nor read English, nor understand it, without experience or knowledge concerning the machine which she was operating, or machinery of any kind, as the defendant well knew, and that under these circumstances it was the duty of the defendant to carefully warn and instruct the plaintiff as to the danger of operating the machine. It charged the machine as dangerous in operation. It charged that during the six days the plaintiff was operating the machine on different occasions the metal caps would become fastened in the die on the press, and the plaintiff, not knowing how to remove them, applied to the foreman, and that he on two or three occasions removed the caps, but afterwards, when she applied to him for such assistance, he declined to give it, and quarreled with and scolded her, and told her to remove the caps herself. The count charged that it was the duty of the defendant to exercise care to see that the plaintiff should not be injured in operating the press, the defendant well knowing that its operation was attended with great danger, and well knowing the plaintiff's inexperience and lack of knowledge of the danger, and that it was the duty of the defendant to warn the plaintiff of the danger, and instruct her as to the particular danger incident to the removal of fastened caps, and to exercise care and caution likely to protect her from injury or hurt while operating the press. It charged that the defendant carelessly and negligently disregarded such duties, and utterly failed

to use care and caution to see that the plaintiff should not be exposed to danger. Here we have as the gravamen of the action failure to instruct the plaintiff in the operation of the press—failure to use care and caution to avoid danger.

[1] The first count does not charge defective machinery, only omission of instruction to a young, inexperienced girl, and the only matter giving me question is whether the admission that, when called on when a cap was fastened, the foreman took it out, was an instruction. I have concluded that it is not clearly so. Did he tell her to use a stick in unloosing a cap, as the defense claims was the practice? From the declaration we cannot say. The defense claims that she did not, as she ought to have done, take her foot off the treadle and thus stop the machine. It does not appear whether she was instructed as to this essential and important matter, the thing that would prevent accident; or rather the evidence conflicts. It does not appear any instruction was given by the plaintiff's evidence, or to what extent. "Where the duty exists to warn and instruct a servant, the master must give such instructions as would, in the judgment of men of ordinary minds, understanding, and prudence, be sufficient to enable the servant to appreciate the danger, and the necessity for the exercise of due care and precaution and do the work safely, so far as it can be done with proper care." 17 Ann. Cas. 490, note; full collection of cases in 3 Ann. Cas. 368, the note in 17 Ann. Cas. 487, relating to infants. Labatt on Master and Servant, §§ 252, 253, lays down the law to be, as to infant servants: "Owing to the more restricted capacity of young persons for understanding the perils of their employment, the law imposes an obligation to give them detailed and special instructions in many instances in which a general notification would have been an adequate warning to an adult."

\* \* \* In numerous cases the servant has been allowed to recover for the reason that the court felt itself unable to say, as a matter of law, that the master's culpability might not reasonably be inferred from evidence which indicated that the servant, though warned in general terms, has received no special warning in regard to the particular danger to which the injury was due, or no explicit instruction as to the proper manner of avoiding it, and that, under the circumstances, the information which the master had thus failed to communicate was necessary to enable the servant to obtain an intelligent comprehension of the danger. For obvious reasons the courts are less disposed to interfere with a verdict for a minor on this ground than where the injured person was an adult." The master must "give him such instruction as will enable him to avoid injury"—must give "such notice and instruction as is reasonably re-

quired by the youth, inexperience, or want of capacity of the servant." *Giebell v. Collins Co.*, 54 W. Va. 518, 46 S. E. 569.

[2] The second count alleges the failure to give the plaintiff instructions, and it also alleges, with particular specification, defects in the press, and bad metal used in making caps, tending to cause the stop, and surely alleges duties and negligence in defective machines and materials the servant was to handle. It is suggested in a brief of counsel that, if there was negligence, it is to be attributed to the foreman, and that he is a fellow servant with the plaintiff, and the company not responsible for that foreman's negligence. As I have said, the action rests on failure to give notice of danger and instructions to avoid it, and defective machinery and material. I have above cited abundant law to show that it is the master's duty to give notice and instruction. I will add *Ewing v. Lanark Co.*, 65 W. Va. 726, 65 S. E. 200, 29 L. R. A. (N. S.) 487, saying that, "if the servant is an infant, the duty becomes more imperative." There cannot be fellow servant as to that duty. As to this duty the foreman was not a fellow servant with the plaintiff, but a vice principal. The defendant could not delegate or shift such duty from his shoulders, and be exempt himself from his negligence, because it is a duty of the master, not assignable, and, if assigned, the master is liable for the foreman's default. The duty rests primarily on the master, and is not delegable. 17 Ann. Cas. 491, note; 26 Cyc. 1167. The case of *Lang Paper Co.*, 178 Fed. 253, 101 C. C. A. 613, is much like our case.

It is hardly necessary to cite law for the proposition that the duty of furnishing safe machinery is the master's duty, nonassignable. The fellow servant doctrine has no

application to this case. Such being the legal principles of the case, and the jury having found, on much oral evidence, and conflicting, either that proper instruction against danger was not given, or that the press was defective, one or both, we cannot reverse the circuit court for its refusal of a new trial.

It is argued that the danger of unfastening the can top with the fingers was plain to Malky Shaw, and she was guilty of contributory negligence. That was a jury question under all the evidence. The girl was young, and open to rashness of youth, ignorant and inexperienced as to dangerous machinery, and she had been directed to remove can tops without help. When the foreman was called to her aid to remove a can top, he used his fingers to release the top, and thus suggested to the girl that use of the fingers was not dangerous. She was thus misled. She but followed the foreman. The girl's evidence was that the foreman did not warn her against removing the can top with her fingers; that he showed her how to put her foot on the treadle, but did not tell her to take her foot off it and stop the machine when removing the can tops. The girl was inexperienced, uneducated, a poor immigrant, not even able to give her birth date. Thus great care, very definite warning, was required. The safe course was to use a stick or some implement for such removal. Some evidence shows that sticks were at command, but this is denied by other evidence. The jury passed on this contestation. It was its function to say whether the girl was chargeable with negligence. Under the Constitution, we must concede great force to a verdict on oral evidence, especially when conflicting, as in this case.

Judgment affirmed.



(159 N. C. 488)

## STATE v. LAUGHTER.

(Supreme Court of North Carolina. May 15, 1912.)

## 1. HOMICIDE (§ 214\*)—EVIDENCE—DYING DECLARATIONS.

An exception to the hearsay rule in favor of dying declarations rests solely on the ground of necessity and public policy; but a dying declaration is admissible only in a homicide case, and is restricted to the act of the killing and the circumstances immediately attending the act and forming a part of the *res gestæ*.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 448-450; Dec. Dig. § 214.\*]

## 2. HOMICIDE (§ 200\*)—"DYING DECLARATION"—ADMISSIBILITY.

A declaration is admissible as a "dying declaration" only where declarant was in actual danger of death, and had a full apprehension of the danger, and death ensued; but it is not always necessary that declarant should state that he believed that he was about to die, but the circumstances must indicate that he was fully under the influence of such belief.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 425-427; Dec. Dig. § 200.\*]

For other definitions, see Words and Phrases, vol. 3, pp. 2297, 2298.]

## 3. HOMICIDE (§ 203\*)—DYING DECLARATIONS—ADMISSIBILITY.

Where a wife, who had been severely beaten by her husband with a hickory stick, became aware about 15 days later of her dangerous condition, declarations by her, made the day before her death, after she became aware of her dangerous condition and had expressed the belief that she would die, were admissible as dying declarations.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 430-437; Dec. Dig. § 203.\*]

Appeal from Superior Court, Polk County; Long, Judge.

Andy Laughter was convicted of murder in the second degree, and he appeals. Affirmed.

This is an indictment of the defendant for the murder of his wife, and the only question in the case relates to the competency of the dying declarations of the wife as to the cause of death. There was evidence tending to show that her husband had beaten her severely with a hickory stick at their home on May 28, 1911, and that she left that day and went to her sister's, and from there she went to the home of defendant's sister, and then to the home of her own sister, Mrs. Hendrix, where she arrived on Sunday, June 11, 1911. W. A. Hendrix testified that when she came to his house she looked very badly and very soon after she came she lay on the bed, and that there were bruises on her body, several on her back, and one on her side "which was black and blue and half as big as a man's hand." She told Hendrix and his wife on Monday night, May 12, 1911, that she could not live, and that she expected to die; that she was going to die, and she could not live in her condition. This was repeated several times on Tuesday morning about 6 o'clock, and she died about 11 o'clock the same morning. The mother of the deceased testified that she had hemorrhages from her womb several days before she died, and had pains

in her abdomen. Dr. Brockman stated that he made an examination of the deceased, and found bruises or laches on her arms and back, and evidences of a wound or bruise on the abdomen, and a wound or rupture of the inside lining of the womb. He also found a dead foetus in the womb, which was decomposed, and a small clot of blood in the right ventricle of the heart. He testified that death evidently followed the formation of this clot in the heart in a very few minutes, and that the condition of the womb and the foetus would account for the clot of blood in the heart. There was evidence tending to show that deceased fell in the arms of her sister and died very suddenly after stating again that "she was going to die." The state then offered to show by W. A. Hendrix and his wife what she had said as to the cause of her condition and subsequent death. The defendant objected, but the evidence was admitted, and defendant excepted. The witnesses testified that deceased had said that her husband had beaten her to death. She remonstrated with him about drinking so much, and he went out and got a stick and "fixed her up—that he killed her." The court restricted the proof of the state to the declaration of the deceased at the time she said that she expected to die. The prisoner was convicted of murder in the second degree and appealed.

Smith, Shipman & Justice, for appellant. The Attorney General and Assistant Attorney General Calvert, for the State.

WALKER, J. (after stating the facts as above). [1] While the sense of impending death is considered by the law as sufficient a guaranty of truth as the solemnity of an oath, a dying declaration cannot be subjected to the other test, there being no opportunity for cross-examination and nothing to meet the objection to it, as hearsay, which will answer as an equivalent for such an examination; hence the exception to the hearsay rule in favor of dying declarations rests solely upon the ground of necessity and public policy, for if they were not admitted as evidence it would be impossible to convict in a case of homicide, the knowledge of the facts, in many cases, being confined to the party slain and the perpetrator of the crime. But, as the exception can only be sustained upon the ground of necessity, the declaration is admissible only in indictments for homicide, and is restricted to the act of killing and the circumstances immediately attending the act and forming a part of the *res gestæ*. State v. Shelton, 47 N. C. 360, 64 Am. Dec. 587; State v. Jefferson, 125 N. C. 712, 34 S. E. 648.

[2] The rule for the admission of such testimony is thus stated in State v. Mills, 91 N. C. 581, quoting from Taylor on Evidence, § 648: "(1) At the time the declaration was made, the declarant should have been in ac-

\*For other cases see same topic, and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

tual danger of death. (2) He should have a full apprehension of his danger. (3) Death should have ensued." The evidence in this case that the declarant was in extremis, and was conscious or apprehensive of approaching death, and had abandoned all hope of recovery, is quite as strong and convincing as was that in *State v. Quick*, 150 N. C. 820, 64 S. E. 168, and *State v. Bagley*, 158 N. C. —, 73 S. E. 995. In the case last cited we said: "Dying declarations are admissible in cases of homicide, when they appear to have been made by deceased in present anticipation of death. It is not always necessary that the deceased should declare himself that he believes that he is about to pass away; but all the circumstances and surroundings in which he is placed should indicate that he is fully under the influence of the solemnity of such a belief." To like effect is *Wigmore on Evidence*, §§ 1430, 1442. *State v. Brogden*, 111 N. C. 656, 16 S. E. 170. We held in *State v. Tilghman*, 33 N. C. 513, that, "in order to make the declarations of a deceased person evidence as 'dying declarations,' it is not necessary that the person should be in articulo mortis (in the very act of dying). It is sufficient if he is under the apprehension of impending dissolution, when all motive for concealment or falsehood is presumed to be absent, and the party is in a position as solemn as if an oath had been administered."

[3] The wife of the defendant appeared to have known of her delicate condition, and to have become suddenly aware, the day before she died, that the violent assault of her husband and the injuries which he inflicted upon her would result fatally, and subsequent events disclosed, unfortunately, that her apprehension was well-founded. Her dissolution was impending, and no one knew it better than she did. There was no error in admitting her declarations as to the assault upon her by the defendant; the evidence showing that the wounds she received were sufficient to cause death.

No error.

(159 N. C. 465)

#### STATE v. TAYLOR.

(Supreme Court of North Carolina. May 15, 1912.)

#### 1. CRIMINAL LAW (§ 1141\*)—APPEAL AND ERROR—CONSTRUCTION OF EVIDENCE.

On a review of the refusal of the court to instruct that the evidence is insufficient to warrant a conviction, only the evidence most favorable to the state will be considered.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 3014, 3015; Dec. Dig. § 1141.\*]

#### 2. ARSON (§§ 37, 40\*)—EVIDENCE—SUFFICIENCY—SUBMISSION.

In the trial of one for burning a barn, evidence held sufficient to warrant submission of the case to the jury and to sustain a conviction.

[Ed. Note.—For other cases, see *Arson*, Cent. Dig. §§ 71-73, 76; Dec. Dig. §§ 37, 40.\*]

#### 3. CRIMINAL LAW (§ 730\*)—ARGUMENT OF COUNSEL—MATTERS NOT IN EVIDENCE.

Where, in the trial of one for burning a barn, the state contended that the defendant by mashing down the vamps wore shoes too small for him, the action of the solicitor in his argument in exhibiting to the jury a pair of shoes not in evidence, to illustrate his contention that one after mashing down the vamps could wear smaller shoes than otherwise, was harmless, where the court checked him and told the jury that he was only illustrating his argument and that the shoes were not in evidence.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 1693; Dec. Dig. § 730.\*]

Appeal from Superior Court, Burke County; Justice, Judge.

Chas. F. Taylor was convicted of burning a barn, and he appeals. No error.

Spainhour & Mull, for appellant. The Attorney General and T. H. Calvert, Asst. Atty. Gen., for the State.

CLARK, C. J. This was an indictment for burning a barn.

[1] The first exception is to the refusal of the court to charge the jury that the evidence was not sufficient to warrant a conviction and to return a verdict of not guilty. Upon this prayer we can consider only the evidence most favorable to the state.

[2] There was evidence that the defendant lived about one mile from the prosecutor; that there was bad blood between them; that the prosecutor, who was the owner of the burned barn, had reported the defendant for running a blockade still; that the defendant had endeavored to get the witness Blue to hide on the roadside and shoot the prosecutor, and a few days before the barn was burned had endeavored to get said Blue to burn the barn; that the barn was burned one night in November; that on that night when the witness Blue, who was visiting at defendant's house, started to leave, the defendant insisted on his staying all night, promising him fried chicken and liquor for breakfast; that Blue, when he went to bed, left his shoes in a corner of the next room; that the next morning he found his shoes in the middle of the room, wet, muddy, the vamps mashed down, and the strings broken; that the next morning tracks corresponding to Blue's shoes were found leading by a devious route to the barn from defendant's house and going back to defendant's house; that Blue's shoes had an iron on heel and the toe of the right foot pointed in; that these peculiarities showed in the tracks found; that Blue's shoes were too small for defendant; and that the next day the defendant was limping and said he had a sprained ankle. We think that the above evidence was sufficient to submit the case to the jury. *State v. Hunter*, 143 N. C. 610, 56 S. E. 547, 118 Am. St. Rep. 830; *State v. Daniels*, 134 N. C. 655, 46 S. E. 743.

[3] The theory of the state was that the

defendant had used Blue's shoes, which being too small for him, he had used by mashing down the vamps. The solicitor, in his argument, contended that, when shoes are too small for a man, he can wear them by mashing down the vamps, and exhibited shoes, with the vamps thus mashed down, stating that he did this for illustration, and that the shoes were not in evidence. On objection by the defendant, the court told the solicitor not to proceed further along that line, and said to the jury that the solicitor was only illustrating his argument, and that the shoes were not in evidence. We cannot perceive how the defendant was prejudiced thereby.

No error.

(159 N. C. 372)

### GROSS v. McBRAYER.

(Supreme Court of North Carolina. May 15, 1912.)

#### 1. APPEAL AND ERROR (§ 179\*)—SPECIAL ISSUES—REQUESTS.

Where the special issues submitted seem to embrace the issues presented by the pleadings, a party who did not request the submission of other issues cannot complain on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1137-1140; Dec. Dig. § 179.\*]

#### 2. MORTGAGES (§ 496\*) — FORECLOSURE — DECREE — VACATING — FRAUD — BURDEN OF PROOF.

One suing to vacate a decree of foreclosure of a mortgage on the ground of fraud has the burden of proof.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 1457-1468; Dec. Dig. § 496.\*]

Appeal from Superior Court, Rutherford County; Long, Judge.

Action by Wright Gross against T. C. McBrayer. From a judgment for defendant, plaintiff appeals. Affirmed.

D. F. Morrow and Quinn & Hamrick, for appellant. McBrayer, McBrayer & McRorie and Murray Allen, for appellee.

WALKER, J. [1] This action was brought to impeach the sale of land under a decree for a foreclosure. The plaintiff, in one section of his complaint, seeks to recover \$1,000, as damages resulting from a fraudulent sale of the land, and in the prayer he demands judgment that defendant be declared a trustee for him, that he be required to account to him for rents and profits received, and that a sale of the land be ordered and the proceeds applied according to the rights of the parties. In the one view, there would be a ratification of the sale and an election to recover damages for the fraud, and in the other, there would be a repudiation of the sale. But we do not consider it material which view we take of the action. The following appear to be the facts: On November 12, 1893, Sherman Gross gave his note to the defendant for \$350, and to secure the same he, at the same time, executed a mortgage

upon 52 acres of land. Sherman Gross died in June, 1897, leaving his widow, Eliza Jane Gross, and an infant son, Wright Gross, who is plaintiff in this case. The mortgagee commenced a suit on October 27, 1898, for a foreclosure of the mortgage, alleging that there was due, at that time, on the debt, the sum of \$312.40. Summons was duly served upon the widow and on Wright Gross, the minor, and a guardian ad litem, R. W. Logan, was duly appointed for the minor, who was under 14 years of age. The widow filed an answer, and the guardian was notified to file his answer. There appears on the back of the widow's answer the following: "Answer of guardian filed December 31, 1898." The administrator was a party to the suit and served with process. A judgment was rendered for the debt and a sale of the land, which was afterwards sold by the commissioner and bought by the mortgagee, who is the defendant in this case. The sale was duly reported and confirmed by the court, and a deed made to the purchaser, who has since sold the land to other parties. It is not very clear, from a reading of the complaint, what is the particular fraud alleged against the defendant; but we gather that he prosecuted the foreclosure suit to judgment and bid it off at the sale, when he knew that plaintiff, Wright Gross, was a minor and under "a pretended appointment of a guardian ad litem for him, and without any answer having been filed by him, as plaintiff is informed and believes he did not have his day in court." The court submitted two issues to the jury, which, with the answers thereto, are as follows: (1) Did the defendant with intent to cheat and defraud the plaintiff, under a pretended mortgage and judgment, have the land bid in at the sale for himself, as alleged in the complaint? Answer: No. (2) Did the defendant procure judgment for sale of the lands by securing a pretended appointment of a guardian ad litem for the plaintiff, as alleged? Answer: No. Plaintiff objected to these issues, but tendered no issues himself.

It seems to us that the issues submitted by the court were those made by the pleadings, and if the plaintiff desired any other issue, he should have tendered it. When issues embrace the real matters in dispute and afford an opportunity for the parties to present and develop their contentions, and, when answered, are sufficient to determine the rights of the litigants and to support the judgment, they are sufficient within the requirement of the statute. *Clark v. Guano Co.*, 144 N. C. 64, 56 S. E. 858, 119 Am. St. Rep. 931; *Shoe Co. v. Hughes*, 122 N. C. 296, 29 S. E. 339; *Hatcher v. Dabs*, 133 N. C. 239 (Anno. Ed.) and notes, 45 S. E. 562. This exception is therefore overruled.

[2] There was evidence which, if believed, was sufficient to support the verdict, and it was submitted to the jury under proper in-

structions from the court. The plaintiff excepted to an instruction of the court, by which the jury were told that the plaintiff must establish the affirmative of the issues by the greater weight of the evidence; but this is not unfavorable to the plaintiff, and he has no reason to complain of it. This is an action to set aside the judgment and the sale for fraud in procuring title. The plaintiff was required to take the laboring oar, and the burden rested upon him to make good his allegation of fraud.

There was evidence that the land brought its full value at the sale, and that which the plaintiff offered to show its value, not at the time of the sale, but many years before, was too remote to have any bearing upon the question. The court allowed the plaintiff much latitude in his attempt to show the value of the land at the time of the sale, as a circumstance involved in the issue of fraud. It may well be doubted if the plaintiff offered any evidence of fraud sufficient for the consideration of the jury; but he cannot complain, as the court permitted the jury to hear what evidence there was and to pass upon the issue of fraud. The charge was very fair and liberal to the plaintiff, and an adverse verdict has been the result upon what was substantially a mere question of fact.

We find no error in the case.

No error.

(159 N. C. 455)

#### STATE v. DAVIS et al.

(Supreme Court of North Carolina. May 15, 1912.)

#### 1. HIGHWAYS (§ 151\*)—OFFENSES—APPEALS.

Under Revisal 1905, § 2690, providing that any person may appeal to the superior court from the determination of the county supervisors, and where any proceeding to establish public roads is carried to the superior court, the parties shall have the right to have every issue of fact joined in such proceeding, an appeal from a judgment of the board vacates it, and so, although notified, persons are not guilty of an offense in failing to work an intended road during the pendency of an appeal taken from an order of the board establishing it.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 407-416; Dec. Dig. § 151.\*]

#### 2. CRIMINAL LAW (§ 882\*)—TRIAL—SPECIAL VERDICT.

In a criminal prosecution, the facts should be formally stated and embodied in the special verdict by an impaneled jury, and not according to an agreed statement of facts.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2092; Dec. Dig. § 882.\*]

Appeal from Superior Court, Henderson County; Long, Judge.

William Davis and another were, in a Justice Court, convicted of a failure to work a road, after notice, and on appeal to the Superior Court were again convicted, and they appeal. Reversed.

Indictment for failure to work road after notice heard on appeal from a justice of the

peace and determined as on special verdict before his honor, H. A. Foushee, judge, at March term, 1912, of the superior court of Henderson county. The facts presented in form as a special verdict and agreed upon by solicitor and counsel for defendant are as follows: "That a petition for a public road in Crab Creek township was filed with the board of commissioners, Henderson county. That there was also a counter petition filed. That an order was made by the board of commissioners that the road should be opened. That no further action was taken in the matter, and the road was never opened. That four years thereafter a petition was filed before the board of commissioners, asking that the road be opened according to the order previously made. To this a counter petition was filed. The board of commissioners having ordered that the road be opened, the counter petitioners prayed an appeal to the superior court and gave bond for the costs in accordance with the statute. Pending this appeal, the overseer of the road summoned the defendants to work on the road. The defendants refused to do so, being advised by counsel that pending the appeal the overseer had no right to work the road." Upon these facts, the court being of opinion that defendants were guilty, it was so adjudged, and defendants excepted and appealed.

McD. Ray and H. G. Ewart, for appellants. The Attorney General and T. H. Calvert, Asst. Atty. Gen., for the State.

HOKE, J. [1] The first order for the laying out of the road was not pursued, and the second application was recognized and dealt with as an original petition both by the parties and the board of commissioners, and, considering the proceedings in that aspect, the case as correctly stated by the Attorney General presents the single question whether defendants can be convicted of the offense of failing to work a public road after being duly notified, while an appeal was pending in the superior court to review the action of the county commissioners establishing the road. The statute applicable to appeals and the effect of them in cases of this kind (Revisal, § 2690) is as follows: "Any person may appeal to the superior court at term time from the determination of the board of county commissioners, and if any person shall appeal from the board on a petition, he shall give bond to the opposing party as provided in other cases of appeal, and the superior court at term shall hear the whole matter anew; and where any proceeding is instituted to lay out, establish, alter or discontinue public roads or to appoint and settle ferries, and the said proceeding is carried to the superior court in term time by appeal or otherwise, the parties to said proceeding shall be entitled to have every issue of fact join-

ed in said proceeding tried in the superior court in term time by jury, and from the judgment of the superior court either party may appeal to the supreme court as is provided by law for other appeals." From the broad import of the language and authoritative interpretations of this and similar statutes, as well as from the "reason of the thing," we conclude that an appeal properly taken from an order directing the laying out of a highway has the force and effect of vacating the judgment or order, and that pending such appeal the case does not come within the provision of the law looking to the proper maintenance and working of the roads. *Keaton v. Godfrey*, 152 N. C. 17, 87 S. E. 47; *McDowell v. Insane Asylum*, 101 N. C. 656-659, 8 S. E. 118; *Turley v. Oldham*, 68 Ind. 114; *Taft v. Pittsford*, 28 Vt. 286; *Pool v. Breese*, 114 Ill. 594, 3 N. E. 714.

Speaking to the question in *McDowell v. Asylum*, supra, Merrimon, Judge, delivering the opinion of the court, said: "Moreover, the statutory provision allowing the appeal from the order of the county commissioners establishing or refusing to establish, or discontinuing or refusing to discontinue, a road or ferry already established, contemplates that an appeal shall lie at once from such order. The province of the superior court upon such appeal is not simply to correct errors of law of the county commissioners. In such case the whole matter of the application is heard de novo, and the parties will be entitled to have all the issues of fact raised by the petition, and the objections thereto tried by a jury. Then, wherefore execute the principal order before an appeal would lie from it? What end could be subserved by delaying the appeal until it could be executed? It is not probable that the dissatisfied party would be content after its execution, because his objection was to establishing the road at all, and his appeal would prevent questions in that respect that he would be entitled to have settled and decided by the superior court, not exercising jurisdiction and authority simply to correct errors of law, but to hear and determine the whole matter anew upon the merits as to the facts and the law applicable. It would be idle and nugatory to execute such order before the appeal."

It is otherwise with us in regard to appeals in ordinary civil litigation, but this is so by express provision of the statute in such cases. Revisal, § 604, and other sections looking to a stay of execution in ordinary civil judgments, as in section 1490, referring to appeals from cases of a justice of the peace. There is no such provision, however, on appeals of the kind we are considering and where, as in this case, "the whole matter is to be heard anew," and a party is entitled to have every issue of fact

raised determined in the appellate court. We are of opinion, as stated, that the appeal should be held to vacate the judgment. 2 Ency. Pl. & Pr. p. 328; *Lucas v. Dennington*, 86 Ill. 88; *Paine v. Cowdin*, 17 Pick. (Mass.) 142. It is true we have said, in *Blair v. Coakley*, 136 N. C. 405, 48 S. E. 804, that, in the absence of specific statutory provision, appeals from the board of county commissioners should be in accord with the rules obtaining in cases of appeals from a justice court, but this was said in reference to the more formal regulations concerning the prosecution of such appeals, and was not intended to change or alter the express provision of the statute, without restriction or limitation, that on appeals of this kind "the whole matter should be heard anew."

[2] We have considered the appeal as if the questions raised had been formally and properly presented by a special verdict. It was so dealt with in the court below; but we must not be understood as approving the submission of facts in these cases by agreement of counsel. They should be formally stated and embodied in a special verdict by an impaneled jury. *State v. Wells*, 142 N. C. 590-596, 55 S. E. 210.

There is error, and on the facts presented, when properly established, defendants are entitled to an acquittal.

Error.

(159 N. C. 432)

#### HOLTON v. TOWN OF MORGANTON.

(Supreme Court of North Carolina. May 15, 1912.)

#### TRIAL (§ 256\*)—INSTRUCTIONS—REQUEST—NECESSITY.

A plaintiff cannot complain of the failure to explain the law of contributory negligence where all the special instructions requested by her were given, especially where the court did charge that, although plaintiff saw the ditch in the sidewalk which caused the injuries, she was not guilty of contributory negligence if she exercised reasonable care in stepping into the ditch, and fell in her effort to get out of the ditch in a reasonably careful manner, and that a recovery would not be barred, unless the condition of the sidewalk was such that a prudent person in her condition would not have attempted to cross the ditch.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 628-641; Dec. Dig. § 256.\*]

Appeal from Superior Court, Burke County; Long, Judge.

Action by Ellen Holton against the Town of Morganton. From a judgment for defendant, plaintiff appeals. Affirmed.

This action is to recover damages against the town of Morganton for personal injuries, sustained, as the plaintiff alleges, by the negligence of the defendant in permitting a ditch or gully to remain open across one of its sidewalks.

The negligence is alleged in the complaint as follows: "That on or about the 1st day of August, 1909, while plaintiff was walking

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

along and on said sidewalk, hereinbefore set out and described, going from the depot to the home of her son, E. W. Holton, near the intersection of said sidewalk with King or Church street, which was the nearest and most direct route, street, or sidewalk to the home of her son, as aforesaid, and when she reached a point about half the distance of said sidewalk, to wit, about 200 yards, going in the direction of the residence of her son, and in attempting to avoid the gullies and ditches on said sidewalk, as hereinbefore alleged, and trying to get from one side of said sidewalk, across a large ditch in the middle of said sidewalk, which was about 20 inches deep, to the other side of the sidewalk, on account of the dangerous, defective, and unsafe condition of said sidewalk, and without any negligence or fault on her part, her foot slipped into said ditch or gully, throwing her violently to the ground and into the aforesaid ditch or gully, and breaking her left arm, so that she was rendered unable to use said arm for a long time, and was confined to her room for a month or two; that she incurred heavy expense in employing a physician and buying medicine; and that she suffered and still suffers much pain—all to her great damage."

The defendant denied negligence, and pleaded contributory negligence as a defense. Evidence was introduced on behalf of the plaintiff and defendant on the issues of negligence and contributory negligence.

The jury returned the following verdict:

"(1) Was the plaintiff injured by the negligence of the defendant, as alleged in the complaint? Answer: Yes.

"(2) Did the plaintiff, by her own negligence, contribute to her own injury? Answer: Yes.

"(3) What damage, if any, is plaintiff entitled to recover? Answer: Not answered."

There is no contention on the part of the plaintiff that there was no evidence of contributory negligence. Judgment was rendered in favor of the defendant, and the plaintiff excepted and appealed.

R. L. Huffman and Spainhour & Mull, for appellant. S. J. Ervin and Avery & Avery, for appellee.

**PER CURIAM.** There are ten exceptions in the record, seven of which are to rulings upon the first issue, which we need not consider, as this issue was answered in favor of the plaintiff.

The eighth exception is to a part of his honor's charge on the second issue, which, when considered alone, might be the subject of criticism; but, if read in connection with other parts of the charge, it will be seen that the plaintiff's contention was fairly submitted to the jury. His honor told the jury more than once that the burden of the second issue was on the defendant; and that

the plaintiff would not be guilty of contributory negligence if she exercised ordinary care.

The ninth exception is that his honor failed to declare and explain the law as to contributory negligence. We think he did so; but, if he did not, it was the duty of the plaintiff to request more specific instructions. *Craft v. Timber Co.*, 132 N. C. 151, 43 S. E. 597. It appears, however, from the record, that all prayers for instructions tendered by the plaintiff, six in number, were given, two of which relate to the second issue, and are as follows:

"(5) The court instructs you that if you find the plaintiff saw the ditch in front of her across the sidewalk, if she exercised reasonable care in stepping down into the ditch, and you find this was done for the purpose of being careful, and in doing so you find that she used reasonable care, and in her effort to get out of the ditch in a reasonably careful manner she slipped and fell, and an injury was thereby caused, then she would not be guilty of contributory negligence, and you should answer the second issue, 'No.'

"(6) The court instructs you that, though the plaintiff saw the condition of the sidewalk, it would not bar her of a recovery or make her guilty of contributory negligence, unless the obstruction or defect in the sidewalk was of such a character that a prudent person in her condition would not have attempted to cross the same; and, if you find that she used reasonable or ordinary care for her own safety, then you would answer the second issue, 'No.'"

The tenth exception is formal, to the refusal to set aside the verdict.

We see no reason for reversing the judgment.

No error.

(159 N. C. 429)

### FEATHERSTONE v. LOWELL COTTON MILLS.

(Supreme Court of North Carolina. May 15, 1912.)

#### 1. JURY (§ 88\*)—TRIAL (§ 108½\*)—EXAMINATION OF JURORS—PREJUDICE OR BIAS.

Stockholders, officers, and employes of a casualty company which has insured defendant against liability for personal injuries are not competent jurors in an action for such injuries; and hence, under ordinary conditions, questions asked jurors on their voir dire as to whether they are interested in such company are not improper.

[Ed. Note.—For other cases, see *Jury*, Cent. Dig. §§ 409, 410; Dec. Dig. § 88; *Trial*, Dec. Dig. § 108½.\*]

#### 2. DAMAGES (§ 64\*)—REDUCTION—INDEMNITY OF PARTY AGAINST LIABILITY.

The fact that a defendant is protected by insurance from liability is not relevant on the trial of an action.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. § 113; Dec. Dig. § 64.\*]

### 3. APPEAL AND ERROR (§ 1031\*)—TRIAL (§ 127\*)—REVIEW—MATTERS OF DISCRETION—EXAMINATION OF JURORS.

Where questions asked jurors as to whether they are interested in a casualty company which has insured defendant against liability, and remarks in the presence of the jury that defendant is so insured, are made in bad faith, a recovery by plaintiff should be set aside, but matters of this kind are largely within the discretion of the trial court; the presumption being that the jury were not influenced.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4038-4046; Dec. Dig. § 1031.\* Trial, Cent. Dig. § 275; Dec. Dig. § 127.\*]

Appeal from Superior Court, Gaston County; Long, Judge.

Action by Laura J. Featherstone against the Lowell Cotton Mills. From a judgment for plaintiff, defendant appeals. Affirmed.

Civil action to recover damages for personal injuries, tried before his honor Judge B. F. Long, and a jury at special term of superior court of Gaston county, January, 1912. There was verdict for plaintiff, and judgment, and defendant excepted and appealed, assigning for error: (1) That plaintiff's counsel, for the purpose of ascertaining their competency to serve as jurors, was allowed to ask, over defendant's objection, if they were interested as stockholders, officers, or employes, etc., of the Maryland Casualty Company. (2) That, while the court was examining an authority on the subject, plaintiff's counsel stated in the hearing of the jurors, and before they were selected: "I desire to ask the attorney for defendant if the Lowell Cotton Mills pays one cent of any recovery in the action up to \$5,000." Defendant objected, on the ground "that the statement was calculated to prejudice the jury, and because irrelevant and impertinent." The court sustained the objection, and added that defendant's counsel was not required to answer the question. The jurors, already in the box, were then sent out, and it was shown that defendant company held an insurance policy in the Maryland Casualty Company to \$5,000, and was denying its liability thereunder, because not notified as required, etc. The jurors having returned, plaintiff's counsel inquired of them if there was any member of the jury interested in the said Casualty Company; if so, he desired to excuse them. Defendant objected to the question. Court overruled objection, stating it had allowed the question for the purpose of enabling counsel to ascertain if any juror was interested as agent or otherwise in the Maryland Casualty Company, but only for the purpose of allowing plaintiff's counsel to peremptorily challenge such juror. Defendant excepted.

The case on appeal here proceeds as follows: "No juror excused himself on this ground; but there were some jurors, probably as many as three, who were objected to by plaintiff's counsel for some other reason, and stood aside, and other jurors, either

from the regular panel or from bystanders, were called into the box, and the jury was thus supplied with 12 jurors. After such new jurors were called into the box, the plaintiff propounded, among other things, the same question as set out above. The defendant objected. The court allowed the question to be asked for the purpose above set out, and the defendant excepted." The jury, having been obtained, were impaneled, and verdict and judgment for plaintiff. Defendant, as heretofore stated, excepted and appealed.

O. F. Mason, for appellant. Thos. F. McDow, Wm. H. Lewis, and A. G. Mangum, for appellee.

PER CURIAM. [1] Under our decisions, the stockholders, officers, or employes of the Casualty Company would not be impartial or competent jurors to determine the issue; and, under all ordinary conditions, the questions asked by counsel on the voir dire were not improper. *Norris v. Cotton Mills*, 154 N. C. 474, 70 S. E. 912; *Blevin v. Cotton Mills*, 150 N. C. 493, 64 S. E. 428.

[2, 3] It has also been held with us, however, that the fact that a principal defendant is protected from liability by an insurance policy is not a relevant circumstance on the trial of the issue. *Lytton v. Manufacturing Co.*, 157 N. C. 331, 72 S. E. 1055; and before jury impaneled, if it should be made to appear that questions of this character have been asked in bad faith, and have likely operated to defendant's prejudice, a recovery should not be allowed to stand. In this case, on the facts as presented, both the questions asked of the jurors, the same being as a rule competent, and that addressed to defendant's counsel are matters which must be left largely to the discretion of the court below; and it must be presumed that the character and good sense of the jurors selected have protected them from improper bias, or that any such tendency has been effectually checked and corrected by the learned and impartial judge who presided at the trial.

We find no error in the record to justify the court in disturbing the results of the trial; and the judgment in plaintiff's favor is therefore affirmed.

No error.

(159 N. C. 142)

PHIFER v. GILES et al.

(Supreme Court of North Carolina. May 15, 1912.)

### 1. PLEADING (§ 34\*)—PETITION—CONSTRUCTION AND SUFFICIENCY ON DEMURRER.

If the allegations of a petition disclose grounds for relief, when liberally construed, a demurrer thereto, which admits the allegations, should be overruled.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 5½, 66, 74; Dec. Dig. § 34.\*]

**2. CONVERSION (§ 16\*)—EQUITABLE CONVERSION.**

Where a testatrix bequeathed and devised real and personal property, in trust, with power to sell, without making any distinction between the two kinds of property, and directed the application of the "proceeds," and the general scope of the will indicated that she thought it would be necessary to sell the whole and dispose of it for that purpose, a conversion of the realty into personalty was effected.

[Ed. Note.—For other cases, see Conversion, Cent. Dig. §§ 38-40, 42, 43; Dec. Dig. § 16.\*]

**3. CONVERSION (§ 16\*)—EQUITABLE CONVERSION—EFFECT OF POWER OF SALE IN WILL.**

A power of sale in a will does not effect an equitable conversion, unless it is imperative, arising by express command or necessary implication.

[Ed. Note.—For other cases, see Conversion, Cent. Dig. §§ 38-40, 42, 43; Dec. Dig. § 16.\*]

**4. CONVERSION (§ 18\*)—EQUITABLE CONVERSION—PARTIAL CONVERSION.**

If a testatrix, in devising real property, with power to sell the property, or any part thereof, for specified purposes, intends that only enough shall be sold to carry out these purposes, there is only a partial conversion of the realty into personalty.

[Ed. Note.—For other cases, see Conversion, Cent. Dig. § 44; Dec. Dig. § 18.\*]

**5. CONVERSION (§ 22\*)—EQUITABLE CONVERSION—RECONVERSION.**

Where a testatrix devised land in trust, with power to sell for the payment of debts and charges, the residue to be divided among the children, a petition by the wife of one of the children for an allotment of dower, which showed that the debts and charges had been paid, and that much of the land remained unsold, that her husband, by a deed in which she did not join, conveyed his interest in the "land" to the other children, and that the unsold portion of the land had been divided among the other children as land, in connection with an allegation that when her husband executed the deed he was seised in fee of an undivided one-seventh interest in the land remaining unsold, sufficiently shows a reconversion of such unsold land into real property to be good against demurrer, assuming that the will effected a conversion of the whole property into personalty.

[Ed. Note.—For other cases, see Conversion, Cent. Dig. §§ 66-72; Dec. Dig. § 22.\*]

**6. CONVERSION (§ 22\*)—EQUITABLE CONVERSION—RECONVERSION.**

Where parties, entitled under a will to property in its converted form, elect to take it in its original form, there is a reconversion; and this election may be inferred from acts or conduct manifesting an unequivocal intention to so elect.

[Ed. Note.—For other cases, see Conversion, Cent. Dig. §§ 66-72; Dec. Dig. § 22.\*]

Appeal from Superior Court, Mecklenburg County; Lyon, Judge.

Proceedings for an allotment of dower by Belle McGhee Phifer against Wilhelmina Phifer Giles and others. From a judgment sustaining a demurrer to the amended petition, the petitioner appeals. Reversed, and demurrer overruled.

See, also, 157 N. C. 221, 72 S. E. 1006.

This is a proceeding for the allotment of dower; the petitioner claiming as the widow

of R. S. Phifer, who was one of seven children of M. M. Phifer.

A demurrer was filed to the original petition, which was sustained, and the petitioner excepted and appealed to this court. The appeal was heard at the last term, and the judgment of the superior court was affirmed. Upon the opinion of the Supreme Court being certified to the superior court, the petitioner filed an amended petition, by permission of the court, by adding the following paragraphs to the original petition:

"(9) That after the execution of the last will and testament of M. M. Phifer, referred to in paragraph 3, and before her death, said M. M. Phifer paid the purchase money for the real estate referred to in the last will and testament of M. M. Phifer, and received a deed from said Joseph H. Wilson, conveying to her the land therein referred to in fee, it being the first tract of land described in the second paragraph of this complaint, and thereby became the owner of the legal and the equitable title to said property before her death, and at the time of her death was seised of said real estate in fee.

"(10) That W. W. Phifer, executor of said last will and testament, has filed no report of his dealings with said real estate, either as executor or trustee, in the office of the clerk of the superior court of Mecklenburg county, as required by law; that W. F. Phifer died on the 30th day of December, 1882, and never qualified as executor of said last will and testament, and this petitioner is informed, advised, and believes that the deceased, M. M. Phifer, died owing no debts; that there was sufficient personal estate belonging to said M. M. Phifer at her death to pay all of her debts, and all of said debts, if any, have long since been paid.

"(11) That a portion of the land hereinbefore described has been cut up into city lots, some of said lots have been sold and conveyed to various persons, deeds to which have been executed by W. W. Phifer, as executor and trustee, and by W. W. Phifer and the other devisees named in said last will and testament, except R. S. Phifer; but the petitioner alleges that the greater part of said real estate has never been sold, and that the defendants George M. Phifer, Cordelia W. Phifer, Josie P. Durant, Mary W. Quinn, El. W. Phifer, and W. W. Phifer, being all the devisees and heirs at law of M. M. Phifer, deceased, except R. S. Phifer, deceased, are now in the actual possession of said unsold land.

"(12) That on the ——— day of October, 1906, the defendants W. W. Phifer, individually and as the executor of the will of M. M. Phifer, Edward W. Phifer and wife, Annie Phifer, and Mary C. Quinn and husband, M. C. Quinn, Josie P. Durant, Cordelia W. Phifer, and George M. Phifer entered into an agreement in writing, whereby they attempted to divide among themselves a part of the



land described in the second paragraph of this petition, which said written agreement is recorded in the office of the register of deeds of Mecklenburg county in Book 209, page 494, a copy of which is hereto attached, and marked 'Exhibit C.'

"(13) That there still remains a part of said land in the possession of the defendants George M. Phifer, Cordelia W. Phifer, Josie P. Durant, Mary W. Quinn, Edward W. Phifer, and W. W. Phifer yet undivided and unsold.

"(14) That this petitioner is informed, advised, and believes that the defendant W. W. Phifer, trustee and executor, has sold and disposed of more than enough of the land, hereinbefore described, to pay off all of the debts of M. M. Phifer, deceased, and to pay all of the devisees named in said last will and testament of the said M. M. Phifer a sum of money equal to the amount advanced to R. S. Phifer by said M. M. Phifer, as referred to in her said last will and testament, and that all of the trusts, charges, obligations, and duties imposed upon said W. W. Phifer, executor and trustee, by the said M. M. Phifer in her last will and testament have been fully discharged and satisfied, and that all of said duties, trusts, charges, and obligations imposed upon said W. W. Phifer, executor and trustee, were either performed by M. M. Phifer during her lifetime, and after the execution of her said last will and testament, or by W. W. Phifer, trustee, after the death of M. M. Phifer and before the death of the petitioner's husband, R. S. Phifer, and that at the time of the execution of Exhibit A said R. S. Phifer was seised and possessed of a one-seventh undivided interest in the land described in paragraph 2 of this petition, except such land as the trustee, W. W. Phifer, had sold off for the purpose of applying the proceeds of the sale to the payment of the debts of M. M. Phifer, and the payment of the devisees named in the last will and testament of said M. M. Phifer, an amount of money equal to the amounts advanced by the said M. M. Phifer in her lifetime to the petitioner's husband, R. S. Phifer.

"(15) That your petitioner is informed, advised, and believes that her said husband, R. S. Phifer, at the time said deed (Exhibit A) by him purports to have been made, was seised and possessed of a one-seventh undivided interest in the land described in paragraph 2 of this petition, except such lands as were actually sold by W. W. Phifer, executor and trustee, prior to the date of Exhibit A, for the purpose of applying the proceeds of such sale to the payment of the debts of M. M. Phifer, and to the payment to said devisees, except R. S. Phifer and W. W. Phifer, an amount of money equal to the amount advanced to said R. S. Phifer, referred to in said last will and testament; and your petitioner desires to have her dower in said lands allotted to her, and to that end she prays the

court to issue a writ to the sheriff of Mecklenburg county, commanding him to summon three freeholders, connected with the parties neither by consanguinity nor affinity, entirely disinterested, and qualified to act as jurors, to view the said lands, and to allot to your petitioner a one-third part of the one-seventh undivided interest in said lands, as hereinbefore set out, for the term of her natural life and to report their proceedings to this court in due form of law."

A demurrer to the amended petition was sustained, and the petitioner again excepted and appealed.

The facts stated in the original petition, the will of M. M. Phifer, and the papers executed by R. S. Phifer are fully reported on the former appeal. 157 N. C. 221, 72 S. E. 1006.

W. F. Harding, for appellant. Burwell & Cansler, Tillett & Guthrie, Cameron Morrison, and Maxwell & Keerans, for appellees.

ALLEN, J. (after stating the facts as above). When this case was before us on the former appeal, it was decided, upon the allegations then made, that the petitioner was not entitled to dower, as it was not made to appear that any part of the trusts declared in the will of M. M. Phifer had been executed, or that any part of the land devised in said will remained unsold, or that it was unnecessary to sell all of said land, or that after the payment of the debts and charges there would be any surplus.

It was also intimated that the trusts declared in said will were active trusts, and that a construction of the will was permissible to the effect that it was the intention of the testatrix to convert the realty to personalty, and that, in either event, the petitioner would not be entitled to dower; but the court refrained from passing finally upon these questions as the pleadings then stood.

The amended petition presents a new case for our consideration; and, if its allegations are true, which we must assume in reviewing a judgment sustaining a demurrer to it, it is doubtful if there has been a conversion as to the land remaining unsold after the payment of the debts and the charges for equality among the children; and, if there was such conversion, the facts alleged, undisputed and without explanation, would be evidence of a reconversion.

The petitioner now alleges, in substance, that the debts and charges for equality, provided for in the will of M. M. Phifer, have been paid; that a sale of the land was unnecessary; that, although more than 30 years have elapsed, a large part of the land remains unsold; that the beneficiaries under the will have elected to take the property as realty; and that her husband was seised in fee of an undivided one-seventh of the land remaining unsold.

[1] These allegations are admitted by the

demurrer, and must be construed liberally; and, if they disclose grounds for relief, although imperfectly alleged, the demurrer must be overruled. *Brewer v. Wynne*, 154 N. C. 472, 70 S. E. 947.

[2] The will of Mrs. Phifer bequeaths and devises personal and real property, in trust, with power to sell, without making any distinction between the two kinds of property, which is evidence of an intention to convert the whole to personality (*Burr v. Sim*, 1 Whart. [Pa.] 252, 29 Am. Dec. 52); and it directs the application of the *proceeds*, which indicates a purpose for all to be sold. The general scope of the will, examined by itself and without reference to the facts now alleged, suggests that the testatrix thought it would be necessary to sell the whole, and that she disposed of it for that purpose, which would be a conversion. *Ford v. Ford*, 70 Wis. 19, 83 N. W. 188, 5 Am. St. Rep. 124; *Lent v. Howard*, 89 N. Y. 169.

[3, 4] On the other hand, there is no conversion, unless the power to sell is imperative, arising by express command or necessary implication (*Mills v. Harris*, 104 N. C. 626, 10 S. E. 704; *Benbow v. Moore*, 114 N. C. 272, 19 S. E. 156; *Haward v. Peavey*, 128 Ill. 430, 21 N. E. 503, 15 Am. St. Rep. 124); and the power to sell conferred by the will is "to sell said property or any portion thereof," which may mean that the testatrix intended that the trustees should sell so much of the property as might be necessary to pay debts and charges for equality among the children, and no more, in which event there would be a conversion of a part only (*Smith v. McCrary*, 38 N. C. 208; *Scholle v. Scholle*, 113 N. Y. 273, 21 N. E. 84; *Cronise v. Hardt*, 47 Md. 436; *Roy v. Monroe*, 47 N. J. Eq. 359, 20 Atl. 481; *Sheridan v. Sheridan*, 136 Pa. 20, 19 Atl. 1068; *King v. King*, 13 R. I. 507); and, if the allegations of the amended petition are true, the debts and charges have been paid, and much of the land remains unsold.

[5] If, however, it should be held that a conversion has taken place, the specific facts alleged, considered in connection with the allegation of the petitioner that her husband was seised in fee of an undivided one-seventh interest in the land remaining unsold, if true, would amount to an allegation of a reconversion.

It is alleged that R. S. Phifer, the husband, conveyed his interest in the land, not in the fund, for the benefit of the other children of M. M. Phifer, in 1881, without the joinder of the petitioner, and that a large part of the land has remained unsold for more than 30 years, and that it has been divided as land among said children.

The doctrine of conversion and reconversion is clearly stated by Justice Hoke, in *Duckworth v. Jordan*, 138 N. C. 525, 51 S. E. 111; and he there says, with reference to the latter: "This reconversion can be effected where all the parties beneficially interested in the property, by some explicit and

binding action, direct that no actual conversion shall take place, and elect to take the property in its original form. \* \* \* In devises of the kind we are now considering, where land is directed to be sold and the proceeds divided, in order to a valid election, all the interests must concur, and all must be bound. If the beneficiaries are all sui juris, such election can be made by deed in which all join, or by answer, expressly stating that the parties desire to hold the land as it is, or this may be done partly by deed and partly by answer (and there are other methods); but all must concur by some action that will bind them."

It will be noted that, upon the facts in that case, the question was presented of a reconversion by deed or answer; but the court said "there are other methods." Mr. Pomeroy, in his work on Equity Jurisprudence (volume 3, § 1175), says: "By reconversion is meant that 'notional or imaginary process by which a prior *constructive* conversion is annulled and taken away, and the *constructively* converted property is restored, in contemplation of a court of equity, to its original actual quality.' \* \* \* The rationale of this doctrine is clearly found in the right which every absolute owner or donee has to dispense with or forbid the execution of any trust, in the performance of which he alone is interested. Reconversion is the result of an election expressly made, or inferred by a court of equity. It depends wholly upon the right of election held by the person entitled to the property to choose whether he will take the property in its converted condition or in its original and unconverted form." And, again, in section 1177: "It being assumed that the party entitled to the property has the capacity to elect to receive it in its unconverted form, and thus to effect a reconversion, the further question remains how such election must or may be made. An express declaration of the intention in language is always sufficient; but is not necessary. An election may be inferred from acts or writings. Any act or writing which shows an unequivocal intention to possess the property in its actual state and condition will amount to a valid election."

[6] It appears, therefore, that there is a reconversion when the party or parties, entitled to the property as converted, elect to take it in its original form; and that this election may be inferred from acts or conduct which manifest an unequivocal intention to do so. *Harcourt v. Seymour*, 42 Eng. Ch. 45; *In re Davidson*, 11 Ch. Div. 350.

Many expressions are to be found in the reported cases as to the conduct which is evidence of an intention to reconvert. It is said, in *Bradish v. Gee*, 1 Amb. 229, that very slight evidence of intention by acts done is sufficient; in *Putten v. Darlington*, 1 Br. Ch. R. 213, that circumstances of demeanor, even though slight, will do; in *Wheldale v. Partridge*, 8 Ves. 235, that the slightest act

would do; in *Van v. Barnett*, 19 Ves. 108, that a slight circumstance is sufficient; in *Fluker v. Gordon*, 17 Beav. 434, that slight circumstances are sufficient; in *Prentice v. Janssen*, 79 N. Y. 478, that a slight expression of intention will do; and in *Burr v. Sim*, 1 Whart. (Pa.) 252, 29 Am. Dec. 52, that holding possession for one year is entitled to some weight.

Also it has been held that a reconversion will be inferred from an uninterrupted possession of the property in its original form and the receipt of the rents for 16 years (*Greesbach v. Freemantle*, 17 Beav. 318); from a possession for 21 years. *Stuck v. Mackey*, 4 Watts & S. [Pa.] 196; from advising with an attorney as to the right to elect to take as land, and retaining possession of the title deeds (*Davis v. Ashford*, 38 Eng. Ch. 44); from an execution of a deed (*Beal v. Stehley*, 21 Pa. 376).

In the last case cited, land was devised, with power to sell, and to divide the proceeds between three persons, two of whom conveyed their interest in the land to the third; and it was held that the making of the deed by the two was an election by them to take as land, and that the acceptance of the deed by the other was an election by him.

We have thought it necessary to say this much on the question presented by the record to show the difference between the case on the former appeal and as now constituted; but the rights of the parties cannot be finally determined until the facts are ascertained, and to that end the demurrer is overruled, with leave to answer.

Reversed.

(159 N. C. 138)

# SMITH v. PATTERSON et al.

(Supreme Court of North Carolina. May 15, 1912.)

## 1. RAILROADS (§ 22\*)—STATUTORY PROVISIONS —“ACTIONS AGAINST RAILROADS”—VENUE.

The proviso of Revisal 1905, § 424, that “actions against railroads” shall be tried in the county where the cause arose or in a county where the plaintiff resided when the cause arose or an adjoining county, applies only to actions in which a railroad is the sole defendant, and not to actions in which it is joined with an individual defendant.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 46-50; Dec. Dig. § 22.\*]

## 2. DEATH (§ 36\*)—VENUE—STATUTORY PROVISIONS—ACTIONS BY ADMINISTRATORS.

Under Revisal 1905, § 424, providing that actions, not otherwise specified, shall be tried in the county in which the plaintiffs or defendants or any of them resided at the commencement of the action, an action by an administrator for the death of his intestate is properly brought in the county in which the administrator resides, although it is not the county where he was appointed administrator.

[Ed. Note.—For other cases, see *Death*, Cent. Dig. § 51; Dec. Dig. § 36.\*]

Appeal from Superior Court, Mecklenburg County; Lyon, Judge

Action by W. M. Smith, administrator of Joshua Gosnell, against E. L. Patterson and the Southern Railway Company. From a judgment denying defendants' motion for a change of venue, they appeal. Affirmed.

The action was to recover damages for the death of intestate caused by the movements and operation of an engine of defendant company attributed to the negligence of the company and of E. L. Patterson, the engineer and employé of defendant company at the time of the killing. The court denied the motion and entered judgment embodying the relevant facts in terms as follows: “This cause coming on to be heard at the March, 1912, term of superior court of Mecklenburg county, before his honor, C. C. Lyon, judge presiding, and being heard upon a motion filed by the defendants at the January, 1912, term of the superior court of Mecklenburg county, the following facts are found by the court: That this action was brought to the January, 1912, term of this court, and that at said term, and before the time for filing answer had expired, defendants filed a written motion to remove this cause to Henderson county; that the intestate, Joshua Gosnell, was killed at Melrose, in Polk county, N. C., on or about the 28th day of July, 1911, and was at the time of his death a resident of the county of Henderson, state of North Carolina; that subsequent to the time of the said Gosnell's death, and previous to the time of the institution of this action, W. M. Smith, a resident of Mecklenburg county, N. C., now and at the time of death of said Gosnell qualified as administrator of the estate of Joshua Gosnell, before the clerk of the superior court of Henderson county, N. C.; that the defendant E. L. Patterson is, and was at the time of the death of the said Gosnell, a resident of Polk county, N. C. It is therefore considered and adjudged by the court that this action was properly brought in Mecklenburg county, N. C., and it is further ordered and adjudged that the defendant's motion to move to Henderson or Polk county be not allowed.” Defendants excepted and appealed.

O. F. Mason and Shannonhouse & Jones, for appellants. C. W. Tillett, Jr., and Tillett & Guthrie, for appellee.

HOKE, J. (after stating the facts as above). The validity of his honor's ruling is dependent upon the proper construction of section 424, Revisal, in terms as follows: “In all other cases the action shall be tried in the county in which the plaintiffs or the defendants, or any of them, shall reside at the commencement of the action; or if none of the defendants shall reside in the state, then in the county in which the plaintiffs, or any of them shall reside; and if none of the parties shall reside within the state, then the same may be tried in any county which

the plaintiff shall designate in his summons and complaint, subject, however, to the power of the court to change the place of trial, in the cases provided by statute: Provided, in all actions against railroads the action shall be tried either in the county where the cause of action arose, or in some county where the plaintiff resided at the time the cause of action arose, or in some county adjoining the county in which the cause of action arose, subject, however, to the power of the court to change the place of trial in the cases provided by statute." Authoritative interpretations of this and legislation of similar import elsewhere would seem to favor the position that in respect to actions instituted by an administrator and coming within the effect of the proviso, the terms appearing therein, "where plaintiff resided at the time the cause of action arose," have reference to the residence of the individual holding the office and not to the official residence or place where he may have qualified." *Whitford v. Insurance Co.*, 156 N. C. 42, 72 S. E. 85; *Robertson v. Lumber Co.*, 153 N. C. 120, 68 S. E. 1064; *Railroad v. Stith*, 120 Ky. 237, 85 S. W. 1173, 1 L. R. A. (N. S.) 1014; *Turner, Adm'r, v. Railroad*, 110 Ky. 879, 62 S. W. 1025.

[1] Without present decision of this question, however, we are all of opinion that the proviso to the section should be construed and held to apply to cases where a railroad company alone is defendant, and that the venue in actions where there are other parties defendant should come within the body of the act. This is not only the primary and natural meaning of the language used, but without express requirement it would be unreasonable to hold that the rights of all other litigants should be made subservient to a particular class and this without regard to the convenience of the parties or the amount of the interest involved.

[2] On authority, therefore, and owing to the joinder of the individual defendant *Patterson*, the action is properly brought in Mecklenburg county. *Whitford v. Insurance Co.*, *supra*.

There is no error, and the judgment below is affirmed.

(156 N. C. 353)

#### WOODIE v. TOWN OF NORTH WILKESBORO.

(Supreme Court of North Carolina. May 15, 1912.)

#### 1. WITNESSES (§ 274\*)—IMPEACHMENT—QUESTION.

In a civil case, where plaintiff's witness had testified as to his good character, a question to the witness, as to whether he thought that a man, who would go to a distillery and try to run another away with a gun and would attend a lynching bee, was a man of good character, was incompetent, tending to raise collateral issues.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. §§ 965, 966; Dec. Dig. § 274.\*]

#### 2. WATERS AND WATER COURSES (§ 208\*)—PROXIMATE CAUSE—WHAT CONSTITUTES.

In an action by one injured by being thrown from his buggy upon the running away of his horses, which were frightened by the overflowing of a city water standpipe, the failure to properly equip the standpipe was the proximate cause of the injury.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. § 300; Dec. Dig. § 208.\*]

#### 3. MUNICIPAL CORPORATIONS (§ 733\*)—TORTS—CORPORATE FUNCTIONS.

Where a city operates a waterworks plant, it is exercising a corporate and not a governmental function, and owes the same duty to its servants and the public as would a private corporation under like circumstances.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1547-1549; Dec. Dig. § 733.\*]

#### 4. WATERS AND WATER COURSES (§ 208\*)—CONTRIBUTORY NEGLIGENCE—ORDINARY CARE.

Where plaintiff, who was properly on the highway, was injured by the running away of his horses, which became frightened at the overflowing standpipe belonging to the municipal waterworks, he was, to avoid contributory negligence, bound to use only that degree of care which a man of ordinary prudence would have exercised when so placed.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. § 300; Dec. Dig. § 208.\*]

Appeal from Superior Court, Wilkes County; Foushee, Judge.

Action by John A. Woodie against the Town of North Wilkesboro. From a judgment for plaintiff, defendant appeals. Affirmed.

The following issues were submitted to the jury:

(1) Was the plaintiff injured by the negligence of the defendant, as alleged in the complaint? Answer: Yes.

(2) Did the plaintiff by his own negligence contribute to his injury, as alleged in the answer? Answer: No.

(3) What damage, if any, is the plaintiff entitled to recover? Answer: \$800.

From the verdict and judgment rendered, the defendant appealed.

Frank D. Hackett, for appellant. W. W. Barber, C. B. Spicer, and T. C. Bowie, for appellee.

BROWN, J. This action is brought by the plaintiff against the defendant to recover damages for the alleged negligence of the defendant in the operation of its waterworks. The plaintiff alleges that the defendant, a municipal corporation, was duly authorized to construct and maintain a system of waterworks and lease, sell, and dispose of water and water privileges to the citizens of the town for compensation. It appears in the evidence that the standpipe of the said waterworks is situated some distance from the pumping station, and the alleged negligence consists in not having a proper water gauge at the pumping station to indicate to the pumper when the standpipe was full of wa-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

ter, so as to prevent dangerous overflow. On the — day of October, 1910, plaintiff was driving his horses and wagon by the pumping station, and alleges that the overflow of the standpipe was so great that it frightened his horses, caused them to run away, threw him out, as well as his daughter, who was with him, damaged the wagon, and greatly injured the plaintiff.

Several assignments of error relate to testimony offered tending to prove the condition of the wagon after the accident, the repairs that were put on it, the injury to the habits of the horses, caused by the runaway, and as to the worth of the horses before the accident and immediately afterwards. We think it unnecessary to discuss these assignments of error, as in our opinion the testimony was plainly competent.

[1] The plaintiff's witness David Hart, after testifying to facts material to the case, stated that he had known the plaintiff for 80 years, and that his general character was good. The defendant then asked him the following question: "Do you think a man that will go to a distillery and try to run another man away with gun and sticks and other weapons, and attend a lynching bee, and help lynch a man, is a man of good character?" This question was plainly incompetent, as it sought to inject into the case questions of fact utterly foreign to the issues in the case. As said by Mr. Justice Allen in *State v. Holly*, 155 N. C. 492, 71 S. E. 453: "If one collateral question of this character can be raised and tried, the same rule would permit a hundred others. The authorities in this state are numerous and uniform that it is an error to allow such questions on the cross-examination of a witness as to character." The learned judge cites practically all of the precedents in our reports.

The defendant entered the usual motion to nonsuit, which we think was properly overruled.

There was evidence tending to prove that the standpipe was overflowing at the time the plaintiff drove by with his horses, wagon, and daughter; that there was no accurate water gauge by which the operator at the pumping station could ascertain whether the standpipe was overflowing, or not; testimony is to the fact that he had to depend upon somebody's telephoning him, and that after this accident the defendant caused a proper water gauge to be put in. From examination of the evidence, we are of opinion that it was a fair inference to be drawn by the jury as to whether the overflow of the water caused the horses to run away, and that his honor properly left the question to the jury to determine.

The evidence as to the damage is plenary.

[2] As to the defendant's contention in regard to the proximate cause of the injury,

we think it too plain for argument that if the horses were frightened by the overflowing standpipe, causing them to run away, that was the proximate cause of the injury and the sole cause. *Clark v. Railroad*, 109 N. C. 430, 14 S. E. 43, 14 L. R. A. 749.

[3] We have held at this term that when a city operates an electric light plant, its duties towards its employes, as well as towards the public, are the same as those of an individual or private corporation under like circumstances, since in operating such public utilities the city is exercising a corporate and not a governmental function. *Terrell v. Washington*, 73 S. E. 888.

It was plainly the duty of the defendant to have provided a proper water gauge so as to have prevented the overflow of its standpipe and it is evident from the testimony that, if one had been provided, the overflow of water would have been prevented by the operator at the pumping station.

[4] It is very doubtful whether there is any evidence of contributory negligence. Under conditions similar to those in which the plaintiff was placed, he was not required to act with absolute wisdom, but only to exercise that care which a man of ordinary prudence would have exercised when so placed. *Hinshaw v. Railroad*, 118 N. C. 1047, 24 S. E. 426.

In leaving this question of contributory negligence to the jury under what is known as the "rule of the prudent man," we think his honor gave the defendant the benefit of everything it was entitled to.

No error.

(159 N. C. 222)

WITHROW et al. v. SOUTHERN RY. CO.  
(Supreme Court of North Carolina. May 22, 1912.)

1. PARTIES (§ 88\*)—MISJOINDER—DEMURRER.  
Joinder of an unnecessary party plaintiff is not a ground for demurrer.

[Ed. Note.—For other cases, see Parties, Cent. Dig. §§ 145-147; Dec. Dig. § 88.\*]

2. APPEAL AND ERROR (§ 1036\*)—REVIEW—HARMLESS ERROR.

In an action brought by two parties, defendant was not prejudiced by delay in a ruling that one of them could not recover, where all the material evidence introduced would have been competent with the other plaintiff as sole plaintiff.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4069-4074; Dec. Dig. § 1036.\*]

3. CARRIERS (§ 104\*)—CARRIAGE OF FREIGHT—DELAY IN TRANSPORTATION—DAMAGES—EVIDENCE—SUFFICIENCY.

In an action against a railroad company for delaying freight, evidence held insufficient to warrant a finding that plaintiff shipper received the full contract price for the freight at the destination, notwithstanding the delay, on sale to a third person.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 439-447, 459-461; Dec. Dig. § 104.\*]

**4. CARRIERS (§ 105\*)—CARRIAGE OF FREIGHT—DAMAGES—RIGHT TO RECOVER.**

If freight was damaged while the property of plaintiff, and while being transported by defendant railroad company, plaintiff was entitled to recover all damages caused by defendant's negligence.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 451-458; Dec. Dig. § 105.\*]

Appeal from Superior Court, Rutherford County; Judge.

Action by W. M. Withrow and another against the Southern Railway Company. Judgment for plaintiff the Virginia-Carolina Chemical Company, and defendant appeals. Affirmed.

This is an action to recover \$1,100 damages, alleged to have been caused by delay in transporting guano, and the plaintiffs are W. M. Withrow and the Virginia-Carolina Chemical Company. The plaintiffs allege, in substance, that in February, 1907, the plaintiff company agreed to sell and to deliver at Caroleen, N. C., to the plaintiff Withrow, certain guano; that pursuant to said agreement, said guano was delivered to the defendant at Blacksburg, S. C., on the 1st day of March, 1907, to be transported to Caroleen; that no part of said shipment was delivered at Caroleen until the 3d day of April, 1907; and that a part of said guano was lost and the remainder injured, by the negligence of the defendant, before it reached Caroleen.

The defendant demurred to the complaint as follows:

"First. That there is a misjoinder of parties plaintiff in this case; that from the complaint it appears that the plaintiff the Virginia-Carolina Chemical Company entered into a contract with W. M. Withrow, by which the Virginia-Carolina Chemical Company agreed to deliver to the said W. M. Withrow, at Caroleen, N. C., sixty (60) tons of fertilizer; that the said Virginia-Carolina Chemical Company delivered said fertilizers to defendant in March, 1907, and the defendant failed to transport the same until April, 1907; that from the complaint it appears that this is a complete cause of action in favor of the Virginia-Carolina Chemical Company and against the defendant company; and that the said W. M. Withrow has no interest or part therewith.

"Second. That the said complaint does not state a cause of action in favor of W. M. Withrow and against this defendant, for that it appears from the complaint that the only contract entered into or made by this defendant with any person whatsoever in reference to the said fertilizers described in the complaint was with the Virginia-Carolina Chemical Company; and that the title or right of possession to said property did not vest in the said W. M. Withrow until the same reached Caroleen, and was there delivered to W. M. Withrow."

The demurrer was overruled, and the de-

fendant excepted. The defendant then answered, denying negligence, and also that the guano had been injured.

The plaintiffs introduced evidence tending to prove that it was a part of the contract between the plaintiffs that the guano was to be delivered at Caroleen; that the delay in transportation was unreasonable; and that a part of the guano was lost and the remainder damaged, on account of the delay, before it reached Caroleen. The plaintiff Withrow testified as to the damage as follows: "It [the shipment] would come from Blacksburg to Shelby over defendant's road; then over the S. A. L. to Caroleen. When the guano reached Caroleen, it was in bad shape, sacks torn, and a great deal of it gone; and the part that was delivered was damp and wet and greatly damaged. It was not all there. At Shelby one of the cars was broken down on the defendant's track. They had to transfer shipment to another car. Lots of it was left in the box car which was broken down, and a larger quantity scattered round on the ground at the place of the breakdown, from shoe-mouth deep to half-leg deep. I went to see Purvis, agent of the guano company. The guano was torn all to pieces where the breakdown occurred."

The defendant introduced no evidence. At the conclusion of the plaintiff's evidence, the defendant moved for judgment of nonsuit, which was overruled, and the defendant excepted.

The defendant requested that the following instructions be given to the jury:

"(1) That the plaintiff W. M. Withrow, upon all the evidence, has no cause of action against the defendant, and cannot recover in this action." The court gave this prayer for instruction, and added that the plaintiff Withrow could not recover on his own testimony that the guano was to be delivered to him by the Chemical Company at Caroleen, N. C.

"(2) That there is no evidence of damage to the plaintiff Carolina Chemical Company, and the said plaintiff is not entitled to recover in this action." The court refused to give this prayer for instruction, and the defendant excepted.

There was a verdict in favor of the Virginia-Carolina Chemical Company for \$284, and from a judgment rendered thereon the defendant appealed.

S. Gallert, for appellant. McBrayer, McBrayer & McRorie, for appellees.

ALLEN, J. (after stating the facts as above). [1] The demurrer was properly overruled. It is not based upon defect of parties, but because one had been joined as plaintiff who had no interest in the subject of the litigation, and was therefore an unnecessary party, which is not good cause for demurrer. *Green v. Green*, 69 N. C. 294; *Sullivan v.*

Field, 118 N. C. 358, 24 S. E. 735; Worth v. Trust Co., 152 N. C. 242, 67 S. E. 590.

In the last case, Justice Hoke, speaking for the court, says: "Our decisions are to the effect that the joinder of unnecessary parties plaintiff or defendant is not good cause for demurrer. 'That there is a defect of parties plaintiff or defendant' is the language of our own statute; and numerous decisions with us have given the interpretation that the joinder of too many parties does not come within the statute."

[2] In any event, however, the defendant received the full benefit of the objection raised by the demurrer, as his honor instructed the jury that the plaintiff Withrow could not recover; and the defendant was not prejudiced by the delay in making the ruling, as all the material evidence introduced on the trial would have been competent with the Chemical Company as sole plaintiff.

[3] The motion for judgment of nonsuit, and the exception to the refusal of the instruction requested, involve the same question, and that is the right of the Chemical Company to recover damages upon the evidence.

The defendant admits that, as the stipulation that the guano was to be delivered at Caroleen was a part of the contract between the plaintiffs, the title to the guano was in the Chemical Company at the time of the delay complained of (*Summers v. Railroad*, 138 N. C. 295, 50 S. E. 714; *Cardwell v. Railroad*, 146 N. C. 218, 59 S. E. 673), and it does not deny that there is evidence of damage; but it contends that the evidence shows that the Chemical Company received the full contract price for the guano, and therefore says it has suffered no damage.

If it be conceded that this would constitute a defense to the claim for damages, the evidence does not, in our opinion, justify the construction placed upon it by the defendant. There were in the shipment 55 tons of guano, the contract price of which was \$20.40 per ton, and 5 tons of acid, sold at the price of \$14 per ton, making the total shipment at the price of \$1,192.

The only evidence tending to prove that anything was paid the Chemical Company on account of this shipment was that of W. T. Purvis, an agent of the company, who testified as follows: "I made contract for plaintiff company to ship the two cars to Withrow. There were other car loads shipped to Withrow. I don't think he settled with the company for these cars of guano. He gave notes and real estate mortgage to secure what he owed the company, but has not paid same. These cars of fertilizers were sold at public auction. Perry Hardin bought them and gave note to Withrow, and plaintiff company took the note as collateral to secure our debt against Withrow. This fertilizer was bid off by Hardin for \$420." This falls far short of sustaining the con-

tention that the contract price of \$1,192 was paid to the Chemical Company. The witness says he does not think any settlement was made for this shipment; that the plaintiff had bought other guano from the company, and had given his note and mortgage for the indebtedness, and that \$420 was realized from the shipment, which was paid to the company.

[4] It does not appear that any part of the value of this shipment was included in the note and mortgage, or that the plaintiff Withrow agreed to pay more than its value after it reached Caroleen; and, as the guano was damaged while the property of the Chemical Company, the company was entitled to recover all damages which were caused by the negligence of the defendant.

We find no error in the record, and the verdict of the jury seems to be conservative. No error.

(159 N. C. 129)

MOORE et al. v. QUICKLE et al.

(Supreme Court of North Carolina. May 8, 1912.)

ACKNOWLEDGMENT (§ 29\*)—CERTIFICATE—VALIDITY—"JURAT."

A deed, of record for more than 40 years, and on which there appeared, after the grantor's signature, the words, "Signed, sealed and delivered in the presence of [two parties named], Jurat," was presumptively legally probated and duly registered; the word "Jurat," when written on a deed by an officer authorized to take probate, meaning "proved."

[Ed. Note.—For other cases, see Acknowledgment, Cent. Dig. §§ 151-159; Dec. Dig. § 29.\*]

For other definitions, see Words and Phrases, vol. 4, p. 3875.]

Appeal from Superior Court, Gaston County; Long, Judge.

Action by Kathleen Moore and others against T. C. Quickle and others. From a judgment for plaintiffs, defendants appeal. Affirmed.

This is an action to recover possession of a tract of land. Both parties claim under deeds from William Sams, each purporting to convey the land in controversy; the deed under which the plaintiff claims bearing date of November 7, 1859, and the deed under which the defendant claims bearing date March 7, 1860. Neither party claims title by possession, and the original deeds from William Sams were not produced; both parties relying on the records. The deed from William Sams, of date November 7, 1859, has been on the records for more than 40 years. After the signature of William Sams, at the bottom of the deed, is found the following: "Signed, sealed and delivered in the presence of Wm. T. Shipp. A. W. Davenport, Jurat," and the only question presented by the appeal is whether this deed has been probated and is properly on the registry. If it has been duly probated and registered, the plaintiff is the owner of the land in con-

troversy, as, in that event, she would have the older and better title from the common source.

A. L. Quickel and Carpenter & Carpenter, for appellants. R. S. Hutchison and A. L. Bulwinkle, for appellees.

ALLEN, J. In *Starke v. Etheridge*, 71 N. C. 245, which has been frequently cited with approval, it is held that the word "jurat," when written on a deed by an officer authorized to take probates, means "proved," and in *Quinnerly v. Quinnerly*, 114 N. C. 147, 19 S. E. 99, that the presumption is that the probate is properly taken, when the only indorsement on the deed is that the parties claiming under it "procured the same to be proved." These authorities are conclusive against the defendant, if there is any evidence that the word "jurat" was written on the deed by an officer of the law, or if, in the absence of such evidence, the law would presume the fact to exist.

The question has arisen in several cases before this court, and it has been held, as we think, without exception, in the absence of evidence, and when there is nothing in the form of the probate on the deed indicating that it was improperly taken, that a presumption arises from the act of the register of deeds in admitting the deed to registration that the probate was by the proper officer, and regular, and that proof of that fact was before him. *Strickland v. Draughan*, 88 N. C. 317; *Howell v. Ray*, 92 N. C. 513; *Cochran v. Improvement Co.*, 127 N. C. 389, 37 S. E. 496. If the rule is ever applicable, it should be in a case like this, where the deed has been registered more than 40 years.

Being of opinion, upon these authorities, that the deed of 1859 was duly registered, upon a legal probate, and that the judgment of his honor is in accordance with law, it is affirmed.

Affirmed.

HOKE, J., did not sit.

(91 S. C. 411)

#### BRUNSON v. BRUNSON.

(Supreme Court of South Carolina. May 17, 1912.)

#### 1. CONTEMPT (§ 49\*)—CIVIL CONTEMPT—NATURE OF PROCEEDINGS—REVIEW.

The judgment in a civil contempt proceeding is a judgment in a civil case, and, if the order to which the civil contempt proceeding is attached as an incident is set aside for any cause, the proceedings for contempt fail.

[Ed. Note.—For other cases, see Contempt, Cent. Dig. § 135; Dec. Dig. § 49.\*]

#### 2. DIVORCE (§ 284\*)—CONTEMPT PROCEEDINGS—STAY—PENDING APPEAL.

Where defendant appealed from an order requiring the payment of alimony pendente lite, and pending the appeal proceedings were instituted to punish him for contempt for failure to comply with the order, he was entitled

to a stay of the contempt proceedings pending the appeal on giving bond to save respondent harmless by reason of the stay.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. § 767; Dec. Dig. § 284.\*]

Appeal from Common Pleas Circuit Court of Sumter County; H. F. Rice and John S. Wilson, Judges.

Action by Katie Brunson against G. W. Brunson. Application for an order staying proceedings against defendant for contempt for failing to obey an order requiring the payment of certain alimony pending an appeal from such order. Granted.

John H. Clifton, of Sumter, for appellant. L. D. Jennings, of Sumter, for respondent.

GARY, C. J. This is an application before me at chambers for an order staying proceedings in the above-stated case, pending an appeal to the Supreme Court. The main question argued before me was whether such order should be granted as there was not a separate appeal from the order of his honor, Judge H. F. Rice, adjudging the appellant guilty of contempt, in refusing to obey the order of his honor, Judge John S. Wilson, requiring him to pay certain sums of money for alimony pendente lite.

[1] In the case of *State v. Nathans*, 49 S. C. 199, 27 S. E. 52, the court points out the incidents of civil contempt proceedings as follows: "The judgment in a civil contempt proceeding is a judgment in a civil case, and, if the order to which the civil contempt proceedings attached as an incident is set aside for any cause, the proceedings in civil contempt fall with it. *Pelzer, Rodgers & Co. v. Hughes*, 27 S. C. 408 [3 S. E. 781]. This case is an illustration of the principle announced. The defendant therein was ordered to turn over certain choses in action to a receiver appointed by the court, and, on failing or refusing to do so, was ruled to show cause why he should not be attached for contempt. The rule was made absolute nisi. On appeal from this order, as well as the order appointing a receiver, this court held that the order appointing a receiver was erroneous because no case was made for the appointment of a receiver, and so set it aside; then very briefly the court said: 'This disposes also of the third question as to contempt.' That was a clear case of civil contempt. If the proceedings in the case at bar could be sustained as civil contempt proceedings, then, under the authority of *Pelzer v. Hughes*, supra, the order appealed from would have to be reversed, because the principal order to which it would attach as incident was not set aside."

[2] If the order requiring the appellant to pay alimony pendente lite should be set aside, then the order adjudging the appellant guilty of contempt of court would fall with it.

Under these circumstances, the order of his honor, Judge H. F. Rice, should be stayed



pending the appeal to this court from the order of his honor, Judge John S. Wilson, upon the appellant entering into bond to save the respondent harmless, by reason of this order, in the sum of \$500, and it is so ordered.

(30 S. C. 503)

**CAMERON v. WESTERN UNION TELEGRAPH CO.**

(Supreme Court of South Carolina. March 4, 1912.)

**1. TELEGRAPHS AND TELEPHONES (§ 66\*)—  
NEGLECT—ACTIONS—PRESUMPTIONS AND  
BURDEN OF PROOF.**

Plaintiff, in an action against a telegraph company for damages for its negligence in transmitting and delivering a message, has the burden of proving that the message was received by the company, or that the failure to receive it was due to defendant's negligence; and there is no presumption that the sender, communicating the message by telephone, was understood.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. §§ 61-63; Dec. Dig. § 66.\*]

**2. TELEGRAPHS AND TELEPHONES (§ 68\*)—  
NEGLECT—ACTIONS—MENTAL SUFFERING  
—STATUTORY PROVISIONS.**

Under express statutory provision, telegraph companies are liable in damages for mental suffering actually resulting from negligence in receiving or delivering messages, regardless of whether such messages afford notice that damage would result.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. §§ 69, 70; Dec. Dig. § 68.\*]

Appeal from Common Pleas Circuit Court of Lancaster County.

Action by W. W. Cameron against the Western Union Telegraph Company. Judgment for defendant, and plaintiff appeals. Reversed and remanded.

J. Harry Foster, of Yorkville, for appellant. Williams & Williams, of Lancaster, Geo. H. Fearons, of New York City, and Nelson, Nelson & Gettys, of Columbia, for respondent.

**FRASER, J.** This was an action for damages for mental anguish, alleged to have been suffered by the plaintiff, W. W. Cameron, on account of the alleged negligence of the defendant in its failure to transmit and deliver promptly a message to the plaintiff, which would have enabled him to be present in the last illness and death of his brother, James Cameron, and deprived him of the consolation of his family in time of bereavement. It was not clear as to the exact message; it was either, "Come at once," or, "Come at once, your brother very ill."

The evidence tends to show that Walter Cameron, the brother of the plaintiff, gave the message to a friend, Capt. J. R. Dickert, and requested him to telegraph the same to the plaintiff at Lancaster, S. C. Capt. Dick-

ert called up the telegraph office over the telephone, and undertook to communicate with the defendant company over the telephone. The message was taken down by the defendant's operator as a message to W. W. Clemmons, instead of W. W. Cameron. This seems to have been the cause of the failure to deliver promptly.

The question now before this court arises on exceptions to the judge's charge. There are nine exceptions; but the appellant groups his exceptions under two heads, and cannot complain if this court adopts his classifications and considers 1 to 4 together, and exceptions 5 to 9 as one. We will first consider the second group.

[1] 1. The appellant assigns "error in the circuit judge in charging the jury as follows: 'The burden is upon the plaintiff to show by the preponderance of the evidence that the misunderstanding or error arises from the negligence of the telegraph company or its agents, who received the message.'"

The appellant claims that proof of delay raises a presumption of negligence on the part of the telegraph company, and cites *Hellams v. Telegraph Company*, 70 S. C. 87, 49 S. E. 12, and *Du Bose v. Telegraph Company*, 73 S. C. 221, 53 S. E. 175, in support of the proposition. This, as an abstract proposition, is too well settled to be disputed.

Appellant also states correctly, by way of analogy, the presumption of negligence in injury to passengers and injury to stock. The burden of proof, to which his honor referred, was in reference to the receipt of the message.

When a plaintiff brings an action for damages for an injury to himself while a passenger, the burden of proof is on the plaintiff to show, or, in other words, the plaintiff must make out, by the preponderance of the evidence (they mean the same thing), the relationship of carrier and passenger, and also the injury resulting from some agency or instrumentality of the carrier. When the plaintiff has done this, the burden of proof is shifted to the defendant; and the defendant must show that it was not negligent. The plaintiff must show that the telegraph company received the message, or, but for the negligence of its agent, it ought to have received the message, before the presumption that men, standing face to face, understand each other; and the law, in order to prevent misunderstanding of errors, requires some contracts to be in writing. There is certainly no presumption that people speaking over the phone understand each other.

The plaintiff must prove, by the preponderance of the evidence, that correct information was received by the defendant, or was not received by it through its negligence.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

We see no error in this portion of the charge, and these exceptions are overruled.

[2] 2. The first group of exceptions are consolidated by the appellant, as follows: "It was error for the court to have charged the jury, as follows: If, also, the message was merely, 'Come at once,' then there would be no notice from the wording of the message that such a telegram related to sickness or death; and in such case there could be no recovery for any damages, by reason of mental anguish resulting from the nondelivery of such a message, unless at the time the defendant had notice of the fact, outside of the message, that it was a sickness or death message, and therefore failed to use due diligence to transmit and deliver the same promptly."

This exception ought to be sustained. The language of the statute is: "All telegraph companies, doing business in this state, shall be liable in damages for mental anguish or suffering \* \* \* for negligence in receiving, transmitting or delivering messages without regards to relationship by blood or marriage, or whether such message afforded notice of such relationship or otherwise, or that injury or damage would result if such anguish or suffering resulted as a matter of fact."

It is hard to see how the defendant would not be liable for mental anguish which resulted from the negligence in delivering this telegram, if there was negligence, whether such message afforded notice that injury or damage would result, if such injury resulted as a matter of fact. This may look to some like a hardship; but it is not the province of this court to condemn or defend. The power to amend does not belong to this department of government. We have no disposing power.

The judgment of this court is that the judgment of the circuit court be reversed, and the cause remanded for a new trial.

(91 S. C. 399)

# O'ROURKE v. ATLANTIC PAINT CO.

(Supreme Court of South Carolina. May 14, 1912.)

## 1. JUSTICES OF THE PEACE (§§ 155, 116\*)—APPEAL—NEW TRIAL—NOTICE—TIME FOR SERVING.

Under Code Civ. Proc. 1902, § 359, providing that a party appealing from a judgment of a magistrate's court shall file a notice of appeal within five days after judgment, but that, where a judgment is rendered on process not personally served, a defendant who did not appear shall have five days after personal notice of the judgment to serve the notice of appeal, section 88, subd. 17, providing that magistrates may grant new trials, and subd. 18, requiring motions for new trials to be made within five days after rendering of judgment, where a magistrate does not render judgment on the day the case is tried, but reserves decision, a party's time to appeal or

move for a new trial does not begin to run until he has notice of trial.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 524-533, 369-371; Dec. Dig. §§ 155, 116.\*]

## 2. APPEAL AND ERROR (§ 2\*)—STATUTORY PROVISIONS—LIBERAL CONSTRUCTION.

The Constitution and statutes should be liberally construed in favor of the right to appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3-7, 1882, 2421; Dec. Dig. § 2.\*]

## 3. JUDGMENT (§ 345\*)—VACATION—JUSTICE'S JUDGMENT.

Under Code Civ. Proc. 1902, § 359, limiting the time within which appeals may be taken from judgments of magistrate's courts, section 88, subd. 17, providing that magistrates may grant new trials, subdivision 18, limiting the time within which motions for new trials may be made, section 87, providing for the issuance of transcripts and their filing in the circuit court, from which time the judgment is a judgment of that court, and section 368, providing that on the hearing of the appeal, if the defendant failed to appear before the magistrate, and it is shown that manifest injustice was done, and he satisfactorily excuses his default, the court may order a new trial, the only remedy of a party against whom a judgment is rendered in magistrate's court is by appeal or motion for a new trial; and hence, where a party did neither within the time limited by statute, and the judgment has been transcribed into the circuit court, that court cannot vacate it on motion on the ground of mistake or surprise.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 674-676; Dec. Dig. § 345.\*]

Appeal from Common Pleas Circuit Court of Charleston County; Ernest Gary, Judge.

Action by the Atlantic Paint Company against Mrs. M. F. O'Rourke, brought in the magistrate's court, judgment in which was transcribed into the circuit court. From an order of the circuit court denying a motion to vacate the judgment, defendant appeals. Appeal dismissed.

G. F. von Koltitz, of Charleston, for appellant. B. C. Bellinger, of Charleston, and Douglas McKay, of Columbia, for respondent.

GARY, C. J. The appeal herein is from the following order of his honor, Judge Ernest Gary: "The above matter comes up on return to rule heretofore issued by Hon. R. W. Memminger, requiring the plaintiff to show cause why a judgment, heretofore rendered against the defendant in a magistrate court and transcribed into this court, should not be vacated, under section 195 of the Code, upon the ground of mistake and surprise, etc., occurring during the trial before the magistrate. After hearing argument of counsel, it is ordered that the injunction heretofore granted be vacated, upon the ground that the surprise, etc., for which relief is asked did not occur in this court, or in the transcribing, but in the magistrate's court; and therefore section 195 of the Code has no application, and gives no jurisdiction to this court to grant the relief asked."

The magistrate did not render judgment on the day the case was tried, but reserved his decision until a subsequent day. The appellant alleges she did not know the judgment had been filed until the time for appeal had expired, and a transcript of the judgment had been filed with the clerk of the circuit court. Section 23, art. 5, of the Constitution, provides that in all cases tried by magistrates the right of appeal shall be secured under such rules and regulations as may be provided by law. Section 359 of the Code, relating to appeals from judgments rendered by magistrates' courts, is as follows: "The appellant shall, within five days after judgment, serve a notice of appeal, stating the grounds upon which the appeal is founded. If the judgment is rendered upon process not personally served, and the defendant did not appear, he shall have five days, after personal notice of the judgment, to serve the notice of appeal provided for in this section and the next section." (Section 360 provides that the notice of appeal shall be served upon the magistrate also.) Subdivision 17, § 88, of the Code, provides that magistrates shall have power to grant new trials. And subdivision 18 is as follows: "No motion for a new trial shall be heard, unless made within five days from the rendering of the judgment: Provided, that the right of appeal from the judgment shall exist for five days after the refusal of a motion for a new trial." Section 87 of the Code is as follows: "A magistrate on the demand of a party, in whose favor he shall have rendered a judgment, shall give a transcript thereof, which may be filed and docketed in the office of the circuit court of the county where the judgment was rendered. The time of the receipt of the transcript by the clerk shall be noted thereon and entered in the abstract of judgments; and from that time the judgment shall be a judgment of the circuit court, but no sale shall be made under any execution issued upon such judgment in the circuit court, until the time for appealing from the judgment in the magistrate's court has expired, nor pending such appeal. If the judgment is set aside in the magistrate's court, it shall have the effect of setting aside the judgment filed and docketed in the circuit court. The filing and docketing such transcript in the circuit court, shall not affect the right of the magistrate to grant a new trial. \* \* \* " Section 368 contains this provision: "If the defendant failed to appear before the magistrate, and it is shown by the affidavits served by the appellant, or otherwise, that manifest injustice has been done, and he satisfactorily excuses his default, the court may, in its discretion, set aside or suspend judgment, and order a new trial, before the same, or any other magistrate in the same

county, at such time and place, and on such terms, as the court may deem proper."

[1] The foregoing provisions of the Constitution and statutes show clearly that the lawmaking department of the government intended to secure to litigants in magistrates' courts the right of appeal. The failure to provide specifically for a case like this, where the magistrate reserved his decision and rendered judgment afterwards, without giving the parties notice, was, most probably, an unintentional omission; and, while the courts have no power to supply omissions in a statute, yet, where all the legislative provisions on a given subject, on being construed together, show clearly the legislative intent, it is the duty of the court to so construe them as to give effect to that intent. The general law, as well as the statutes, contemplate that a party shall have notice before his rights are cut off. Hence the provision of section 359 that, "If the judgment is rendered upon process not personally served, and the defendant did not appear, he shall have five days, after personal notice of the judgment, to serve his notice of appeal," etc. Therefore we merely give effect to the legislative will when we declare the law to be that the time to move for a new trial or appeal in a case like this does not begin to run until the party affected by the judgment has had notice of it. This interpretation of the Constitution and statutes is in accord with the just administration of the law; and it is not in conflict with the decision of this court in the case of Doty v. Duvall, 19 S. C. 143. In that case, the court held that a trial justice (now magistrate) had no jurisdiction to entertain a motion for a new trial, unless it is made within five days from the rendering of the judgment; and that section 195 of the Code, which authorizes the court, in certain cases, to relieve a party from a judgment taken against him, was not intended to apply to trial justices' courts. But the language of every decision must be read with reference to the facts of the case under consideration. And, while it is not distinctly so stated in the report of the case, it is clearly inferable that the defendant was personally served with process, and made default. Therefore she was bound to take notice that judgment would be rendered on the day set for trial. Therefore the time within which to appeal or move for a new trial began to run from that day.

[2] The court should give a liberal construction to the Constitution and statutes in favor of the right of appeal. In *Archer v. Long*, 46 S. C. 292, 24 S. E. 83, although section 345 of the Code provides that appeals from orders granted at chambers shall be noticed within ten days from written notice of the granting thereof, this court held that the time to appeal did not begin to run until the order appealed from was filed

with the clerk of court, notwithstanding notice of the granting thereof had been given in strict accordance with the terms of the statute. In *Appleby v. Railroad*, 58 S. C. 33, 36 S. E. 109, it was held that, when the circuit judge heard a motion for a new trial on the minutes during the term, but reserved his decision and filed it six days after the adjournment of the term, the parties had ten days after written notice of the filing thereof within which to appeal, thereby construing the words "rendered at chambers" to mean the same as "rendered out of term time." In *Greenwood L. & G. Ass'n v. Childs*, 67 S. C. 251, 45 S. E. 167, the court held that handing an attorney an original order, with date of filing indorsed thereon, is not written notice of the filing as required by statute, and did not give currency to the time for appealing. In *State v. Gandy*, 87 S. C. 523, 70 S. E. 163, notwithstanding the statute says the defendant shall serve his notice of grounds of appeal "within five days after sentence," the court held that, where the last day falls on Sunday, he is entitled to six days in which to serve his notice and grounds of appeal.

[3] From the foregoing, it follows that the only remedy of a party against whom a judgment is rendered is either to appeal, or make a motion for a new trial, and appeal in case such motion is refused. The motion for a new trial must be made within five days from the rendition of the judgment; and, if it be refused, the appeal must be taken within five days from the refusal of such motion. If the judgment is rendered upon process not personally served, and the defendant does not appear, he shall have five days within which to appeal after personal notice of the judgment. If the magistrate does not render judgment on the day of trial, but reserves his decision, the party against whom judgment is rendered has the right to appeal or move for a new trial within five days after personal notice of the judgment.

At the time a transcript of the judgment was filed in the office of the clerk of the court (the plaintiff having had notice of the judgment), the time had expired within which the appellant had the right to make a motion for a new trial, or to appeal from the judgment rendered by the magistrate; and it could not be extended by the court. *Gibbes v. Beckett*, 84 S. C. 534, 66 S. E. 1000.

It is true the appellant had five days after personal notice of the judgment within which to make a motion for a new trial or to appeal; but at the time the transcript was filed the appellant was not entitled to any relief whatever, as she had failed to make a motion for a new trial, or to appeal within the statutory period. And the filing of the transcript did not have the effect of restoring the right to the relief which

she had lost by her failure to take action within the time required by law.

Appeal dismissed.

WOODS, HYDRICK, WATTS, and FRASER, JJ., concur.

(91 S. C. 404)

TINDAL et al. v. RICHBOURG et al.

(Supreme Court of South Carolina. May 15, 1912.)

WILLS (§ 634\*)—CONSTRUCTION—VESTED INTERESTS.

A devise to testator's wife for life and after her death to his three children, equally, "if living, and if they or either of them should be dead, to the child or children of the deceased one, in like proportion as the parent would have inherited, had they been living," gives to the children a vested transmissible interest, on testator's death, subject to the life estate of the wife, and the share of a daughter of testator, dying before the wife, passes to her child.

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. §§ 1488-1510; Dec. Dig. § 634.\*]

Frazer and Woods, JJ., dissenting.

Appeal from Common Pleas Circuit Court of Clarendon County; S. W. G. Shipp, Judge.

Action by Alexander A. Tindal and another, individually and as executors and trustees of Amzi Tindal, deceased, against Willie A. Richbourg and others. From a judgment for plaintiffs, defendants appeal. Reversed.

Davis & Weinberg, of Manning, for appellants. Charlton Du Rant, of Manning, for respondents.

GARY, C. J. This is an action for partition, and involves the construction of a will.

On the 28th of April, 1902, Amzi Tindal departed this life, leaving in full force and effect his last will and testament, which contained these provisions:

"I give, devise and bequeath all of my property, both real and personal of whatsoever kind, that I am now or may be at the time of my decease 'possessed,' to my beloved wife, Winnie Tindal, for her sole use and benefit, during her natural life.

"(2) That after the death of my wife, Winnie Tindal, I desire that all of the property, both real and personal, not used by executors hereinafter named, for the support and maintenance of my wife the said Winnie Tindal, be equally divided among my three children, Alexander A. Tindal, Alvinia Richbourg, and Ladson Tindal if they be living, and if they or either of them should be dead, to the child or children of the deceased one, in like proportion as the parent would have inherited, had they been living."

Winnie Tindal, wife of the testator, died on the 25th of November, 1910, Alexander A. Tindal and Ladson Tindal, children of the testator, survived their mother, Winnie Tin-

dal. Alvinia Richbourg, daughter of the testator, died prior to the death of her mother, Winnie Tindal, to wit, in 1907, leaving, among other children, her daughter Mattie, who had married a man by the name of Montgomery. Mattie Montgomery departed this life in 1909, leaving her husband and three children, who are also claiming an interest under the will. On the 17th of November, 1908, Mattie Montgomery conveyed to J. H. Rigby her entire interest under the will.

The sole question in the case is whether his honor, the circuit judge, properly construed the will of Amzi Tindal, in holding that Mattie Montgomery took no interest under the will, and therefore that J. H. Rigby had none.

My construction of the will is that the testator gave and devised the said land, unto his wife, Winnie Tindal, for and during the term of her natural life, and at her death, to be equally divided among his three children, Alexander A. Tindal, Alvinia Richbourg, and Ladson Tindal, the child or children of a deceased child, to take the share his or their parent would have taken.

In the case of *Brown v. McCall*, 44 S. C. 503, 22 S. E. 823, that great jurist Mr. Chief Justice McIver delivered an exceedingly able opinion in which he announced the doctrine that governs this case. In that case, a tract of land was settled by the court of equity upon a married woman, by directing the conveyance of the land to a trustee, to hold in trust for her for life and then for her present husband for life, and, after the death of the survivor, to the use of her children by her first husband, the issue of a deceased child taking, by representation, the parent's share, and the other half to her issue by her second husband, the issue of a deceased child taking, by representation, the parent's share. The court held that "the children took vested transmissible interests, and that the shares of such of them, as died before the surviving life tenant, passed to their vendee or heirs at law, provided they left no issue; but if they left issue who survived the life tenants, then their shares could not be claimed by their vendees or heirs at law, but were divested by the express terms of the deed, and vested in such their issue."

In the case of *Rutledge v. Fishburne*, 66 S. C. 155, 44 S. E. 564, 97 Am. St. Rep. 757, the court had under consideration the construction of a will in which there was a devise to a certain person for life, with remainder to her children share and share alike, the child or children of a deceased child to represent and take the parent's share, and it was held that these words created a vested transmissible interest in remainder to the child of the life tenant, and that children born to her during the life of the life tenant took by way of executory devise. The court used this language: "Much

of the confusion upon the question, whether the language of a will creates an executory devise or contingent remainder, has arisen from the failure to keep clearly in mind the marked and well-defined differences in the characteristics of the two estates. If the words of the will, out of which the contingency arises, are relied upon for the purpose of *defeating* an estate, which has already become *vested*, then this can only be done by construing them as an executory devise. But if the question is which of the two estates *shall become* vested, then such estates will be construed as remainders, alternative or substitutional in their nature; and such remainders are always *contingent*. Our conclusion is that such children would take by way of executory devise, and not as contingent remaindermen."

These principles are sustained by the cases of *Woodley v. Calhoun*, 69 S. C. 285, 48 S. E. 272, and *Brantley v. Bittle*, 72 S. C. 179, 51 S. E. 561.

For these reasons, I think the judgment of the circuit court should be reversed.

HYDRICK and WATTS, JJ., concur in this opinion.

FRASER, J. (dissenting). This is a suit for partition. Amzi Tindal made his will and died in 1902. By his will he devised and bequeathed his property to his wife for life, and by the second clause provided: "After the death of my wife, Winnie Tindal, I desire that all the property \* \* \* be equally divided among my three children, Alexander A. Tindal, Alvinia Richbourg, and Ladson Tindal, if they be living, and if they or either of them be dead, the child or children of the deceased one, in like proportions as the parent would have inherited, had they been living." Alvinia died before the life tenant leaving children, two of whom died before the life tenant.

The statement in the case is as follows: Amzi Tindal died April 28, 1902. Winnie Tindal, the widow, died November 25, 1910. Alvinia Richbourg, daughter of Amzi and Winnie Tindal, died in 1907. Lilly Ida Sumter, a daughter of Alvinia, died in 1908. Mattie Montgomery, another daughter of Alvinia, died in 1909. Lilly Ida Sumter left children. Mattie Montgomery left children, but conveyed her interest, if she had any, to the appellant. The referee held that the children of Lilly Ida Sumter did not take, but that the grantee of Mattie Montgomery did. His honor, Judge Shipp, who tried the cause, modified the master's finding and held: "I hold that under the second clause of the will only such children of Alvinia Richbourg as were living at the time of the death of the life tenant, Winnie Tindal, took anything of the one-third part that would have gone to Alvinia had she been living. There were only four such children living at that time, namely, Willie A. Richbourg,

John L. Richbourg, Joshua Richbourg and Joseph Richbourg. Except as above modified, I think the referee has reached the correct conclusion. It will follow that J. H. Rigby can take nothing by reason of his conveyance from Mattie Montgomery."

The following are the exceptions: "(1) That his honor erred, it is respectfully submitted, in holding that under the second clause of the will of Amzi Tindal only those children of Alvinia who were living at the death of the life tenant, Winnie, and should have sustained the finding of the referee that, notwithstanding Mattie Montgomery was dead at the falling in of the life estate, her grantee was entitled to her interest therein. (2) That his honor erred in holding that the appellant J. H. Rigby took no interest by virtue of his conveyance from Mattie Montgomery, and in reversing the finding and conclusion of the referee that he did."

It is a well-settled rule applied here to the exclusion of the children of Lilly Ida Sumter that "children" means immediate offspring, unless there is something in the will to show that it has a broader meaning. If Alvinia had conveyed her interest in the land, no one would have contended that the conveyance would have been effective, because the will says: "If they be living, and if they or either of them be dead, to the child or children of the deceased one." There is no other provision by which this provision is to be explained, and the provision made must govern. The contingency provided for was the death of one or more of the children of Amzi. Then the interest of the deceased was to go to his or her children. Alvinia died before the life tenant, and, under the express provision of the will, her interest went to her children. It will be observed that there is no limitation to children or issue of deceased children, as in other cases. Those cases in which these words occur do not apply. The simple question here is: Who are included in the term "children"?

Ruff v. Rutherford, Bailey, Eq. 9: "I am aware that there are cases in which grandchildren have been permitted to take under bequests to children; but this has never been done except where there were no children, or there were very strong and conclusive circumstances to show that such was the intention of the testator."

Matthis v. Hammond, 6 Rich. Eq. 401, 402: "Children, in its primary and ordinary sense, means the legitimate descendants of the first generation of the person named, and where there is nothing to show that the donor intended to use the term in a different sense, it will not include illegitimate offspring or stepchildren or grandchildren or more remote descendants. Remoter descendants are sometimes permitted to take under an enlarged sense of the term 'children,' in sup-

port of the intention of the testator, where the will would be otherwise inoperative, or where the context, by the employment of the terms 'issue' or 'descendants' promiscuously with children, exhibits the intention of testator to use the term 'children' in a secondary and liberal sense. Such liberal construction of the term 'children' is never made, except for the benefit of the issue of children or from the force of the context. (Citing authorities.) It is not made when persons exist who accurately fulfill the terms of description." See, also, Conner v. Johnson, 2 Hill, Eq. 41, and Wessenger v. Hunt, 9 Rich. Eq. 459.

Shanks v. Mills, 25 S. C. 362: "The rule is that while any of the class remain they take the whole interest, excluding the representatives of any of the class who may have died before the time indicated for distribution."

Hayne v. Irvine, 25 S. C. 292: "All who answer the description at the time of the distribution are the parties alone entitled."

Here those who fill the description exist, and there is nothing in the context to extend the term. We see no error in the construction placed upon the will by the circuit judge. The two exceptions raise only one question, and they are overruled.

The judgment of this court is that the judgment of the circuit court is affirmed.

WOODS, J., concurs in this opinion.  
GARY, C. J., dissents.

(91 S. C. 394)

STATE ex rel. LYON, Atty. Gen., v. VERDIER et al.

(Supreme Court of South Carolina. May 14, 1912.)

TOWNS (§ 28\*)—TOWNSHIP OFFICERS—USURPERS.

Where parties exercise the powers and duties of the office of township commissioners in a county, under appointment from the Governor in the year 1911, without the recommendation of the senator and representatives from that county, they are mere usurpers, unlawfully holding and exercising the duties of such officers.

[Ed. Note.—For other cases, see Towns, Cent. Dig. §§ 43-51; Dec. Dig. § 28.\*]

Four original causes by the State of South Carolina, on the relation of J. Fraser Lyon, Attorney General, against C. A. Verdier and others, A. J. Alexander and another, C. E. Boineau and others, and C. A. Walker and others. Judgment for plaintiff, excluding the defendants from the office.

J. Fraser Lyon, Atty. Gen., for plaintiff.  
Thos. Talbird, for defendants.

WATTS, J. These four causes were heard together by this court in its original jurisdiction, and involve substantially the same

questions of law and fact, so it is only necessary to set out the pleadings in one case. The complaint in the first-named action, omitting the usual caption, alleges:

"(1) That plaintiff is informed and believes that C. A. Verdier, J. R. Cooler, and W. W. Hudson have, since the — day of February, 1911, been exercising, and are still exercising, the powers and duties of the office of township commissioners for Bluffton township in Beaufort county, without legal appointment to said office, and without authority for exercising the powers and duties thereof.

"(2) That on the 24th day of February, 1911, the Governor of the state, without the recommendation of the senator and members of the House of Representatives from Beaufort county, appointed the said C. A. Verdier, J. R. Cooler, and W. W. Hudson to be township commissioners for Bluffton township, in Beaufort county. That said appointments have never been submitted to the Senate for approval, and have not been confirmed by the Senate.

"(3) That the said C. A. Verdier, J. R. Cooler, and W. W. Hudson, under the said appointments illegally given to them as township commissioners, as aforesaid, and without the consent and approval of the Senate, and without any other or any legal warrant, right, or grant whatsoever, have undertaken to exercise the powers and duties of said office, and have since that time continuously exercised the powers and duties of said office, notwithstanding the fact that they were unlawfully appointed, as aforesaid, and no commissions have been issued to them as such township commissioners.

"(4) Wherefore the plaintiff prays that this court, in the exercise of its original jurisdiction, issue its order against the said C. A. Verdier, J. R. Cooler, and W. W. Hudson, the defendants above named, requiring them to answer and show by what authority they claim to hold and exercise the duties of said office of township commissioners for Bluffton township, in Beaufort county. That it be adjudged that the said C. A. Verdier, J. R. Cooler, and W. W. Hudson are unlawfully exercising said office of township commissioners, as aforesaid, and that they be excluded therefrom. That the said C. A. Verdier, J. R. Cooler, and W. W. Hudson be required to pay the costs of this action, together with such fine, not to exceed two thousand dollars (\$2,000) each, as the court may adjudge."

Upon the verified complaint, a rule, requiring the defendants to show by what authority they were exercising the duties of said office, etc., was issued by Chief Justice Gary and made returnable to this court on April 29, 1912, on which day the defendants, by their counsel, appeared and first demur-

red to the complaint, and asked that the same be dismissed, on the following grounds:

(1) Because it appears on the face of the complaint that the defendants therein named were appointed as township commissioners of Beaufort county by the Governor in February, 1911, entered immediately thereafter upon the discharge of the duties of their offices, and have continued so to do for over a year, without question, and are at least de facto officers.

(2) Because there is nothing in the complaint to show that they were not legally appointed to said offices by the Governor; nor does it appear in the complaint that the delegation from Beaufort county, even if that were necessary, recommended any other persons to the Governor for appointment in the said several townships in said county.

(3) Because there is nothing in the complaint to show that any of the defendants usurped, intruded into, or are unlawfully holding or exercising the said offices.

(4) Because it does not appear upon the face of the complaint that there are any other persons than the defendants who are qualified, under the law, to discharge the duties of the several offices, if vacated by defendants in this case.

(5) Because it appears by the complaint that, if there ever were any persons legally qualified to perform the duties of these offices, they have vacated the same by abandonment in not undertaking to discharge the duties of these offices, or making an effort to do so.

In addition to the demurrer, the defendants answer and make return both. By their answer they admit they are exercising the duties of the office as alleged, but deny that they were not legally appointed. On the contrary, they alleged their appointment to office was legal; that on February —, 1911, they were notified by the clerk of court of Beaufort county of their appointment, and promptly filed their oath of office with him, and entered upon the discharge of the duties of the office to which they had been appointed, deeming nothing further necessary to perfect their title to office. They allege there is another action pending in the court of common pleas for Beaufort county to test their title to the office, in which the state, on the relation of J. W. Simmons and others, are plaintiffs; allege that at the last session of the Legislature an act passed, known as the Beaufort Delegation Bill, purporting to legislate them out of office, and naming others in their stead, which act they allege, on information and belief, is unconstitutional and void, which is the only thing, and a temporary injunction, which was set aside, that interfered with them in the discharge of the duties of their office since their first appointment by the Governor. They allege that in April,

1912, prior to service of papers on them in this case, that they received notice that they had been reappointed to these offices by the Governor, and filed their oaths of office and expect soon to get their commissions. They deny that it is necessary for their appointments to be confirmed by the Senate, and allege that no demand has ever been made on them by any one to turn these offices over to them. The return raises practically the same questions as the demurrer and answer of defendants. The plaintiff interposed a demurrer to the answer and returns of the defendants. Demurrer to answer on the ground that it fails to state facts sufficient to constitute a defense, in that: (1) It admits all of the material allegations of the complaint. (2) It is not alleged that the defendants were appointed by the Governor, either in 1911 or in 1912, upon the recommendation of the senator and members of the House of Representatives from Beaufort county. (3) It is not alleged that the action pending against them in the court of common pleas has the same parties plaintiff and defendant as in this action. On the contrary, it appears that the said action is brought by J. W. Simmons et al., as relators, and it is not alleged that said relators had any right to use the name of the state, or authority granted by the court or judge to bring such action.

The demurrer to the return is on the ground it fails to state facts sufficient to constitute a defense, and that it fails to show why defendants should not be ousted from office, in that it fails to allege that any of defendants were appointed by the Governor, either in 1911 or in 1912, upon the recommendation of the senator and members of the House of Representatives of Beaufort county. On the trial of the cases, an order was passed, dismissing the complaint as to B. Josselson. The demurrer interposed by the defendants to plaintiff's complaint are overruled, and the demurrer interposed by the plaintiff to the answer and returns of the defendants must be sustained. These cases are controlled by decisions of this court in *Elledge v. Wharton*, 89 S. C. 113, 71 S. E. 657, *Golden v. Wharton*, 90 S. C. 355, 73 S. E. 628, and *Russell et al. v. Lyon*, 72 S. E. 496; there being a striking similarity in the facts of the cases and the wording of the acts providing how rural policemen are to be appointed in Greenwood county and township commissioners in Beaufort county. See Acts of Legislature 1907, p. 623, and 1911, p. 194. It is therefore adjudged that the defendants against whom these actions are brought and are still before the court are guilty of usurping and intruding into, and are unlawfully holding and exercising the duties of, the office of township commissioners in Beaufort county; and it is the judgment of this court, that the de-

fendants be excluded from said offices, and that the plaintiff recover costs in each case against the defendants.

GARY, C. J., and WOODS, HYDRICK, and FRASER, JJ., concur.

(11 Ga. App. 187)

CHEROKEE MFG. CO. v. WHITE et al.  
(No. 4,085.)

(Court of Appeals of Georgia. May 22, 1912.)

(Syllabus by the Court.)

1. CERTIORARI (§ 27\*)—JURISDICTION—GRANTING OF NEW TRIAL.

"The superior court has, on certiorari, no power to grant a new trial in an inferior judicatory on the ground of alleged newly discovered evidence." *Lafitte v. State*, 105 Ga. 596, 31 S. E. 540.

[Ed. Note.—For other cases, see *Certiorari*, Cent. Dig. § 40; Dec. Dig. § 27.\*]

2. REVIEW ON APPEAL.

Though weak and unsatisfactory, there was some evidence to support the verdict, and the judgment overruling the certiorari will not be disturbed.

Error from Superior Court, Murray County; A. W. Fite, Judge.

Action between the Cherokee Manufacturing Company and V. A. White and others. From the judgment, the Manufacturing Company brings error. Affirmed.

F. K. McCutchen, of Dalton, for plaintiff in error. W. W. Sampler, of Spring Place, for defendants in error.

POTTLE, J. Judgment affirmed.

(11 Ga. App. 188)

FLOYD COUNTY v. BAKER. (No. 4,108.)  
(Court of Appeals of Georgia. May 22, 1912.)

(Syllabus by the Court.)

BRIDGES (§ 38\*)—INJURIES—LIABILITY—STATUTE.

Where, in an action brought to recover damages against a county for injuries to live stock, alleged to have been due to the defective condition of a public bridge, the evidence failed to disclose that the bridge in question was erected after the passage of the act of December 29, 1888 (Pol. Code 1910, § 748), creating a liability against counties upon such a cause of action, a verdict in favor of the plaintiff was unauthorized.

[Ed. Note.—For other cases, see *Bridges*, Cent. Dig. §§ 37, 109; Dec. Dig. § 38.\*]

Error from City Court of Floyd County; John H. Reece, Judge.

Action by John L. Baker against Floyd County. Judgment for plaintiff, and defendant brings error. Reversed.

Walter B. Shaw, of Rome, for plaintiff in error. Eubanks & Mebane, of Rome, for defendant in error.

POTTLE, J. Plaintiff recovered a verdict against Floyd county for injuries re-



ceived by his horse, on account of a defective bridge along one of the public roads of the county. The petition does not allege, nor does the evidence disclose, when the bridge was built. The defendant's motion for a new trial was overruled.

Since a county is not liable to suit for any cause of action, unless made so by statute (Political Code 1910, § 384), prior to the act of December 29, 1888 (Political Code 1910, § 748), there was no law of this state which created a cause of action against a county in a case like the one embraced in the present record. Counties of Bibb and Crawford v. Dorsey, 90 Ga. 72, 15 S. E. 647. For this reason, the Supreme Court held, in Seymour v. Elbert County, 116 Ga. 371, 42 S. E. 727, that a petition, asserting a liability against a county for injuries to live stock, alleged to have been due to the defective condition of a bridge, was fatally defective and set forth no cause of action, because it did not allege that the bridge was a public bridge, and that it was erected after the passage of the act of 1888. This decision was reaffirmed in Butts County v. Johnson, 136 Ga. 354, 71 S. E. 428. The petition in the present case having been passed over without demurrer, and without motion to dismiss, if the evidence had affirmatively shown that the bridge in question was a public bridge, and was erected after the passage of the act of 1888, the case would have been made out.

It was admitted by counsel for the county that the bridge was a public bridge. But there were public county bridges long prior to the act of 1888; and consequently this admission did not supply the proof that the bridge was in point of fact erected after the passage of the act of 1888. Political Code 1910, § 744. The evidence for the plaintiff having failed to show this necessary fact, the principle of the two decisions of the Supreme Court, above cited, is controlling; and a new trial should have been granted, on the ground that the verdict was without evidence to support it. At another trial, the plaintiff will have an opportunity to amend his petition and supply this necessary ingredient in the proof.

Judgment reversed.

(11 Ga. App. 173)

**BAGGS v. FUNDERBURKE.** (No. 4,042.)  
(Court of Appeals of Georgia. May 22, 1912.)

(Syllabus by the Court.)

**1. GUARANTY (§ 9\*)—REQUISITES.**

A contract on the back of a promissory note, signed by one other than the payee thereof and in the following words, "For value received, we hereby guarantee the payment of the within note at maturity, or at any time thereafter, with interest at the rate of 8 per cent. per annum, until paid, waiving demand,

notice of nonpayment and protest," prima facie imports a contract of guaranty.

[Ed. Note.—For other cases, see Guaranty, Cent. Dig. § 10; Dec. Dig. § 9.\*]

**2. EVIDENCE (§ 419\*)—PAROL EVIDENCE—CONTRACT OF SURETYSHIP.**

Parol evidence is, however, admissible to show that the party signing the contract received no independent consideration, and that the contract is in fact one of suretyship.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1912-1928; Dec. Dig. § 419.\*]

**3. BILLS AND NOTES (§ 467\*)—PLEADING—ACCOMMODATION INDORSER.**

An allegation that a defendant is sued as indorser of a promissory note, but that he received no independent consideration, is equivalent to an averment that he is an accommodation indorser or surety.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1480-1498; Dec. Dig. § 467.\*]

Error from City Court of Macon; Robt. Hodges, Judge.

Action by T. C. Funderburke against L. D. Baggs and one Deal. From an order overruling a demurrer to the petition, Baggs brings error. Affirmed.

Russell & Custer, of Bainbridge, and Lane & Park, of Macon, for plaintiff in error. M. E. O'Neal, of Bainbridge, Hardeman, Jones, Callaway & Johnston, of Macon, for defendant in error.

POTTLE, J. [1] This was an action in the city court of Macon, against Deal, a resident of Bibb county, and Baggs, a resident of Decatur county, upon a promissory note. The petition described Deal as the maker and Baggs as the indorser of the note. It was alleged that the indorsement of Baggs "rested upon no independent consideration." The indorsement relied on was on the back of the note, undated, and signed by Baggs, and was in the following language: "For value received, we hereby guarantee the payment of the within note at maturity, or at any time thereafter, with interest at the rate of 8 per cent. per annum, until paid, waiving demand, notice, or nonpayment and protest." By demurrer the point was made that the contract of Baggs was one of guaranty; that the averment in the petition that he received no independent consideration was an attempt to vary the contract of guaranty; and that the city court of Macon was without jurisdiction of the cause of action, so far as Baggs was concerned. The demurrer was overruled, and Baggs excepted.

The Code provides that a "contract of suretyship" is where one obligates himself to pay the debt of another in consideration of credit or indulgence, or other benefit given to his principal; the principal remaining bound therefor. It differs from a "guaranty," in that the consideration of the latter is a benefit flowing to the guarantor. Civil Code 1910, § 3538. But the test laid down in the Code to distinguish a contract of

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

suretyship from one of guaranty is not decisive. As with other contracts, the whole matter is governed by the intention of the parties. For instance, in the usual indemnity contracts, the parties generally intend that the indemnitor shall be surety, although he receives an independent consideration. And again, sometimes a contract will be construed to be one of guaranty, although the guarantor receives no consideration other than the benefit flowing to his principal. *Musgrove v. Luther Pub. Co.*, 5 Ga. App. 279, 63 S. E. 52. As a general rule, where one other than the payee undertakes to guarantee the payment of a note, and he employs apt language to evidence a contract of guaranty, the undertaking will not be construed to be one of suretyship, unless the only consideration be the benefit flowing to the principal. But if the contract be made at the time the note is executed, and solely in consideration of the benefit to the principal, or if made afterwards in consideration of an extension of time to the principal, or the like, the obligation will generally be held to be that of a surety, even though words importing a contract of guaranty are employed. *Baldwin Fertilizer Co. v. Carmichael*, 116 Ga. 762, 42 S. E. 1002; *Schittler v. Deering Harvester Co.*, 3 Ga. App. 86, 59 S. E. 342; *Fields v. Willis*, 123 Ga. 272, 51 S. E. 280; *Watters v. Hertz*, 135 Ga. 814, 70 S. E. 343. It is contended, however, that, as the contract of Baggs recites that it was executed "for value received," it must conclusively be presumed that it was founded upon an independent consideration, and parol evidence will not be heard to dispute it.

[2] In this state the relation to the contract of one signing a promissory note may be shown to be different from that which it appears to be on its face. *Buck v. Bank*, 104 Ga. 660, 30 S. E. 872. By express provision of the Code, "if the fact of suretyship does not appear on the face of the contract, it may be proved by parol." Civil Code 1910, § 3556.

[3] The petition alleges that Baggs was an indorser, and that he received no independent consideration. This averment is equivalent to an allegation that he was merely an indorser for accommodation, and such an indorser is a surety and suable in the same county with the maker as a joint promisor. Civil Code 1910, §§ 3541, 6540; *Heard v. Tappan*, 116 Ga. 930, 43 S. E. 375. The words "value received" are always subject to explanation. *Bing v. Bank*, 5 Ga. App. 578, 63 S. E. 652; *Pitts v. Allen*, 72 Ga. 69; *Reviere v. Evans*, 103 Ga. 169, 29 S. E. 756; *Brewer v. Grogan*, 116 Ga. 60, 42 S. E. 525. In *Schittler v. Deering Harvester Co.*, 3 Ga. App. 86, 59 S. E. 342, the language of the contract was: "For value received, I hereby guarantee the payment of the within note." It appearing from the evidence that the sole

consideration was the benefit to the principal, the contract was held to be one of suretyship. In the opinion it was said: "Nor do the words 'value received' conclusively import a consideration." In *Lacey v. Hutchinson*, 5 Ga. App. 865, 64 S. E. 105, it was held that a total want of consideration for a promissory note might be shown, though the note was under seal and recited that it was given "for value received." While the court in that case dealt solely with the effect of the presence of a seal, the fact is the note did upon its face purport to have been given "for value received," and it is evident that the court did not deem these words so far conclusive as to prohibit parol proof that there was in fact no consideration. Whatever may be the rule elsewhere, it is apparent that in Georgia the words "value received" only prima facie import a consideration, and that, notwithstanding the use of these words, parol evidence is admissible to show there was really no consideration moving to the promisor. Under the allegations of the petition, Baggs was a surety for Deal, and, as such, was suable in Bibb county. In *Gelser Mfg. Co. v. Jones*, 90 Ga. 307, 17 S. E. 81, there was no averment that the contract was not in fact founded upon an independent consideration, and the words, "for a consideration not herein named," prima facie imported that it was.

There was no error in overruling the demurrer.

Judgment affirmed.

(11 Ga. App. 193)

I. SILVERMAN & SON v. L. J. SLOAT  
& BRO.

(No. 4,124.)

(Court of Appeals of Georgia. May 22, 1912.)

(Syllabus by the Court.)

ATTACHMENT (§ 122\*)—AFFIDAVIT—AMENDMENT.

Where, in an affidavit made as the foundation for an attachment, it is alleged that the defendant is a nonresident of the state and is indebted to the plaintiff in a named sum, an amendment is allowable, setting forth the nature and character of the indebtedness claimed.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. §§ 323-337; Dec. Dig. § 122.\*]

Error from Superior Court, Fulton County; J. T. Pendleton, Judge.

Action by I. Silverman & Son against L. J. Sloat & Brother. Judgment for defendant, and plaintiff brings error. Reversed.

Tindall & Silverman, of Atlanta, for plaintiff in error. W. S. Dillon and Anderson, Felder, Rountree & Wilson, of Atlanta, for defendant in error.

POTTLE, J. Plaintiffs in error sued out an attachment against defendants in error, and in the affidavit alleged that the defendants were indebted to the plaintiffs "in the sum of \$75," and that the defendants resided

without the state. Upon this affidavit an attachment was duly issued, returnable to the justice's court, and the case was thereafter appealed to the superior court. When the case came on to be tried on the appeal, a motion to dismiss the attachment was made upon the ground that no cause of action was set forth, and because no itemized statement of the indebtedness was attached thereto. In response to this motion the plaintiffs in the attachment offered to amend by setting forth a bill of particulars or statement of indebtedness. The judge refused to allow this amendment and sustained the motion to dismiss. In this we think the trial judge was in error. In all cases of money demands, in suing out an attachment, all that the Code requires is that an affidavit be made that the debtor has placed himself in some one of the positions enumerated in the Code as authorizing an attachment to issue, and that he should also set out "the amount of the debt claimed to be due." Civil Code 1910, § 5056. By Civil Code 1910, § 5110, the plaintiff in attachment is given the right to "amend his attachment, or bond, or declaration, as in other cases at common law." Without reference to whether the amendment offered in the present case was necessary, it is very clear that the plaintiff had a right to amend. The attachment was not void and was amendable so as to specify the nature and character of the indebtedness which the plaintiff claimed against defendants in attachment. Indeed, this court held, in *Penn v. McGhee*, 6 Ga. App. 631, 85 S. E. 686, that "the affidavit upon which an attachment is based is amendable, not only as to form, but also as to substance." There was enough in the attachment proceedings to amend by, and the amendment offered was simply an amplification of the cause of action originally set forth.

Judgment reversed.

(11 Ga. App. 199)

FOLSOM v. STATE. (No. 4,156.)

(Court of Appeals of Georgia. May 22, 1912.)

(Syllabus by the Court.)

1. CRIMINAL LAW (§§ 1187, 1132\*)—CERTIORARI—PROCEDURE.

In a criminal case the judge of the superior court has jurisdiction to hear and determine a writ of certiorari and the return thereof, at any time after 10 days' notice, either in term time or in vacation, and, on the hearing, whether in term time or in vacation, may pass such judgment or sentence as, in a review of the whole case, is consistent with justice and law.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3220, 3221, 2980-2983; Dec. Dig. §§ 1187, 1132.\*]

2. CRIMINAL LAW (§ 1132\*)—CERTIORARI—PROCEDURE.

Where, on certiorari in a criminal case tried in a county court, a traverse is filed to

the answer, the superior court judge shall try the traverse either in term time or in vacation.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2980-2983; Dec. Dig. § 1132.\*]

3. LARCENY (§ 27\*)—LIABILITY.

Where two persons agree to commit a larceny and to divide between them the stolen property, and one of them actually commits the larceny, and the other stands conveniently near by while the larceny is actually in progress, and then receives his portion of the stolen property, both are guilty as principals. Especially is this true in misdemeanor cases, where all are principals.

[Ed. Note.—For other cases, see Larceny, Cent. Dig. §§ 55-57; Dec. Dig. § 27.\*]

Error from Superior Court, Baldwin County; Jas. B. Park, Judge.

Burl Folsom was convicted of larceny, and he brings error. Affirmed.

The plaintiff in error was convicted of the offense of simple larceny at the December term, 1911, of the county court of Baldwin county, on an indictment transferred from the superior court; and his counsel presented to the judge of the superior court of Baldwin county a petition for certiorari, during the regular session of the January term, 1912. The judge sanctioned the certiorari, in an order concluding as follows: "Let the writ of certiorari be issued by the clerk of this court in terms of the law, returnable before me at Eatonton, Ga., the third Monday in March, 1912." On filing the petition for certiorari in the clerk's office, due notice of this order was given to the Solicitor General of the circuit. This written notice was signed by the attorney of record for the applicant of the writ. On the third Monday in March, in pursuance of the order referred to, the certiorari came on to be heard at Eatonton, Ga., and at that time the attorney for the plaintiff specially appeared and filed what he called a formal protest and objection to the trial of the traverse filed by him to the answer of the county judge to the writ of certiorari. Counsel insisted that the court was without jurisdiction to try in vacation the issue raised by the traverse. This protest or objection was overruled, and the plaintiff excepted; and then, upon motion of his counsel, the hearing of the certiorari was postponed to March 22, 1912, at Milledgeville, Ga. At that time the plaintiff's counsel objected to the hearing of the certiorari, alleging that the court had no authority to order the hearing of the certiorari in vacation, or to hear it in vacation. The judge overruled this objection, heard the traverse, and found against it, and then heard the certiorari and overruled it, and the plaintiff excepted.

Livingston Kenan, of Milledgeville, for plaintiff in error. Jos. E. Pottle, Sol. Gen., of Milledgeville, for the State.

HILL, C. J. (after stating the facts as above). Two questions, therefore, arise for decision: (1) Can a writ of certiorari, sued out to review a judgment of a county court established under the general law, upon its sanction, be ordered by the superior court judge to be heard in vacation? (2) Where a traverse has been filed to the answer of the respondent, has the judge of the superior court jurisdiction to try and determine the traverse in vacation?

The law of this state applicable to writs of certiorari in criminal cases, where the same are brought for the purpose of reviewing the decisions of county courts of the state, seems to have been left out of the Code of 1910. It is found in the Penal Code of 1895, §§ 763-768, inclusive. This principle of law contained in the Penal Code of 1895 has not been repealed by any subsequent statute or by any provision of the Code of 1910, and is still of force. *Hicks v. Moyer*, 10 Ga. App. —, 78 S. E. 754. It was probably by mistake or oversight that it was omitted from the Code of 1910.

[1] Section 764 of the Penal Code of 1895 provides that, where a certiorari is sued out to review the judgment of a county court in a criminal case, "the writ must be applied for within thirty days after the trial, and may be obtained and disposed of either in term time or in vacation." And in *Avery v. State*, 4 Ga. App. 460, 61 S. E. 839, it is held that the judges of superior courts have jurisdiction in vacation to hear and determine certioraris in criminal cases as in civil cases, and in a county other than that where plaintiff in certiorari was tried and convicted.

[2] Section 766 of the Penal Code of 1895 provides that, "if, upon examination, the judge of the superior court considers the petitioner entitled to the writ, he shall issue it directed to the county judge, as in civil cases, requiring him to certify and send up to the judge of the superior court a complete and accurate history of the case." Section 767 of the Penal Code of 1895 is as follows: "The history of the case given by the county judge is his answer. It is subject to correction and traverse as prescribed in civil cases, except that the superior court judge shall try the traverse. He shall hear and determine the writ and return at any time, after 10 days' notice to the accuser, and may then pass such judgment or sentence as, in review of the whole case, is consistent with justice and law." It will be noted that there is quite a difference in the method of disposing of certioraris in criminal cases and in civil cases. In criminal cases the judge of the superior court hears and determines, either in term time or in vacation, everything appertaining to the writ

of certiorari, including the traverse to the magistrate's answer. In civil cases the certiorari is returnable to the superior court, and stands for trial at the return term, and if any traverse is filed to the truth of the answer or return of the magistrate, the law provides that it shall be tried by a special jury at the same term. The purpose of the statute as to certiorari in criminal cases is manifestly that there shall be a speedy determination of such cases, and that the accused shall not be allowed to use the writ merely for the purpose of delaying the judgment of the court. It is therefore very clear, from the Code sections cited, that in this case the judge of the superior court was fully authorized to hear the certiorari and the traverse to the answer of the magistrate in vacation, and to make a final disposition of the case, and that therefore the objections and protests to such hearing and determination by the judge interposed by counsel for the defendant were not only without merit, but were clearly antagonistic to the purpose of the law in reference to certioraris in criminal cases; that is, that they should be speedily heard and determined by the judge of the superior court, and not be subject to the delay of procedure governing certioraris in civil cases.

[3] 2. Under the evidence the jury were warranted in finding the accused guilty of the offense of simple larceny, and not of the specific offense of receiving stolen goods, knowing them to have been stolen, as contended for by his counsel; and there was no error in the refusal of the trial judge to charge the section of the Code defining the latter offense. In misdemeanor cases all are principals, and the evidence in this case shows that the accused entered into an agreement with another, who was the principal thief, to steal the property set out in the indictment, and that, while the larceny was being consummated by this principal thief, the accused remained at or near the place where the property was stolen, waiting for the principal thief to steal the property, so that he might receive the fruits of the crime, and he then and there received a part of the stolen property. The statute as to the offense of receiving stolen goods was intended to cover cases where the circumstances were not sufficient to make the receiver guilty as a principal, as, for instance, where he was not present constructively or actually at the commission of the offense, and had no previous understanding or knowledge that the offense was to be committed, and rendered no encouragement or actual assistance in the commission of the offense. The evidence supports the verdict.

Judgment affirmed.

(70 W. Va. 664)

**WESTINGHOUSE LAMP CO. v. INGRAM**  
et al.(Supreme Court of Appeals of West Virginia.  
April 16, 1912.)*(Syllabus by the Court.)***1. FRAUDULENT CONVEYANCES (§ 114\*) —  
TRANSACTIONS INVALID — PREFERENCES —  
RIGHT TO PREFER CREDITORS.**

Intent of an insolvent debtor to prefer one creditor over another does not constitute fraud justifying total annulment of a preferential deed, or the deprivation of the secured creditor of pro rata distribution with other creditors.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Cent. Dig. § 369; Dec. Dig. § 114.\*]

**2. FRAUDULENT CONVEYANCES (§ 114\*)—AS-  
SIGNMENTS FOR BENEFIT OF CREDITORS (§  
12\*)—TRANSACTIONS INVALID—PREFERENCES  
—STATUTORY PROVISION.**

Where no actual fraud is charged or proven, section 2, chapter 74, Code 1906, does not avoid a deed intended as a preference in toto; it only avoids it as a preference, and thereby converts it into a general assignment for the benefit of all creditors, on suit brought for that purpose within the time limited by the statute.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Cent. Dig. § 369; Dec. Dig. § 114.\* *Assignments for Benefit of Creditors*, Cent. Dig. §§ 15-19; Dec. Dig. § 12.\*]

**3. FRAUDULENT CONVEYANCES (§ 171\*) —  
REMEDIES OF CREDITORS—RELIEF.**

In a suit by creditors to set aside or avoid such preferential deed, it is error, without actual fraud charged and proven, to deprive the preferred creditor of pro rata distribution in the proceeds of the sale of the property conveyed.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Cent. Dig. § 522; Dec. Dig. § 171.\*]

**4. FRAUDULENT CONVEYANCES (§ 312\*) —  
REMEDIES OF CREDITORS—PARTIES.**

Where in such suit judgment creditors of a prior owner of a part of the real estate conveyed appear before the commissioner and assert and prove their liens on such property, it is error for the court, without requiring the judgment debtor to be brought in and made a party defendant, to decree such judgments in favor of the lienors, and a sale of such land to satisfy the same. Such judgment debtor is a necessary and proper party to such suit.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Cent. Dig. §§ 963-965, 967; Dec. Dig. § 312.\*]

**5. APPEAL AND ERROR (§ 61\*)—APPELLATE  
JURISDICTION—AMOUNT—DECREE FOR COSTS.**

A decree in such suit in favor of the plaintiff's attorney, for \$75.00, to be paid out of the proceeds of the sale of the property as a part of the costs, being insufficient in amount to give this court jurisdiction, is not reviewable here.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 276-292; Dec. Dig. § 61.\*]

Appeal from Circuit Court, Preston County.

Bill in equity by the Westinghouse Lamp Company against W. S. Ingram and others. From the decree, J. Ami Martin appeals. Affirmed in part, and reversed in part, and remanded.

William J. Snee, of Morgantown, for appellant. J. T. Dalley, A. G. Hughes, and P. J. Crogan, all of Kingwood, for appellees.

MILLER, J. Of the two decrees appealed from, the first, of December 8, 1908, adjudges that the deed of trust of July 7, 1908, of Ingram and wife to Weaver, Trustee for Martin, conveying the lots, electric light plant and equipment, was made to hinder, delay and defraud the creditors of Ingram, and to create a preference in favor of Martin, and thereby to hinder, delay and defraud the creditors of Ingram, and especially the plaintiff, and the petitioning creditors; and it was thereby further decreed that said deed of trust be set aside and held for naught, in so far and in so far only as the debt of the plaintiff, and the petitioning creditors Wickes Brothers and others, Doubleday-Hill Company and others, and Sands Electric Manufacturing Company are concerned, "or any other judgments, liens and debts contracted prior to the execution of said Trust by the said W. S. Ingram." This decree also referred the cause to a commissioner "for the purpose of ascertaining the accurate amounts due unto the said plaintiff and petitioning creditors herein mentioned and any other liens and debts properly chargeable against said W. S. Ingram."

The second of said decrees, that of June 18, 1909, the final decree, brought the cause on to be further heard upon the papers theretofore read, former orders and decrees therein, the answer of Martin to the bill of complaint, and his several answers to the petitions of the several petitioning creditors filed in the cause, the report of the commissioner, and the exceptions thereto of Martin and Ingram; and interpreting the language of appellant's petition filed, as a waiver of his exceptions to the commissioner's report, and of his right to equal priority with other creditors in the distribution of the proceeds of the sale of the property covered by said trust, the court overruled said exceptions, confirmed the report of the commissioner, and postponed appellant until the debts of all other creditors reported and decreed them, and which had accrued prior to the date of said trust, should be fully paid and satisfied.

The first point made is, that the court erred in confirming the commissioner's report, and in so postponing appellant. The appellant in his answer conceded to the other creditors, the only right prayed for in the bill, namely, that his deed of trust should be treated as a general assignment of Ingram, for the benefit of all his creditors, and that there should be pro rata distribution among them, of the proceeds of the sale of the property.

[1] While recitals in the bill may imply a charge of fraud, and a purpose to hinder and delay creditors in the execution of said trust, they do not amount to positive averment. The bill is clearly intended as a bill to avoid a preference, under section 2, chapter 74, Code 1906. Our decisions hold that

proof of an intent to prefer one creditor over another does not constitute fraud justifying a decree annulling a deed in toto. *Drug Co. v. Faulconer*, 52 W. Va. 581, 44 S. E. 204; *Herold v. Barlow*, 47 W. Va. 750, 36 S. E. 9.

Notwithstanding the purpose and prayer of the bill was to avoid the deed of trust as a preference, the court by its decree of December 8, 1908, undertook to avoid the deed entirely, in so far as it affected the plaintiff and other creditors. This was clearly error, and wholly unwarranted by pleadings or proof.

But can the decree postponing appellant be justified on the theory of waiver? The object of appellant's petition among other things was to have the report of the commissioner corrected in accordance with his exceptions thereto. The prayer thereof, construed as a waiver was, "that said Commissioner's Report be corrected to the extent of allowing the said J. Aml Martin's claim of \$22,000.00, equal in priority to all the other creditors except as to the plaintiff and the petitioning creditors and others whose claims accrued prior to the execution of the deed of trust by the defendant W. S. Ingram to J. Aml Martin." If the court's interpretation of this language be the correct one, the petition would be a vain and meaningless performance, for the commissioner had already reported exactly in accordance with the decree. The petitioner plainly meant to have the commissioner's report corrected so as to allow him to share pro rata with other creditors. The exception may have been intended to apply more particularly to the plaintiff and any other creditors who had recovered judgments and acquired liens on the property antedating the deed of trust. The language is awkward it is true, but it is plainly apparent that no waiver was intended.

[2] Appellant's rights therefore depend wholly on the provisions of said section 2, chapter 74, of the Code. Where no actual fraud is charged or proven that section does not avoid a deed intended as a preference in toto; it only avoids it as a preference, and thereby converts it into a general assignment for the benefit of all creditors, on suit brought for that purpose within the time limited by the statute. Relating to such suit the provision of the statute is: "Every such suit shall be deemed to be brought in behalf of the plaintiff and all other creditors of such insolvent debtor, but the creditor instituting such suit or proceeding, together with all creditors of such insolvent debtor, who shall come into the suit and unite with the plaintiff before final decree and agree to contribute to the costs and expenses of said suit, shall be entitled to have their claims first paid in full pro rata out of the property so transferred or charged, in preference to any creditor of such debtor who shall before final decree decline or fail to so unite and agree to contribute to the costs and expenses of

said suit, but not in preference to such creditor as may attempt to sustain the preference given him by such transfer or charge."

[3] The language of this section is clear and requires no interpretation. The last clause of the provision quoted makes it plain that even if the appellant had attempted to sustain the preference given him, other creditors would have acquired no priority over him. But he did not attempt to do so. He at once acknowledged the rights of other creditors to participate on equal terms in the distribution of the assets. On what principle of law or equity then can he be deprived of his rights as creditor? From a verified statement of appellant's claim accompanying his exceptions to the commissioner's report it appears to be made up of purchase money and other money advanced to Ingram. The deed of trust itself was at least prima facie evidence of the genuineness of his claim if no other proof had been introduced before the commissioner. The commissioner reported this claim in full. No one excepted to his report on this ground. Our conclusion, therefore, is that the court erred in denying appellant equal rights of priority with other creditors of the same class under said general assignment.

[4] The next error assigned is, that the court erred in decreeing as liens on the real estate, designated in the record as Parcel No. 2, or the interest of J. J. Jenkins therein, certain judgments against Jenkins and others, aggregating some \$900.00. Two points are made against the report of the commissioner, and the decree of the court in favor of these creditors, first, that neither the creditors themselves nor Jenkins the judgment defendant, were parties to the suit, or in any way impleaded in the cause, so as to be bound by the decree; and, second, that if they had been made parties, these judgments were recovered and docketed long after Jenkins by parol contract had sold said lots to Martin, and he had gone into possession and improved the property, wherefore these judgment creditors acquired no lien on said property, superior to the equitable rights of appellant.

First, it is argued that this is not a judgment creditors suit, in which, without pleading, a judgment creditor by appearing before the commissioner may have his lien reported, and a decree for his debt. We pass this point, for we have concluded that Jenkins, the judgment debtor, is a necessary party to the suit. The necessity of his presence does not appear from the bill and could not have been reached by demurrer. It does appear, however, from the commissioner's report, and from the answer and petition of the appellant. Jenkins conveyed this property to Martin, by deed of general warranty, dated February 15, 1907, acknowledged March 5, 1908, but it was not recorded until March 7, 1908, Martin assuming to pay a prior purchase money lien in favor of Flike and wife,

from whom Jenkins had acquired the property. So that if this property, with the improvements put upon it by Martin, shall be subjected to the payment of these judgment liens against Jenkins, Martin will have right of action against Jenkins on his covenant of warranty. This being so, is not Jenkins, the judgment debtor, assuming this to be a judgment creditors suit, a necessary party? If there be such judgments, and they have not been paid, is not Martin entitled to have Jenkins brought in and bound by the decree? It is unnecessary to cite authorities for the familiar rule, that all persons materially interested in the subject of the controversy ought to be made parties in equity, and if they are not the defect may be taken advantage of, either by demurrer, or by the court at the hearing. See the many cases digested, 10 Enc. Dig. Va. & W. Va. Rep. 736, et seq. In the recent case of Augir v. Warder, 68 W. Va. 752, 70 S. E. 719, we held, the principal contractor to be a necessary party to a suit to enforce a mechanics' lien against the building of the owner. The rule of that case we think applicable here. We are of opinion, therefore, that the court below erred in not requiring Jenkins to be brought in as defendant, and that the decree on review will have to be reversed on this ground.

The second point we do not think fairly arises. It is true, that a purchaser by parol contract, having by possession and by part performance, acquired the equitable title to land, is protected against subsequent judgments recovered against his vendor. Snyder v. Martin, 17 W. Va. 276, 41 Am. Rep. 670; Biern v. Ray, 49 W. Va. 129, 38 S. E. 530; Smith v. Gott, 51 W. Va. 141, 41 S. E. 175. But appellant refers the date of his alleged parol contract to the date of his deed from Jenkins. That deed is in the record, and while it bears date prior to the date of the judgments, it was not recorded until after the judgments were recovered and docketed. The fact of a prior parol contract and possession under it is not established by allegata or probata. True the fact is alleged in the petition, but the petition was without parties, and no issue thereon was fairly presented to the court below for decision. We therefore overrule the point.

[5] The only other point of error is, that the court below erroneously decreed James T. Dailey, plaintiff's attorney, as a part of the costs of the suit, to be paid out of the proceeds of the sale of the property, a fee of \$75.00. If this be error the sum in controversy is not sufficient to give this court jurisdiction to correct it, and this point will have to be overruled. Wees v. Elbon, 61 W. Va. 380, 387, 56 S. E. 611, and cases cited.

Our conclusion, therefore, is to reverse the decrees appealed from in so far as they set aside in toto the deed of trust of July 7, 1908, and deny to appellant the right to participate in equal priority with other cred-

itors of the same class in the distribution of the proceeds of the sale of the property decreed to be sold, and to sustain his exceptions to the commissioner's report on this ground. And the decree of June 18, 1909, which in the absence of J. J. Jenkins, the judgment debtor, and in so far as it decrees the several judgments of the Terra Alta Bank, Charles W. Jackson, and Offutt & Lakin, against the said Jenkins and others, as reported by said commissioner, to be liens on the supposed interest of said Jenkins in said Parcel No. 2, must also be reversed, and appellant's exceptions to the report of the commissioner on this ground must also be sustained. And perceiving no other errors therein, remediable here, said decrees will in all other respects be confirmed, and the cause will be remanded with leave to the parties to amend their pleadings, and to bring in as defendant the said J. J. Jenkins, and to be further proceeded in in accordance with the foregoing principles, and further according to the rules and principles governing courts of equity.

(70 W. Va. 670)

# JOPLING v. BLUEFIELD WATERWORKS & IMPROVEMENT CO.

(Supreme Court of Appeals of West Virginia.  
April 16, 1912.)

(Syllabus by the Court.)

## 1. WATERS AND WATER COURSES (§ 202\*)—PUBLIC WATER SUPPLY—CONTRACTS—CONSTRUCTION.

The rules of a waterworks company, adopted for the government of its relations with its patrons, do not become parts of a contract between it and a patron, made in terms and upon conditions not contemplated by such rules and regulations, and radically different therefrom.

[Ed. Note.—For other cases, see Waters and Water Courses, Dec. Dig. § 202.\*]

## 2. WATERS AND WATER COURSES (§ 202\*)—PUBLIC WATER SUPPLY—CONTRACTS—CONSTRUCTION.

Such rules and regulations, to be applicable and effective, must enter into the contract by express or implied adoption at its inception. They cannot be ingrafted upon a contract, complete in itself and independent of them, except by the assent of both parties.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 276; Dec. Dig. § 202.\*]

## 3. DAMAGES (§ 91\*)—EXEMPLARY DAMAGES.

To sustain a claim for punitive damages, the wrongful act must have been done maliciously, wantonly, mischievously, or with criminal indifference to civil obligations. A wrongful act, done under a bona fide claim of right, and without malice in any form, constitutes no basis for such damages.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 198-201; Dec. Dig. § 91.\*]

Error to Circuit Court, Mercer County.

Action by T. O. Jopling against the Bluefield Waterworks & Improvement Company. Judgment for plaintiff, and defendant brings

error. Reversed, and remanded for new trial.

Sanders & Crockett, of Bluefield, for plaintiff in error. Ross & Kahle and D. E. French, all of Bluefield, for defendant in error.

POFFENBARGER, J. On this writ of error, to a judgment against a waterworks company for damages for cutting the water off from plaintiff's storeroom, justification of the act complained of is asserted on the one side and denied on the other, in the arguments to overthrow and sustain the verdict, on the ground of sufficiency and insufficiency of the evidence, and as the basis for contentions respecting the propriety of rulings on instructions. Assuming the act to have been done without right, the motive of the defendant becomes an important inquiry in passing upon instructions respecting the award of punitive damages.

The plaintiff, occupying the ground floor of a certain building, had contracted with the defendant for a supply of water and paid the rent therefor in advance, as required by a rule of the company. Another tenant having taken up his residence on the second floor of the same building and refused to pay the water rent in accordance with the rule, the defendant cut off all the water from the building, whereupon this action was brought. The single service pipe, passing through the ground floor and on up to the second, was equipped with a cut-off, just above the spigot used by the ground floor tenant, and he gave the defendant permission to enter the room and there cut the water off from the second floor; but the appliance was such that any person could have turned the water on again without the knowledge of the company. Accordingly it refused to turn it off there and continue the supply to the lower room, but offered to continue it, if the pipe should be disconnected above the spigot. This was not done, by either the tenant or the owner, and the water was cut off agreeably to notice of intent to do so, after demand for the rental from both tenant of the ground floor and the owner of the building.

[1] The company's rules 1, 8, and 22 are relied upon for justification of the act complained of, as being reasonably within the legal definition of the term, and as having entered into and become a part of the contract. Rule 1 required the owner of the property in every case to sign a permit, subject to the rules of the company. Rule 8 reserved right to render the bill to the owner of the property for the entire supply of water thereto, in case of occupancy by more than one person and consumption of water by all through a single tap, and to look to the owner for the entire rent for all water used in the building, and gave notice of intention not to attempt to collect rent from tenants, unless hydrants and pipes should be so ar-

ranged and supplied with stop keys as to give the agents of the company perfect and absolute control over the supply to each individual at all times, and then to shut off the water from all, if any refused to pay. Rule 22 required all flat rate rentals to be paid three months in advance, and all meter rentals within one month after the rendition of the service, and reserved the right to cut off the water for noncompliance.

As the contract here involved was made with a single tenant, and not with the owner of the building, as contemplated by the rules, the position assumed for the plaintiff in error is untenable. There was no contract with the owner, no written contract with anybody, nor an agreement by any person to pay for water furnished to persons other than himself. The plaintiff may have had knowledge of the company's rules. Conceding this, he knew equally well the company could make a special contract with him. His money had been accepted and the water furnished. If the agent who made the special contract had no authority to make it, restoration of the money or a portion of it equal to the unearned rental was a condition precedent to release from its obligation, and it was neither refunded nor tendered.

[2] To say these rules became a part of the contract, under the circumstances, would permit them to be used for a purpose wholly different from that for which they were made and promulgated. They require the owner to obtain a permit and agree to be liable for all rentals accruing against his tenants. The owner might be willing thus to bind himself for some tenants, but not for others, and he has the right to assume, in case water is furnished to his tenant, without such an agreement, that the company looks to the tenant for the rental. To begin a supply of water, under such circumstances, and then attempt to apply and enforce the rule, works surprise, injustice, and hardship. The rules do not contemplate action of that sort. If they are so burdensome upon property owners, or so inconvenient to the company, as to create confusion or make trouble in their application and enforcement, the remedy is a revision of the rules, not to put in water without any reference to them and then attempt to apply them. As the contract here involved was a separate, single, and complete contract, not within nor under the rules, breach thereof by the company is clear, and the rules are not at all involved. Hence there is no occasion to say whether they are reasonable and such as the company could lawfully prescribe and enforce.

[3] The jury found a verdict for \$126, reciting an allowance of \$1 for actual damages and \$125 for punitive damages. This finding and two instructions given by the court, over the objection of the defendant, on the subject of punitive damages, necessitate inquiry as to whether any evidence jus-



tifying a verdict for such damages was ad-  
duced. One of these instructions authorized  
the finding of such damages, if the jury  
should believe the action of the company  
was willful, wanton, or in reckless disregard  
of the rights of the plaintiff; and the other  
instructed them not to find such damages un-  
less defendant's action was malicious, op-  
pressive, wanton, or willful, or its conduct  
reckless. There is no evidence of any vio-  
lence or reprehensible conduct on the part  
of the defendant. It merely demanded from  
the plaintiff and the owner of the property  
the payment of rental in advance for water  
to be supplied to Johnson, tenant of the sec-  
ond floor, who had refused to pay, declining  
further to furnish water for the first floor  
with the water cut off from the second, as  
proposed by the plaintiff, and then cut off  
the water from the building. Nothing in  
the evidence indicates the action of the com-  
pany was oppressive in any peculiar sense.  
Ample opportunity had been given the plain-  
tiff to secure water by paying a small  
amount for a short time that it did not  
justly owe and for the benefit of a third  
party. Had he paid this, he would no doubt  
have been entitled to recover it back. On  
the whole, the evidence indicates nothing  
more than a purpose on the part of the  
company to test the validity of its claim  
of the right, under the circumstances of  
the case, to compel such payment as it de-  
manded or to cut off the water on refusal  
thereof. Nothing indicates any intent be-  
yond this. In other words, nothing indicates  
intention to cut off the water merely to in-  
jure the plaintiff, or to enforce a right and  
also injure the plaintiff otherwise than in-  
cidentally. The sole purpose was the asser-  
tion of a claim of right on the part of the  
defendant. Under such circumstances, there  
is no right to a verdict for exemplary or  
punitive damages. To justify the recovery  
of such damages, there must be evidence in  
some form of malice. It may consist of  
abusive language, violence, invasion of an-  
other's right with knowledge thereof, or  
some other circumstance from which malice  
can be implied. *Fink v. Thomas*, 66 W. Va.  
487, 66 S. E. 650, 19 Ann. Cas. 571, states  
the rule as follows in an action for assault  
and battery: "In an action for assault and  
battery punitive damages cannot be found  
unless the act is unjustifiable, willful, wan-  
ton, and reckless, manifesting malice." The  
court has thus stated the principle or basis  
of the allowance of such damages. In the  
opinion in that case, Judge Brannon said:  
"All the books say that, to warrant punitive  
damages, there must be malice, oppression,  
or wanton, willful, and reckless conduct."  
\* \* \* There must be fraud, malice, op-  
pression, or wanton, willful, or reckless con-  
duct, or criminal indifference to civil obliga-  
tions." All the decisions of this court on the  
subject are to the same effect. *Pollock*

on Torts, pp. 185, 186, marks the distinction.  
This author says punitive damages are such  
as are intended to express indignation at the  
defendant's wrong, and then proceeds as  
follows: "Damages awarded on this prin-  
ciple are called exemplary or vindictive. The  
kind of wrongs to which they are applicable  
are those which, besides the violation of a  
right or the actual damages, import insult  
or outrage, and so are not merely injuries,  
but injuries in the strictest Roman sense of  
the term." He then quotes the following as  
indicating the basis of such damages from  
*Railroad Co. v. Arms*, 91 U. S. 489, 23 L.  
Ed. 374: "The tort is aggravated by the  
evil motive." *Cooley on Torts* (3d Ed.) p.  
1511, marks the distinction thus: "Motive  
generally becomes important only when the  
damages for a wrong are to be estimated.  
It then comes in as an element of mitigation  
or aggravation, and is of the highest impor-  
tance." Numerous cases cited amply sustain  
the text.

In most of the opinions delivered by courts  
and the text-books, the limits of the rule are  
defined by the principle of inclusion, stating  
what conduct will authorize recovery of such  
damages. In *Railroad Co. v. Prentice*, 147  
U. S. 101, 13 Sup. Ct. 261, 37 L. Ed. 97, the  
court went beyond this and applied the prin-  
ciple of exclusion, saying: "In this court  
the doctrine is well settled that in actions of  
tort the jury, in addition to the sum award-  
ed by way of compensation for the plaintiff's  
injury, may award exemplary, punitive or  
vindictive damages, sometimes called 'smart  
money,' if the defendant has acted wantonly  
or oppressively, or with such malice as im-  
plies a spirit of mischief or criminal indif-  
ference to civil obligations. But such guilty  
intention on the part of the defendant is re-  
quired in order to charge him with exem-  
plary or punitive damages." In *Railroad Co.  
v. Quigley*, 21 How. 202, 16 L. Ed. 73, a ver-  
dict was set aside for allowance of exem-  
plary damages in the absence of malice, and  
the court said: "Whenever the injury com-  
plained of has been inflicted maliciously or  
wantonly, and with circumstances of con-  
tumely or indignity, the jury are not lim-  
ited to the ascertainment of a simple com-  
pensation for the wrong committed against  
the aggrieved person. But the malice spoken  
of in this rule is not merely the doing of an  
unlawful or injurious act. The word implies  
that the act complained of was conceived in  
the spirit of mischief, or of criminal indif-  
ference to civil obligations." *Suth. on Dam.*  
§§ 392-393, reviewing the whole subject,  
shows the weight of authority to be in ac-  
cord with these decisions as well as those of  
our own court. As there was no evidence of  
malice or intent to bring injury upon the  
plaintiff beyond what was necessarily inci-  
dent to the assertion of the claim of right  
in good faith, it was improper to give any in-  
struction on the subject of exemplary dam-

ages, other than one inhibiting the finding of any.

A peremptory instruction to find for the defendant was properly refused for reasons stated. Instructions Nos. 2, 3, 4, 5, and 10, predicated defense upon the rules of the company, were also properly refused, since the rules are in no way involved. Instructions Nos. 6 and 7, limiting the right of recovery to actual damages, should have been given, and the court erred in refusing them. Instruction No. 9, limiting recovery to \$1, was properly refused, and the court erred in giving instruction No. 8, limiting the recovery to \$1 for actual damages. The quantum of damage is a question for the jury, not for the court.

For the errors noted, the judgment will be reversed, and the cause remanded for a new trial.

(70 W. Va. 655)

BRAGG et al. v. UNITED THACKER COAL CO. et al.

(Supreme Court of Appeals of West Virginia. April 16, 1912.)

*(Syllabus by the Court.)*

1. EQUITY (§ 362\*)—DEFECT OF PARTIES—DISMISSAL OF SUIT.

If a plaintiff in a suit in equity will not bring in necessary parties by proper amendment and process, within a reasonable time after being ordered to do so, it is proper to dismiss his suit.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 758-761; Dec. Dig. § 362.\*]

2. EQUITY (§ 115\*)—NECESSARY PARTIES.

In a suit asserting equitable title to land and seeking to obtain the legal title thereto, the plaintiff must amend his bill and bring before the court the holder of the legal title when it is shown that the legal title is outstanding in a person other than the one originally proceeded against as holding the same.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 280-283; Dec. Dig. § 115.\*]

3. EQUITY (§ 115\*)—ADDITIONAL PARTIES.

Whenever during the progress of an equity suit it appears in any way that persons not parties to the cause are materially interested in the subject involved, or have rights that will be affected by the decree sought, they must be made parties by proper amendment and process.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 280-283; Dec. Dig. § 115.\*]

Brannon, P., and Williams, J., dissenting.

Appeal from Circuit Court, Mingo County.

Bill by Burman Bragg and others against the United Thacker Coal Company and others. Decree for defendants, and plaintiffs appeal. Affirmed.

Stokes & Bronson, of Williamson, for appellants. Edward C. Lyon, of New York City, Sheppard, Goodykoontz & Scherr, of Williamson, and Campbell, Brown & Davis, of Huntington, for appellee United Thacker Coal Co.

ROBINSON, J. The legal title to a tract of land equitably belonging to F. G. Bragg was held by David Bragg. The latter, regardless of the equitable interest of F. G. Bragg, conveyed the tract to Hatfield, who conveyed the same to Phillips, Trustee. By subsequent conveyances the legal title was passed to the United Thacker Coal Company. F. G. Bragg thereafter transferred his equitable interest in the land to the plaintiffs in this suit. By the bill and amended bill exhibited against the United Thacker Coal Company and others, plaintiffs seek to obtain the legal title to the land. They charge that Hatfield and the subsequent grantees of the land took the legal title with full knowledge that F. G. Bragg was the real owner of the property. They specifically charge that the United Thacker Coal Company holds the legal title to the property, which in equity belongs to them. In the original bill, plaintiffs pray that the conveyances to Hatfield and the subsequent alienees be set aside, annulled, and removed, and that the United Thacker Coal Company be enjoined and restrained from interfering with the plaintiffs in the peaceable enjoyment of the land. In the amended bill, plaintiffs pray that the United Thacker Coal Company be made to convey the legal title of the land to them. That company had mortgaged the property, by a conveyance to the United States Mortgage and Trust Company, Trustee, to secure the payment of a large issue of bonds. But the trustee in the mortgage, and the beneficiaries thereunder, were not made parties to the cause by either of the bills, though the mortgage had been duly executed and recorded, plainly covering the land, at the time of the institution of the suit. Nor was the existence of this mortgage conveyance mentioned by plaintiffs in their suit.

The answers of the United Thacker Coal Company denied all the material allegations of the bills and asserted that it was the legal owner of the land by virtue of the conveyances which lead from David Bragg to it. Before the cause had been finally heard, the trustee in the mortgage filed its petition, asserting that it held the legal title to the land, exhibiting the mortgage, and praying that it and the bondholders be made parties defendant. Plaintiffs were thereupon ordered to amend their bill of complaint by making the trustee and bondholders parties, and the cause was remanded to rules for that purpose, with the direction that if the names of the holders of the bonds were unknown to plaintiffs they might proceed against them as unknown parties. At a later term, the bill not having been amended as ordered, the cause was reinstated on the docket and a motion was made by the United Thacker Coal Company to dismiss it for the failure to amend. Plaintiffs moved to submit the cause without the amendment that had been order-

ed, and declined to make any amendment whatsoever. But the court refused to hear the cause without compliance with the order for amendment, and, wholly on the ground of the refusal to amend, dismissed the cause. From the decree of dismissal, plaintiffs have appealed.

[1] If the trustee in the mortgage and the bondholders are necessary parties to the suit, the dismissal is right. A court cannot hear a cause in the absence of necessary parties. If a plaintiff will not bring in necessary parties by proper amendment and process, within reasonable time after being ordered by the court to do so, it is proper to dismiss his suit. What other course can be pursued when a plaintiff unreasonably refuses to do that which equity and proper procedure require? Must the court, notwithstanding disobedience to its proper order, hear the cause in an imperfect shape? Must it do injustice by improper procedure simply because the plaintiff will not pursue the course which the rules and practice of equity require?

[2] Surely, the holder of the legal title to land should be made a party defendant in a suit by which the plaintiff calls for the legal title to be given over to him. When the object of the suit is none other than to obtain an outstanding legal title, as in the case before us, there can be no complete and satisfactory end to the litigation unless the holder of the legal title is before the court. The very object of the suit cannot be attained without the presence of that holder. Without him a decree in relation to the legal title would be abortive. Now, the case at hand seeks nothing but the bringing to plaintiffs of the legal title, which they say belongs to them. They say that the United Thacker Coal Company holds a legal title which belongs to them, and they demand nothing by their suit but that this legal title be set over to them by decree and that they be protected therein. How is the plainly expressed object of their suit to be attained unless the holder of the legal title is brought before the court? The mere fact that the answer of the United Thacker Coal Company admits that it holds the legal title will not excuse plaintiffs from bringing in the trustee as a party when that trustee comes by petition and shows that it has the legal title and that the admission in the answer cannot be true. When the case is changed by the filing of the petition, when the fact is clearly shown that the thing sought by the suit is not held by any party before the court, the court can do nothing but direct an amendment in furtherance of the object of the cause. It will not heedlessly go on to do a vain thing—to direct a transfer of the legal title by a corporation which does not have it. Plaintiffs must amend their suit when it has been made to appear that the coal company cannot give what they are demanding from that company. If they de-

sire to continue their demand for the legal title, they must amend their bill and bring before the court the party from which it can be obtained. They cannot go on against the coal company, seeking the legal title, for the fact has been made to appear that the coal company has only the mere equity of redemption in the land. If plaintiffs would go on only against the coal company, deeming that they cannot make a case against the trustee that will take the legal title from it, then they must amend their suit so as to seek from the coal company the equity of redemption only and not the legal title. But for the mere equity of redemption they have never asked. Nor have they said that they desire any decree in relation to it. They insist on a decree for the legal title against the coal company only, in the face of the fact that the legal title is claimed by another corporation and is conclusively shown by the mortgage to be vested in it. As long as they continue the demand for the legal title, they cannot proceed until they amend their bill and bring in the party from which it can be obtained.

The subject of this suit is the legal title to land. The decree sought by the pleadings on behalf of plaintiffs is one pertaining solely to this subject. It is proposed to affect that legal title by a decree. Therefore, all parties interested in the legal title sought to be affected are entitled to be made parties to the cause. "It is a general rule in equity that all persons interested in the subject matter of the bill, and which is involved in and to be affected by the proceedings and result of the suit, should be made parties, however numerous they may be." 1 Barton's Ch. Pr. § 35. Clearly, the trustee and the bondholders are interested in the legal title that is to be affected by the proceedings and result of this suit. It is not enough to say that a decree against the coal company for the legal title cannot affect the legal title held by the trustee when that party is not before the court. For, it is the same legal title; there can be but one legal title to land. It is the business of equity to deal completely and justly with that title, if at all. Equity will not untruthfully deal with that title as belonging to one party when it knows the title belongs to another. Equity will not thus leave the way open for another suit to involve the same subject, when it can fully settle in the pending suit the claims of that other party. "It is the constant aim of a court of equity to do complete justice by deciding upon and settling the rights of all persons interested in the subject of the suit, to make the performance of the order of the court perfectly safe to those who are compelled to obey it, and to prevent future litigation. For this purpose all persons materially interested in the subject ought to be parties to the suit, plaintiffs or defendants, however numerous they may be, so that a

complete decree may be made between those parties." 4 Minor's Inst. (3d Ed.) 1398. The decree sought by the plaintiffs, one ordering the coal company to make over a title it does not hold, would be anything but a complete decree as to the subject of the suit, and would merely invite further litigation to obtain the same legal title from the trustee. Equity does not proceed so disjointedly and unsatisfactorily. It settles things. It brings in and deals with all parties that are necessary to a complete determination of the subject of the suit.

[3] The trustee and bondholders have a plain interest in the subject-matter of this suit; surely, that proposition cannot be gainsaid. Their rights would be materially affected by such a decree as plaintiffs insistently call for in their pleadings. Deeds underlying the legal title held by the trustee would be annulled and removed, and the legal title would be decreed to be in plaintiffs, though the trustee rightly holds it. All this would be done to the beclouding of the rights of the trustee, in its absence, notwithstanding it clamors for admission to the cause so that it may sustain the title it holds and secure the regularity and completeness which equity so willingly accords. The trustee has the right to be heard. The order directing the amendment so as to secure a proper determination of the suit was rightly made, and should have been promptly complied with by plaintiffs. "When, in any way, it appears in a suit in equity that any person, not a party, has a subsisting interest in the subject-matter of the suit and whose rights will be affected by a final decree therein, such party should be brought in by amended bill and proper process before final decree." *Rexroad v. Raines*, 63 W. Va. 511, 60 S. E. 495.

An order affirming the decree of dismissal will be entered.

BRANNON, P. (dissenting). I cannot agree to the dismissal of the suit for omission to make the trustee and bondholders parties. If the proposal of the suit were to sell the property, it would be different, as the legal title must be in the hands of the court, or in any case where that should be requisite. There is no reason for it in this case. No relief was asked against the trustee or bondholders. No harm to their interest was asked. The bill said that the coal company held legal title; the answer admits it; but, though that was true, the plaintiff had right to have such title as was in the company conveyed to it, the equitable title, the equity of redemption. The decree for that right would be subject to the superior right of the mortgage. The trustee was not a party. The decree would not affect that trustee. Its rights would be open, a matter between it and the plaintiff. The plaintiff sought no litigation with the trustee company. Sup-

pose the trustee and bondholders had been made parties. What would have been the decree? Only that the company convey its equity of redemption, such title as it had, to the plaintiff subject to the mortgage. Though a party sell land by executory contract, then give a deed of trust to secure a debt, without notice to the trustee or creditor, cannot the purchaser sue his vendor to get his equity of redemption? Such right as he has, subject to the trust? The land may be redeemed from the trust by payment. This indicates the basis of my dissent. I cannot elaborate, nor is it necessary.

Judge WILLIAMS joins me in dissent.

(70 W. Va. 783)

McSWEGIN et al. v. HOWARD et al.  
(Supreme Court of Appeals of West Virginia.  
April 23, 1912.)

(Syllabus by the Court.)

1. EQUITY (§ 281\*)—PLEADING—AMENDMENT—EFFECT OF DELAY.

An amended answer, offered five years after the filing of the original answer, is properly rejected; no excuse or reason being given for delay.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 572; Dec. Dig. § 281.\*]

2. EQUITY (§ 281\*)—PLEADING—AMENDMENT—EFFECT OF DELAY.

An amended answer, though containing cross-bill matter, must be filed with reasonable promptness, and, where long delayed without excuse, is properly rejected.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 572; Dec. Dig. § 281.\*]

(Additional Syllabus by Editorial Staff.)

3. EQUITY (§ 431\*)—DECREE—CONSTRUCTION—AGREEMENT BETWEEN DISTRIBUTEES.

A decree reciting an agreement between legatees, excepting the children of one of testator's children, for the management of a farm constituting a part of the estate by certain persons, and stating that under the agreement the distributees, excepting the children referred to, took the estate in lieu of bequests of testator, and that there was no liability on the executors for debts of the estate, did not render the children referred to liable for compensation of those employed to manage the farm.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 1048-1051; Dec. Dig. § 431.\*]

Appeal from Circuit Court, Hancock County.

Bill in equity by J. D. McSwegin, administrator, against A. P. Howard and others. From the decree plaintiff and others appeal. Reversed and remanded.

E. A. Hart and John R. Donehoo, both of New Cumberland, for appellants. Alfred Caldwell, of Wheeling, and John A. Campbell, of New Cumberland, for appellees.

BRANNON, P. This case, begun in 1890, has been twice in this court before the present appeal. 63 W. Va. 92, 59 S. E. 894, and 66 W. Va. 570, 66 S. E. 694. In 63 W. Va. 92, 59 S. E. 894, the facts and character of

the case will appear. When the case returned to the circuit court, a decree was entered declaring certain sums of money charges upon the fund coming from the sale of the land, which decree dates April 6, 1910. From it J. D. McSwegin, administrator of Elizabeth McSwegin, James A. McKenzie, administrator of Edwin G. McSwegin, and Alice McSwegin appeal.

[1, 2] On the date of the decree McKenzie, administrator of Edwin G. McSwegin, and Alice McSwegin tendered an amended and supplemental answer and cross-bill; but the court refused to allow it to be filed. This is assigned as error. This answer sought to charge rents and profits against those of the children who occupied the land. As an amended answer there are several reasons why its rejection is not error. It came too late. The bill was filed in May, 1890, 20 years before this answer was offered. Edwin and Alice McSwegin had before filed an answer in January, 1906, asking no rents and profits. This subject was not in the bill. An amended answer should not be allowed, raising new issues, where it appears that the party knew the facts, and is thus guilty of negligence. *Goldsmith v. Goldsmith*, 46 W. Va. 428, 33 S. E. 268. No excuse was shown for delay. *Foutty v. Poar*, 35 W. Va. 70, 12 S. E. 1096; *McKay v. McKay*, 33 W. Va. 724, 11 S. E. 213. Viewed as a cross-bill, it came too late. No excuse was given for delay. *Baker v. Oil Co.*, 7 W. Va. 454; *Barton's Ch. Pr.* 320; 5 Cyc. 653. This answer does not appeal to a court, because it reopens old transactions not in the bill or first answer.

[3] The material question in the case arises upon the assignment, as error, that the court decreed payment out of the estate funds of wages accruing under the verbal agreement for the farm operations as debts of preference over legacies. This refers to money decreed to William Hewitt and R. Brown Hewitt, \$5,313.10 each, and to children of Anna Howard, \$317.44, as wages for services of William, R. Brown, and James Hewitt in managing the land after the testator's death under an agreement between his children stated in 63 W. Va. 93, 59 S. E. 894, under which three of the sons, William, R. Brown, and James Hewitt were to manage the land and pay the debts, and retain the land for the children of the testator, Robert Hewitt, instead of selling it, as directed by his will. I do not interpret the assignment of error as contesting the decree in its provision for payment of what is called wages for service rendered the testator in his lifetime, given by will and charged by it on the land. Surely there would be no color for that. But the question is: Does the decree err in paying said sums to William and R. Brown Hewitt and to the children of Anna Howard, for such service in managing the land? Just here I note the fact that that arrangement for the management of the land has no binding

force on the children of Elizabeth McSwegin. They were infants, very young when it was made, not parties to it. Their mother did participate in it; but she had only a life estate, her children the remainder. No one claims that that arrangement puts any obligation on them; all conceded that it does not; the decree of July, 1906, while holding effective that arrangement for the operation of the farm, expressly declares that they were not bound by it. Therefore there was no liability on them for those post mortem wages. That farm arrangement was contrary to the will, and, if binding on the adult parties making it, could establish no liability on the McSwegin infant children. Therefore the decree appealed from, that of April 6, 1910, is erroneous as to the McSwegin children, the only appellants, unless the former decree of 1906 can be held to have adjudicated the right of William and R. Brown Hewitt and children of Anna Howard to the money decreed for such wages or services for managing the farm as against the McSwegin children; for if the decree of 1906 be held as so adjudicating against the children, however erroneous as to those children, it is *res judicata*, an appeal from it is barred by limitation, and the decree of 1910, in decreeing those moneys to be paid, is not erroneous, because it would then be only executing and carrying out the decree of 1906.

But we hold that the decree of 1906 does not adjudge those wages for managing the farm against the McSwegin children. In the decree the court recites the agreement as one between the legatees "(excepting the said children of Elizabeth McSwegin)," and says that under that agreement the "said distributees, excepting the said children of the said Elizabeth McSwegin," took and held the real estate in lieu of the bequests in the will of Robert Hewitt, and there was no liability on the executors for debts of the estate, thus holding that agreement valid as against its parties, excepting those children. Now, can we think, in the face of this exception, that the court intended, or that its decree is to be construed as intending, to make those McSwegin children liable for the management of the farm? It is plain that the court intended to relieve them from such liability. Again, this is fortified by other features of the decree. One clause declares the amounts due to various children by virtue of the will, allowing pay for services for them after their majority, rendered to their father, which I would call testamentary wages, and in words decrees that those sums "constitute and are valid debts against said real estate and personal property." Another clause ascertains what it calls "expenses of the trust arrangement under and by which the farm operations were carried on as reported by the commissioner," fixing amounts; but the decree does not, as is the case of the testamentary wages, declare

them valid debts against the property. As to those sums it was likely intended to fix the amounts going to certain named persons as an adjudication between those who made the agreement for operating the farm; but surely it did not intend to make those sums payable out of the assets as against the McSwegin children, when the court had just excepted them from all obligation under that farm arrangement, by saying that they were not parties to it. The commissioner did not report them as binding debts, but in words said that he did not intend to do so.

It seems to us reasonably plain, taking the words of the decree of 1906, that it was not intended to charge to the McSwegin children services in management of the farm after the testator's death. But there is a doubt; suppose that the construction of the decree is not so plain. Should we so construe it as to be erroneous and promote injustice? Rather we should so interpret it as to conform to law and justice. These children were never bound for any part of such service in the management of the farm.

The McSwegin children alone appeal. No one else complains of the decree. We decide the case only as to them. We hold that the decree of 1906 does not hold them bound for such farm wages. As to them the decree of 1910 is erroneous, in construing the decree of 1906 as holding them chargeable with farm wages. I suppose that was the reason of so decreeing the farm wages. If not, then as an original decree on the subject the decree of 1910 is erroneous. The assets of the estate cannot, as to the McSwegin children, be lessened by payment out of them of the sums decreed to William Hewitt, R. Brown Hewitt, and the children of Anna Howard for compensation for farm service.

Therefore we reverse the decree of 6th day of April, 1910, as to the appellants, and remand the case, in order that their rights in the assets of the estate of Robert Hewitt may be ascertained and decreed according to the principles above stated.

(70 W. Va. 758)

**BOWDISH & DEGARMO BROS. v.  
GROSCUP.**

(Supreme Court of Appeals of West Virginia.  
April 23, 1912.)

(Syllabus by the Court.)

**1. JUSTICES OF THE PEACE (§ 130\*)—CONCLUSIVENESS — FAILURE TO ASSERT CLAIM—"COUNTER CLAIM."**

"Counter claim," employed in section 55, chapter 50, Code 1906, by proper construction includes recoupment when such counter claim arises out of the same contract sued on by plaintiff; and if defendant having such counter claim neglects or refuses to produce it with his evidence in support thereof, as provided in said section he will be forever precluded from maintaining any action for the recovery thereof, unless, as provided by section 56, his claim ex-

ceeds plaintiff's demand more than three hundred dollars.

[Ed. Note.—For other cases, see *Justices of the Peace*, Dec. Dig. § 130.\*]

For other definitions, see *Words and Phrases*, vol. 2, pp. 1645-1650; vol. 8, pp. 7620, 7621.]

**2. JUSTICES OF THE PEACE (§ 130\*)—FAILURE TO ASSERT COUNTER CLAIM — SUBSEQUENT ACTION—AMOUNT OF CLAIM.**

In a suit subsequently brought before a justice by the defendant against the plaintiff in the former action, he is concluded as to the amount of his counter claim by the damages claimed in his suit.

[Ed. Note.—For other cases, see *Justices of the Peace*, Dec. Dig. § 130.\*]

**3. JUSTICES OF THE PEACE (§ 130\*)—ACTION—JUDGMENT—EFFECT.**

If defendants in a prior suit before a justice be partners and sued as such, but only one of them be served with process, but judgment be rendered against all, the error in or voidness of the judgment against those not served will not render void the judgment against the one served with process, nor excuse him from producing the counter claim of his firm with his evidence in support thereof, or relieve him or his firm from the consequences of his failure to do so, imposed, by said section 55, Code 1906; for as the partner served and against whom judgment is pronounced, is thereby rendered incompetent to sue, he cannot subsequently be joined as plaintiff with his other partners in an independent action against the plaintiff in said action, and by his failure to act they are thereby also precluded, except as provided by said section 56.

[Ed. Note.—For other cases, see *Justices of the Peace*, Dec. Dig. § 130.\*]

Error to Circuit Court, Upshur County.

Action by Bowdish & Degarmo Brothers against William Groscup. From a judgment for defendant, plaintiffs bring error. Affirmed.

U. G. Young, of Buckhannon, for plaintiffs in error. C. C. Higginbotham and Wm. S. O'Brien, both of Buckhannon, for defendant in error.

MILLER, J. Defendant sued plaintiffs before a justice of Webster County. Process against all was served upon but one of the partners. On the return day of the writ, two of the partners being present but not appearing, the justice pronounced judgment against all for \$110.84, the amount sued for, with interest and costs.

Afterwards, August 30, 1909, Bowdish & Degarmo Brothers brought this suit against Groscup, before a justice in Upshur County, demanding judgment for \$300.00, with interest and costs, the account filed calling "for damages for failing to comply with contract dated April 15, 1908, \$300.00." Another account appearing in the record, by items, is as follows: "Loss on 35,321 ft. Lumber, \$128.37; Loss on 84,197 ft. Lumber, \$225.15; Loss on 65,418 ft. Logs \$2. per M. \$130.84; Loss on use of Mill, \$100.00; Loss on use of Team, \$50.00; Total \$634.36."

On the trial, on a plea of general denial, plaintiffs obtained judgment for \$250.00, interest and costs. From this judgment the defendant appealed to the circuit court.

On the trial in the circuit court, defendant interposed a special plea in writing, alleging in substance, that plaintiffs ought not to have or maintain said action against him, for the reason, that plaintiffs' claim for damages arose out of the same contract, on which he had previously obtained his judgment against them before the justice in Webster County, and that as plaintiffs, after service of process on one of them, had not appeared in that action, or filed any credit, set-off or counter claim, they were thereby barred of all right of action for the damages sued for.

A demurrer to this plea was overruled by the court, the grounds assigned being, (1) that plaintiffs' claim is one for unliquidated damages, which could not have been set off in the first action; (2) because plaintiffs' claim is for a sum in excess of \$300.00, after deducting defendant's claim; (3) because the plaintiff's judgment in that action is void as to the plaintiffs in this action not served with process, and (4) for other reasons apparent on the face of the plea.

There is another plea in the record purporting to be defendant's rejoinder to plaintiffs' replication of nul tiel record, averring that there is such record, of the recovery of his said judgment before the justice, as in his plea alleged, which he is ready to verify by the record thereof and which he prayed might be inspected by the court.

On the trial of this plea, and the demurrer thereto, the court overruled the demurrer and sustained the plea. Whereupon, plaintiffs admitting the facts set out in the plea, it was considered and ordered by the court, by the judgment complained of, that plaintiffs take nothing by their suit, and that defendant recover his costs.

[1] The correctness of the judgment below depends, in the main, on the proper construction to be given to section 55, of chapter 50, Code 1906, relating to justices and constables. The pertinent provision of that section is: "If the defendant, at the time the plaintiff's action is commenced, has any credit, or set-off, or counter claim to allege in defence or reduction of the plaintiff's demand, and be personally served with process in the suit, or appear and answer the action, he shall produce the same, with his evidence in support thereof, in the cause, or be forever precluded from maintaining any action for the recovery thereof," etc.

It is conceded that the plaintiffs' claim is not a "credit" within the meaning of this statute; but it is insisted that "counter claim" is broad enough to include both recoupment and set-off, and that though technically plaintiffs' claim if applied to the defendant's claim would be recoupment, it is nevertheless a "counter claim," and not having been alleged in defense or reduction of the defendant's demand the statute applies and plaintiffs are "forever precluded from maintaining any action for the recovery thereof."

If Groscup's action had been in the circuit court, the question presented for decision could not have arisen, for the general rule undoubtedly is, that a defendant may elect recoupment, or an independent action against plaintiff. If he chooses the former he loses his right to recover by separate action excess of damages. *Webster v. Couch*, 6 Rand. (Va.) 519; *McSmith's Adm'r v. Feamster*, 4 W. Va. 673; *Knight v. Brown*, 25 W. Va. 808; *Hargreaves v. Kimberly*, 26 W. Va. 787, 800, 53 Am. Rep. 121; *Guano Co. v. Appling*, 33 W. Va. 470, 10 S. E. 809; *Coal & Coke Co. v. Coal & Coke Corporation*, 67 W. Va. 503, 68 S. E. 124; *Hogg's Treatise and Forms*, § 111.

Our chapter 126, Code 1906, relating to payment and set-off, does not contain the words "recoupment" or "counter claim." As has been truly said, "recoupment" is a development of the common law, while "counter claim" is purely a statutory remedy. 34 Cyc. 643. The word "counterclaim" occurs in the Codes of Civil Procedure of many of the states, as in New York, *Stover's N. Y. Anno. Code of Civ. Pro.*, volumes 1 and 3, sections 500, 501, and 2949. Some of the sections of our chapter 50, Code 1906, were apparently taken from the Code of New York. Other sections of that chapter were likely influenced by the codes of New York and other states. In New York, and perhaps in other states, the term "counterclaim" is defined. Section 501, *supra*. It is not given the same meaning or scope in all the states, either by statute or judicial decision; but generally it covers recoupment, particularly as applied to a claim for damages arising out of, or relating to the same transaction. So that now under these codes, and as used and understood, counterclaim includes both recoupment and set-off, being broader than both and including matters which do not fall under either head. 25 Am. & Eng. Ency. Law, 570, 571. The object of these statutes is to enable parties to settle and adjust all their cross claims in a single action, avoiding circuity of action and multiplicity of suits. The authority last cited, agreeably to the general rule, says, that counter claim differs from recoupment, in that under a counterclaim defendant may have an affirmative judgment for the excess of his demand over the demand of the plaintiff, whereas damages proved by way of recoupment can only go to reduce or extinguish the plaintiff's claim against him. Of course this distinction would not obtain if the statute otherwise provides.

"Counter claim" as used in our statute, section 55, chapter 50, *supra*, is nowhere defined. Does it, as held in other states, include recoupment, precluding subsequent action by the defendant if he fails to interpose it as a defense or counter claim, in a prior action against him? That chapter, we think, must be regarded as a code of civil and criminal procedure for justices' courts. Sections

52 to 57, inclusive, cover the subject of set-off and counter claim. The question is do these several sections, taken together and properly construed, deprive a defendant of his right of election to recoup or resort to an independent action to recover his damages? If by interposing his claim as a defense he would thereby lose his right to excess of damages, we ought not, we think, construe "counter claim" to include "recoupment"; but if by reasonable and proper construction of the several sections of our statute, excess of damages may be recovered as upon a set-off, we think the spirit of the statute requires us to construe "counter claim" as including "recoupment."

By section 52, as is manifest, the demand to be set-off must be *ex contractu*, that is it must "be founded on judgment or contract, express or implied." By section 53, if the claim of the defendant equals that of the plaintiff, judgment shall be entered for him; if it be less, the plaintiff shall have judgment for the residue only. By section 54, if the balance due the defendant exceed the jurisdiction of the justice and he do not release the excess, he shall have judgment for costs, and may thereafter recover the balance due him in any court having jurisdiction. And by way of exception to section 55, by section 56, if defendant's claim exceeds the plaintiff's demand more than three hundred dollars, he is not required, on penalty of losing his rights, to interpose his claim as a defense, but may resort to a separate action in a court having jurisdiction.

If therefore "counter claim," in section 55, includes "recoupment," defendant may recover excess of damages, arising out of the same contract, and we perceive no reason why we should not give the term "counter claim" the broad construction, which the statute seems to imply, and which is given it in other states having statutes of similar import. It may be argued that section 52 is applicable alone to set-off, and does not apply to "credit" or "counter claim," covered by section 55. But the last clause of section 55, we think, clearly indicates the contrary. That clause is: "And if the plaintiff, in the cases provided for in the fifty-second section, has any credit, set-off or counter claim to allege in defence or reduction of the defendant's set-off or counter claim, and fail to produce and claim the same, he shall, in like manner be forever precluded from maintaining an action for the recovery thereof." This provision makes it clear that the credit, set-off or counter claim which, by section 55, the defendant is required to interpose by way of defense or reduction of the plaintiff's demand, are those defenses which by section 52 he is permitted to make, for if the plaintiff by said provision neglects to interpose like defenses to the set-off or counter claim of the defendant, the same punishment is visited upon him. Our con-

clusion, therefore, is that "counter claim" does include recoupment, where the claim arises out of the same contract sued on by the plaintiff, and if the defendant neglects to produce his claim with his evidence in support thereof, as provided in section 55, he is thereafter barred, as provided thereby, of subsequent action thereon.

Two prior decisions of this court are cited as supporting the contrary proposition. *Natural Gas Co. v. Healy*, 33 W. Va. 102, 10 S. E. 56; *Clark's Cove Guano Co. v. Appling*, 33 W. Va. 470, 10 S. E. 809. The second point of the syllabus of the first case apparently supports plaintiffs' contention. But it is apparent the point is obiter. It did not fairly arise. The statute we have construed was not considered. The point of the syllabus is correct when applied to proceedings in the circuit court. In that case the defendant offered to prove his counter claim before a jury, but the justice denied him that right. The real question was whether that ruling of the justice was error. The question we have here was not presented, though inadvertently covered by the syllabus. In the other case, originating in a justice court, the statute was not construed or brought to the attention of the court. Besides the claim of defendant treated as a claim for recoupment did not arise out of the claim sued on, as stated by Judge Brannon in the opinion. In that respect it is distinguishable from the case at bar, and technically speaking, unliquidated damages are not the subject of set-off, as held in the first point of the syllabus. In *Turk v. Shein*, 55 W. Va. 466, 47 S. E. 253, the proposition involved here was covered by an instruction refused, but as the point did not fairly arise it was not decided. So we have no prior decision covering the point.

[2] But are plaintiffs protected in this action by the alleged excess of their claim to over three hundred dollars? We think plaintiffs are concluded as to the amount of their claim, by the demand in the writ and their bill of particulars filed. True there is copied in the record an account against the defendant, which would show a balance in excess of the jurisdiction of a justice, and if plaintiffs had gone into the circuit court and sued there, they might with some show of consistency rely upon the exception in section 56. Not having done this we think they are concluded and estopped as to the amount of their claim by the amount actually sued for.

[3] But is the correctness of the judgment below affected by the fact that but one of the plaintiffs was served with process in the defendant's action against them in Webster County? It is contended by plaintiffs' counsel, on the principles of *Turk v. Shein*, supra, and *Riley v. Jarvis*, 43 W. Va. 43, 26 S. E. 366, that because but one of the defendants in that action was served with process



there was no litigation of the matters in controversy, so as to bar the present action. There certainly was litigation of the matters in controversy, as to the defendant served. The defendants in that action were co-partners. The judgment bound him, if not those not served. Though but one was served the judgment appears to have been against all. But if void as to defendants not served, as it probably is, are the plaintiffs nevertheless not barred of their present action? The plaintiff served in the defendant's action undoubtedly had the right for his individual protection to interpose his firm's claim for damages and to defend the action against all, and if we are correct in our construction of the statute, section 55, chapter 50, of the Code, he was bound to do so, as he had the legal right, for his own protection, if not that of his firm.

The filing of a counter claim is the equivalent of instituting a new suit against plaintiff. It is within the implied powers of a partner to institute a suit on behalf of his firm, as well as to defend one against it. 30 Cyc. 556, and cases cited, including *McCluny v. Jackson*, 6 Grat. (Va.) 96. Our case of *Lee v. Hassett*, 41 W. Va. 368, 23 S. E. 559, holds, that "where a judgment is rendered against two partners on a partnership debt, and one of the partners has not been served with process, nor appeared to answer the action, such judgment is valid as to the partner served with process; and an execution issued thereon should not be quashed, on his motion, on the sole ground that the process was not served on his co-partner." Clearly therefore the plaintiff served with process in the defendant's suit was concluded by the judgment in that suit from maintaining any action on his firm's counter claim for damages against the defendant. And the rule seems to be that "Where one partner is disqualified to sue upon a firm claim, no action at law can be maintained thereon, for the reason that such partner is a necessary party plaintiff, and one who cannot sue by himself cannot do so merely by joining others with him." 15 Ency. Pl. & Prac. 867.

On consideration of these principles we are of opinion to affirm the judgment, and we will so order.

(70 W. Va. 766)

KIMBALL et al. v. LOUGHNEY, Mayor, et al.  
(Supreme Court of Appeals of West Virginia.  
April 23, 1912.)

(Syllabus by the Court.)

1. STATUTES (§ 158\*)—REPEAL BY IMPLICATION.

Repeal of a statute by implication is not favored in law.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 228; Dec. Dig. § 158.\*]

2. STATUTES (§ 162\*)—REPEAL—GENERAL AND SPECIAL LAWS.

A general statute should not be construed as repealing a special law, unless by express words, or the words employed manifest a plain intention to do so.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 235-237; Dec. Dig. § 162.\*]

3. CONSTITUTIONAL LAW (§ 48\*)—VALIDITY OF STATUTES—CONSTRUCTION IN FAVOR OF CONSTITUTIONALITY.

Courts will sustain an act of the legislature as constitutional, unless it clearly contravenes some provision of the organic laws.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 46; Dec. Dig. § 48.\*]

4. STATUTES (§ 138\*)—AMENDMENT—REFERENCE TO FORMER ACT.

Section 11 of the charter act of the City of Sistersville, otherwise complete in itself, passed in 1899 (Laws 1899, c. 4), but which adopts by reference only, as a method or mode for conducting municipal elections, the general election law in force March 10, 1891, which latter act was on the following day amended and re-enacted. (Laws 1891, c. 89) is not void, as contravening section 30, art. 6 of the Constitution (Code 1906, p. 1x), providing that "no law shall be revived, or amended, by a reference to its title only," etc., although by section 85 of such general law as amended it is provided that "every municipal election shall be held in conformity with the provisions of this act."

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 205, 206; Dec. Dig. § 138.\*]

Original proceeding in mandamus by Charles N. Kimball and others against J. T. Loughney, Mayor of the City of Sistersville, and others. Writ denied.

E. L. Robinson, of New Martinsville, and Charles N. Kimball, of Sistersville, for petitioners. Townsend & Bock, of Charleston, and J. B. Handlan, of Wheeling, for respondents.

MILLER, J. The alternative writ of mandamus awarded petitioners, citizens, taxpayers, and qualified voters of the City of Sistersville, and nominees of the Citizens' Party, respectively, for mayor, clerk and treasurer, and two of them for auditors, commanded defendants, mayor, city clerk, and members of the city council, forthwith to appoint certain persons alleged to have been nominated to said council by the executive committee of said party, commissioners and challengers of the municipal election to be held in said city on March 28, 1912, or appear and show cause on a day named why they had not done so.

Petitioners, as their petition alleges and the writ recites, base their claim of right to the peremptory writ on sections 7, 85 and 93, chapter 3, Code 1906; and it is conceded that if this general law of the state is applicable to municipal elections in said city, petitioners are entitled to the peremptory writ, otherwise not.

Section 7 of said act relates to the appointment by the county court, on the nomination of the county chairmen of the two leading political parties, of commissioners

of election, their power to administer oaths and take affidavits, and imposes punishment for perjury; section 93 to the appointment by said court, on like nomination, of challengers of election, and prescribes certain duties of the clerk of the court in relation to elections. By section 85, "Every municipal election shall be held in conformity with the provisions of this act," except that the duties therein required of the county and circuit court and its officers are to be performed by the city or town council and its officers.

Respondents in their return, however, deny the applicability of the general law to municipal elections in the City of Sistersville. They contend that such municipal elections are governed by chapter 4, Acts of the Legislature of 1899, entitled "An act to amend and re-enact and to reduce into one Act, the several Acts incorporating the town of Sistersville, in the County of Tyler; defining the powers thereof, and describing the limits of said town; and incorporating the city of Sistersville, in said Tyler County." Section 11 of that act, which if a valid enactment, must control, provides, among other things, that "The elections in said city shall be held and conducted and the result thereof certified, returned and finally determined, under the laws in force in this State, relating to general elections, on the tenth day of March, eighteen hundred and ninety-one," the corporate authorities to perform the duties in relation to such elections required by the general law of county courts and officers.

Two points are made against the validity of this charter law, first, that the general law in force on March 10, 1891, was on March 11, 1891, amended and re-enacted (Laws 1891, c. 89), and that the new act constitutes one comprehensive statute, and was intended to cover all elections by the people, including municipal elections, thereby repealing, if not in express words, by implication, the provisions of the law in force on March 10, 1891, which are inconsistent or repugnant to the new act; second, that whether or not the first proposition be true, said section 11 of the charter act of 1899, which by reference only, undertakes to make the general law in force March 10, 1891, the law controlling the municipal elections, is unconstitutional and void, being in contravention of section 30, article 6 of the Constitution, which provides: "No law shall be revived, or amended, by a reference to its title only; but the law revived, or the section amended, shall be inserted at large, in the new act."

[1, 2] The first point we think without merit. The general law enacted March 11, 1891, contains no repealing clause. Repeals by implication, as many times said by text writers and in judicial decisions, are not favored. Besides it is familiar law that a

general statute will never be construed as repealing a special act, unless by express words it does so, or the words employed in the general law leave no doubt of the intention of the legislature. See cases collated in 12 Ency. Dig. Va. & W. Va. Rep. 780, 781. This point, however, does not seem to be seriously relied upon.

[3, 4] The second is the real point of contention. Is section 11 of the charter act repugnant to the constitutional provision invoked against it? True it is that at the time of the charter act in 1899, the general law in force on March 10, 1891, had been amended and re-enacted, and in so far as inconsistent with or repugnant to the amending act was thereby repealed. "The courts should sustain legislative action when not clearly satisfied of its invalidity; and unless it clearly appears that it is contrariant to the constitution then there is reasonable doubt of its invalidity, and it should be sustained and enforced." *Bridges v. Shallcross*, 6 W. Va. 562, 574; *Slack v. Jacob*, 8 W. Va. 612; *Bridge Co. v. County Court*, 41 W. Va. 658, 24 S. E. 1002; *Mackin v. County Court*, 38 W. Va. 338, 18 S. E. 632; *Roby v. Sheppard*, 42 W. Va. 286, 26 S. E. 278; *Duncan v. B. & O. R. R. Co.*, 68 W. Va. 293, 69 S. E. 1004.

The provision of the constitution is, "no law shall be revived, or amended, by reference to its title only." It is not claimed that section 11 of the charter act is a revival or an amendment by reference to its title of the general law in force on March 10, 1891. Of course its provisions are, by the charter reference, made applicable to municipal elections in the City of Sistersville, and so far as repealed by the act of March 11, 1891, the charter act operated by adoption as a revivor for municipal purposes, but the charter act in no sense revived or amended the general law; it amounted to revival only in this limited sense, and not to the extent we think which the constitution was intended to prohibit. *Shields v. Bennett*, 8 W. Va. 74, much relied upon by respondents, involved a general law. The point we have here was not involved or decided in that case, and it can have only general application. And *Lehman v. McBride*, 15 Ohio St. 602, and other cases cited and relied upon will be found on examination to be cases of like character.

Besides, section 11 of said charter act does more than merely refer to the former general law of elections. It provides that the election shall be by ballot, that the voter shall be left free to vote by open or secret ballot as he may elect. Other sections of the statute provide what officers of the municipality shall be elected under the charter. Section 11 simply adopts by reference the prior general law and prescribes it as the mode or method of conducting elections. The old and more simple method

of conducting elections was for some reason preferred to the more cumbersome or Australian ballot law, provided by the subsequent general act. Reference statutes of this kind are frequently resorted to; many of them will be found in our own code. It is done where not specifically inhibited by the organic law to avoid encumbering legislation with unnecessary prolixity. "It is generally held that if an act is complete in itself, it may adopt rules of construction or modes of procedure for carrying out its provisions by reference to other statutes, whether or not this provision is contained in the constitution; and such adoption by reference may include references to local as well as general laws. Statutes of this character are known as reference statutes." 26 Am. & Eng. Ency. Law, 711. In *Schwenke v. Union D. & R. R. Co.*, 7 Colo. 512, 4 Pac. 905, it is held, that "A local and special statute, which adopts, by reference, provisions relating to procedure from an existing general law, is not necessarily abrogated or affected by the subsequent repeal of the act containing the provisions adopted." Speaking of the act involved in that case, the court at page 514 of 7 Colo., at page 906 of 4 Pac. says: "This act [Act July 1, 1864, c. 205, 13 Stat. 343] is not, as claimed, an amendment of the law of 1844 [Act May 23, 1844, c. 17, 5 Stat. 657]; it is 'An act for the relief of the citizens of Denver, in the territory of Colorado.' It is local and special; it was intended to relieve the inhabitants of a particular locality from an inconvenience or disability existing under the general law, and confer upon them certain privileges not bestowed thereby. This important and controlling purpose was attained by the very language of the statute itself; so far it was in no way dependent upon the general town site law of 1844."

In New Jersey one of the provisions of the constitution is: "No act shall be passed which shall provide that any existing law or any part thereof shall be made or deemed a part of the act, or which shall enact that any existing law or any part thereof shall be applicable except by inserting it in such act." [Amendments, art. 4, § 7, par. 4] Notwithstanding this drastic provision of the Constitution the Supreme Court of that state in *Campbell v. Board of Pharmacy*, 45 N. J. Law, 241, held, that an act of the legislature, complete and perfect in itself, and the purpose, meaning and full scope of which was apparent on its face, is not invalid, though it may provide for actions or means for carrying its provisions into effect by reference to a course of procedure established by other acts of the legislature. See also *Christie v. Bayonne*, 48 N. J. Law, 407, 409, 5 Atl. 805. And the court in *Campbell v. Board*, supra, referring to this constitutional provision, at page 246 of 45 N. J. Law, says: "The constitutional provision in question, and that which forbids the re-

vival or amendment of a law by reference to its title only, were designed for the suppression of deceptive and fraudulent legislation, the purpose and meaning of which could not be discovered either by the legislature or the public without an examination of and a comparison with other statutes. Neither of these provisions were designed to obstruct or embarrass legislation. Both were intended only as a means to secure a fair and intelligent exercise of the law-making power." In the case of *In re Haynes*, 54 N. J. Law, 6, 22 Atl. 923, it was held, that an act altering the mode of appointing a board of municipal officers, removing them from office, and which declared that the newly appointed officers should have the same statutory power, possessed by their predecessors, was not in conflict with the provision of the constitution referred to. And in *Bradley & Currier Co. v. Loving*, 54 N. J. Law, 227, 23 Atl. 685, the second point of the syllabus is: "Nor is a clause declaring that a provision in an earlier law shall be applicable, without a recital of such provision, in all cases, unconstitutional." The point of the syllabus in that case was made applicable to a supplemental statute, which referred to the primary act for the purpose of defining its own subject.

But we have law still more applicable to the concrete case presented here. In 1 *Lewis, Sutherland on Stat. Const. § 242*, it is said: "The constitutional provision now under consideration usually provides that no law shall be amended or revived by reference to its title, and requires the act revived to be set out and published at length. Few cases have arisen on this branch of the provision. It has been held that a repealed act is not revived, in the constitutional sense, when its provisions are adopted by another act for the purposes of the latter act only." The principal case cited by Mr. Sutherland is *State v. Green*, 36 Fla. 154, 18 South. 334. Point 9 of the syllabus in that case is a comprehensive statement of the facts, particularly applicable here: "The provision in section 152 of the act (chapter 4513, Acts 1895), that the first election thereunder should be held on the first Tuesday in June, 1895, and biennially thereafter on the same day, and that the election should be held under the general law governing state elections existing at the last state election, is not in conflict with the constitutional provision (section 16, art. 3) that no law shall be amended or revised by reference to its title only, but in such case the act as revised, or section as amended, shall be re-enacted and published at length." The contention in that case as in the case at bar, was, that the act in question sought to revive by reference only a prior act which had been repealed. The word in the Florida constitution is "revised," in our constitution "revived." In answer to this contention the court in that case at page 180 of

36 Fla. and at page 338 of 18 South. observes, "it was neither the purpose nor the effect of the act in question to amend or revive the election law in force at the preceding state election, but simply to adopt the provisions of that law as the rule for the government of the municipal election under the act."

Two other cases are cited by Mr. Sutherland in a foot note, namely, *Stewart v. State*, 100 Ala. 1, 13 South. 943, and *Miller v. Berry*, 101 Ala. 531, 14 South. 655. These decisions may appear to assert the contrary proposition, but if so they are not in accord with subsequent decisions of that court. The word in the constitution of that state, as in this state, is "revived." In *Railway Co. v. Land Co.*, 114 Ala. 70, 21 South. 314, the act in question provided that street railroad companies might condemn rights of way and take possession thereof on paying just compensation "in the same manner as now provided by law for taking private property for railroad and other public uses in article 2, chapter 17, title 2, part 8 of the Code [Acts 1886-87, p. 122]." It was held that this act was not interdicted by the provision of the constitution. The judge writing the opinion in that case was of a different opinion, he said, for reasons given by him in *Stewart v. Com.*, 82 Ala. 209, 2 South. 270, but his associates, upon the authority of *State v. Rogers*, 107 Ala. 444, 19 South. 909, 32 L. R. A. 520, held the contrary. The doctrine of the latter case was re-affirmed by that court in *Cobb v. Vary*, 120 Ala. 263, 24 South. 442, holding, point one of the syllabus, that "An act of the legislature, which is in form original, and is in itself intelligible and complete, and does not, either in its title or in its body, appear to be revisory or amendatory of any existing law, is not within the inhibition of the constitution, that 'no law shall be revived, amended, or the provisions thereof extended or conferred by reference to the title only,' etc., (Const. [1875] art. 4, § 2); and this is true where such act seeks to effectuate the rights conferred, by referring to certain sections of the Code as furnishing means necessary for their enforcement."

On a former day we denied the peremptory writ, we now file this opinion giving our reasons for doing so.

(70 W. Va. 688)

#### FETTY v. HUNTINGTON LOAN CO.

(Supreme Court of Appeals of West Virginia.  
April 23, 1912.)

(Syllabus by the Court.)

#### 1. MALICIOUS PROSECUTION (§ 42\*)—LIABILITY OF CORPORATION—ACTS OF AGENT.

A corporation is liable for a malicious prosecution by its agent, acting within the scope of his employment and in furtherance of his company's business, notwithstanding the

company may not have expressly authorized or ratified his act.

[Ed. Note.—For other cases, see *Malicious Prosecution*, Cent. Dig. §§ 83-86; Dec. Dig. § 42.\*]

#### 2. MALICIOUS PROSECUTION (§§ 15, 24, 32, 56\*)—WANT OF PROBABLE CAUSE.

Points 8, 10, and 16 of the syllabus, *Vinol v. Core*, 18 W. Va. 1, approved and applied.

[Ed. Note.—For other cases, see *Malicious Prosecution*, Cent. Dig. §§ 18, 49-55, 67, 68, 112-116; Dec. Dig. §§ 15, 24, 32, 56.\*]

#### 3. ASSIGNMENTS (§ 88\*)—MALICIOUS PROSECUTION (§ 71\*)—WAGES—SECURITY FOR DEBT.

A contract, purporting to be a sale or transfer of wages due, held to be a collateral security for a loan; and whether it was made with intent to defraud held to be a question for the jury.

[Ed. Note.—For other cases, see *Assignments*, Cent. Dig. §§ 135, 136; Dec. Dig. § 88.\* *Malicious Prosecution*, Cent. Dig. §§ 160-167; Dec. Dig. § 71.\*]

Error to Circuit Court, Cabell County.

Action by Myron Fetty against the Huntington Loan Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Wyatt & Graham and C. W. Freeman, all of Huntington, for plaintiff in error. Isbell & Perry, of Huntington, for defendant in error.

**WILLIAMS, J.** This writ of error brings up for review a judgment for \$400 rendered against defendant, a corporation, by the circuit court of Cabell county, in an action for malicious prosecution.

[1] F. L. Doolittle, defendant's secretary, procured the arrest of plaintiff upon a warrant, issued by a justice of the peace, upon affidavit charging him with grand larceny. At the preliminary hearing the justice discharged him, and there was no indictment found against him. It is insisted that, because the arrest was not expressly authorized or ratified by the corporation, it is not liable; that a corporation is not liable for the unauthorized torts of its agents. Courts for a time, held different views on this question; some holding that corporate action, authorizing or approving the wrongful act, was necessary to fix liability. But some of the courts, that held to this view in their earlier decisions, have since overruled them, and have fallen in line with the majority of the courts of the different states. It is now the generally accepted doctrine that a corporation is liable for the torts of its agents, committed within the scope of his employment, in the same manner that an individual principal is liable, and that no corporate action is necessary. *Goodspeed v. East Had-dam Bank*, 22 Conn. 530, 58 Am. Dec. 439, decided in 1853, is a leading case on this subject, and has generally been followed by the courts throughout this country. A corporation is liable for a false arrest or malicious prosecution, procured by its agent in furtherance of the company's business, and

within the scope of the agent's employment. 10 Cyc. 1216; 5 Thompson on Corp. (2d Ed.) § 5447; Copley v. Sewing Machine Co., Fed. Cas. No. 3,218; Vance v. Railway Co., 32 N. J. Law, 334, 90 Am. Dec. 685; Wheelless v. Second National Bank, 1 Baxt. (Tenn.) 469, 25 Am. Rep. 783; Railroad Co. v. Quigley, 21 How. 209, 16 L. Ed. 73; Hussey v. Railroad Co., 98 N. C. 84, 3 S. E. 923, 2 Am. St. Rep. 312.

"A corporation may be held liable for a false imprisonment procured by the wrongful acts of its agents and servants in the course of their employment although it neither authorized nor ratified such acts." Wheeler & Wilson Manf. Co. v. Boyce, 36 Kan. 350, 13 Pac. 609, 59 Am. Rep. 571.

[2] It is insisted that plaintiff failed to prove either want of probable cause or malice, and that the court erred in overruling defendant's motion to set aside the verdict and award it a new trial. Want of probable cause is one of the essential grounds of an action for malicious prosecution, and, notwithstanding it is a negative proposition, the burden rests upon plaintiff to prove it. But, in view of its negative character, only slight proof is required. Vinol v. Core, 18 W. Va. 1; 26 Cyc. 86.

That plaintiff's arrest was procured upon complaint made by defendant's secretary, charging him with a felony, is admitted; and his discharge is proven by the transcript from the justice's docket. No indictment was made by a grand jury. The prosecution had terminated. Waldron v. Sperry, 53 W. Va. 116, 44 S. E. 283. Plaintiff's discharge by the justice is *prima facie* evidence of the want of probable cause, but may be rebutted by proof. Vinol v. Core, *supra* (Syl. pt. 16); Harper v. Harper, 49 W. Va. 661, 39 S. E. 661.

Malice is also a necessary element of the action, which plaintiff must establish. But being a matter of motive, and, therefore, difficult to prove by direct evidence, it may be inferred from want of probable cause. Vinol v. Core, *supra* (Syl. pt. 10). Malice is a comprehensive, technical term. It is not confined to personal hatred or ill will, but comprehends any unlawful motive or purpose; as, for instance, procuring the arrest of a party on a criminal warrant for the purpose of forcing him to pay a debt, and not for the purpose of punishing him for the crime charged. 26 Cyc. 50.

In the summer of 1906 plaintiff, then a boy between 17 and 18 years of age, was employed by the American Car & Foundry Company. He procured loans of small sums of money from defendant by a sale to it of his "time," or wages due him, as follows, viz.: On the 11th of August, \$11; on the 28th of August, \$3.50; and on the 8th of September, \$14.50. The form of contract which plaintiff was required to sign, and which he did sign, was as follows, viz.:

"Huntington, W. Va., September 8, 1906.

"This is to certify that I the undersigned, represent to and agree with the Huntington Loan & Surety Company as follows:

"1st. That I am past 21 years of age.

"2d. That, for value received, I am indebted to the Huntington Loan & Surety Company in the sum of \$14.00 dollars and fifty cents.

"3d. That I am employed by the American Car & Foundry Company, a corporation, and that said company is indebted to me in a sum sufficient to repay the Huntington Loan & Surety Company the above-named amount.

"4th. That I have irrevocably assigned to the Huntington Loan & Surety Company by extended order the amount herein before represented to be due or hereafter to become due me by the above-named corporation.

"5th. That no other assignment of said wages have been made nor will be made by me, nor have the same been attached or garnished prior to the above date.

"6th. That if from any cause an amount exceeding my indebtedness to the Huntington Loan & Surety Company be paid to them by the above-named corporation, it is agreed that said amount shall be refunded to me by them, unless circumstances otherwise prohibit the refunding of the balance.

"7th. That if the Huntington Loan & Surety Company is put to any trouble in collecting the above-named amount, I hereby agree to pay to said Huntington Loan & Surety Company a fee not to exceed \$10.00 for any act or thing done by them toward the collection of the above-named amount, and the fee to be charged shall be optional with said Huntington Loan & Surety Company.

"8th. That the above sum of money is obtained by me from the Huntington Loan & Surety Company upon the representations above made by me.

"[Signed] Myron Fetty.

"Endorser, \_\_\_\_\_  
"Witness, Grace Staley."

Accompanying this, there was also a written power of attorney, which plaintiff executed to William Chaffin, authorizing him to settle plaintiff's accounts with the American Car & Foundry Company, and to receipt to it for the money that was due or that might become due him; also an agreement to pay said Chaffin an attorney's fee, not to exceed \$15, "for any act performed" in plaintiff's behalf. At the same time orders upon the American Car & Foundry Company were given, as follows, viz.:

"Huntington, W. Va., 9/8, 1906.

"To the American Car & Foundry Company, a Corporation:

"For value received, I, the undersigned, have bargained, transferred, absolutely sold and conveyed to the Huntington Loan & Surety Company all moneys due or which may hereafter become due to me for the

period of one year from date. You are therefore directed to pay to their order all moneys due or which may hereafter become due me during said period.

"[Signed] Myron Fetty.

"[Signed] \_\_\_\_\_

"Witness, Grace Staley."

Plaintiff testifies that he continued to work for the American Car & Foundry Company until about the 15th of September, 1906, and that within that time he had repaid to defendant company between \$6 and \$7 of the money borrowed. Defendant did not notify the American Car & Foundry Company that it held assignments for plaintiff's wages, and did not present any of the orders to it, for acceptance or payment, until the 28th of September, and after it had learned that plaintiff had ceased to work for that company. There was then only two days' wages to his credit, for which there was due him \$3. That was paid to defendant.

Obtaining from another money, by false pretenses, with intent to defraud, is made larceny by statute. Section 23, c. 145, Code 1906. And the obtaining of the money in the manner and by the means above stated is the ground of the complaint on which plaintiff was arrested.

On the day of the trial before the justice, B. L. Fetty, plaintiff's father, and J. W. Perry, as surety, gave their note to defendant company for \$18.50, in settlement of the balance which plaintiff owed to defendant. Defendant's agent must have known, at the time he made complaint before the justice, that plaintiff was not guilty of a felony. Why, then, did he make the charge as he did? He was both secretary and manager of defendant's business at the time he made the complaint. But are the facts and circumstances sufficient to justify a reasonable belief that plaintiff was guilty of obtaining a less sum than \$20 by false pretenses and with intent to defraud? This question must be answered from defendant's standpoint. *Porter v. Mack*, 50 W. Va. 581, 40 S. E. 459; *Scott v. Shelor*, 28 Grat. (Va.) 891. What effect would be produced on a reasonable mind by the facts which defendant's agent knew? If they are such as to induce belief of guilt, then there was probable cause; otherwise, not. *Porter v. Mack*, supra. If the facts are admitted, or if they are proven and not denied, then whether they are sufficient to show want of probable cause is a question of law. But if the facts depend upon conflicting testimony, the question is one of mixed law and fact, and must be decided by the jury. *Vinol v. Core*, supra (Syl. pt. 8). Therefore, in considering the question, we must regard those facts as proven which tend to show want of probable cause, if there is sufficient testimony to prove them, because the jury's verdict is a finding of such facts. The error complained of is the refusal of the court to set aside the verdict. The jury's finding of facts, depending on conflicting tes-

timony, must have its proper weight with the court. On this question the character and the language of the contract on which the money was obtained is important. It states, in reference to plaintiff's age, that he is 21 years old. But at that time he was in fact only a little over 17. He testified at the trial of this case, on the 29th of April, 1909, that he would be 20 years old in the following October, and he got the money in August and September, 1906. Whether his appearance was such as would likely cause another to believe he was 21 years old, or whether the statement in the written contract was made to deceive, and did actually deceive, defendant's agent, were questions for the jury, and they have, in effect, answered them in the negative. The contract was according to a printed form which defendant used in its business. It was not read to plaintiff, and it does not appear that he read it before signing it. Therefore the jury may have believed that he did not know that he was falsely certifying to his age.

Again, the contract certifies that the American Car & Foundry Company, by whom plaintiff was employed, was indebted to him in a sum sufficient to repay defendant the amount named in the paper. But was this statement made for the purpose of deceiving, and did it in fact deceive, defendant's agent? It seems not. If the defendant regarded the contract as an assignment to it of \$14.50 of money which was at that time owing by the American Car & Foundry Company to plaintiff, and if it relied upon the representation that so much money was at that time actually due plaintiff, and was thereby induced to lend him money, why did the very next clause of the contract take an assignment of "moneys thereafter to become due"? And why did the order to the American Car & Foundry Company direct it to pay to defendant all moneys due and thereafter to become due to plaintiff for the period of one year from that date? Another significant fact which tends to show that defendant did not rely upon the representation that plaintiff had enough money to his credit, at that time, to repay the money borrowed, is that defendant did not file any of the orders with the American Car & Foundry Company until the 28th day of September, after it had learned that plaintiff had ceased to work for that company. True, at that time, he had but \$3 to his credit at the company's office, and that is all that defendant got upon the order. That does not prove that plaintiff made a false representation as to the amount due him, or that defendant would not have gotten its money if it had presented the orders immediately after they were given. Moreover, plaintiff testified that, at the time he gave the orders, he had enough money then due him to repay the loan; and this testimony seems not to be denied. He also testifies that he repaid defendant between \$6 and \$7. True, the paymaster for the Amer-

ican Car & Foundry Company testified that plaintiff's name did not appear on the company's books after September 1st. But it does not appear what day of the month was pay day, or that the names of the workmen were noted on the records of the company except on pay day. Hence plaintiff's testimony may be reconciled with that of the paymaster. He may have worked until as late as September 15th, and still his name may not have appeared on the pay roll. But, like other facts in the case, this was a jury question.

[3] On the order for \$14.50 plaintiff received \$13. The order was discounted \$1.50, which is equivalent to about two years' interest, at 6 per centum per annum, or one year's interest at 12 per centum. All the above enumerated facts and circumstances were sufficient to warrant the jury in believing that the representations, as to plaintiff's age and as to the amount of money due him, set out in the printed form of agreement, were not made with intent to defraud defendant, and that they did not in fact deceive its agent. Instead of being intended as a transfer of wages then due, the transaction seems to have been really designed to operate as a security for a loan of money, to be repaid at some future time. Otherwise, there is no explanation for defendant's delay in presenting the orders to the American Car & Foundry Company until after it had learned that plaintiff had ceased to work for that company. Why he quit work does not appear. That he did it to avoid his contract with defendant is certainly not proven. Mr. Doolittle testified that plaintiff "was to pay before he borrowed again." What does this mean, if plaintiff was not given the right to draw his wages, after he had given the assignment? How, otherwise, could he pay what he had borrowed?

To hold that defendant regarded the contract as an assignment of so much of plaintiff's wages as were then stated to be due, which gave plaintiff no right thereafter to draw such wages, would necessarily be to take a very uncharitable view of defendant's business. It would mean that it was exacting usury to an enormous extent. Why should plaintiff be willing to accept \$13 for \$14.50 of wages, if that amount of money was due him from the American Car & Foundry Company, and was intended to be transferred to defendant immediately? That the parties so understood the contract is wholly inconsistent with the subsequent conduct of defendant's agent, at least, until he caused plaintiff's arrest. The purposes for which defendant was incorporated do not appear. But that it is in the business of lending money is suggested by its name, and that it is doing so for a profit is shown by the facts in this case.

After plaintiff had ceased to work for the American Car & Foundry Company, he got

a job on a sawmill in Logan county. Defendant says it was a long time before it could ascertain where he was, and that it was under the belief that he left the county, and secreted himself, to avoid the payment of its debt. Defendant's agents, F. L. Doolittle and C. C. Curtis, testified that they made inquiries concerning his whereabouts, and were unable to locate him for about two years. But they made no inquiry of plaintiff's family until a short time before plaintiff was arrested, when Curtis first inquired of plaintiff's father, and was told where he was. If they had inquired of the boy's father sooner, they might have located him sooner. His absence from the county was not sufficient to induce belief in a reasonable mind that he had procured the loan fraudulently. It does not appear why he quit work at the American Car & Foundry Company, or why he went to work in Logan county. He may have been discharged by the American Car & Foundry Company, and sought work elsewhere.

It is insisted that defendant is a different corporation from the one that made the loan, and that, therefore, it is not liable. The Huntington Loan & Surety Company was a corporation chartered under the laws of Arizona. But on January 1, 1907, defendant company was chartered under the laws of West Virginia, and took over the business of the old company, including the debt owing by plaintiff. F. L. Doolittle was, successively, secretary and manager for both companies. He testifies that at the time he swore out the warrant for plaintiff's arrest he was acting for defendant company. Therefore the act, being performed for this company, and being within the scope of the agent's employment, would certainly make defendant liable, according to the authorities cited in the first part of this opinion. The debt which plaintiff owed the old company was, at the time plaintiff was arrested, the property of defendant.

The foregoing opinion practically disposes of the assignments relating to the giving of plaintiff's instructions Nos. 2 and 3, and to the refusal to give defendant's instruction No. 1, which was a peremptory one to find for the defendant, and the judgment will be affirmed.

(70 W. Va. 752)

ROSENTHAL et al. v. FOX et al.

(Supreme Court of Appeals of West Virginia.  
April 23, 1912.)

(Syllabus by the Court.)

1. NEW TRIAL (§ 65\*)—GROUNDS—DISCRETION OF COURT.

The trial court cannot properly set aside a verdict and grant a new trial when it has committed no error to the prejudice of the party against which the verdict was rendered and

when the verdict is not plainly contrary to law and the evidence.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. § 130; Dec. Dig. § 65.\*]

**2. JUDGMENT (§ 126\*) — OFFICE JUDGMENT—INQUIRY OF DAMAGES.**

An inquiry of damages is requisite in an action based on a writing for the payment of money which by its terms does not ascertain the amount to be paid thereunder. Code 1906, c. 125, § 45, does not refer to writings in which the amount to be paid is undetermined.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 228-230; Dec. Dig. § 126.\*]

Error to Circuit Court, Cabell County.

Action by Samuel Rosenthal and another, partners, against Sam Fox and another. Judgment for defendants, and plaintiffs bring error. Reversed and rendered.

W. K. Cowden, of Huntington, for plaintiffs in error.

ROBINSON, J. [1] An examination of the record discloses no error committed at the trial to the prejudice of the defendants. Nor does it show the verdict found by the jury in favor of the plaintiffs to be contrary to law and the evidence. Therefore, the order of the trial court setting aside the verdict and granting a new trial is not justified. *Robinson v. Kistler*, 62 W. Va. 489, 59 S. E. 505. By a fair and proper submission of the case, the plaintiffs obtained a verdict on which they should have had judgment. The order denying them that right is not war-

ranted by the record. The court at the trial properly applied the written contract on which the action is based. The legal consequence of that writing is so clear and simple that it deserves no discussion here.

[2] The office judgment in this case was properly set aside by counter affidavit filed at a term subsequent to the one following the entry of that office judgment. An inquiry of damages was demanded. "It is only in actions wherein no writ of inquiry is requisite that office judgment becomes final so as to bar counter affidavit and plea at a subsequent term." *Gray v. Mankin*, 69 W. Va. 544, 72 S. E. 648. True, the action is based on a writing for the payment of money. Code 1906, c. 125, § 45. But that writing is not for a definite or ascertained amount. It is a guaranty to pay as much as may be found due, not exceeding four hundred dollars. It is like a bond with collateral condition. The statute cited does not mean this kind of writing for the payment of money. That statute refers to a writing for the payment of an ascertained amount. If the amount to be paid under a writing on which action is based is not definitely settled by its terms, the amount must be ascertained by an inquiry of damages. 4 *Minor's Inst.* (3d Ed.) 724; *James River, etc., Co. v. Lee*, 16 Grat. (Va.) 424; *Assurance Co. v. Everhart*, 88 Va. 952, 14 S. E. 836.

The order setting aside the verdict and granting a new trial will be reversed and judgment entered here on the verdict.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes



(159 N. C. 158)

**RIPLEY v. ARMSTRONG.**

(Supreme Court of North Carolina. May 22, 1912.)

**1. WILLS (§ 108\*)—EXECUTION—SUFFICIENCY.**

A finding that testatrix, "holding the instrument in her hands with her name written at the bottom, acknowledged and declared the same to be her last will and testament, that the same had been signed by her, that she then and there requested the witnesses to sign the instrument, which they did in her presence and at her request as witnesses," shows a valid execution of the will.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 249-258; Dec. Dig. § 108.\*]

**2. TRUSTS (§ 191\*)—SALE BY TRUSTEE—POWER—CONSTRUCTION OF WILL.**

A will, giving testatrix's property to her husband "to use as he thinks best for the maintenance of our children," made him a trustee with power to sell and convey in fee simple; it appearing to be necessary to sell the land to obtain means for the children's maintenance.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 243; Dec. Dig. § 191.\*]

**3. WILLS (§ 441\*)—CONSTRUCTION.**

A will should be construed to ascertain testator's intention from the language used by him in the light of his condition, that of his family, and all the attendant circumstances.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 958; Dec. Dig. § 441.\*]

Appeal from Superior Court, Henderson County; Foushee, Judge.

Action by J. H. Ripley against T. H. Armstrong. Judgment for defendant, and plaintiff appeals. Reversed.

Smith, Shipman & Justice, for appellant. Michael Schenck, for appellee.

**CLARK, C. J.** The plaintiff contracted to sell a tract of 17½ acres to the defendant, who now refuses to pay for the same upon the ground that the plaintiff cannot execute a good title. The plaintiff acquired title under the will of his wife.

[1] Two questions are presented on this appeal. It appears in the probate of the will that the testatrix, "holding the instrument in her hands, with her name written at the bottom, acknowledged and declared the same to be her last will and testament, that the same had been signed by her, that she then and there requested the witnesses to sign the instrument, which they did in her presence and at her request as witnesses." This was sufficient. *Eelbeck v. Granberry*, 3 N. C. 233; *Bateman v. Mariner*, 5 N. C. 176. This acknowledgment was of the same effect as if the testatrix had signed in the presence of the witnesses, which indeed the statute does not require. In *re Herring*, 152 N. C. 260, 67 S. E. 570.

[2, 3] The provision in the will in controversy is as follows: "I give and bequeath to my beloved husband J H Ripley all my real estate consisting of land houses and whatsoever it may be in Hendersonville N C or wheresoever it may be found also

all my personal property to use as he thinks best for the maintenance of our children." Upon this language, especially taken in connection with the attendant circumstances, we are of opinion that the plaintiff took as trustee with power under the will to sell and convey the property in fee simple. The primary purpose in construing a will is to ascertain the intention of the testator from the language used by him. In ascertaining such intention it is competent to consider the condition of the testator and family and all the attendant circumstances. *Parks v. Robinson*, 138 N. C. 269, 50 S. E. 649. In *Crawford v. Wearn*, 115 N. C. 540, 20 S. E. 724, it was held that the "power to invest or use" conferred upon life tenant the power to convey in fee simple.

It appears upon the "facts agreed" in this case that the testatrix had executed mortgages upon the land described, aggregating \$2,200, which were unpaid and a lien upon her land at the time of her death, and that she left no fund or personalty with which to liquidate said indebtedness; that the land is not valuable for agricultural purposes, and it is without improvements thereupon, except a cottage, and no income can be derived from the land sufficient to maintain the family of four children who survived her except by a sale; that it was necessary for the plaintiff to sell the land to obtain means of maintenance for the children. Upon these facts it is placed beyond reasonable doubt that the intention and meaning of the testatrix was to vest the husband with authority to sell said land, and that he can make a good title in fee thereto.

Upon the case agreed the judgment must be reversed.

(159 N. C. 151)

**SMITH v. MORGANTON ICE CO. et al.**

(Supreme Court of North Carolina. May 16, 1912.)

**1. MONOPOLIES (§ 28\*)—RESTRAINT OF TRADE—STATUTES.**

Laws 1911, c. 167, amending Laws 1907, c. 218 (Revisal 1908, § 3028a, subd. b), makes it unlawful for any person to willfully injure, or attempt to injure or destroy, the business of any opponent, in order to fix the price of anything of value by removing competition, by circulating false reports tending to damage the credit of a rival, and provides in subdivisions "a" and "c"—"h" that it shall be unlawful to sell on condition that purchasers shall not deal with competitors, to destroy a rival's business by lowering prices, to raise prices to increase profit after a rival is destroyed, to differentiate in prices with intent to injure the business of another, to agree not to buy or sell in certain territory with intent to prevent competition, to conspire to keep down or put up prices, and to solicit trade by means of false statements. *Held*, that threats by one ice company that it would sell ice in a town of a second ice company, if that company continued to supply ice to a rival in its town, are not prohibited.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 18; Dec. Dig. § 28.\*]

## 2. MONOPOLIES (§ 10\*)—STATUTORY PROVISIONS.

Laws 1911, c. 167, amending Laws 1907, c. 218 (Revisal 1908, § 3028a, subd. b), which prohibited certain combinations in restraint of trade, does not, under the direct provisions of Revisal 1908, § 2830, affect an action begun in 1909 for a cause accruing under the prior act, and such action is governed either under the law of 1907, or by the common law; both such acts declaring the common law to be still in force so far as not expressly changed by the statutes.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 9; Dec. Dig. § 10.\*]

## 3. MONOPOLIES (§ 28\*)—TRUSTS—STATUTES—VIOLATION.

Under Laws 1907, c. 218 (Revisal 1908, § 3028a, subd. b), making it unlawful for any person to directly or indirectly willfully injure the business of an opponent with the intention of fixing prices after the competition is removed, defendant ice company, which by threats of ruinous competition against another ice company prevented it from shipping ice to plaintiff, was liable, regardless of whether there was a contract for the sale of the ice, if the shipping company would have shipped and sold the ice to plaintiff but for defendant's interference.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 18; Dec. Dig. § 28.\*]

## 4. MONOPOLIES (§ 28\*)—TRUSTS—ACTIONS—PUNITIVE DAMAGES.

In an action under Laws 1907, c. 218 (Revisal 1908, § 3028a, subd. b), prohibiting combinations in restraint of trade, punitive damages are properly allowed to one whose contract with defendant's rival was broken owing to defendant's interference, where defendant accomplished his wrongful purpose by fraud or malice or recklessness.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 18; Dec. Dig. § 28.\*]

## 5. DAMAGES (§ 91\*)—EXEMPLARY DAMAGES—"MALICE."

For the purpose of determining whether exemplary damages are properly allowed, the word "malice" means that the act done must have been without right or justifiable cause.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 193-201; Dec. Dig. § 91.\*]

For other definitions, see Words and Phrases, vol. 5, pp. 4298-4304; vol. 8, pp. 7712, 7713.]

## 6. TRIAL (§ 296\*)—INSTRUCTIONS—CURE OF ERROR.

In an action for violation of Laws 1907, c. 218 (Revisal 1908, § 3028a, subd. b), prohibiting combinations in restraint of competition, an erroneous instruction that the jury could award exemplary damages for any injury that plaintiff suffered by defendant's interference with his business in attempting to fix the prices of ice at a certain place was cured by another instruction that exemplary damages could be allowed only in case of malice.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 705-713, 715, 716, 718; Dec. Dig. § 296.\*]

Appeal from Superior Court, Burke County; Long, Judge.

Action by J. M. Smith against the Morganton Ice Company and others. From a judgment for plaintiff, defendants appeal. Affirmed.

M. Silver and Avery & Ervin, for appellants. John T. Perkins, for appellee.

CLARK, C. J. Though this state enacted an anti-trust law in 1889 (Laws 1889, c. 374), this case is the first that has reached this court in which it has been attempted to enforce such legislation by civil action, and none has so far come up on the criminal side of the docket. The defendant ice company owned an ice plant in Morganton. The plaintiff had a fresh meat market which required ice, and he desired to deal in ice. The defendants procured an agreement with the deaf and dumb school in Morganton, the only other ice plant in that town, not to sell ice to any one. They then went to the neighboring towns that had ice plants and procured agreements from them not to ship ice to Morganton to plaintiff unless he would agree to sell at a minimum price in Morganton of 50 cents per 100 pounds. The plaintiff already had a contract with the ice company in Newton to ship him all the ice he wished at .17½ per 100 which he was selling at .35 per 100 pounds at a profit. The defendants by threats that they would ship ice to Newton and put wagons on the streets there to dispose of their ice, and cause the Newton company to lose money, deterred the Newton company from shipping plaintiff any more ice, and for a time at least broke up both the plaintiff's ice business as well as his meat market, whereby the defendants obtained a monopoly and control of the ice business in Morganton and sold ice at the minimum price to the public of 50 cents per 100 pounds.

[1] Laws 1907, c. 218, now Revisal 1908, § 3028a, subsec. "b" made it unlawful for "any person, firm, corporation, or association to directly or indirectly willfully destroy or injure, or undertake to destroy or injure the business of any opponent or business rival in the state of North Carolina with the purpose or intention of attempting to fix the price of anything of value when the competition is removed." This action was begun when the above section was in force; but chapter 167, Laws 1911, subsec. "b" amended the above section by interpolating the words "by circulating false reports" tending to damage the credit of said opponent or rival. The effect of the amendment made in subsection "b" by the act of 1911 is to narrow and restrict the forbidden conduct "tending to interfere with the trade of an opponent or business rival with the purpose of attempting to fix the price of anything of value when the competition is removed" to the single instance when it is done "by circulating false reports." Under the act of 1907, all conduct of any nature done with such purpose or intention was made unlawful. Under the act of 1911 no conduct with such purpose or intention is unlawful save only that of "circulating false reports." The other subsections in the act of 1911 apply when the

methods forbidden are: (a) Sales on condition that purchasers shall not deal with competitors. (c) Destruction or injury by reason of lowering price. (d) Lowering or raising price with purpose of increasing profit when rival is destroyed. (e) Differentiating prices with intent to injure business of another. (f) Agreements not to buy or sell in certain territory with intention of preventing competition. (g) Conspiracy to keep down or put up prices. (h) Solicitation of trade, patronage, or good will, by means of false statements. The conduct alleged against the defendants in this case is therefore not prohibited by the anti-trust act of 1911.

[2] Section 11 of the act of 1911 specifically repealed the above act of 1907. This action was begun in 1909. Whatever the purpose in thus restricting the provisions of subsection "b" and in repealing the act of 1907, this action begun before its repeal is saved from its operation by Rev. § 2830, which provides: "The repeal of a statute shall not affect any action brought before the repeal for any forfeitures incurred or the recovery of any rights accruing under such statute." The act of 1907 contained the provision, now Rev. § 3028b, that it shall "not be construed so as to repeal or restrict the common-law doctrine preventing unlawful combinations in trade and commerce which is hereby re-enacted and declared to be in full force in this state," except as inconsistent with that statute. This last provision is re-enacted in the Act of 1911, c. 167, § 9. Therefore this action is governed by the Act of 1907, c. 218, § 1b, or by the common law existing prior to the adoption of any statute on the subject. Under these the charge of the court and the verdict of the jury should be sustained.

The defendants' first exception is to evidence of the contract which the plaintiff had made with the Newton Ice Company, and the second is to the refusal of the issues tendered by the defendant. The third exception is to the refusal of a nonsuit. These exceptions are without merit, require no discussion, and indeed do not seem to be insisted upon by the defendants in their brief.

[3] The fourth and fifth exceptions are because the court refused to charge that there was no evidence that the defendants at any time knew of the existence of a contract between the plaintiff and the Newton Ice Company by which the latter was to furnish the ice to the former. The witness Wagoner, of the Newton Ice Company, testified that they could manufacture and sell ice to the plaintiff in any quantities he wished at 17½ cents, and would have done so, but for the interference of the defendant, and in fact that they had a contract with the plaintiff to furnish him what ice he needed and ordered and as often as he should order it during the season. The

plaintiff's evidence was to the same effect. There was ample evidence to justify the jury to find that the defendants were aware of the contract. Besides, it is not material whether the defendants by threats induced the Newton Ice Company to break a contract to ship ice to the plaintiff, or merely prevented them from shipping, if they otherwise would have done so.

[4] Exception 6 is because the court refused to charge that the plaintiff could recover only actual damages. Exception 7 is to the following charge: "It is made unlawful in this state for any person or persons to attempt to injure and break up the business of another for the purpose of fixing a rate at which any article of commerce shall be sold; and the court charges you that if you find from the greater weight of the evidence that the defendants attempted to break up the business of the plaintiff and did break up his business, as alleged, and did injure him therein in the selling of ice in Morganton, for the purpose of fixing a minimum price at which ice should be sold when his competition was removed, and that, pursuant to this intention, the defendants tried to induce nearby manufacturers of ice not to sell to the plaintiff, and prevented the Newton Ice Company from fulfilling their contract and fix the price at which ice should be sold at a minimum at retail in Morganton as 50 cents per 100, when the plaintiff had arranged and was then and there able to sell ice at a less price, you may award exemplary damages for any injury you may find that the plaintiff suffered by the interference in his business in the attempt to fix the price of ice in Morganton and effectuating the illegal purposes aforesaid."

The eighth exception is because the court charged the jury: "If you find that such contract as the plaintiff claims did exist, then if the defendants knowingly and intentionally procured it to be violated, they may be held liable for the wrong, although it may have been done for the purpose of promoting their own business, but in order to justify the finding of punitive damages against the defendant, the act done must have been done with the unlawful purpose to cause such damage or loss without right or justifiable cause on the part of the defendant, which constitutes damage."

[5] The ninth exception is because the court told the jury that under the decision in *Haskins v. Royster*, 70 N. C. 605, 16 Am. Rep. 780, the court had defined the word "malice" as follows: "The act done must have been done without right or justifiable cause on the part of the defendant, which constitutes malice."

The tenth and last exception is because the court charged that it was held in *Hayes v. Railroad*, 141 N. C. 199, 53 S. E. 848, *Brown, J.*: "This court has said, in many cases, that punitive damages may be allow-

ed or not as the jury see proper, but they have no right to allow them unless they draw from the evidence the conclusion that the wrongful act was accomplished by fraud or malice, or recklessness or other unlawful and wanton aggravation on the part of the defendant. In such cases the matter is within the sound discretion of the jury, not only as to the allowance of damages, which is sometimes called smart money or punitive damages, not only as to the allowance, but as to the amount that is allowed."

Upon examination of the foregoing instructions they are found to be a correct exposition of the law on the subject.

[8] The defendants insist that there was error in allowing the jury to consider the question of exemplary or punitive damages, and particularly urge that there was error in instructing the jury that they could "award exemplary damages for any injury you may find that the plaintiff suffered by the interference in his business in the attempt to fix the price of ice in Morganton and effectuating the illegal purposes aforesaid." But construed in connection with the context and with the whole charge, this exception is hypercritical. The conduct with which the defendants were charged, and of which the jury, in response to the first three issues, find that they were guilty, made them liable not only for the actual damages sustained, but also for punitive damages if the jury found, as they must have done, that such conduct was willful and malicious, as the latter word was construed in the charge and in the decisions of this court which were quoted to them, to wit: That the act was done with the unlawful purpose, without right or justifiable cause on the part of the defendants of interfering with the business of the plaintiff. If there was error, it was against the plaintiff, as the charge should have been that the jury could allow "exemplary damages in addition to the actual damages sustained" by the wrongful act of the defendants.

There is no error, and the defendants are not entitled to a new trial. "It is, however, singular that with numerous and glaring instances of the violation of law and right, in the manner herein shown by other parties and to a far vaster extent in the 21 years since this statute was passed, and indeed in violation of the common law, which punishes such offenses, that this case in which a small infraction of the law is involved is the only one that has come to this court. The enforcement of the law and the protection of the plaintiff and the public in this instance is noteworthy when with a statute so widely known and discussed, and when the evil has been so great and manifest, there has been no attempt to enforce the law in other cases."

No error.

# PARKER v. VANDERBILT et al.

(Supreme Court of North Carolina. May 22, 1912.)

## MASTER AND SERVANT (§ 286\*)—ACTIONS FOR INJURIES—QUESTIONS FOR JURY.

Where the evidence tended to prove that plaintiff was injured while in defendant's employ, and while operating a swing cut-off saw, that the saw had no guard, and that guards were in general use on similar machines, and would have prevented the injury, defendant's negligence should have been submitted to the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1001, 1003, 1008, 1010-1015, 1017-1033, 1038-1042, 1044, 1046-1050; Dec. Dig. § 286.\*]

Appeal from Superior Court, Buncombe County; Lane, Judge.

Action by George W. Parker against G. W. Vanderbilt and Schenck. From a judgment of nonsuit, plaintiff appeals. Affirmed as to Schenck, and reversed for new trial as to Vanderbilt.

This is an action to recover damages for personal injury, caused, as the plaintiff alleges, by the negligence of the defendants. The plaintiff was in the employment of the defendant Vanderbilt at the time of his injury, and was engaged in operating a swing cut-off saw, and was injured by a piece of wood, which he alleges he was sawing, being thrown against his face. The negligence alleged was a failure to provide a shield or guard for the saw.

The plaintiff testified, among other things, that he had been in the employment of the defendant in his wood yard about three years, and that before he was injured he had used the cut-off saw to some extent, but not much, and that he was directed to use it at the time of his injury, and he gave the following description of the saw, of the circumstances connected with his injury, and of the general use of a shield or guard: "Q. Tell about this machinery, this cut-off saw; describe it to the jury the best you can, so that they will know what it is. A. This swing cut-off saw is hung up, and it balances on a countershaft, and the saw swings back and forth, so you can catch hold of it and pull it and turn it loose when you cut the stick of wood off, and it swings out. You put your wood on the table, and you catch your saw with your right hand, and you grab the wood with your left hand, if you are a mind to—if not, you pull it up with your right hand—and cut the wood into stove-wood and fire-wood lengths. Q. You say this saw would swing out again? A. Yes. Q. In order to cut the wood, you pulled it through it? A. Yes. Q. What is the size of that saw? A. Twenty-four inches. Q. By what power was that saw run? A. Electric motor; current from the Weaver plant. Q. At what speed would it revolve? A. About 3,500. Q. State whether it revolved fast

or slow. A. Very fast. Q. State to his honor and the jury about your injury there. A. I was cutting cordwood; was ordered by Mr. Forestburg to go and cut a cord of pine wood. And I went into the mill, and there was no one there to help me. Mr. Benken had got hurt, got his finger cut, and Mr. Forestburg asked me to go to Biltmore and see if I could get a man to help with the cordwood that morning. And I went over there and found Mr. Green, and I asked him if he wanted to go to work, and he said he did; and I went over to the mill with him, and I went to the office and told Mr. Forestburg that I had found a man, and I went to the mill and started it to running and got hurt. The block hit me in the face, and that was about all I knew until I found myself out in the field. And I went to the office and tried to telephone for the doctor, and I was bleeding so I could not telephone for the doctor; and I went over to the drug store and asked Mr. Grove to give me something to keep me from getting sick, and I went over to the hospital, and one of the nurses telephoned for Dr. Glenn, and that was all I remembered until I woke up in bed. Q. Just before you received that blow, what did you do? A. I had pulled up this stick of wood and cut off one block, and I went to cut off another; and when I got it in about this position (indicating with arms), it struck me in the face. Q. State what kind of a block it was? A. I cannot say; I did not see it. Q. State whether it was from the wood you were sawing. A. It must have come from the wood I was sawing. Q. State whether it came from the wood you were sawing. A. I do not know. Q. What threw it in your face? A. The saw. Q. You said you heard the ring of the saw? A. Yes. Q. State whether this swing cut-off saw had any guard on it or not. A. It did not. It had no protection that I know of. Q. Have you seen swing cut-off saws at other places, and are you familiar with them? A. Yes. Q. How many and what number? A. I have seen about four. Q. Then describe fully to his honor and the jury just what a guard on a swing cut-off saw is; what its use; what it does, etc.? A. A swing cut-off saw, all the others that I saw had the guard. There is a short mandrel that comes together at the lower part of it, and right at the side of this mandrel is a shield on all I ever saw, except this one. Q. What is the use of the shield? A. To keep the blocks from coming back over the saw. Q. How does that keep the blocks from coming up? A. It catches them from behind and keeps them from coming up. Q. You say that you know of five or six saws that ran here? A. Yes. Q. And you say that all had the guards? A. Yes; all except one. Q. And you saw them where else? A. I worked in the car shops at Wilmington. I was in the car department, and those saws all had the shields. There were four of them. Q.

Did you operate those saws yourself? A. No, sir. Q. Where else did you see those saws? A. At Rocky Mount and at Wilmington; was after I got hurt. Q. You did not operate them? A. No, sir. Q. Did you see them anywhere else? A. I saw them at Waycross, Ga. Q. Did you operate those at Waycross? A. No, sir. Q. State what they had. A. They had guards."

J. J. Harris, a witness for the plaintiff, among other things testified as follows: "Q. Did you ever work for the Biltmore estate in reference to this lumber yard and woodshop they were speaking of? A. Yes. Q. About when? A. My recollection is that I went there about 1901, as well as I remember now. No; it was later than that. I worked there four years, and my recollection is that I left there in 1907. Q. What were your duties; what position did you hold? A. I was foreman of the plant. Q. What did the machinery consist of; was that swing cut-off saw part of it? A. Yes. Q. What was its condition with reference to this guard? A. It did not have any. Q. How long have you been engaged in business of that character? A. Regularly for the last eight years. Q. What is your knowledge and experience with saws of this character; what is your knowledge and experience, if any, with these swing cut-offs? A. I have seen them in operation, several of them just like this one. I have one like it in the plant I operate now. Q. State whether saws of this kind are common in plants of this character? A. Yes; they are common. Q. With or without guards? A. With guards. Q. What is the object of that guard? A. If his body was very near the saw, and if anybody should fall against that saw, the shield would protect him and they would not be apt to be cut, unless they got their hand under the machine; and that shield would keep the saw from throwing pieces of timber up, or in some other direction. Q. What do you mean by 'throwing them in some other direction'? A. Unless it was a very small piece of a block, it would not have room to come up between the saw and the shield; and it would go behind."

At the conclusion of the evidence, his honor entered judgment of nonsuit, on motion of the defendant, and the plaintiff excepted and appealed.

H. C. Chedester, for appellant. J. H. Merrimon and J. G. Merrimon, for appellee.

ALLEN, J. (after stating the facts as above). Applying the principle, frequently announced, that the evidence must be considered in the light most favorable to the plaintiff on a motion for judgment of nonsuit, we are of opinion there was error in allowing the motion as to the defendant Vanderbilt. There was evidence tending to prove that the plaintiff was in the employment of the defendant, and was operating a swing

cut-off saw; that, while operating said saw, a piece of wood he was sawing was thrown against him by the saw and injured him; that the saw had no shield or guard; that a shield or guard would have prevented the wood from striking him; that shields or guards were in general use on machines used for similar purposes. If so, the case is controlled by *Pritchett v. Railroad*, 157 N. C. 88, 72 S. E. 828, and *Rogers v. Manf. Co.*, 157 N. C. 484, 73 S. E. 227. The facts in the last case referred to are very much like those in this case, and the principles of law are the same.

We find no evidence tending to prove liability on the part of the defendant Schenck, and as to him the judgment of nonsuit is affirmed.

A new trial is ordered as to the defendant Vanderbilt.

New trial.

(159 N. C. 319)

#### ROLLER v. MCKINNEY et al.

(Supreme Court of North Carolina. May 22, 1912.)

#### 1. NEW TRIAL (§ 104\*)—GROUNDS—NEWLY DISCOVERED EVIDENCE—CUMULATIVE EVIDENCE.

A new trial, asked on the ground of newly discovered evidence, is properly refused, where the evidence is cumulative, and has little bearing on the main issue.

[Ed. Note.—For other cases, see *New Trial*, Cent. Dig. §§ 218-220, 228; Dec. Dig. § 104.\*]

#### 2. PLEADING (§ 365\*)—ANSWER—MOTION TO STRIKE PARAGRAPHS—TIME.

Motion to strike matter from an answer comes too late, when filed after the jury is impaneled.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. §§ 1163-1172; Dec. Dig. § 365.\*]

#### 3. BILLS AND NOTES (§ 443\*)—ACTIONS—PARTIES.

Suit on a note must be brought by the real party in interest.

[Ed. Note.—For other cases, see *Bills and Notes*, Cent. Dig. §§ 1377-1380, 1383-1392, 1394-1423; Dec. Dig. § 443.\*]

#### 4. PARTNERSHIP (§ 199\*)—ACTIONS—PARTIES.

A partner has no right to sue as an individual on a note purchased by the firm.

[Ed. Note.—For other cases, see *Partnership*, Cent. Dig. §§ 362-368; Dec. Dig. § 199.\*]

Appeal from Superior Court, McDowell County; Foushee, Judge.

Action by Will Roller against T. M. McKinney and others. Judgment for defendants, and plaintiff appeals. Affirmed.

The action was to recover judgment upon certain notes which the plaintiff alleged he had purchased for value before maturity.

These issues were submitted to the jury:

"(1) Were the defendants, and each of them, induced to sign the notes in question by fraud, as alleged in the answer? Answer: Yes; except as to T. M. McKinney.

"(2) Is the plaintiff a purchaser of said

notes for value, and without notice of said fraud? Answer: No.

"(3) Is the plaintiff the owner of the notes sued on? Answer: No."

Pless & Winborne, for appellant. S. J. Ervin, for appellees.

BROWN, J. [1] We have considered the motion for a new trial upon the ground of newly discovered evidence submitted by the plaintiff, and we are of opinion that the motion should not be granted. The evidence offered was mostly cumulative, and has very little bearing upon the third issue, upon which we think the case turns.

[2] After the jury was impaneled, the plaintiff moved to strike out a portion of paragraphs 2, 3, 4, and 5 of the defendant's answer, which the court overruled, and the plaintiff excepted. We think his honor properly overruled the motion, as it came too late after the impaneling of the jury; but, even if his ruling was erroneous, it was harmless error.

[3, 4] There are 31 assignments of error, relating to the different issues passed upon by the jury; but we think exception No. 17, which is to the charge of his honor relating to the third issue, is the only assignment of error necessary to be considered, as that assignment relates to the third issue, upon which we think the case turns. A portion of the charge excepted to is as follows: "If you find that in purchasing said notes the plaintiff was not acting for himself alone, but for the partnership, and purchased them as the agent of the firm, then you will answer the third issue, 'No.'"

This action is instituted by the plaintiff individually to recover on three notes of \$1,000 each, executed by the defendants to Bauhard Bros., for the purchase of a horse, and the plaintiff claims to be purchaser for value, and without notice of any defect or infirmity in the notes, or of the alleged fraud by which the defendants claim the execution of the notes was procured.

There are several defenses set up in the answer. Among others, it is alleged in the answer that the plaintiff is not the owner of the notes sued on, and that he is not the real party in interest, in whose name the suit must be brought. *Vaughan v. Davenport*, 74 S. E. 967, at this term.

There is abundant evidence in the record tending to prove that, if the note was purchased at all for value, it was purchased in behalf of the partnership, of which the plaintiff was simply a member. If this is true, as the jury have found, then the plaintiff was not the sole owner of the note, and had no right to maintain the action in his own name as an individual. *Heaton v. Wilson*, 123 N. C. 398, 31 S. E. 671, in which case it is held that it is the general rule that in all suits relating to a partnership all the partners are necessary parties; and the ac-

tion must be brought in the name of the partnership.

This case at bar is to be distinguished from *Brewer v. Abernathy*, 74 S. E. 1025, at this term. In that case, the point was attempted to be raised under a motion to nonsuit after the evidence was all in, and had not been pleaded either by way of demurrer or answer. In this case, it is specially pleaded in the answer that the note sued on was the property of the partnership, and not the individual property of this plaintiff. We think, therefore, the instruction of his honor was correct; and, inasmuch as the jury have found the third issue in favor of the defendant, it terminates the action, so far as this plaintiff, as an individual, is concerned.

Affirmed.

(159 N. C. 369)

**VAUGHAN et al. v. DAVENPORT.**

(Supreme Court of North Carolina. May 15, 1912.)

**1. ASSIGNMENTS (§ 18\*) — RIGHTS ASSIGNABLE—EXECUTORY CONTRACTS.**

A cotton contract, in writing and reciting a consideration, by which a seller covenants and agrees to deliver a certain quantity and quality of cotton to the buyer, and by which the buyer is to pay a certain price, providing for tender and acceptance and for damages for the seller's failure to deliver, is a chose in action and assignable.

[Ed. Note.—For other cases, see Assignments, Cent. Dig. §§ 25-27; Dec. Dig. § 18.\*]

**2. ASSIGNMENTS (§ 121\*)—ACTION—SUIT IN NAME OF ASSIGNEE.**

Under the rule that every action must be prosecuted in the name of the real party in interest, the assignee of a chose in action must sue in his own name, and not in the name of the assignor.

[Ed. Note.—For other cases, see Assignments, Cent. Dig. §§ 200-205; Dec. Dig. § 121.\*]

**3. DISMISSAL AND NONSUIT (§ 68\*)—TIME FOR MOTION—AFTER VERDICT.**

Under the *Hinsdale Act* (Revisal 1908, § 539), a motion for nonsuit cannot be made after verdict.

[Ed. Note.—For other cases, see Dismissal and Nonsuit, Cent. Dig. §§ 163, 176; Dec. Dig. § 68.\*]

**4. APPEAL AND ERROR (§ 1106\*)—DISPOSITION OF CAUSE—REMAND FOR NEW TRIAL.**

In an action for damages for the seller's failure to perform a contract to deliver cotton, brought by the buyer and his assignee, where there is evidence of the assignment of the contract to one not a party to the action, so that the seller, notwithstanding a recovery, might be exposed to an action by such other party, and where it would be a miscarriage of justice to permit the plaintiffs to recover, the court, of its own motion, will remand the cause, with order for a new trial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4386-4398, 4585; Dec. Dig. § 1106.\*]

On petition for rehearing.

Petition for former opinion, see 72 S. E. 842. Petition allowed, former opinion modified, and new trial ordered.

The cotton contract referred was as follows:

"State of North Carolina, Pitt County:

"This agreement made this the 19th day of April, 1909, by and between Moseley Brothers, of Greenville, N. C., parties of the first part, and J. R. Davenport, of Pactolus, Pitt county, and state of North Carolina, party of the second part, witnesseth: That the said J. R. Davenport, for and in consideration of the sum of one dollar to him in hand paid by the said Moseley Brothers, the receipt whereof is hereby acknowledged, bargains, covenants and agrees to and with the said Moseley Brothers, that he will deliver to the said Moseley Brothers, their heirs, executors or assigns fifty thousand pounds of lint cotton, at railroad depot or steam landing at Pactolus, N. C., during November next, said cotton to be packed in regulation bales and to average in weight as near five hundred (500) pounds per bale as possible, and to be graded according to the New York Cotton Exchange standard or classification. That the said Moseley Brothers agree to pay the said J. R. Davenport on the delivery of said cotton at the rate of ten (10) cents per pound, middling and better. The said Moseley Brothers on their part agree to accept said cotton when so delivered and to pay therefor at the price hereinbefore mentioned. That, if any part of said cotton shall be tendered before delivery of the whole can be completed, then the parties of the first part shall accept such tender, paying to the party of the second part whatever amount may be due for the quantity received. That, in event party of the second part shall fail to deliver the said cotton, or any part thereof, according to this contract, then the parties of the first part shall be entitled to recover at law, and shall recover damages for such failure of the party of the second part, his executors or assigns. The measure of damages for such failure, or part thereof, shall be calculated at the highest price in the above-mentioned market on any day during November, 1909, with interest on such amount from December first. In witness whereof, said Moseley Brothers and J. R. Davenport have hereunto set their hands and seals, this the day and year first above written. [Signed] Moseley Brothers. [Signed] J. R. Davenport. Witness: Alex L. Blow, Jr. Witness: J. P. Davenport. [Signed in duplicate.]"

BROWN, J. Upon the former hearing of this case, it was held by the court that the plaintiffs could not recover, because it affirmatively appeared that the plaintiffs had assigned the contract for the purchase of the cotton to Hogan & Co., who are not parties to this action; and upon that ground it was held that the motion of the defendant for

nonsuit should have been granted, on the ground that the evidence discloses that the plaintiffs were not the owners of the claim sued on.

It is contended by the plaintiff upon the rehearing that there is no evidence that Vaughan & Barnes, the plaintiffs, have assigned the contract for the purchase of the cotton entered into by the defendant to Hogan & Co., but that the evidence is that Vaughan & Barnes contracted to sell the cotton to Hogan & Co., but did not assign the contract; and that therefore Vaughan & Barnes may still sue for a breach of the contract.

Upon re-examination of the record, we find that there is evidence that Vaughan & Barnes did assign the contract to Hogan & Co., as contradistinguished from the sale of the cotton. There are three letters in evidence, signed by Vaughan & Barnes and directed to the defendant, Davenport. In the one dated November 22d, the plaintiffs, Vaughan & Barnes, refer to a sale of the said cotton to Messrs. Hogan & Co., made by them, in which they say: "We will thank you to make settlement in accordance with the terms of sale, which contract was indorsed to us by Moseley Brothers, \* \* \* and we want to know by return mail what you propose to do in order that we may be able to tell the buyer here when he may expect the delivery of the 100 bales of cotton in question." In the letter dated October 11th, Vaughan & Barnes refer to the hypothecation of the contract with them by Moseley Bros., and refer to the contract as "sold by us to one of the buyers here for November delivery," and again refer to the assignment of the contract, and request that the cotton due under it be shipped at once to the buyer.

[1, 2] That a cotton contract of the character sued on is a chose in action and assignable admits of no controversy. Every action must be prosecuted in the name of the real party in interest. *Chapman v. McLawhorn*, 150 N. C. 166, 63 S. E. 721; *Martin v. Mask*, 74 S. E. 343, this term. The assignee of a chose in action must sue in his own name, and not in the name of the assignor. Under the modern Code of Procedure, the rule seems to be universal that the action cannot be brought in the name of the assignor. *Pomeroy*, Code Remedies, § 63.

[3] We find, upon examination of the record, that the defendant did not make, on the trial of the case in the superior court, a formal motion for nonsuit. The record discloses that after the verdict had been rendered the defendant moved the court for a judgment against the plaintiff upon the entire evidence. We gathered from this and from the argument of counsel, as well as the briefs, that this motion was made at the

conclusion of the evidence, and before the cause was submitted to the jury. We readily acknowledge that a motion for nonsuit, under the Hinsdale Act (Revisal 1908, § 539), cannot be made after the verdict of the jury has been rendered. We take it that the motion of the defendant was intended as a motion for nonsuit, although made too late.

[4] We think, under the circumstances, that we were in error in dismissing the action, as a motion for nonsuit was not made in time; but it is plain that upon the letters sent by the plaintiffs, Vaughan & Barnes to Davenport that there was evidence of an assignment of the contract itself to Hogan & Co., and that the defendant, Davenport, would still, notwithstanding a recovery in this case against him, be exposed to an action by Hogan & Co., and it would be a manifest miscarriage of justice to permit the plaintiffs to recover in this case, and leave the defendant still exposed to such an action. This court has sometimes, upon its own motion, ordered a new trial and remanded a cause, when it appeared that a necessary party was missing from the case, or that the issues were not determinative of the cause of action, and that manifest justice required a new trial. *Meadows v. Marsh*, 123 N. C. 189, 31 S. E. 476; *McManus v. Railway*, 150 N. C. 662, 64 S. E. 766; *Bryan v. Insurance Co.*, 147 N. C. 181, 60 S. E. 983.

The petition to rehear is allowed and the former opinion modified, and a new trial of the case is ordered, with leave to the defendant to have Hogan & Co. made parties to the action, in order that they may be bound by whatever judgment is rendered.

New trial.

(150 N. C. 259)

CHADWICK v. KIRKMAN et al.

(Supreme Court of North Carolina. May 22, 1912.)

1. PLEADING (§ 172\*)—FILING OUT OF TIME—DISCRETION OF COURT.

Where, in an action for damages for fraud in the sale of land to plaintiff, a part of the defendants counterclaimed for alleged fraud on the part of the plaintiff in transferring the land after its conveyance to him, the action of the court in permitting plaintiff to file a reply at the trial term and ordering a trial on the issue thereby raised was not an abuse of discretion, especially in view of the fact that defendants offered no evidence in support of the charge of fraud on the part of plaintiff.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 334-338; Dec. Dig. § 172.\*]

2. TRIAL (§ 118\*)—ARGUMENT OF COUNSEL—STATING FACTS OF ANOTHER CASE.

Under the statute providing that an attorney may argue the whole case to the jury, both as to fact and law, an attorney may state the facts of another case for the purpose of applying the law of that case to the one in hand, but only to the extent required for such purpose.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 290-293; Dec. Dig. § 118.\*]



### 3. BILLS AND NOTES (§ 497\*)—BURDEN OF PROOF—HOLDER IN DUE COURSE—FRAUD IN INCEPTION.

Where the maker of a note alleges fraud in procuring its execution, one seeking to maintain the position of a holder of the note in due course has the burden of proving that it was indorsed to it for value before maturity and without notice of such fraud.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1448, 1675-1681, 1683-1687; Dec. Dig. § 497.\*]

### 4. BILLS AND NOTES (§ 489\*)—ACTION—ISSUES.

Where defendant bank, in an action for damages for fraud in the sale of land, alleged that it was a bona fide holder of plaintiff's note given for the price which it had "taken over" in due course, without alleging that it was the indorsee of such note, the facts embraced in an issue as to whether it participated in the knowledge of any fraud by which the note was secured were immaterial and properly disregarded by the court in its judgment.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1587-1642; Dec. Dig. § 489.\*]

### 5. APPEAL AND ERROR (§ 1050\*)—HARMLESS ERROR—ADMISSION OF EVIDENCE.

Plaintiff, in an action for damages for fraud in the sale of lands to him, who had testified fully and directly to the entire transaction, tending, if believed, to establish a deliberate fraud on the part of defendants, was allowed to say in reference to a foreclosure sale of the mortgage given by him that "on coming to Marion on one occasion he found there was a crooked sale on hand." *Held*, that such expression of opinion, while not strictly admissible, was not reversible error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1068, 1069, 4153-4157, 4166; Dec. Dig. § 1050.\*]

Appeal from Superior Court, McDowell County; Foushee, Judge.

Action by D. N. Chadwick, Jr., against O. A. Kirkman and others. Judgment for plaintiff against all the defendants except Kirkman, and they appeal. No error.

Civil action to recover damages for fraud and deceit in the sale of realty, tried before his honor, H. A. Foushee, judge, and a jury at February term, 1912, of the superior court of McDowell county. There was allegation, with evidence on part of plaintiff, tending to show that in March, 1910, and at various times thereafter and before action commenced, the defendants G. T. Penny, J. R. Thomas, and the Carolina Loan & Realty Company by fraud and deceit induced plaintiff to buy one-half interest in a body of land in McDowell county composed of several tracts and to pay therefor \$2,500 in money and to execute his note for \$2,500 additional, secured by a mortgage on the property; that the land was comparatively worthless, and defendants without title to the most of it, and the damages suffered were practically the entire purchase price paid and agreed upon. For a second cause of action, plaintiff sued for a breach of warranty in the conveyance from defendant to plaintiff for the land in question. Defendant the Home Banking Company, an institution in

which defendant Penny was a director at the time, answered, denying any participation in the alleged fraud, and alleged that it was bona fide owner and holder of the unpaid \$2,500 note, having "taken over" same in due course of business. The other defendants answered fully denying any and all allegations of fraud made against them and set up a counterclaim in which they alleged that, in the course of the transaction, plaintiff, having received title for entire tract and made these defendants a warranty deed for one-half interest in same, had placed a mortgage on the entire land before defendants had registered their deed, and that this was done by plaintiff with design and intent to cheat and defraud defendants, etc., and offered evidence in support of some of these positions. At the trial term, and over defendants' objection, plaintiff was allowed to file a reply denying this charge of fraud, and defendants excepted and objected, and excepted further that they were compelled to try at said term on issues raised by this reply.

The following verdict was rendered: "(1) Did the defendants George T. Penny and J. R. Thomas procure the plaintiff to execute his note for \$2,500 and pay \$2,500 (in a check which was cashed) for the deed from O. Arthur Kirkman by fraud and misrepresentation, as alleged in the complaint? Answer: Yes. (2) If so, was the Carolina Loan & Realty Company a party to the fraudulent contract entered into by the defendants George T. Penny and J. R. Thomas, by which \$2,500 and the note for \$2,500 was obtained from plaintiff, as alleged in the complaint? Answer: Yes. (3) Did the Home Banking Company participate in or have knowledge of any fraud by which a note for \$2,500 was secured by plaintiff, as alleged in the complaint? Answer: No. (4) What amount of damage, if any, is the plaintiff entitled to recover from George T. Penny, J. R. Thomas, and the Carolina Loan & Realty Company? Answer: \$2,500 with interest from March 28, 1910, plus \$10, without interest. (5) Did the defendant O. A. Kirkman have title to the 640-acre tract of land described in the deed from Kirkman to plaintiff at the time said deed was made, or did he afterwards acquire the same? Answer: No. (6) What amount of damages, if any, has the plaintiff sustained by reason of the failure of the title to the land described in the deed from O. A. Kirkman to plaintiff? Answer: Nothing. (7) Did plaintiff execute a mortgage on the lands described in the deed from Kirkman to plaintiff to L. W. Davis for \$2,500 after he had executed a deed to one-half interest in said lands to Penny and Thomas? Answer: Yes. (8) What damage, if any, has the defendants Penny and Thomas sustained thereby? Answer: None."

On the rendition of the verdict, the court being of opinion that there was no evidence from either party tending to show that the Home Banking Company was a holder of the note, in due course set aside the verdict on the third issue and gave judgment on the verdict for plaintiff, the material parts of which are as follows: "It is therefore adjudged that the verdict as to the third issue be set aside, and that the plaintiff have and recover of defendants George T. Penny, J. R. Thomas, and the Carolina Loan & Realty Company the sum of \$2,500, with interest from the 28th day of March, and a further sum of \$10, with interest on the \$10 from the date of this judgment, and the cost of this action. It is further adjudged that the said Home Banking Company is not the bona fide holder of the said note given by the plaintiff, referred to in the pleadings, and can recover nothing from the plaintiff on account thereof. And it further adjudged that the said note be delivered up for cancellation." Defendants duly excepted and appealed.

Justice & Broadhurst and Pless & Winborne, for appellants. J. F. Spainhour, W. T. Morgan, and E. D. Steele, for appellee.

HOKE, J. (after stating the facts as above). There was ample evidence to support the verdict, and on careful perusal of the record, we find no good reason for disturbing the results of the trial.

[1] It was urged for error that the court below permitted the filing of a reply to defendants' counterclaim at the trial term and in ordering a trial on the issues thereby raised. This is a matter that is left largely in the discretion of the trial court, and while such court should be always careful to see that a party is not taken by surprise and unduly prejudiced by being presently forced into the trial of issues which he had no reason to expect or prepare for, there is nothing in this case to show that the discretion vested in his honor was improperly exercised. The counterclaim of defendant was only one incident in this matter. The cause of action set up by plaintiff embraced the entire transaction and fully apprised defendants of all the facts relevant to the inquiry, and they were evidently not taken by surprise. As a matter of fact, there was no testimony offered tending to support a charge of fraud against plaintiff, and the counterclaim referred to and made the basis of this exception seems to have been inserted more with a view of "talking back" in the record than with any well grounded hope of benefit to be derived from it.

[2] It was insisted further that in the argument of plaintiff's counsel to the jury improper use was made of the case of *Brite v. Penny*, reported in 157 N. C. 110, 72 S. E. 964, a case involving an issue of fraud and in which the same defendant, George T.

Penny, appears to have been an actor. It is recognized with us, a rule established by express statutory provision, that an attorney may argue the whole case to the jury both of fact and law, and in the exercise of this privilege counsel have been allowed to state the "facts of another case for the purpose of applying the law of that case to the one in hand," and only to the extent required for such purpose. *State v. Corpening*, 157 N. C. 623, 73 S. E. 214; *Harrington v. Wadesboro*, 153 N. C. 437, 69 S. E. 399; *Horah v. Knox*, 87 N. C. 483. It is unfortunate for defendants that he has figured in another cause involving an issue of fraud and on facts not dissimilar to the one at bar, and the propriety of using such a case is at least questionable. We deem it right to say further that, if his honor in this instance had denied the right to counsel, his ruling would have been upheld; but as a matter of law the argument was kept well within the principles of the cases referred to and others of like kind, and we have concluded that on this record the question could very properly be left to the decision of the just and learned judge who presided at the trial.

[3] The action of the court in setting aside the verdict on the third issue or in disregarding it as immaterial was entirely proper and worked no legal wrong to defendants. *Sprinkle v. Wellborn*, 140 N. C. 163, 52 S. E. 666, 3 L. R. A. (N. S.) 174, 111 Am. St. Rep. 827. The fraud having been established, in order to maintain the position of holder in due course of the \$2,500 note, the burden was on the defendant to prove that it was indorsee for value before maturity and without knowledge or notice of the impeaching facts. *Manufacturing Co. v. Summers*, 143 N. C. 103, 55 S. E. 522.

[4] There was not only an entire absence of evidence to support the position, but it was not even alleged in the answer that defendant company was indorsee of the notes; the allegation being simply that the company had "taken over" the notes. The facts therefore embodied in the third issue were irrelevant and immaterial and could well have been disregarded by the court in its judgment. *Mayers v. McRimmon*, 140 N. C. 640, 53 S. E. 447, 111 Am. St. Rep. 879; *Tyson v. Joyner*, 139 N. C. 69, 51 S. E. 803.

[5] The objection that plaintiff in his testimony was allowed to say, in reference to a foreclosure sale under the mortgage given by him to the railway company, that "on coming to Marion on one occasion he found there was a crooked sale on hand," may not be sustained. The witness had testified fully and directly to the entire facts of the transaction, tending if accepted by the jury to establish a deliberate fraud on the part of defendants, and this expression of opinion, while not in strictness permissible, was too remote and insignificant to be allowed for reversible error.

On examination of entire record, we are of opinion that the case has been tried on correct legal principles, that an actionable wrong has been clearly established, and the judgment on the verdict in plaintiff's favor should be affirmed.

No error.

(159 N. C. 357)

**FRY v. NORTH CAROLINA R. CO.**

(Supreme Court of North Carolina. May 15, 1912.)

**1. MASTER AND SERVANT (§ 293\*)—INJURY TO SERVANT—NEGLIGENCE—INSTRUCTIONS.**

Where, in an action for injuries to a railroad employé while uncoupling an air hose between two cars, the issue was whether the employé was injured by the starting of the cars after they once stopped, as testified to by him, or whether he was injured by going between moving cars, in violation of the rules of the employment, as testified to by the company, an instruction that an employé must obey the orders of the master, and if a superior ordered the employé to go between two cars and uncouple the air hose, and if, in obedience, the employé went between the cars, and while he was between the cars, and in the act of uncoupling the air hose, the cars were jerked, injuring him, the company was guilty of negligence, was erroneous as authorizing a finding of negligence without limiting the negligence to the proximate cause of the injuries complained of.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1148-1156, 1158-1160; Dec. Dig. § 293.\*]

**2. MASTER AND SERVANT (§ 296\*)—INJURY TO SERVANT—CONTRIBUTORY NEGLIGENCE—INSTRUCTIONS.**

A charge that, if the employé was guilty of contributory negligence by going between the cars when they were moving, and attempting to release the air brakes, and if the going between the cars, while moving, was the proximate cause of the injury, he could not recover was erroneous, because, if the cars were moving, the employé's injury was caused solely by his disobedience of the rule of the employment as a matter of law, and because the jury must determine, as a question of fact, whether he attempted to uncouple the cars while they were in motion, or while they were at rest.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1180-1194; Dec. Dig. § 296.\*]

**3. DAMAGES (§ 100\*)—PERSONAL INJURIES—MEASURE OF DAMAGES.**

A person sustaining a permanent injury partially incapacitating him to earn money is only entitled to recover the reasonable present value of his diminished earning power in the future, and not the difference between what he would have been able to earn in the future, but for the injury, and such sum as he would be able to earn in his injured condition.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 237-241; Dec. Dig. § 100.\*]

Clark, C. J., dissenting in part.

Appeal from Superior Court, Mecklenburg County; Lyon, Judge.

Action by O. L. Fry against the North Carolina Railroad Company. From a judgment for plaintiff, defendant appeals. Reversed.

The first issue was: "Was the plaintiff injured by the negligence of the defendant, as alleged in the complaint?"

O. F. Mason and Shannonhouse & Jones, for appellant. McCall & Smith, E. R. Preston, and N. R. Graham, for appellee.

**WALKER, J.** [1] This action was brought by the plaintiff to recover damages for injuries received while uncoupling an air hose between two cars, and which, he alleges, were caused by the negligence of the defendant. The rules of the railroad company prohibited employés from going between cars, while in motion, for the purpose of coupling or uncoupling cars; and plaintiff was aware of this rule at the time of the accident, and knew that he was also forbidden by it to go between cars, while in motion, even by the order of the conductor. He testified that when he was ordered to uncouple cars it was his duty to wait until the train had stopped, and then execute the order. He was ordered by the conductor to uncouple the cars, but knew, as he stated, that he was to do so only when the cars had stopped. He also knew that he was not bound or permitted to obey an order to uncouple cars when moving, and he was fully protected by the rules in refusing to do so; and he testified that he would not have obeyed such an order, and he did not receive any such order, but he was ordered to uncouple after the cars had stopped. He further testified that the cars had come to a full stop when he went between the cars to uncouple. While performing his duty, the cars were started, and his left hand was caught between the dead blocks, or bumpers, and crushed. This was his version. The defendant alleged and offered evidence to show that the cars were in motion when he attempted to uncouple, and he was hurt by this movement of the cars, and not by starting them after they had stopped. So that the issue was squarely made whether he was injured by the starting of the cars after they had once stopped, or by going between moving cars. The plaintiff had agreed in writing to abide by the rules of the company, and observe the same while in the discharge of his duties, and not to hold the company liable for any injuries to himself resulting from his own disobedience or infraction of the rules.

Upon this state of facts, the court charged the jury, with reference to the first issue, as follows: "It is the duty of an employé of a railroad company to obey the orders and directions of the master; and, if you should find by the greater weight of the evidence in this case that W. R. Murray was acting as yardmaster for the defendant's lessee, as alleged in the complaint, and was engaged in making up a train of cars in the defendant's yard in or near the city of Charlotte on

December 2, 1910, and that while thus engaged he ordered the plaintiff, who was an employé of the defendant's lessee, to go between two of the cars and to cut off, or uncouple, the air hose attached to said cars, and if you should further find that the plaintiff, in obedience to said order, went between the cars, and while he was between the cars, and in the act uncoupling the air hose, the defendant's lessee jerked or shoved the train and injured the plaintiff, as alleged, the court instructs you that this would be negligence on the part of the defendant's lessee, and you should answer the first issue, 'Yes.'"

We think that this instruction was erroneous in two respects: It authorized the jury to find that there was negligence, if the plaintiff went between the cars to uncouple the air hose, while the train was in motion, and in disobedience of the rule, and was thereby injured; whereas the defendant, by its rule or regulation, had provided a perfectly safe way for the work to be done—that is, by waiting until the cars had stopped—when it was the duty of the engineer to protect him, and not to move the train until he had uncoupled the hose and notified the engineer of the fact by the proper signal. It will be observed that the court, in the instruction, makes no distinction between uncoupling when the cars were in motion and when they were not. Besides, the jury could have answered the first issue in the affirmative, if they had found that his going between the cars in obedience to an order was not the proximate cause of his injury. In this respect, a similar instruction has been condemned by this court. *Edwards v. Railroad*, 129 N. C. at marginal page 81, 89 S. E. 780. There was no reference in the instruction to proximate cause; the charge being that negligence on the part of the defendant was, of itself, sufficient to warrant a finding for the plaintiff on the first issue.

[2] The court charged the jury upon the second issue, as follows: "The second issue is: 'Did the plaintiff, by his own negligence, contribute to his injury, as alleged in the answer?' Now, if you find from the evidence, by the greater weight thereof, the burden being on the defendant to so satisfy you, that the plaintiff was guilty of contributory negligence in that he went between the cars when they were moving, and attempted to release the air brakes, and you find that the going between the cars, while they were moving, was the proximate cause of the injury complained of, then you will answer the second issue, 'Yes;' otherwise you will answer it, 'No.'" The jury returned a verdict for the plaintiff, and, judgment having been entered thereon, defendant appealed.

We think the charge upon the issue as to contributory negligence was erroneous; and the judge should have told the jury that, if the plaintiff was injured because he went be-

tween the cars, while in motion, to uncouple, in disobedience of the rule, it was, in law, the proximate cause of his injury, which could not be imputed to the negligence of the company, but to his own carelessness and deliberate violation of the rule which was made for his protection. It is plain that if the cars were moving the plaintiff's injury was caused solely by his disobedience of the rule in trying to uncouple the hose when the cars were thus moving. Nothing done by the engineer in the movement of the train, if it caused the injury, would be negligence, as it was not expected that the plaintiff would go between the cars while they were moving; and jerks will frequently occur in such cases. If the engineer knew he was between the cars, even though they were moving, and did something willfully and for the purpose of injuring him, or even negligently, a different question would be presented; but there is no such evidence in this case. The plaintiff was injured by the starting of the cars, when he was between them for the purpose of uncoupling the hose, according to his contention, or he was injured by his own folly and disobedience of the rule in going between the cars when they were moving. In the latter case, the law refers the injury to the plaintiff's own negligent and disobedient act.

In *Stewart v. Carpet Co.*, 138 N. C. 60, 50 S. E. 562, discussing a similar question, we said: "It follows that, if the jury had taken the defendant's view of the evidence and found that plaintiff was, at the time of his injury, acting in disobedience of orders, no negligence could be imputed to the defendant, even if the elevator was defective, as defendant omitted no duty to the plaintiff in respect to its condition, as we have stated; and the plaintiff's own act in disobeying instructions would, in law, be regarded as the proximate, and indeed, the only cause of his injury. The defendant was entitled to have this view of the case submitted to the jury; but the charge of the court excluded it."

And in *Whitson v. Wrenn*, 134 N. C. 86, 48 S. E. 17, the same principle is stated, as follows: "Instead of the plaintiff having been commanded to do a dangerous act, it is assumed in the instruction, and there was evidence to show, that he was ordered to do the particular work assigned to him in a safe way, but elected to do it in his own way, which turned out to be a dangerous one, and which actually resulted in his injury. The law, under such circumstances, refers the injury to his own fault, and not to any wrong on the part of his employer."

It has been held directly in other jurisdictions that, if an employé attempts to couple or uncouple cars while they are in motion, in violation of the company's rules which are known to him, and which provide a safe way for doing the work, and is injured, he is guilty of such negligence as bars his recovery of damages. *Sedgwick v.*

Railway, 76 Iowa, 340, 41 N. W. 35; Daracott v. Railroad, 83 Va. 288, 2 S. E. 511, 5 Am. St. Rep. 266; Johnson v. Railway, 38 W. Va. 206, 18 S. E. 573; Finnill v. Railroad, 129 N. Y. 669, 29 N. E. 825.

In Johnson v. Railway, supra, the court said: "It appears from the plaintiff's own testimony that, if he did not in fact read the rule of the company, he frequently had it in his hands, with opportunity to read it, and from the testimony of one of his witnesses, that 'men are always notified not to go in between the cars to uncouple, while they are in motion, and that it is unnecessary, and obviously dangerous at all times;' and it is equally clear from plaintiff's own testimony and that of his witnesses that his violation of this rule was the proximate cause of his injury, without which it would not have happened. To hold otherwise would be giving a party the advantage of his own wrong." See, also, Mason v. Railroad, 111 N. C. 499, 16 S. E. 698, 18 L. R. A. 845, 32 Am. St. Rep. 814, and 114 N. C. 724, 19 S. E. 362.

He was not ordered to uncouple while the cars were in motion, but to do so after they had stopped; there was not any defect in the construction of the cars, if that would make any difference in this kind of case; the plaintiff knew that he had been forbidden to uncouple the angle cock or the hose while the cars were moving, and that it was dangerous to do so, and would not have done so because of the danger and the rule of prohibition. This is his own testimony. The question of fact, as to whether he attempted to uncouple the cars while they were in motion, or when they were at rest, was one for the jury. The error in the instruction of the court consists in leaving to the decision of the jury, as a question of fact, whether, if he attempted to uncouple moving cars, his disobedience of the rule was the proximate cause of the injury, as it was plainly so as matter of law. If his testimony is accepted as true, he was not ordered to go between moving cars, but to wait until the cars had stopped, so that it necessarily follows that the engineer and conductor did not know he was between the cars while they were in motion; and there is no evidence that they did. How, then, could they be guilty of negligence with respect to him? By his own words, he had assumed a perilous position, if he violated the express order and went between moving cars; and his own confessed negligence was not only the proximate cause, but the sole cause of his injury. This is in accordance with reason and the acknowledged rule of law. It is not opposed to the precedents; nor does it violate any statutory provision or change the burden of proof as fixed by law.

[3] There was error in the following instruction as to damages: "If you find that he has been permanently injured, and that such

injury partially incapacitates him to earn money, then he would be entitled to recover damages for partial incapacity, if you find the injury was caused by the negligence of the defendant. He would be entitled to recover the difference between what he is able to earn at the present time, and in the future, and what he would have been able to earn if the accident had not happened, and, passing upon his expectancy, the mortuary table has been read to you, and you will bear that in mind in awarding damages, if you find that the plaintiff is entitled to recover anything." In an action for injuries by negligence, such as this one, the plaintiff is only entitled to recover the reasonable *present value* of his diminished earning power in the future, and not the difference between what he would be able to earn in the future, but for such injury, and such sum as he would be able to earn in his present condition. Railroad v. Paschall, 41 Tex. Civ. App. 357, 92 S. W. 446. Where future payments for the loss of earning power are to be anticipated by the jury and capitalized in a verdict, the plaintiff is entitled only to their present worth. Goodhart v. Railroad, 177 Pa. 1, 35 Atl. 191, 55 Am. St. Rep. 705. The damages to be awarded for a negligent personal injury resulting in a diminution of earning power is a sum equal to the *present worth* of such diminution, and not its aggregate for plaintiff's expectancy of life. O'Brien v. White, 105 Me. 308, 74 Atl. 721. The rule, as we see, may be stated with varying phraseology; but they all carry the same idea that the estimate should be based upon the present value of the difference between plaintiff's earning capacity, and not the total difference caused by the injury. The rule is supported by many authorities in this and other jurisdictions. Pickett v. Railroad, 117 N. C. 616, 23 S. E. 264, 30 L. R. A. 257, 53 Am. St. Rep. 611; Wilkinson v. Dunbar, 149 N. C. 20, 62 S. E. 748; Benton v. Railroad, 122 N. C. 1007, 30 S. E. 333; Watson v. Railroad, 133 N. C. 188, 45 S. E. 555; Railroad v. Carroll, 84 Fed. 772, 28 C. C. A. 207; Fulsome v. Concord, 46 Vt. 135; Kinny v. Folkerts, 84 Mich. 616, 48 N. W. 283.

Nothing said in this opinion conflicts with the decision in Boney v. Railroad, 155 N. C. 95, 71 S. E. 87, as in that case it was adjudged that the defendant had the last clear chance to avoid the injury to the plaintiff, by displaying the proper signal at the switch, notwithstanding any negligence of the plaintiff in disobeying the rule of the company, which limited the speed of the train at the place of the accident to six miles an hour.

New trial.

BROWN, J., concurs.

ALLEN, J. (concurring). I agree with the opinion of the court that the question of

proximate cause is involved in the first issue, and that before the jury can answer that issue in the affirmative they must find that the defendant was negligent, and that this negligence was the proximate cause of the injury. Otherwise the jury could find that the defendant was negligent, and that the plaintiff was not guilty of contributory negligence, and could award damages to the plaintiff, without finding that the negligence of the defendant caused the injury to the plaintiff.

I also concur in the opinion expressed by the CHIEF JUSTICE, which I do not understand to be controverted, that the negligence of the plaintiff, before it will bar his recovery, must be contributory, and that, to be contributory, it must be either the sole proximate cause of the injury, or it must concur in point of time with the negligence of the defendant in bringing it about; but I do not think there is any reasonable view of the evidence in this case tending to show that the plaintiff went between the cars while they were in motion, that the cars stopped, and that he was then injured by a sudden movement of the train; and it is upon this view that the opinion of the Chief Justice is predicated.

The only question of fact in dispute between the plaintiff and the defendant was whether the cars were in motion when the plaintiff went between them, and the plaintiff did not testify or contend that he went in while the cars were in motion, that they then stopped, and that he was afterwards injured by the movement of the cars; and I agree to a new trial, because I do not think that the jury could have understood from the charge that the determination of the issue depended almost entirely upon this one fact.

HOKE, J. I concur in the decision that a new trial should be awarded, being of opinion that there was error in the instruction as to damages.

CLARK, C. J. (dissenting). Notwithstanding the rules of the company prohibited employees from going between cars while in motion, if the plaintiff had orders to do so from the yardmaster, and was injured in consequence, the company is liable. *Mason v. Railroad*, 111 N. C. 485, 16 S. E. 698, 18 L. R. A. 845, 32 Am. St. Rep. 814; s. c., 114 N. C. 718, 19 S. E. 362.

On the first issue, "Was the plaintiff injured by the negligence of defendant?" there is no question of proximate cause, but of direct cause. The language of the issue itself is clear as to this, "Was the plaintiff injured by the negligence of the defendant?" The court charged in accordance with the precedents, and the jury found in the affirmative.

The second issue is, "Was the plaintiff

guilty of contributory negligence?" Upon the very frame of the issue, the question of proximate cause is its essential element, which the statute requires the defendant to allege and prove. Unless the negligence of the plaintiff contributed to the injury, i. e., was the proximate cause thereof, so as to exculpate the defendant from liability for the injury which, on the first issue, the jury found the defendant caused the plaintiff by its negligence, then the defendant is liable. The very heart of the issue is the inquiry of fact as to whether the plaintiff contributed to the injury, and by such negligence as was the proximate cause of the injury he sustained. The charge of the court properly presented the real issue of fact in controversy, and that was: "Did the plaintiff, by stepping in between the moving cars, if he did so step in (which the plaintiff testified that he did not), contribute to his injury, or was it an act entirely disconnected with the injury, which was caused solely by attempting to uncouple the hose while the train was stationary?"

The jury found, either that the plaintiff did not step in between the cars while in motion, which was his testimony, or that, if he did, this did not contribute to (that is, that it was not the proximate cause of) the injury, but was totally disconnected with the injury, which was caused by the sudden jerking of the car, while the plaintiff was uncoupling the hose after the train had stopped. This was a question of fact for the jury, as to which the judge could have expressed no opinion.

The lawmaking power of a just and humane people has often found it necessary to legislate for the protection of employees injured in the service of railroad companies. It has been enacted (now Revisal 1905, § 483), contrary to the former ruling of this court in *Owens v. Railroad*, 88 N. C. 502, that the burden is upon the defendant to allege and prove contributory negligence. It must not only prove negligence on the part of the plaintiff, but that his negligence was the proximate cause of his injury. A later act (now Revisal 1905, § 2646) cut off the defenses of the assumption of risk, and that an injury was caused by the negligence of a fellow servant. The federal statute not only embraces the above provisions, but it has gone further, and has provided that contributory negligence shall not be a bar to any action, but can only be considered by the jury in estimating the amount of the recovery. This is doubtless the result of the decisions of some courts upon above statutes, not in accord with their spirit. To hold that the proximate cause is a question of law for the court, and not one of fact for the jury, is to reverse our entire doctrine in regard to negligence. When we adopted the "rule of the prudent man," we made negligence an issue of fact, and not one of law.

Proximate cause has always been an issue of fact to be found by the jury.

On the issue of damages, the court erred in the respect pointed out, but this entitles the defendant merely to a new trial upon that issue; for the error is totally disconnected with the issues as to negligence and contributory negligence.

There should be a partial new trial upon the issue as to damages only.

(159 N. C. 425)

GARRISON et al. v. WILLIAMS et al.

(Supreme Court of North Carolina. May 22, 1912.)

1. TRIAL (§ 351\*)—ISSUES TO BE SUBMITTED.

Issues tendered were properly refused, where the issues submitted covered every phase of the case and presented every contention between the parties.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 829, 834-839; Dec. Dig. § 351.\*]

2. PUBLIC LANDS (§ 164\*)—DISPOSITION OF ESTATE—LANDS SUBJECT TO ENTRY.

It is essential to a valid entry of state lands under the statutes that such land should have been vacant and unappropriated at the time of the entry.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 466-476; Dec. Dig. § 164.\*]

3. APPEAL AND ERROR (§ 1064\*)—HARMLESS ERROR—INSTRUCTIONS.

In a civil action to have defendants declared trustees of lands for the plaintiff, an instruction as to running one of the lines of one of the grants involved with the county line to a designated tree was without prejudice, where all the lands covered by the plaintiff's grant had been previously granted.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4219, 4221-4224; Dec. Dig. § 1064.\*]

Appeal from Superior Court, Burke County; Webb, Judge.

Action by Ida E. Garrison and others against R. Williams and others. Judgment for defendants, and plaintiffs appeal. No error.

See, also, 150 N. C. 674, 64 S. E. 783.

The case was tried on the following issues, answered by the jury as follows:

"(1) Did Ida E. Garrison enter the lands in controversy on August 14, 1900, as alleged? Answer: Yes.

"(2) Did the defendant Williams enter the same lands on January 6 and March 10, 1902? Answer: Yes.

"(3) Was the notice of the entries made by Ida E. Garrison posted as the law directs at the time said entries were made, or within a short time thereafter? Answer: Yes.

"(4) Was the protest entered by Williams filed within 10 days after the aforesaid notice of the Garrison entries were posted? Answer: No.

"(5) Are the lands in dispute covered by the grants of the plaintiff? Answer: Yes.

"(6) Were the lands claimed by the plaintiff and covered by her grant No. 16,532 va-

cant and unappropriated lands of the state of North Carolina at the time plaintiff made her entry of the same? Answer: No.

"(7) Were the lands claimed by the plaintiff and covered by her grant No. 16,533 vacant and unappropriated lands of the state of North Carolina at the time the plaintiff made her entry of the same? Answer: No.

"(8) Were the lands claimed by the plaintiff and covered by her grant No. 16,534 vacant and unappropriated lands of the state of North Carolina at the time plaintiff made her entry of the same? Answer: No.

"(9) Did the defendant Williams, with notice of the said entries of Ida E. Garrison, obtain his grant for said land and thereafter convey said lands to the defendant R. F. Whitmer? Answer: Yes.

"(10) Did the defendant Whitmer take title to the lands described in the complaint with notice of the alleged equity of the plaintiff? Answer: No.

"(11) Did the defendant Table Rock Lumber Company take title to the land conveyed to it by Whitmer on the 24th of February, 1906, with notice of the alleged equity of the plaintiff? Answer: No.

"(12) Did the Table Rock Lumber Company convey said land to the Empire Trust Company by deed of March 1, 1906, after this suit was begun, in order to secure a proposed issue of bonds, and was said land afterwards by deed reconveyed by the Empire Trust Company to the Table Rock Lumber Company on the — day of —, 1906? Answer: Yes.

"(13) If any bonds were issued under and pursuant to the said deed of trust to the Empire Trust Company, were they paid by the Table Rock Lumber Company prior to or at the time of said reconveyance? Answer: At time of reconveyance.

"(14) Did the plaintiff request, in good faith, the entry taker to issue to her her warrants of survey on her entries a day or two after the protest was filed by Williams? Answer: No.

"(15) Did the entry taker refuse to issue the warrants of survey to the plaintiff for the reason that the protest had been filed by Williams? Answer: Yes."

The plaintiff tendered two issues, as follows:

"(1) Was Ida E. Garrison prevented by the protest filed from obtaining warrants of survey and paying for and obtaining grants for the lands entered on or before December 31, 1902, and did she obtain warrants of survey and pay for and obtain grants therefor within reasonable time after said protest was dismissed at the August term, 1905, of Burke superior court?

"(2) Are the defendants R. F. Whitmer and Table Rock Lumber Company purchasers for value and without notice of the lands in controversy?"

The court declined to submit the issues tendered by the plaintiff.

At the request of the defendant's counsel, the court instructed the jury as follows:

"(1) The court charges you that in locating the lines and boundaries of deeds and grants a call for a natural object, such as marked trees and county lines, and the lines of other tracts will control course and distance, so that the court charges you that in locating the lines and boundaries of grant No. 6,556, if you should find from the greater weight of the evidence that the calls of said grant are: 'Beginning on a rock, known as the pinnacle,' and find that this rock is the beginning corner of said grant, and 'running thence north 25 east 340 poles to a pine and locust in the line of Burke and McDowell counties,' and you should further find from the greater weight of the evidence that said pine and locust are in said county line at the point marked red B, on the official map, and that this is a corner of said grant, and you should so further find that the next call in said grant is south 58 east to a white oak, and that the white oak called for is at the point marked red C, on the official map, and you find that this is a corner of said grant, then the court charges you that the true line of said grant is from the pinnacle to the locust and in the county line, and thence with the county line to the white oak at the letter on the map, and you should so find, notwithstanding the courses and distances called for in the grant, and if you should further so find from the greater weight of the evidence that said grant when so located by you, following its calls from said white oak to the beginning, covers the same lands as are embraced in plaintiffs' grant No. 16,534, then the court charges you that you should answer the eighth issue, 'No.'"

The plaintiff excepted to the said instruction and especially to that part thereof which, after instructing the jury that the true line of grant No. 6,556 is from pinnacle to locust in the county line, proceeded to inform the jury that the true line of said grant "is thence with the county line to the white oak at the letter O on map and you should find, notwithstanding the course and distance called for in the grant."

John M. Mull and S. J. Ervin, for appellants. J. F. Spainhour and Avery & Ervin, for appellees.

**PER CURIAM.** This action was brought by the plaintiff for the purpose of having the defendants declared trustees for the plaintiff of certain tracts of land described in the amended complaint; the plaintiff claiming that in August, 1900, she duly entered the said land in the county of Burke, and that in the year 1902 the defendant, Richard Williams, entered the same land, and that his rights, if he had any, have passed to his co-

defendants with notice of the plaintiff's entries. At a former trial the case was appealed to this court and heard upon a demurrer to the complaint. The cause was remanded for a new trial.

[1] There are 15 assignments of error set out in the record which, in the view we take of the case, need not all be considered. The plaintiff tendered two issues, which were refused by the court, and as we think properly so. The issues submitted covered every phase of the case, and presented every point of contention between the parties.

The claim of the plaintiff is founded upon three grants, which are made the subjects of the sixth, seventh, and eighth issues, as follows: "(6) Were the lands claimed by plaintiff and covered by her grant No. 16,532 vacant and unappropriated lands of the state of North Carolina at the time plaintiff made her entry of the same? Answer: No. (7) Were the lands claimed by plaintiff and covered by her grant No. 16,533 vacant and unappropriated lands of the state of North Carolina at the time plaintiff made her entry of the same? Answer: No. (8) Were the lands claimed by plaintiff and covered by her grant No. 16,534 vacant and unappropriated lands of the state of North Carolina at the time plaintiff made her entry of the same? Answer: No."

[2] One of the essentials to a valid entry under the statute is that the lands should have been vacant and unappropriated at the time of the entry. As the jury have found that the lands were not vacant at the time of the plaintiff's entry, but were covered by the Avery and Tate grants, that of necessity terminates the plaintiff's case, unless there was some error made in the trial of these particular issues.

We find that there is abundant evidence in the record to sustain the findings of the jury. In instructing the jury as to the manner in which grants and deeds should be located, his honor followed precisely the rules laid down by Mr. Justice Hoke in *Bowen v. Lumber Company*, 153 N. C. 368, 66 S. E. 258. The charge of the court is clear and pertinent to these issues, and we find no error in it.

[3] It is not clear to us that the plaintiff was prejudiced by instructions of the court to the jury as to running one of the lines of grant 6,556 to J. C. Tate with the county line, inasmuch as the jury have found that all of the land covered by the plaintiff's grants had been previously granted to Tate and Avery.

We think it unnecessary to discuss any further assignments of error in this case. The law of the case was settled and well stated in the opinion of Mr. Justice Walker, and seems to have been followed carefully by his honor on his trial.

Upon a review of the record, we find no substantial error which we think would warrant us in ordering another trial.

No error.



(91 S. C. 455)

**CITIZENS' TRUST & SAVINGS BANK v. STACKHOUSE et al.**

(Supreme Court of South Carolina. May 28, 1912. Rehearing Denied May 30, 1912.)

**1. BILLS AND NOTES (§ 365\*)—RIGHTS OF BONA FIDE HOLDER.**

A bona fide holder of a negotiable note, before maturity for a valuable consideration without notice, holds the title unaffected by any fact impeaching the validity of the note as between the original parties thereto.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 944, 958, 959; Dec. Dig. § 365.\*]

**2. BILLS AND NOTES (§ 387\*)—RIGHTS OF BONA FIDE HOLDER.**

To defeat the rights of a bona fide holder of commercial paper before maturity and for a valuable consideration, there must be proof of actual notice or knowledge of the defect in title of the payee, or bad faith on the part of the holder at the time of the purchase of the paper by him.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 818, 856-863; Dec. Dig. § 387.\*]

**3. BILLS AND NOTES (§ 525\*)—RIGHTS OF BONA FIDE HOLDER.**

Actual notice by a purchaser of commercial paper of the defect in the title of the payee therein, or bad faith of the purchaser at the time of the purchase to defeat a recovery by him, may be established by circumstantial as well as direct evidence.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1832-1839; Dec. Dig. § 525.\*]

**4. BILLS AND NOTES (§ 497\*)—BONA FIDE HOLDER—EVIDENCE—BURDEN OF PROOF.**

Where a maker of a note shows fraud or illegality in its inception, the presumption raised by its mere possession by a holder is overcome and the burden shifts to him to show that he acquired it in good faith for value before maturity in the usual course of business and under circumstances creating no presumption that he knew of the fraud or other defect.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1448, 1675-1681, 1683-1687; Dec. Dig. § 497.\*]

**5. BILLS AND NOTES (§ 537\*)—DIRECTION OF VERDICT—WHEN AUTHORIZED.**

Where there is no evidence, direct or circumstantial, impeaching a witness testifying to facts that a holder of a note is a bona fide holder before maturity for value without notice, the court must direct a verdict in favor of the holder, but where there is anything, either in the facts in evidence or any direct evidence impeaching the witness, the issue must be submitted to the jury.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1862-1893; Dec. Dig. § 537.\*]

**6. BILLS AND NOTES (§ 525\*)—BONA FIDE HOLDER—EVIDENCE.**

The mere fact that a bank discounting a note payable to a depositor dealing in imported horses had, during 17 years' business with the depositor, discounted numerous notes on which it had brought suits for collection, did not show bad faith so as to defeat its rights as a bona fide holder for value before maturity.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1832-1839; Dec. Dig. § 525.\*]

Gary, C. J., and Fraser, J., dissenting.

Appeal from Common Pleas Circuit Court of Manon County; Thos. S. Sease, Judge.

Action by the Citizens' Trust & Savings Bank against James Stackhouse and others. From a judgment for plaintiff, defendants appeal. Affirmed.

W. F. Stackhouse, for appellants. J. W. Johnson, for respondent.

HYDRICK, J. Plaintiff brought this action on one of three promissory notes given by defendants to McLaughlin Bros. of Columbus, Ohio, in payment for a stallion, alleging that it bought the note for value before maturity. The defendants set up the defenses of failure of consideration, breach of warranty, fraud and misrepresentation in the sale of the horse, and allege that plaintiff is not the bona fide owner of the note sued on, but that it is acting in collusion with the payees thereof to defeat their defenses, under the pretense of being the bona fide purchaser for value without notice. The note was for \$1,399, bears date December 21, 1906, and was due 13 months after date. Plaintiff proved by its vice president and cashier that it bought the note (with 11 others) from McLaughlin Bros. on December 6, 1907, and paid them for it \$1,383.11; that the money was paid by a cashier's check, and it was not deposited to the credit of McLaughlin Bros. in the plaintiff bank, although they were depositors of that bank, and had been since 1890, and for the past several years their deposit account ran from \$5,000 to \$15,000. He said that neither he nor the plaintiff bank had notice of any defense to the note; that he knew the business of McLaughlin Bros. and that they dealt in horses and imported French coach stallions, and he supposed the note sued on was one of a series of notes given in payment for a horse, as the McLaughlin Bros. usually took their notes in that way; that he had discounted many such notes for them during the past 17 years; that formerly, when they were not so strong financially as they are now, he made inquiry as to the solvency of the makers of such notes, but for the past 10 years he had made no such inquiry, because he considered McLaughlin Bros. financially able to protect their indorsements; that the bank had had litigation in the collection of some 20, or probably 40, of the notes discounted for McLaughlin Bros.; the usual defense being that the horse was not satisfactory; that McLaughlin Bros. had always protected the bank, and, when it had had litigation and had paid attorney's fees in the collection of notes indorsed to the bank by them, they reimbursed the bank, and plaintiff would look to them for like protection in this case; however, the plaintiff had no claim upon them except as indorsers of the note. This testimony was brought

out in the examination, direct and cross, of plaintiff's witness.

The defendants offered in evidence a copy of the Marion Star, issued September 4, 1907, in which was published a notice warning people not to trade for the notes given by defendants to McLaughlin Bros., giving the ground of defense. They also offered a letter, dated June 26, 1907, from McLaughlin Bros. to the cashier of a bank at Mullins, in Marion county, in which they offered to sell the defendants' notes aggregating \$4,400 for \$3,700. They also offered to prove that they had notified all the banks in Marion of the fraud in the inception of these notes, and asked the banks to extend the notice to all persons who might inquire about them. They also offered to prove the defenses set up in their answer, to wit, failure of consideration, breach of warranty, and fraud and misrepresentation in the sale of the horse. The court excluded the testimony so offered because there was no evidence that plaintiff had notice of any of the facts or defenses sought to be proved when it purchased the note, and on the ground that there was no evidence tending to show bad faith on the part of the plaintiff in the transaction, and thereupon the court directed a verdict for the plaintiff for the amount sued for.

[1] It is to be regretted that the defendants cannot be permitted to prove their defenses, for, according to the allegations of their answer, the note which they are now called upon to pay was obtained from them by fraud and misrepresentation. But it is of vastly more importance to the commerce of the country that the integrity and unassailability of negotiable paper, in the hands of bona fide holders for value, shall be maintained by the courts than that persons who carelessly put their names to such paper shall be relieved of liability thereon.

In *Swift v. Tyson*, 16 Pet. 1, 10 L. Ed. 865, the Supreme Court of the United States, by Mr. Justice Story, said: "There is no doubt that a bona fide holder of a negotiable instrument for a valuable consideration, without any notice of facts which impeach its validity as between the antecedent parties, if he takes it under an indorsement made before the same becomes due, holds the title unaffected by these facts, and may recover thereon, although as between the antecedent parties the transaction may be without any legal validity. This is a doctrine so long and so well established, and so essential to the security of negotiable paper, that it is laid up among the fundamentals of the law, and requires no authority or reasoning to be now brought in its support. As little doubt is there that the holder of any negotiable paper, before it is due, is not bound to prove that he is a bona fide holder for a valuable consideration, without notice; for the law will presume that in the absence of all

rebutting proofs, and therefore it is incumbent upon the defendant to establish by way of defense satisfactory proofs of the contrary, and thus to overcome the prima facie title of the plaintiff."

In *Murray v. Lardner*, 2 Wall. 110, 17 L. Ed. 857, Mr. Justice Swayne, speaking for the court, said: "The possession of such paper carries the title with it to the holder: 'The possession and title are one and inseparable.' The party who takes it before due for a valuable consideration, without knowledge of any defect of title and in good faith, holds it by a title valid against all the world. Suspicion of defect of title or the knowledge of circumstances which would excite such suspicion in the mind of a prudent man, or gross negligence on the part of the taker at the time of the transfer, will not defeat his title. That result can be produced only by bad faith on his part. The burden of proof lies on the person who assails the right claimed by the party in possession. Such is the settled law of this court, and we feel no disposition to depart from it. The rule may perhaps be said to resolve itself into a question of honesty or dishonesty, for guilty knowledge and wilful ignorance alike involve the result of bad faith. They are the same in effect. Where there is no fraud, there can be no question. The circumstances mentioned, and others of a kindred character, while inconclusive in themselves, are admissible in evidence, and fraud established, whether by direct or circumstantial evidence, is fatal to the title of the holder. The rule laid down in the class of cases of which *Gill v. Cubitt* is the antitype is hard to comprehend and difficult to apply. One innocent holder may be more or less suspicious under similar circumstances at one time than at another, and the same remark applies to prudent men. One prudent man may also suspect where another would not, and the standard of the jury may be higher or lower than that of other men equally prudent in the management of their affairs. The rule established by the other line of decisions has the advantage of greater clearness and directness. A careful judge may readily so submit a case under it to the jury that they can hardly fail to reach the right conclusion. We are well aware of the importance of the principle involved in this inquiry. These securities are found in the channels of commerce everywhere, and their volume is constantly increasing. They represent a large part of the wealth of the commercial world. The interest of the community at large in the subject is deep-rooted and wide-branching. It ramifies in every direction, and its fruits enter daily into the affairs of persons in all conditions of life. While courts should be careful not so to shape or apply the rule as to invite aggression or give an easy triumph to fraud, they should not forget the consider-

ations of equal importance which lie in the other direction."

[2] This court has announced in numerous cases that, to defeat the rights of a bona fide holder for value of commercial paper, something more is required than proof of facts and circumstances which merely give rise to suspicion, or which may be sufficient to put a prudent person on inquiry. There must be proof of actual notice or knowledge of the defect in title, or bad faith on the part of the holder at the time he purchased the paper.

[3] Of course, actual notice and bad faith may be shown by circumstantial as well as by direct evidence. *McCaskill v. Ballard*, 8 Rich. 470; *Witte v. Williams*, 8 S. C. 290, 28 Am. Rep. 294; *Bond Debt Cases*, 12 S. C. 272; *Walker v. Kee*, 14 S. C. 142; *Hand v. Railroad Co.*, 17 S. C. 256; *Bank v. Anderson*, 28 S. C. 149, 5 S. E. 343; *Ehrlich v. Jennings*, 78 S. C. 273, 58 S. E. 922, 125 Am. St. Rep. 795, 13 Ann. Cas. 1166; *Fretwell v. Carter*, 78 S. C. 531, 59 S. E. 639.

[4] No point was made either here or on circuit as to where lies the burden of proof in a case like this, where it is shown by defendants that the note had its inception in fraud. The defendants seem to have voluntarily assumed the burden of proof. While the authorities elsewhere are not entirely in accord, our own cases and the greater weight of authority in other jurisdictions agree that when the defendant shows fraud or illegality in the inception of the paper, or that it was lost by or stolen from the owner, the presumption which is raised by its mere possession is overcome, and the burden then shifts to the holder to show that he acquired it in good faith, for value, before maturity, in the usual course of business, and under circumstances creating no presumption that he knew of the fraud or other defect in title. *Schaub v. Clark*, 1 Strob. 301, 47 Am. Dec. 554; *Witte v. Williams*, supra; *Bank v. Anderson*, supra; see note in 11 Am. St. Rep. p. 324; *Canajoharie Nat. Bank v. Diefendorf*, 123 N. Y. 191, 25 N. E. 402, 10 L. R. A. 676, and note; *Commercial Bank v. Burgwyn*, 110 N. C. 267, 14 S. E. 623, 17 L. R. A. 326, and note.

[5] The application of this rule can make no difference, however, in the decision of this case, but it might be of some consequence in a case where the evidence is very close, or evenly balanced, or in a case where there is no evidence of good faith except that of the holder himself, and the question arises whether his evidence shall be received as true. In such a case, if there is anything, either in the facts and circumstances, appearing in evidence, or any direct evidence tending to impeach the witness, the court would submit the issue to the jury; but if there is no evidence, direct or circumstantial,

tending to impeach the witness, the court would do as it did in this case, direct the verdict, instead of inviting a verdict based upon caprice or prejudice by submitting an issue to the jury when there really is none in the evidence. Courts are organized to do justice, and they should not even impliedly sanction a verdict which is not supported by evidence by submitting an issue to a jury when only one reasonable inference can be drawn from the evidence. Therefore the defendants' attorney very properly concedes that, if there was nothing in the evidence from which a reasonable inference could have been drawn of bad faith on the part of plaintiff in the purchase of the note, the verdict was rightly directed. He zealously contends, however, that the circumstances brought out in the testimony of plaintiff's witness do warrant such an inference. All the facts and circumstances relied on by counsel, as susceptible of such a conclusion, were set out in the statement at the beginning of this opinion.

[6] We have carefully considered them, but we find nothing in them, either singly or collectively, which tends to show bad faith on the part of the plaintiff. The fact most strongly relied upon is that the plaintiff has had some 20, probably 40, suits in collecting notes discounted for *McLaughlin Bros.*; the usual defense being that the horse was not satisfactory. It does not appear, however, what was the result in those cases. It may be that plaintiff won each of them, and that the defenses were wholly without merit. Moreover, it does not appear why the horses were not satisfactory. The dissatisfaction may have been caused by something which would not have suggested to the mind of any one that there had been fraud or misrepresentation in the sale of the horses. Now, if it had appeared that in each case, or in a good number of them, the charge of misrepresentation and fraud was made and proved, then it might, with some show of reason, be contended that plaintiff should have suspected that there may have been fraud and misrepresentation in the sale of the horse to defendants. But we have seen that proof of facts and circumstances which merely create suspicion, or which should put a prudent person on inquiry, is not sufficient. To be sure, the holder of negotiable paper must not be allowed to willfully shut his eyes to the truth, for, as said by Mr. Justice Swayne in *Murray v. Lardner*, supra, willful ignorance is as bad as guilty knowledge, and both involve the result of bad faith.

But certainly the mere fact that plaintiff had litigation in collecting some 20, or probably 40, of the many notes which it had discounted in the run of 17 years' business with the *McLaughlin Bros.* as its depositors

does not tend to show bad faith in discounting the note here sued on.

Judgment affirmed.

WOODS and WATTS, JJ., concur.

GARY, C. J. (dissenting). I will not delay the filing of the opinion by discussing at length the question whether the plaintiff was a bona fide holder of the note. The mere recital in the opinion of the fact, "that the bank had had litigation in the collection of some 20, or probably 40, of the notes discounted for McLaughlin Bros., the usual defense being that the horse was not satisfactory," was in itself sufficient, at least to put the plaintiff on notice, that there was a good defense to the note, but which was heretofore not considered on the merits on the ground that the plaintiff was a bona fide holder.

Furthermore, the fact that the purchase of the note was made just before it was due and long after its execution, thus enabling the payee to avoid valid defenses; the fact that sale was made by men who habitually kept large deposits with the purchaser and who did not appear to have been forced to sell for any legitimate purpose; the fact that the purchase money of the note was immediately taken out of the reach of the purchaser although the seller habitually deposited with the buyer—are circumstances, taken together, that amount to more than a suspicion, and should have carried the case to the jury, as there was testimony tending to show that the transaction originated in fraud.

FRASER, J., concurs.

(91 S. C. 443)

**TEAGUE v. WESTERN UNION TELEGRAPH CO.**

(Supreme Court of South Carolina. May 30, 1912.)

**1. APPEAL AND ERROR (§ 882\*)—INVITED ERROR.**

A telegraph company cannot complain of any error in submitting an issue to the jury, where the same issue was submitted in another instruction at the company's request.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3591-3610; Dec. Dig. § 882.\*]

**2. EVIDENCE (§ 147\*)—NEGATIVE EVIDENCE.**

In an action against a telegraph company for delay in delivering a message, testimony that witness worked in the company's office for about six years, but did not know what office hours were observed Sundays, was properly admitted to show that the company did not have Sunday office hours.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 435-437; Dec. Dig. § 147.\*]

Appeal from Common Pleas Circuit Court of Spartanburg County; R. C. Watts, Judge.

"To be officially reported."

Action by Alfred Teague against the Western Union Telegraph Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Geo. H. Fearons, of New York City, Sanders & De Pass, of Spartanburg, and Nelson, Nelson & Gettys, of Columbia, for appellant. Johnson & Nash, of Spartanburg, for respondent.

GARY, C. J. This is an action for damages alleged to have been sustained by the plaintiff through the negligence and intentional wrong on the part of the defendant in failing to deliver the following telegram within a reasonable time: "Marshall, N. C. Alfred Teague, Clinton, S. C.—Father died last night; funeral tomorrow ten o'clock. R. S. Teague." The defendant denied the material allegations of the complaint, set up the defenses of contributory negligence, and the further defense "that it had established as its Sunday office hours at Clinton certain reasonable hours from 9:30 o'clock a. m. to 10:30 o'clock a. m., and from 4:30 o'clock p. m. to 5:30 o'clock p. m., for receiving and delivering messages at Clinton, and that the message which was sent to the plaintiff on that date was delivered at Clinton out of its office hours."

There was testimony tending to show that the message was delivered to the defendant for transmission at Marshall, N. C., about 11 o'clock a. m. on Sunday the 19th of September, 1909, received by the defendant's agent at Clinton, S. C., at 1:23 o'clock p. m., and delivered to the plaintiff on the same day at 5 o'clock p. m. At the close of the testimony, the cause of action for punitive damages was withdrawn from the jury, which rendered a verdict in favor of the plaintiff for \$200, and the defendant appealed.

[1] The first question that will be considered is whether his honor, the presiding judge, erred in submitting to the jury the question whether the office hours at Clinton were reasonable. Before proceeding to consider this question, it is necessary to determine whether it is to be decided by the court or submitted to the jury.

In 27 Enc. of Law the rule is thus stated: "Like other corporations or individuals engaged in a public business a telegraph company has the right to provide rules and regulations with which all persons desiring to engage its services must comply. This right, however, is subject to the limitation that the regulations must be reasonable, and may not operate to relieve the company of any obligation imposed by law or public policy, and they must be reasonably applied under the special circumstances of any particular cases. The company has the right to provide reasonable regulations as to the hours during which its office shall be open

for the transmission and delivery of messages. The reasonableness of the regulations with respect to any particular office must depend largely upon the locality of that office, and is therefore a mixed question of law and fact. It is not necessary that all offices shall have the same hours; the practical effect of a contrary rule would be to destroy the right of regulations." This language is quoted with approval in the case of *Bonner v. Telegraph Co.*, 71 S. C. 303, 51 S. E. 117. In the case of *Knight v. Railway*, 85 S. C. 78, 67 S. E. 16, the court says: "Ordinarily it is for the jury to determine what is a reasonable time, but, when the facts are undisputed, or are susceptible of but one inference, the court may determine, as matter of law, what is a reasonable time. \* \* \* In 16 Enc. of Law, it is said: "The general rule is well known that questions of fact are to be submitted to the jury, and this includes not only cases when the facts are in dispute, but also when the question is as to inference to be drawn from such facts after they have been determined. \* \* \* The issue of negligence should go to the jury: (1) When the facts which, if true, would constitute evidence of negligence are controverted. (2) When such facts are not disputed, but there may be a fair difference of opinion as to whether the inference of negligence should be drawn. (3) When the facts are in dispute and the inferences to be drawn therefrom, are doubtful." This language is quoted with approval in *Wood v. Mfg. Co.*, 66 S. C. 482, 45 S. E. 81, and other cases in this state.

His honor, the circuit judge, at the request of the defendant's attorneys, charged the jury as follows: "The fact, if it be a fact, that the agent of a telegraph company retains a message which was received on Sunday after office hours is not negligence if it appears that the company had established office hours, which, in the opinion of the jury, were reasonable." So that, even conceding that it would otherwise have been erroneous to submit to the jury the question whether the rules were reasonable, the appellant cannot complain after requesting that such question be submitted to them. The exceptions raising this question are overruled.

[2] The next question to be determined is whether there was error on the part of his honor, the presiding judge, in submitting to the jury the question of waiver.

E. M. Bobo, a witness for the defendant, testified as follows on redirect examination by the defendant's attorney: "Q. Do you know anything about the telegraph office hours during Sundays of your own knowledge? A. No, sir; I did not." Recross-examination by Mr. Nash: "Q. You worked in the same office that the Western Union Telegraph people worked in? A. Yes, sir. Q.

You don't know what their Sunday hours were? A. No, sir. Q. You don't know whether they observed them or not? A. No, sir. Q. If they did observe them, it had never made sufficient impression on you, to cause you to take cognizance of it? A. No, sir. Q. It didn't make any impression on you? A. No, sir. Q. How long have you worked there with them, before and afterwards? A. I have been there about six years. Q. In the same office with the Western Union people? A. Yes, sir. Q. And you don't know what hours they observed? A. No, sir." Redirect examination by Mr. Sanders: "Q. You have nothing to do with the Western Union business? A. No, sir." Recross-examination by Mr. Nash: "Q. Did you sometimes deliver messages for them when they would be out? A. Sometimes; yes, sir. Q. You worked interchangeably there; they would help you sometimes, and you help them? A. Yes, sir. Q. You sold tickets, and sometimes they did? A. Yes, sir." This testimony tended to show that, if the defendant observed Sunday office hours, such fact would have been within the knowledge of the witness. The testimony also tended to show that the defendant did not have Sunday office hours.

The exceptions raising this question are overruled.

Judgment affirmed.

WOODS, HYDRICK, and FRASER, JJ., concur. WATTS, J., disqualified.

(91 S. C. 450)

McKERALL v. ROAD AND HIGHWAY  
COMMISSION OF MARION COUNTY et al.

(Supreme Court of South Carolina. May 30, 1912.)

STATUTES (§ 121\*)—TITLE—SUFFICIENCY.

One section of the general tax act of 1912 provides that the road and highway commission for Marion county shall make certain disposition of the convict labor of that county, and shall exercise certain duties of the county supervisor; but the title to the act states merely that it is an act to provide for the levy of county and state taxes. *Held*, that this section conflicts with Const. art. 3, § 17, which requires every act to express its subject in its title.

[Ed. Note.—For other cases, see Statutes Cent. Dig. §§ 173, 174; Dec. Dig. § 121.\*]

"To be officially reported."

Original proceeding by George G. McKerral, enjoining the Road and Highway Commission for Marion County and another. Injunction granted.

J. D. McLucas and L. D. Lide, both of Marion, for petitioner. J. W. Johnson, of Marion, for respondent.

WOODS, J. This proceeding for an injunction involves the constitutionality of a clause of the general tax act of 1912, pur-

porting to provide for the disposition of the convict labor of Marion county, to relieve the supervisor of that county of certain duties and powers therein mentioned, and to confer them on the road and highway commission of the county, and to abolish the office of supervisor on January 1, 1913.

By an act, approved February 28, 1910 (23 Stat. 945), provision was made for the issuance by the county of Marion of bonds for permanent road and highway improvement to the amount of \$100,000. Five citizens were named in the act as constituting the board, to be known as the road and highway commission for Marion county, and upon this commission was placed the duty of issuing the bonds and applying the proceeds to the building and improvement of public roads of the county. The statute did not abolish the office of supervisor; nor did it contain any express curtailment of his powers, except the following clause: "That it shall be the duty of the county supervisor of said county to assist and co-operate with said commission in carrying on the work herein provided for, and to furnish for the use of said commission the chain gang and road machinery of said county whenever requested to do so by said commission."

By a later act, approved February 14, 1911 (27 Stat. 342), it was enacted:

"Section 1. Be it enacted by the General Assembly of the state of South Carolina, that the supervisor of Marion county be, and he is hereby, required upon the approval of this act by the Governor, to turn over to the road and highway commission of Marion county the chain gang and all other convicts hereafter sentenced to work on the public works of said county, together with all other property belonging to said county, used by him in operating said chain gang, which said highway commission may select, taking their receipt therefor, and when he has done so his responsibility for the same shall cease.

"Sec. 2. That the said supervisor shall also consult with said road and highway commission before undertaking any road improvement, or bridge building, or repairs where the cost of the same will exceed the sum of one hundred dollars.

"Sec. 3. That the failure of said supervisor to perform the duty herein required of him shall cause him to be liable as for malfeasance or misfeasance in office."

This statute changed the powers and duties of the supervisor only to the extent that he was relieved of all control of the chain gang and other convicts sentenced to work on the public works of the county. In all other respects, the important duties and powers conferred on the supervisor by section 755 of the Civil Code remained unimpaired.

At the 1912 session of the General Assembly, the act providing for the levy of taxes for state and county purposes was passed

under the title "An act to provide for the levy of taxes for county and state purposes for the fiscal year beginning January 1, 1912." The section of the act relating to the tax levy for Marion county contained the following as a proviso: "Provided, that the road and highway commission for Marion county are hereby required to furnish to the municipal authorities of the town of Marion and the town of Mullins, such convicts to labor on the streets of said towns as will repay said towns one-half ( $\frac{1}{2}$ ) of the time that said town authorities had given to the county during the year 1911; said convicts to be furnished thirty (30) days after written notice requesting the same from the mayors or other officials of said towns. That the duties of the office of county supervisor for Marion county, in so far as they relate to roads, bridges, and ferries in said county, are hereby transferred to and devolved upon the highway commission of said county, and said supervisor shall be under the direction and control of said commission, and perform such duties as shall be laid upon him and required of him by said commission, and upon his performing such duties, said commission shall pay his salary as now fixed by law until the 1st day of January, next, when said office shall be abolished and become vacant, and all other duties of the office of county supervisor of Marion county, not laid upon the highway commission of said county, by the foregoing words, are hereby devolved upon the two county commissioners of said county."

The petitioner, as a citizen and taxpayer, alleges that the highway commission intends to undertake the duties of the office of supervisor under the act, and to furnish convicts to labor on the streets in the towns of Marion and Mullins, as provided by the act, that the supervisor, D. J. Martin, is failing and refusing to work under the direction and control of the road and highway commission.

In this alleged state of conflict as to the conduct of the public offices of the county, the petitioner asks the court to enjoin the road and highway commission from attempting to carry out the provisions of the clause of the statute, above cited, on the ground that it is in conflict with article 3, § 17, of the Constitution, which requires that "every act or resolution having the force of law shall relate to but one subject and that shall be expressed in the title."

This court has given a very liberal interpretation to the section of the Constitution just quoted; but to sustain the legislation here attempted would require complete disregard of the constitutional requirement. There is not the least hint in the title of the tax act of a purpose to dispose of the convict labor of Marion county, or to take away from the supervisor any of his official powers, or to abolish his office. The case there-

fore falls within the evil against which the constitutional provision is directed. "The purpose of this and other similar constitutional provisions is said to be (1) to prevent hodge-podge, or "log-rolling," legislation; (2) to prevent surprise or fraud upon the Legislature by means of provisions in bills of which the titles give no intimation, and which might therefore be overlooked and carelessly and unintentionally adopted; and (3) to fairly apprise the people, through such publications of legislative proceedings as is usually made, of the subjects of legislation that are being considered, in order that they may have opportunity of being heard thereon, by petition or otherwise, if they shall so desire.'" *Charleston v. Oliver*, 16 S. C. 47; *State v. Fields*, 68 S. C. 148, 46 S. E. 771; *Croxton v. Truesdel*, 75 S. C. 418, 56 S. E. 45; *State ex rel. Fooshe v. Burley*, 80 S. C. 127, 61 S. E. 255, 16 L. R. A. (N. S.) 266.

It is therefore adjudged that the portion of the act of 1912, above quoted, is unconstitutional; and that the road and highway commission for Marion county be enjoined from attempting to carry it into effect.

GARY, C. J., and HYDRICK, WATTS, and FRASER, JJ., concur.

(91 S. C. 447)

#### MARTIN v. MARION COUNTY.

(Supreme Court of South Carolina. May 30, 1912.)

Appeal from Common Pleas Circuit Court of Marion County; J. W. De Vore, Judge.

Proceedings by D. J. Martin to enjoin the County of Marion. From a judgment for plaintiff, defendant appeals. Affirmed.

M. C. Woods, of Marion, for appellant. Jas. W. Johnson, of Marion, for appellee.

WOODS, J. The facts of this case are stated in the circuit decree. The case is controlled by the decision just rendered in the case of *George G. McKerral v. Road and Highway Commission of Marion County*, 74 S. E. 981.

The judgment of this court is that the judgment of the circuit court be affirmed.

GARY, C. J., and HYDRICK, WATTS, and FRASER, JJ., concur.

(91 S. C. 413)

#### BETHEA v. TOWN OF DILLON et al.

(Supreme Court of South Carolina. May 28, 1912.)

#### 1. ELECTIONS (§ 105\*)—SPECIAL ELECTIONS—REGISTRATION—STATUTORY PROVISIONS.

Under Civ. Code 1902, § 195, as amended by Act Feb. 26, 1908 (25 St. at Large, p. 1026), providing that 20 days prior to any special election in any town the books of registration shall be open for registration of the names of the qualified electors, and shall remain open for 10 days, a special election is not void where the books were opened 25 days before the election and were kept open 10 days, in the absence of a showing that the irregularity affected the result.

[Ed. Note.—For other cases, see *Elections*, Cent. Dig. § 94; Dec. Dig. § 105.\*]

#### 2. CONSTITUTIONAL LAW (§ 6\*)—AMENDMENTS—VALIDITY.

A single amendment to Const. art. 8, § 7 (Act Feb. 3, 1911 [27 St. at Large, p. 13]), limiting the indebtedness of municipalities by adding a proviso that the limitations imposed by the section and by article 10, § 5, limiting the indebtedness of political divisions extending over the same territory or portions thereof, shall not apply to any bonded indebtedness where the proceeds of the bonds are applied to the purchase and maintenance of waterworks plants and sewerage systems, is not violative of article 16, § 2, declaring that where two or more amendments shall be submitted at the same time they shall be so submitted that the electors shall vote for or against each of them separately, since the amendment refers to the single subject of the limitation of indebtedness of municipalities.

[Ed. Note.—For other cases, see *Constitutional Law*, Cent. Dig. §§ 2-5; Dec. Dig. § 6.\*]

"To be officially reported."

Suit by W. T. Bethea against the Town of Dillon and others to enjoin the issuance of bonds of the town. Dismissed.

W. H. Muller, of Dillon, for petitioner. J. B. Gibson, of Dillon, for respondents.

HYDRICK, J. The petitioner, who is a resident taxpayer of the town of Dillon, seeks to enjoin the town council and the commissioners of public works from issuing the negotiable coupon bonds of said town to the amount of \$77,000, which he alleges they are about to do. Of the amount which the respondents propose to issue, it appears that \$39,000 are to be used in the establishing of a system of waterworks, and the balance, \$38,000, in the building of a system of sewerage for the town.

The present value of all the property in the town as assessed for taxation by the state is \$550,000. The existing bonded indebtedness of the town is \$26,000, and that of school district No. 8, which embraces the same territory, in whole or in part, is \$35,000.

[1] The first ground upon which it is contended that the bonds cannot be legally issued is that the election which was held upon the question of issuing them was illegal, because the books of registration were not opened 20 days before the election and kept open for 10 days for the purpose of registering the qualified electors of the town, as required by statute. Section 195 of volume 1 of the Code of 1902, as amended by the act of 1908 (25 Stat. 1026), provides that 20 days prior to any special election to be held in any city or town the books of registration shall be opened for the registration of the names of the qualified electors therein, and shall remain open for 10 days. In this case, the books were opened August 4th and were kept open till August 13, 1911, both included. The election was held August 29, 1911. It will be seen that the books were opened 25 days before the election instead of 20 days as

provided by the statute. While it is always better to comply literally with statutory requirements, still the slight variance in this case cannot be held to have vitiated the election, because it has not been made to appear that it affected the result. If it had been made to appear that a number of qualified electors sufficient to change the result had failed to obtain registration certificates because the books were not open during the time fixed by statute, and that they had thereby lost their right to vote, a more serious question would have been presented. But it does not appear that any qualified elector failed to obtain a registration certificate and the consequent right to vote on account of the variance of the time fixed by the statute. It follows that the irregularity complained of did not affect the result and was therefore immaterial. *State v. Board*, 86 S. C. 460, 68 S. E. 676.

[2] The next question is whether the proposed issue of bonds is illegal because it will increase the bonded debt of the town to an amount in excess of 8 per cent. of the value of the property therein as assessed for taxation, and because it will increase the bonded debt of the territory embraced within the limits of both the town and school district No. 8 to an amount in excess of 15 per cent. of the taxable values thereof.

Section 7 of article 8 of the Constitution contains the following limitation: "No city or town in this state shall hereafter incur any bonded debt which, including existing bonded indebtedness, shall exceed eight per centum of the assessed value of the taxable property therein. \* \* \*" And section 5 of article 10 of the Constitution includes a limitation similar to the above, prescribing an 8 per centum limitation to the bonded debt of any political division, as well as the following additional limitation: "And where-ever there shall be several political divisions or municipal corporations covering or extending over the same territory, or portions thereof, possessing a power to levy a tax or contract a debt, then each of such political divisions or municipal corporations shall so exercise its power to increase its debt under the foregoing eight per cent. limitation that the aggregate debt over and upon the territory of this state shall never exceed fifteen per centum of the value of all taxable property in such territory as valued for taxation by the state."

The foregoing provisions of the Constitution have been amended so that they do not now apply to bonds issued for the purposes for which the bonds here in question are to be issued. Section 7 of article 8, above cited, was amended in 1910, and the amendment was ratified by the Legislature in 1911 (27 Stat. 13) by adding at the end of said section the following: " \* \* \* Provided, further,

that the limitations imposed by this section and by section 5 of article 10 of this Constitution, shall not apply to the bonded indebtedness in and by any municipal corporation when the proceeds of said bonds are applied solely and exclusively for the purchase, establishment and maintenance of a water-works plant, sewerage system, or lighting plant, and when the question of incurring such indebtedness is submitted to the freeholders and qualified voters of such municipality as provided in the Constitution, upon the question of other bonded indebtedness." It is contended, however, that this amendment is invalid, because it was not submitted to the people and adopted in the manner prescribed by the Constitution itself for the amendment thereof. To sustain that point section 2 of article 16 of the Constitution is relied upon. It provides as follows: "If two or more amendments shall be submitted at the same time, they shall be submitted in such manner that the electors shall vote for or against each of such amendments separately."

It is clear, upon the slightest consideration, that the submission of the amendment to section 7 of article 8, as above quoted, including the amendment, by reference thereto of section 5 of article 10, was not in violation of the provision of section 2 of article 16, above quoted, because there was really only one amendment submitted, and that had reference to only one subject—the limitation upon the bonded debt of municipal corporations. And it was intended by that amendment to remove all limitations imposed by said sections of the Constitution upon the bonded debt of municipal corporations, when the bonds are issued for any of the purposes mentioned in said amendment. If section 7 of article 8 had been amended as above without any direct reference to section 5 of article 10, the provision of the latter section in conflict with the amendment would have been repealed by necessary implication; and, in like manner and for a like reason, so much of section 2021, vol. 1, Code 1902, as provides "that the aggregate bonded indebtedness of any city or town shall never exceed eight per centum of the assessed value of the taxable property therein" has been repealed. That provision of the statute was really unnecessary, but it was enacted presumably out of abundance of caution to carry out the limitation implied by the Constitution which has been removed by the amendment of section 7 of article 8 as above quoted. *Bray v. Florence*, 62 S. C. 57, 39 S. E. 810; *Seegers v. Gibbs*, 72 S. C. 532, 62 S. E. 586.

Petition dismissed.

GARY, C. J., and WOODS, WATTS, and FRASER, JJ., concur.



(91 S. C. 454)

**REYNOLDS v. DEATON.**

(Supreme Court of South Carolina. May 30, 1912.)

**APPEAL AND ERROR (§ 120\*)—APPEALABLE ORDERS.**

No appeal lies from an order of the circuit court granting a new trial on an appeal to that court from a magistrate, when both questions of law and fact are involved.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 840-862, 884, 865; Dec. Dig. § 120.\*]

Appeal from Common Pleas Circuit Court of Cherokee County; Ernest Gary, Judge.

Action by C. H. Reynolds against Lum Deaton. Judgment for plaintiff, and defendant appeals. Appeal dismissed.

Butler & Hall, of Gaffney, for appellant. Otts & Dobson, of Spartanburg, for respondent.

**HYDRICK, J.** No appeal lies from an order of the circuit court granting a new trial on an appeal to that court from the court of a magistrate, when both questions of law and fact are involved, and this court cannot, therefore, render judgment absolute upon the right of the appellant. *McKnight v. Dyson*, 74 S. E. 753, filed April 24, 1912, and cases cited.

Appeal dismissed.

**GARY, C. J., and WOODS, WATTS, and FRASER, JJ., concur.**

(91 S. C. 464)

**CATHCART v. MATTHEWS.**

(Supreme Court of South Carolina. May 21, 1912. Rehearing Denied May 30, 1912.)

**1. TRESPASS (§ 44\*)—TRESPASS TO REALTY—ACTION FOR RENTS AND PROFITS—BURDEN OF PROOF.**

Where plaintiff in an action for the rents and profits of a storehouse and lot introduced evidence tending to show that he was in possession of the premises, and that defendant wrongfully invaded such possession, the defendant had the burden of proving a better title than that of the plaintiff.

[Ed. Note.—For other cases, see Trespass, Cent. Dig. §§ 112-115; Dec. Dig. § 44.\*]

**2. INSANE PERSONS (§ 59\*)—SUSPENSION OF LIMITATIONS — POSSESSION BY PARTY NON COMPOS.**

Where the statute of limitations had begun to run in favor of one in possession, it was not suspended by an adjudication that he was non compos and by his confinement in an asylum for the insane, since any person holding or entering under him, while he was insane, would hold possession for his benefit.

[Ed. Note.—For other cases, see Insane Persons, Cent. Dig. §§ 91, 92; Dec. Dig. § 59.\*]

Woods and Watts, JJ., dissenting in part.

Appeal from Common Pleas Circuit Court of Fairfield County; Ernest Moore, Special Judge.

Action by William M. Cathcart, as administrator of John H. Cathcart, deceased,

against John P. Matthews. Verdict for defendant, and plaintiff appeals. Reversed, and new trial granted.

Jas. W. Hanahan and Glenn W. Ragsdale, both of Winnsboro, for appellant. McDonald & McDonald, for respondent.

**GARY, C. J.** This is an action by the administrator of the estate of John H. Cathcart, deceased, to recover rents and profits for the use of a certain storehouse and lot in Winnsboro. The defendant denied that the legal title was in John H. Cathcart, and pleaded the presumption of a grant and adverse possession.

It appears from the testimony that Richard Cathcart became feeble in mind about the year 1865, and that he executed a power of attorney whereby he empowered John H. Cathcart to sell all the lands of which he was then seised. In pursuance of said power of attorney, the lot described in the complaint was conveyed to Margaret J. Shaw on the 2d day of November, 1867; and on the same day she executed an instrument of writing under her hand and seal and in the presence of two witnesses, in which she made this declaration: "I hereby acknowledge that I hold the real estate conveyed to me this day, for a full and valuable consideration, paid by John H. Cathcart, subject to such uses as John H. Cathcart may direct; hereby binding myself to make such conveyances as John H. Cathcart may at any time require of me."

On the 22d day of June, 1874, the said Margaret J. Shaw conveyed to Elizabeth Cathcart, and on or about the 16th of October, 1884, Elizabeth Cathcart conveyed to the defendant John P. Matthews. All the deeds of conveyance were duly recorded, but the declaration of trust was not placed on record.

Under proceedings in the probate court, John H. Cathcart was adjudged non compos mentis and sent to the hospital for the insane on the 25th of June, 1874. In May, 1875, he was discharged therefrom, and upon his petition the commission in lunacy was superseded and set aside by an order of the probate court. During the year 1883 he was again adjudged a lunatic and sent to the hospital for the insane, where he remained until his death in 1908.

At the close of the testimony, the defendant's attorneys made a motion for the direction of a verdict upon the ground "that the evidence shows that the legal title was not in plaintiff's intestate at the time title was made to the defendant." After hearing the motion, his honor ruled as follows: "The court has determined that there is no evidence to go to the jury here to support the allegations of the complaint of legal title to the land in question in plaintiff's intestate at the time of the conveyance to the defend-

ant, and therefore has determined to direct the verdict of the jury for the defendant." We have quoted the language of the motion and of the ruling of his honor, the presiding judge, in order to show the exact ground upon which the verdict was directed.

There are two reasons why there was error in directing the jury to render a verdict in favor of the defendant. In the first place, there was testimony tending to show that John H. Cathcart commenced to exercise acts of ownership and to hold possession of the land openly and adversely to the rights of his trustee, Margaret J. Shaw, prior to the adoption of the Code of Procedure on the 1st of March, 1870, when the time necessary to acquire title by adverse possession was changed from 10 to 20 years; and that he had continuously, openly, and adversely, until he was adjudged to be of unsound mind and was sent to the hospital for the insane in 1883, long enough to acquire title by adverse possession, which is "not only a shield of defense, but is capable of being asserted actively." *Duren v. Kee*, 50 S. C. 444, 27 S. E. 875. In the second place, the complaint contains these allegations: That John H. Cathcart took possession of the said house and lot on the 2d day of November, 1867, and continued in uninterrupted ownership thereof until the day of his death, in 1908. That on the ——— day of ———, 1884, while the said John H. Cathcart was confined to the hospital for the insane, the said John P. Matthews entered upon the premises of the said John H. Cathcart and began to use the house and lot for the purpose of carrying on a mercantile business. That the defendant knew, when he entered upon and began to use the premises, that he was entering upon and using the premises of the said John H. Cathcart, and that they had been in the possession and under the control of the said John H. Cathcart from the 2d day of November, 1867, up to the very day upon which the said John P. Matthews entered upon said premises.

It will be observed that the complaint not only alleges that John H. Cathcart was the owner of the land, but that he was in possession, and that this possession had been invaded by acts of trespass on the part of the defendant.

[1] There was testimony tending to prove these allegations, but it was only necessary for the plaintiff to introduce testimony tending to show that John H. Cathcart was in possession of the premises and that the defendant invaded this possession by acts of trespass in order to cast upon him the burden of proving that he had a better title than the plaintiff's intestate.

The rule is thus stated by Mr. Justice Woods in the case of *Investment Co. v. Lumber Co.*, 86 S. C. 358, 68 S. E. 637: "The important question is thus raised whether a plaintiff, alleging both title and possession,

is entitled to recover damages upon proof of his possession and the invasion of it by the defendant, without proving also that he had a perfect title. The question must be answered in the affirmative. One person who finds another in possession of land cannot, by seizing the possession or invading it, put him whose possession he seized or invaded to proof of his title. In such a case possession is prima facie evidence of title, and he who invades it must establish his title. If this were not so, a holder of land could be put to proof of title against the world by any one who might choose to trespass or squat upon his lands. This conclusion is well supported by authority. When the plaintiff alleges an invasion of his possession, this gives character to the action as one in the nature of the old action of trespass *quare clausum fregit*. In the case of *Turner v. Poston*, 63 S. C. 244 [41 S. E. 296], the court uses this language: "The right of possession is a very sacred one, and the court will not allow the repose which it gives to be endangered by giving improper advantages to a trespasser. If defendant had a good title, he should have resorted to the courts when he could have obtained any redress to which, by law, he was entitled."

We do not deem it necessary, to cite other authorities to show that the testimony adduced by the plaintiff cast upon the defendant the burden of proving his title.

Judgment reversed and new trial granted.

HYDRIOK, J., concurs in the result.

WOODS, J. (concurring in the result). The complaint alleges that John H. Cathcart was at the time of his death the owner of the land described in the complaint, and that the plaintiff as the administrator of his estate is entitled to recover of the defendant the sum of \$6,000 as rents and profits. The defendant denied the title of John H. Cathcart and set up title in himself. The trial was by common consent on the issue of the legal title to the land. The circuit judge instructed a verdict for the defendant on this issue, and none of the exceptions raise the question that the plaintiff as administrator of the estate of John H. Cathcart might have been entitled to recover rents and profits under the terms of the trust deed even if the legal title was not in him but in the trustee. All the equitable issues made by the pleadings were expressly reserved by the court.

The declaration of trust under which Margaret J. Shaw, the trustee of John H. Cathcart, held the land in dispute was: "I hereby acknowledge that I hold the real estate conveyed to me this day for a full and valuable consideration paid by John H. Cathcart, subject to such uses as John H. Cathcart may direct; hereby binding myself to make such conveyances as John H. Cathcart may at any

time require of me." The statute did not execute the use, and the trustee held the legal title. *McCaw v. Galbraith*, 7 Rich. 80; *Huckabee v. Newton*, 23 S. C. 295; *Ayer v. Ritter*, 29 S. C. 135, 7 S. E. 53; *Steele v. Smith*, 84 S. C. 464, 66 S. E. 200, 29 L. R. A. (N. S.) 939.

On June 22, 1874, the trustee conveyed to Elizabeth Cathcart, and on October 16, 1884, Elizabeth Cathcart conveyed to defendant Matthews. There was no direct evidence that John H. Cathcart directed the execution of the conveyance by the trustee. Hence there was ground for inference by the jury that the conveyance from the trustee to the grantor of the defendant was not in execution of the trust, but in violation of it. The court could not hold as a matter of law, therefore, that the defendant had conclusively shown that he had a good conveyance from the trustee.

It is true that any possession by John H. Cathcart should be referred to the trust and considered to be held under it until conveyance by the trustee in violation of the trust, but, if the trustee did convey in violation of the trust, then the possession of John H. Cathcart after that repudiation of the trust might well be adverse to the trustee and her grantee. 3 Wash. on Real Property, 1991.

[2] I do not think the proposition sound that John H. Cathcart could not hold by adverse possession while he was non compos or in the lunatic asylum. If any person entered, or being already in held, under John H. Cathcart while he was a lunatic or in the asylum, the possession of such person would inure to the benefit of the lunatic. This is a principle of general recognition. The following are cases in which it was applied in favor of persons under the disability of marriage or infancy: *Sibley v. Sibley*, 88 S. C. 184, 70 S. E. 615; *Davis v. Mitchell*, 5 Yerg. (Tenn.) 281; *Killebrew v. Mauldin*, 145 Ala. 654, 39 South. 575; *Woodruff v. Roysden*, 105 Tenn. 491, 58 S. W. 1066, 80 Am. St. Rep. 905. Applying the principle in this case, there was evidence from which the jury might have inferred that John H. Cathcart held the land adversely to the trustee and her grantee for more than the statutory period after the trustee conveyed the property. This being so, it seems to me there was some evidence upon which the jury could have legally based a verdict in favor of the plaintiff on the ground that John H. Cathcart had acquired the legal title to the land by adverse possession.

I am unable to assent to the conclusion stated by the Chief Justice that the court should have held that, under the facts proved, the defendant had seized upon or invaded the possession of the plaintiff, and that therefore it followed, as a legal proposition, that the burden was on the defendant to prove his title, for there was evidence from

which the jury could have inferred that no one was in possession at the time the defendant obtained his deed and entered, and that therefore he did not seize upon or invade the possession of John H. Cathcart.

The entries in the cashbook of John H. Cathcart were properly excluded. The entries were not made on a book account kept with the parties concerned, but are mere entries of a declaration by a party in his own favor on his cashbook. The person against whom these entries were made is not bound by them.

WATTS, J., concurs.

FRASER, J. I concur in so much of the opinion of the Chief Justice as holds that there was testimony tending to show that John H. Cathcart was in possession of the land described in the complaint and that the defendant, Matthews, invaded that possession, and the burden of proof was on the defendant to justify that invasion.

I also concur in so much of the opinion of Mr. Justice WOODS as holds that the statute, having begun to run in favor of John H. Cathcart, was not suspended during his disability.

(91 S. C. 426)

#### WARING v. JENNINGS.

(Supreme Court of South Carolina. May 27, 1912.)

1. APPEAL AND ERROR (§ 1011\*)—FINDING ON CONFLICTING EVIDENCE—CONCLUSIVENESS. The finding of the circuit court on conflicting evidence is not reviewable by the Supreme Court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3983-3989; Dec. Dig. § 1011.\*]

2. APPEAL AND ERROR (§ 931\*)—PRESUMPTIONS—FINDING—DECISION OF ISSUES.

In the absence of a direct finding upon the facts, the rendition of a judgment for plaintiff presupposes that all facts in issue were decided in his favor.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3728, 3762-3771; Dec. Dig. § 931.\*]

Appeal from Common Pleas Circuit Court of Richland County; John S. Wilson, Judge. "To be officially reported."

Action by Malvina S. Waring against R. T. Jennings. Judgment for plaintiff, and defendant appeals. Dismissed.

Tompkins & Lee, of Columbia, for appellant. D. W. Robinson, of Columbia, for respondent.

GARY, C. J. This is an appeal from an order of the circuit court, affirming a judgment for \$87.50 rendered by a magistrate, in an action to recover rent for the use of a house and lot in the city of Columbia. The plaintiff contended that she rented the premises to the defendant for three months, at \$50 per month, commencing December 1,

1910, with the option on the part of the defendant of buying said property during that period. The defendant claimed that he entered into possession of the premises under a parol contract, under which he had the option for 90 days of purchasing said property, with the right to occupy the premises at a stipulated monthly rent during the term of the option. The defendant also set up the defense of estoppel. The defendant vacated the premises on the 2d of January, 1911, by permission of Charles L. Kelly & Co., and took from them the following receipt: "Columbia, S. C., Jan. 20, 1911. Received of R. T. Jennings, fifty dollars on account for rent. \$50.00. Charles L. Kelly & Co., by Davis." This sum of money was received by the plaintiff from Charles L. Kelly & Co., and she wrote a letter to the defendant; but it was not offered in evidence. The following reply to it was, however, introduced in evidence: "Columbia, S. C., Jan. 3, 1912. Mrs. Clark Waring, City—Dear Mrs. Waring: Your note received. Was very much surprised, indeed, to receive same, as I notified your agents Kelly & Co. several days ago, that I had decided not to take the place, also informed them of my intention of moving. Also stated to them that I would send in the key last night, but it was late when I got through moving. Am sending key by boy. I have their receipt for \$50.00 paid them for rent. Very truly yours, R. T. Jennings, M. D."

[1, 2] The two vital questions in the case are: (1) Whether there was any testimony tending to show that the plaintiff rented the premises to the defendant for the period of three months as contended by her; and (2) whether there was any testimony tending to show that Charles L. Kelly & Co. were authorized by the plaintiff to grant permission to the defendant to surrender the premises upon payment of the amount then due. If there was such testimony, then it made an issue of fact, and the findings of the circuit court thereon are not reviewable by this court. In the absence of a direct finding upon the facts, the rendition of the judgment presupposes that all facts in issue were decided in favor of the plaintiff.

The testimony of the witnesses is contradictory as to the terms of the contract, and this question is therefore eliminated from further consideration.

The plaintiff testified: "Mr. Kelly had the house to sell, but not to rent." Charles L. Kelly testified: "I was present when this contract was made. I was trying to make a sale of the house. I didn't have charge of the renting of the house." This testimony tends to show that Kelly & Co. had nothing to do with the renting of the premises.

Appeal dismissed.

WOODS, HYDRICK, WATTS, and FRASER, JJ., concur.

(91 S. C. 429.)

# STATE v. MALLOY.

(Supreme Court of South Carolina. May 28, 1912.)

## 1. CRIMINAL LAW (§ 1134\*)—APPEAL—QUESTIONS PRESENTED FOR REVIEW.

On appeal from an order quashing a panel of petit jurors and an indictment because of an improper panel of the grand jurors, the only question presented for review is, was there error in quashing the indictment on account of illegality in the drawing of the grand jury? any error in quashing the panel of petit jurors, being a mere abstract question, as the same panel would not be again called on to try the accused.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2587, 2653, 2986-2998, 3056, 3067-3071; Dec. Dig. § 1134.\*]

## 2. INDICTMENT AND INFORMATION (§ 137\*)—QUASHING—DRAWING OF GRAND JURY.

Where an indictment charging murder of two persons was found by a grand jury which was drawn by jury commissioners, one of whom was the father of one of the murdered persons, the indictment was properly quashed as to both offenses.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 480-487; Dec. Dig. § 137.\*]

## 3. GRAND JURY (§ 10\*)—DRAWING—STATUTE.

Under Act Feb. 7, 1902 (23 St. at Large, p. 1070) §§ 16, 17, 18, respectively, providing that, whenever the jury list shall be destroyed by fire or has been unlawfully prepared, it shall be the duty of the county auditor, treasurer, and clerk of the court of common pleas to prepare a special jury list, that, when at any time it shall be determined by the resident circuit judge that an irregularity has occurred in the drawing of the juries, it shall be lawful for such circuit judge to issue his order to the county auditor, treasurer, and clerk to proceed to draw jurors, or to take such measures as may be necessary to correct the error, and that, in case there be a vacancy in the office of the clerk, auditor, or treasurer, the county superintendent of education shall act in his place, or, if two of these officers shall be unable to serve, the superintendent and the sheriff of the county shall act in their places, the resident circuit judge has authority to require the drawing of a new grand jury where an indictment is quashed because found by a grand jury unlawfully drawn.

[Ed. Note.—For other cases, see Grand Jury, Cent. Dig. § 27; Dec. Dig. § 10.\*]

Appeal from General Sessions Circuit Court of Marlboro County; John S. Wilson, Judge.

"To be officially reported."

Joe Malloy was convicted of murder, and from an order quashing the indictment the State appeals. Appeal dismissed, and case remanded.

The state's exceptions were as follows: "(1) His honor erred as matter of law in holding that the fact that the defendant was under indictment for killing the son of one of the jury commissioners was a ground for challenge in this case; the deceased being no relation whatever to any one of the jury commissioners. (2) Because his honor abused his discretion in quashing the indictment and sustaining the challenge to the array of

jurors upon the grounds stated. (3) Because it is respectfully submitted that, under the present law governing the constitution of jury commissioners, the preparation and custody of the jury box, and the manner of drawing jurors therefrom, there is no longer any reason for the old common-law rule applicable to the jury commissioner to be applied to an individual member of the present board of jury commissioners; it being respectfully submitted that, even though a single member of the present board of jury commissioners might be impartial, or even prejudiced, still it would be impossible under our present system for him to do any wrong, or be guilty of any official misconduct prejudicial to the rights of a litigant, without the connivance of some other member of the board of commissioners, and in the absence of any charge of actual misconduct as against the action of the jury commissioners, or a suspicion of impartiality against but one, there is no longer any reason for the application of the common-law rule, and his honor erred and abused his discretion in not so holding."

J. Monroe Spears, Sol., of Darlington, for the State. Townsend & Rogers and J. J. Evans, all of Bennettsville, for respondent.

GARY, C. J. This is an appeal by the state from an order quashing an indictment. Upon the call of the case, and before the defendant was arraigned, his attorneys challenged the array of grand jurors on the following grounds: "That the said grand jury was drawn partly in 1911 and partly in 1912 from names put in the jury box by the jury commissioners in 1911 and 1912, respectively, and that the said jurors were placed in the said box by the jury commissioners of Marlboro county and the said grand jurors by the jury commissioners of Marlboro county, and that the said N. B. Rogers, county treasurer for Marlboro county and ex officio a jury commissioner, participated in the placing of the names in the box and in drawing the same therefrom, and that the said N. B. Rogers is the father of Guy Rogers who is charged to have been killed by the same person and at the same time with Prentiss Moore, and that he has been an active prosecutor ever since the alleged crime was committed in endeavoring to collect evidence and bring about the conviction of this defendant, and that he is disqualified to act in either placing in the box the names of the said grand jury or in drawing the names of the jurors therefrom; and the said defendant therefore challenges the validity of the action of the said grand jurors and moves to dismiss the indictment on the grounds aforesaid."

The defendant's attorneys at that time also challenged the array of petit jurors on similar grounds. The following statement appears in the record: "The facts stated in

the challenge were admitted to be true by the state, and counsel for the state admitted in argument that in his opinion N. B. Rogers was disqualified in so far as the case against defendant for killing Guy Rogers was concerned, and that the indictment in that case should be quashed. It is also admitted by the defendant that he had no ground on which to base a charge of any actual wrongdoing on the part of the jury commissioners."

After hearing argument, his honor the presiding judge granted the following order: "It is ordered that the indictment be quashed on the ground that the grand jury finding the bill was drawn by a board of jury commissioners, one of whom was an active prosecutor and employed counsel in this case, and his connection therewith invalidates the same in so far as this case is concerned, but it does not affect the acts of the grand jury or the jury in other cases not connected therewith." From this order the state appealed upon exceptions which will be reported. It will be observed that the defendant was the moving party, and that the state did not seek any affirmative relief whatever.

[1] In the case of *State v. Henderson*, 73 S. C. 201, 53 S. E. 170, this court ruled that, when the state appeals from an order quashing the panel of petit jurors because of relationship between one of the jury commissioners and the deceased, the appeal presents merely an abstract question, as the defendant could not thereafter be tried by jurors drawn from said panel, and accordingly dismissed the appeal. Therefore the only question now before this court for consideration is whether there was error in quashing the indictment on the ground of illegality in the drawing of the grand jury.

[2] The admissions of counsel for the state that the jury commissioner, N. B. Rogers, was disqualified in so far as the case against the defendant for killing Guy Rogers is concerned further narrows the appeal to the consideration of the question whether there was error in quashing the indictment against the defendant for the killing of Prentiss Moore. If the indictment was properly quashed in so far as it charged the defendant with the murder of Guy Rogers, then it was also properly quashed in so far as it charged the defendant with the murder of Prentiss Moore, "for the reason it is charged that, at the same time, and as part of the same transaction at which the said Prentiss Moore was killed, if killed at all, Guy Rogers was killed also."

The rule as to quashing the indictment in such cases is thus stated in *State v. Perry*, 73 S. C. 199, 53 S. E. 169: "The correct rule is that the consanguinity or affinity must be such as would reasonably lead to the presumption that the jury commissioner would thereby be affected in such manner as to impair the proper discharge of his duties,

and this fact must be determined by the presiding judge in the exercise of a sound discretion. It would tend to retard the trial of cases very much to adopt any other rule." There is nothing indicating an erroneous exercise of discretion by the presiding judge in quashing the indictments.

[3] As there seems to be some doubt in regard to the manner of drawing the grand and petit jurors when any of the jury commissioners are disqualified by reason of relationship, we take this occasion to settle the practice in such cases. Sections 16, 17, and 18 of the Act of 1902 (23 Stat. p. 1070) provide:

"Sec. 16. That whenever the jury list of any county shall be destroyed by fire or other casualty, or whenever it shall be held by any court of competent jurisdiction that the jury list of any county has been unlawfully prepared, or is irregular or illegal, so as to render void the drawing of jurors therefrom, it shall be the duty of the county auditor, the county treasurer, and the clerk of the court of common pleas of each county to prepare a special jury list for the said county forthwith in the manner herein prescribed, from which special list grand and petit jurors shall be drawn for the courts of general sessions and common pleas for such county until the annual jury list shall have been prepared for such county as herein provided.

"Sec. 17. That when at any time it shall be determined by the resident circuit judge of any circuit upon complaint made to him, that an irregularity has occurred in the drawing of the juries for any circuit court within his circuit, or that any act has been done whereby the validity of any juries drawn or to be drawn may be questioned, it shall be lawful for such circuit judge to issue his order to the county auditor, the county treasurer, and the clerk of the court of common pleas for each county for which said circuit court shall be held, at least five days before the sitting thereof, to proceed to draw jurors for such term, or take such measures as may be necessary to correct such error.

"Sec. 18. That in case there shall be a vacancy in the office of the clerk of the court of common pleas, county auditor, or county treasurer, at the time herein fixed for preparing said jury list, or for drawing a jury, or any one of said officers shall be disqualified or unable to serve for any cause, the county superintendent of education shall act in his place and stead, and in case there shall be a vacancy in two of said offices, or for any other cause, two of said officers shall be unable to serve, the county superintendent of education and the sheriff of such county shall act in their places and stead."

These three sections are very broad in their terms and are intended to prevent de-

lay or interruption of the business of the court which would arise but for the powers conferred on the resident circuit judge and the court. In this case it appears that a delay of nearly two years in the trial of an important criminal cause would result if the irregularity in the making up of the grand jury cannot be remedied. It cannot be doubted that the sections of the statute above cited confer ample power on the court and the resident circuit judge to afford relief in such a case.

Appeal dismissed.

WOODS, HYDRICK, WATTS, and FRASER, JJ., concur.

(70 W. Va. 780)

SHRADER v. GARDNER et al.  
(Supreme Court of Appeals of West Virginia.  
April 23, 1912.)

(Syllabus by the Court.)

1. MORTGAGES (§ 413\*) — FORECLOSURE—RESTRAINING SALE.

A demand for unliquidated damages for breach of covenant of warranty of land is not ground to enjoin a sale of land for debt under a deed of trust.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 1187-1201; Dec. Dig. § 413.\*]

(Additional Syllabus by Editorial Staff.)

2. WORDS AND PHRASES—"APPURTENANCE."

An "appurtenance" is a thing belonging to and going with the transfer of a principal thing; used with, dependent upon the thing, and essential to it (citing 1 Words and Phrases, 478).

Appeal from Circuit Court, Hancock County.

Bill by John Shrader against William P. Gardner and others. Decree for defendants, and plaintiff appeals. Affirmed.

O. S. Marshall, of New Cumberland, for appellant. E. A. Hart, of New Cumberland, for appellees.

BRANNON, P. William P. Gardner made a deed conveying to James E. McDonald certain land in Hancock county. In this deed we find a clause reading as follows: "Subject however to a pipe line lease to the Ohio Valley Gas Company and Ruth M. Croxall, which said second part assumes and receives all benefits and rentals derived therefrom." At the time of the execution of that deed McDonald made a deed of trust conveying the same land to William Croxall to secure to Gardner payment of \$7,500, a part of the purchase money which McDonald agreed to pay Gardner for the land. Later McDonald conveyed the same land to John Shrader. The covenant of warranty in this deed excepted said deed of trust, so that Shrader held the land expressly subject to the deed of trust. Later the trustee under the deed of trust gave notice of sale of the

land for the payment to Gardner of the purchase money due him from McDonald, when Shrader filed a bill of injunction to stop the sale. The injunction was dissolved, and Shrader obtained the appeal now in hand.

[1] The bill of injunction alleged in general terms that various payments on the Gardner debt had been made by McDonald, and other payments by him, and that Gardner had received money rentals from the Ohio Valley Gas Company, and that such payments and rentals had fully discharged the debts. The bill made this general charge, without any specification of amounts or dates of payments. The bill is bad for this, I would say. Gardner filed an answer flatly denying that the debt had been paid, but admitting numerous payments, giving amounts and dates, and averring that a large sum specified yet remained unpaid on his debt, and denying that he had ever received a dollar for rentals from the gas company. This answer was verified by affidavit. No replication to this answer. For that reason, and for the reason that the answer denies all the material allegations of the bill on which the injunction rests, and there is no proof of them, other than the affidavit to the bill, under law the dissolution was proper.

But there is another reason justifying such dissolution. Shrader claims in his bill that Gardner received rental from the gas company. As just stated the answer denies this, and the allegation is fruitless because, first, the answer is not replied to; second, if it had been, there is no proof of it. But when we examine the instrument relating to the pipe line lease from Gardner to the Ohio Valley Gas Company we find that it stipulates for no money rental to Gardner. In consideration of 30 cents per lineal rod Gardner granted to the gas company an easement to lay a pipe line through this land to convey gas. This was 10 years before the conveyance by Gardner to McDonald, and of course that 30 cents per rod had been paid, and the clause in the deed from Gardner to McDonald quoted above, saying that the conveyance was subject to the pipe line lease, had no reference to that money. Further, it is not rental. The pipe line lease provided for no money payments for rentals or for any cause, except the 30 cents per rod. The fact must be taken to have been known by McDonald, as well as Shrader, because they were put upon inquiry and given notice by that clause in the deed from Gardner. It appeared in their chain of title. The instrument constituting the pipe line lease provided that Gardner should have right to sufficient gas of the pipe line for use in one house. Gardner transferred this right to Rigby years before the land was conveyed to McDonald. McDonald did not convey this right to Shrader in words.

[2] Then the question comes: Has Shrader any right to it? Does the warranty extend to it? Is there a covenant that he shall have

the benefit as appurtenant to it, or as a covenant running with the land? I scarcely think so. It is not mentioned in Shrader's deed. It cannot be an appurtenance. That is a thing belonging to and going with the transfer of a principal thing; used with, dependent upon that thing. 3 Cyc. 565. Essential to it, used with it. *Com. v. Sanders*, 5 Leigh (Va.) 751. A thing will not pass as appurtenant, unless essential to the main thing. 2 Am. & Eng. Ency. Law, 522, note; 1 Words and Phrases, 478. For a covenant to run with land it must be a grant of it or an interest in it. *Hurxthal v. Boom Co.*, 53 W. Va. 87, 44 S. E. 520, 97 Am. St. Rep. 954. We must note that the contract between Gardner and the gas company does not grant or covenant for right to use gas in a residence situate on the land, as gas leases generally do. It is not a right limited to the land. It is not a lease to take gas from the land. It gives no such right. It simply grants right to pass gas from other lands by pipe through this land. Gardner could use the gas on any land. It is a personal right to him. As before stated, Shrader's deed does not mention this gas right. It is a right not issuing out of land. But we need not, and do not, decide the question whether his deed gives any right to the gas; for if we say that the right is guaranteed by the covenant, or belonged to the land, then I say that McDonald conveyed that right by the deed of trust along with the land to secure Gardner's debt, and I cannot see how he can come in and claim against that deed of trust when he yet owed the debt. It would be a subject conveyed by that deed of trust. But aside from that, if Shrader or McDonald would be entitled to that gas right, what would be the character of that right? If anything, it would be an action of damages for breach of warranty, a collateral matter, a claim for unliquidated damages, which could not be set off against a deed of trust by way of injunction. Must the trustee wait until unliquidated damages shall be liquidated? A mortgagee cannot discharge the mortgage debt by setting off against it a personal demand for unliquidated damages. 27 Cyc. 1392. They cannot be set off against a deed of trust. *Cleaver v. Matthews*, 83 Va. 801, 3 S. E. 439; *Robertson v. Hogshead*, 80 Leigh (Va.) 667. This principle is approved in the opinion in *Koger v. Kane*, 5 Leigh (Va.) 606. I find such to be the general law. High on Injunctions, § 444, says: "And the fact that the mortgagor has unliquidated demands against the mortgagee which he desires to set off against the indebtedness secured by the mortgage will not warrant an injunction against a sale under a power contained in the mortgage, since the rule is regarded as well settled that unliquidated damages cannot be pleaded by way of set-off to proceedings in equity."

We affirm the decree.

(70 W. Va. 777)

**SCOTT v. COAL & COKE RY. CO.**(Supreme Court of Appeals of West Virginia.  
April 23, 1912.)*(Syllabus by the Court.)***APPEAL AND ERROR (§ 395\*) — DISMISSAL — FAILURE TO PERFECT PROCEEDINGS.**

Failure to perfect an appeal, writ of error, or supersedeas, by giving the bond required by law and the order of the court or judge awarding it, within one year and two months from the date of the judgment, decree, or order involved, makes it the mandatory duty of the appellate court, under section 17 of chapter 135 of the Code, to dismiss the appeal, writ of error, or supersedeas, although the bond has been given after the expiration of such period.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2064-2070, 3127; Dec. Dig. § 395.\*]

Error to Circuit Court, Randolph County.

Action by Cora L. Scott against the Coal & Coke Railway Company. Judgment for defendant, and plaintiff brings error. Dismissed.

C. H. Scott and H. G. Kump, both of Elkins, for plaintiff in error. E. A. Bowers, of Elkins, and Price, Smith, Spilman & Clay, of Charleston, for defendant in error.

POFFENBARGER, J. The interpretation of section 17 of chapter 135 of the Code, as amended by chapter 39 of the Acts of 1909, arises on a motion to dismiss this writ of error, on the ground of failure to perfect it within the statutory period. Final judgment was rendered November 25, 1909; the petition for the writ of error was presented November 25, 1910; the writ of error was allowed and the summons issued November 29, 1910; an alias summons, issued May 2, 1911, was served May 5, 1911; and the bond was given before the clerk of the circuit court on the day of the service.

The presentation of the petition was admittedly within the period allowed by section 3 of chapter 135 of the Code; but, as the bond was not given until more than one year and two months after the date of the judgment, section 17 of said chapter is relied upon as requiring dismissal. The applicable portion of that section reads as follows: "No process shall issue upon any appeal, writ of error or supersedeas allowed to or from a final judgment, decree or order, if when the record is delivered to the clerk of the appellate court there shall have elapsed one year and two months since the date of such final judgment, decree or order, but the appeal, writ of error or supersedeas shall be dismissed whenever it appears that one year and two months have elapsed since the said date before the record is delivered to such clerk, or before such bond is given, as is required to be given before the appeal, writ of error or supersedeas takes effect." Whether the last clause of the provision here quoted is independent, and merely requires dismissal

al for failure to give the bond, or requires dismissal for failure to give it within one year and two months from the date of the judgment, is the question. Though the disjunctive "or" is used, it is followed by the word "before," which necessarily relates to time. The provision says, not that the appeal, writ of error, or supersedeas shall be dismissed for failure to give the bond, but that it shall be dismissed whenever it appears that one year and two months have elapsed since the date of the final judgment, decree, or order before such bond is given. To give it the former meaning, it would be necessary to substitute, for the preposition "before," the words "if no" or "unless." Either would manifest legislative intent accordant with the contention made here for the plaintiff in error, but the word "before" expresses a different intention. To sustain the view of the plaintiff in error, that word would have to be utterly changed, and the court cannot alter it. Limitation of the right to appeal and of the time within which an appeal may be perfected is in the discretion and power of the Legislature. Courts have no authority to ignore, set aside or annul the legislative will.

By allowing one year and two months for the execution of the bond after the allowance of the appeal, writ of error, or supersedeas, or presentation of the petition therefor, effect could be given to the statute without ignoring or altering the word "before"; but such an interpretation would conflict with the plain legislative intention indicated by other terms. The period from which to count the time is fixed by preceding terms which cannot be altered. The beginning point is the date of the judgment, decree, or order complained of, and the clause of the section now under consideration, read in the light of its context and connection, requires the bond to be given before "one year and two months have elapsed since the said date." Surely, the Legislature did not intend an allowance of a year and two months for the mere execution and filing of the bond to make the appeal, writ of error, or supersedeas effective, for such a result would be clearly contradictory of the general purpose of the statute, namely, to limit the right of appeal to one year, and then allow two months' additional time for perfection thereof by securing the process, service thereof, and execution of the bond. Strictly speaking, no appeal, writ of error, or supersedeas exists, until the bond is given, in those cases in which bond is required. The statute says it shall not take effect until the bond shall have been given. Code, c. 135, § 14. The plain design of the two sections here involved is to require the petition to be presented within one year from the date of the judgment, decree, or order, and allow two months' additional time for performance

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes



of all additional things requisite to the transfer of the cause into the Supreme Court.

This interpretation of the statute harmonizes with the rulings of the Virginia court under similar statutes. Under Code 1849, c. 182, § 17, the limitation read as follows: "But the appeal, writ of error or supersedeas shall be dismissed whenever it appears that five years have elapsed since the said date before the record is delivered to such clerk, or before such bond is given as is required by law to be given before the appeal, writ of error or supersedeas takes effect." And the court held, in *Yarborough v. Deshazo*, 7 Grat. 374, not only that the bond must be given within five years from the date of the judgment or decree, but also that the statute was mandatory, requiring dismissal for failure and leaving no discretion in the court as to its action. To the same effect see *Otterback v. Railway Co.*, 26 Grat. 940, and *Pace v. Ficklin*, 76 Va. 292.

Our conclusion, therefore, is to dismiss the writ of error.

(70 W. Va. 697)

**PERRY v. OHIO VALLEY ELECTRIC RY. CO.**

(Supreme Court of Appeals of West Virginia.  
April 23, 1912.)

*(Syllabus by the Court.)*

**1. ELECTRICITY (§ 17\*)—NEGLIGENCE—LIABILITY OF GENERATING COMPANY.**

There is no obligation upon a generating company, that sells and delivers electricity to a distributing company, to see that the lines of the latter company, over which the current is to be carried to the consumer, are in safe condition. The former is not liable for the negligence of the latter.

[Ed. Note.—For other cases, see *Electricity*, Dec. Dig. § 17.\*]

**2. ELECTRICITY (§ 17\*)—INJURIES—COMPANIES LIABLE—DISTINCT ENTITIES.**

It is not to be inferred that two corporations are in legal effect one and the same, so as to make one liable for the negligence of the other, simply because they have the same men as officers, employ the same laborers, and apportion between themselves the charges therefor.

[Ed. Note.—For other cases, see *Electricity*, Dec. Dig. § 17.\*]

Error to Circuit Court, Cabell County.

Action by John W. Perry against the Ohio Valley Electric Railway Company. Judgment for plaintiff, and defendant brings error. Reversed and remanded.

Vinson & Thompson, of Huntington, for plaintiff in error. Isbell & Perry, of Huntington, for defendant in error.

**WILLIAMS, J.** Plaintiff recovered a judgment for \$6,000 against defendant for alleged negligence in causing the death of his intestate, and defendant has brought the case here on writ of error.

Merrill Perry, plaintiff's intestate, a boy 11 years old, was killed in the following manner, viz.: He and a number of other boys were playing in one of the streets of the town of Guyandotte, near a guy post, or "stub," to which was tied a guy wire supporting one of the poles between which was suspended one of the arc lamps used to light the street. The stub stood about 1 foot from the board sidewalk, and the guy wire was tied around it about 7 feet above the walk, and around the top of the electric light pole, which was about 28 feet high and stood 40 feet away from the stub. The guy wire was fastened around the electric light pole about 2 inches above the span wire supporting the arc light, and came in contact with it, and, because of lack of insulation between the span wire and the electric light wire, became charged with electricity, and had been so charged for a week or more before the accident. One of the older boys in the group picked up a piece of telephone wire, about 8 feet long, lying in the gutter, bent one end of it to form a hook, and hung it over the guy wire. The loose end of the wire hung down near the sidewalk, and the boys would amuse themselves by standing upon the sidewalk and touching or catching hold of the wire. The board walk being a very imperfect conductor of electricity, the boys would thus experience only a slight shock. One of the boys on the walk pulled on the wire and then let go of it, and it swung away from the sidewalk, and Merrill Perry, who was standing on the ground, caught hold of it and was instantly killed.

Three defenses are set up to the action:

(1) That defendant does not own, control or operate the electric light wire and poles where plaintiff's intestate was killed, and only furnishes electricity to the Consolidated Light & Railway Company, another corporation, that owns and controls the wire and poles in question; (2) that there was an intervening, independent agency, to wit, the hooking of the loose wire over the guy wire, which was the proximate cause of the injury; and (3) that deceased was guilty of contributory negligence.

[1] The proposition involved in the first point of defense was decided by us in *Fickelsin, Adm'r, v. Wheeling Electrical Co.*, on March 29, 1910, reported in 67 W. Va. 335, 67 S. E. 788, 27 L. R. A. (N. S.) 893. The relation, proven in that case to exist between the Wheeling Electrical Company and the Bridgeport Electrical Company, was almost, if not quite, identical with the relation proven to exist in the present case between defendant, the Ohio Valley Electric Railway Company, and the Consolidated Light & Railway Company. In that case John P. Whitney came in contact with a live wire used in lighting the streets in the town of Bridgeport, Ohio, and was killed. In a suit

by his administrator against the Wheeling Electrical Company, it was proven that the Wheeling Company generated the electricity, sold and delivered it to the Bridgeport Company, at the end of the bridge spanning the Ohio river, and that the latter company owned and operated the poles and wires where deceased was killed. That was the first case in which this court was called on to decide whether a generating company, that sells and delivers electricity to a distributing company, is liable for the negligence of the latter in failing to keep its own poles and wires in repair. After a careful consideration of that case, and of all the principles which we thought had any bearing upon its proper determination, and the decisions of courts of other states bearing on the question, we held that the selling company was not liable.

In the present case it is proven, and not denied, that the Ohio Valley Electric Railway Company developed the electricity at its generating plant in the town of Kenova, sold and delivered it to the Consolidated Light & Railway Company, by meter, at the former company's substation near the city of Huntington, and that it did not own or control the poles and lighting wire which carried the electricity that killed the boy. Unless we reverse our holding in the Fickelsin Case, we must reverse the judgment of the lower court in this case.

[2] But it is contended that there is sufficient evidence in the case to justify the jury in finding that the two companies were practically one and the same. We do not think so. True, the evidence does show that they have practically the same officers; that Thomas Hayes is secretary and manager of both companies; that the employees of the Ohio Valley Electric Railway Company performed services also for the Consolidated Light & Railway Company, and were paid partly out of the treasuries of both companies. This, however, is about the same state of facts as existed in the Fickelsin Case, and we there held that such facts were not sufficient to prove that the two companies were practically one and the same, or that the Wheeling Electrical Company had assumed the obligation to keep the lines and poles in Bridgeport in proper condition. The Consolidated Light & Railway Company was incorporated in 1892. The Ohio Valley Electric Railway Company is but a continuation of the Camden Interstate Railway Company, which was incorporated in 1899, and changed its name to the name of this defendant in 1908. The two corporations make separate reports to the state. The salaries of the officers, likewise of the employees who serve both companies, are apportioned between them. It does not appear that the stockholders are identical and hold their shares of stock in

the same proportion in the two companies. This, we think, is necessary to constitute them, in effect, one and the same corporation. So far as the record discloses, they are separate and distinct entities. Therefore, granting that the evidence is sufficient to prove negligence on the part of the Consolidated Light & Railway Company, a question which we do not decide, still there is no liability on this defendant.

It is unnecessary to enter into an elaborate discussion of the same question which was so recently decided by us in the Fickelsin Case. We simply reaffirm our opinion in that case, and adopt the discussion therein made of the question of law, as being applicable here. The other points raised are, therefore, rendered immaterial. The judgment will be reversed, the verdict set aside, and the case remanded for a new trial.

(70 W. Va. 754)

#### ELECTRO METALLURGICAL CO. v. MONTGOMERY.

(Supreme Court of Appeals of West Virginia.  
April 23, 1912.)

(Syllabus by the Court.)

#### 1. LOGS AND LOGGING (§ 3\*) — LEASE OF LAND—CONSTRUCTION—TIMBER.

A lease of land by deed for ninety-nine years with appurtenances, including mining, lumbering and riparian rights, and as construed by the parties, is a grant of all the timber in place that may at the election of the lessee be removed by him or his assignee within the term of the lease.

[Ed. Note.—For other cases, see Logs and Logging, Cent. Dig. §§ 6-12; Dec. Dig. § 3.\*]

#### 2. LOGS AND LOGGING (§ 3\*) — CONTRACT — CONSTRUCTION—OPTION TO PURCHASE.

A contract, not a deed, between such lessee and another, whereby the latter agrees to locate a saw mill on the land and to saw and deliver to the former, as provided, "all the white oak and chestnut oak," he may find on the land "large enough to fill the bill," attached thereto, at a stipulated price, provided the lessee "will agree to sell" such contractor "all the lumber on said land other than the oaks above mentioned at the rate of \$1.50 stumpage and give" him "free of charge all the side boards, etc., that he may get off said oak in bringing it to sizes specified in bill," he to "be allowed to cut all lumber he may wish on said premises not less than 12 inches at butt," is not an absolute sale of the timber other than the white oak and chestnut oak, but constitutes a mere option to purchase and remove the same, which if not exercised within a reasonable time will be treated as abandoned.

[Ed. Note.—For other cases, see Logs and Logging, Cent. Dig. § 612; Dec. Dig. § 3.\*]

#### 3. INJUNCTION (§ 52\*)—TRESPASSING.

Equity will enjoin the cutting of timber on land at the suit of the owner thereof against a trespasser with no right or title thereto.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 105; Dec. Dig. § 52.\*]

Appeal from Circuit Court, Fayette County  
Bill by the Electro Metallurgical Company against J. W. Montgomery. Decree for

defendant, and plaintiff appeals. Reversed, and decree for plaintiff.

Payne & Hamilton, of Fayetteville, for appellant. Osenton, McPeak & Horan, of Fayetteville, for appellee.

MILLER, J. On final hearing on bill, answer and proofs, the court below, by the decree appealed from, dissolved the injunction theretofore awarded, restraining defendant from cutting and removing the standing timber on a tract of four hundred and fifty acres of land and from cutting into lumber and removing logs already cut therefrom, and dismissed the bill.

Plaintiff asserted right and title to this timber as assignee of a lease of the land for ninety-nine years, from Charles Reader to the Wilson Aluminum Company, a corporation, dated May 28, 1897, the assignment being by deed dated January 30, 1907. The particular provision of the lease especially relied on is: "With appurtenances unto said party of the second part including mineral, lumbering and riparian rights, and all rights that the said party of the first part now has in respect to the water power incident to said lands, and with full power of assigning this lease and sub-letting the said lands and the water powers and other rights appurtenances thereto either in whole or in part separately or together, subject to the terms and conditions herein contained, and with the rights in such sub-leases of assignees to remove his or their plant at the expiration of the terms of their leases provided all the terms and conditions of their leases having been fully complied with."

Defendant in his answer claims right and title to the timber which he was enjoined from cutting under an unrecorded contract with the Wilson Aluminum Company, dated August 26, 1899, but of which he alleges and the proof is plaintiff had notice, whereby he agreed to locate a saw mill upon said land and "to saw and deliver to said company" at a point designated below the Kanawha Falls, "all the white oak and chestnut oak" that he might find on said land "large enough to fill the bill" attached thereto, and as otherwise provided, "at the rate of \$12.50 per thousand feet, *provided said company, will agree to sell said Montgomery all the lumber on said land other than the oaks above mentioned at the rate of \$1.50 stumpage and give the said Montgomery free of charge all the side boards, etc., that he may get off said oak in bringing it to sizes specified in bill.*"

\* \* \* Said Montgomery to be allowed to cut all lumber he may wish on said premises not less than 12 inches at butt." The other provisions of the contract are immaterial to the issues presented.

Plaintiff relying on said lease contract and its assignment thereof alleges in its bill good title to said timber, with right and power to sell and dispose of the same; that the chief

value of said land, aside from its riparian rights, is the coal and the growing and standing timber thereon; that said timber is necessary for carrying on the mining operation thereon, by a coal company, an under tenant, which requires large quantities of timber; and that the removal of said timber would irreparably injure plaintiff and said land for coal mining purposes; but it is not alleged or proven that defendant is insolvent.

Defendant relying on his said contract answers that he had possession of said land at the time plaintiff acquired said property, and that he "was the owner of all timber then on said land, which would measure at the butt not less than twelve inches."

[2] The contract pleaded and relied on by defendant was not an absolute sale and purchase of the timber, other than the white oak and chestnut oak which he thereby bound himself to saw and deliver to the Aluminum Company. It amounted to nothing more than an option to him to purchase, remove and pay for the timber optioned within a reasonable time, not a sale and conveyance of the timber in place, to be removed at his pleasure, and limiting him to the timber twelve inches in diameter at the butt at the date of the contract. *McRae v. Stillwell*, 111 Ga. 65, 36 S. E. 604, 55 L. R. A. 513, and note, pp. 523, 533. Not having elected to take and pay for the timber claimed under his contract within a reasonable time, defendant must be treated as having abandoned the only remaining right he had, after completing his contract to saw and deliver to the Aluminum Company the oak timber as provided therein. He did not purchase the timber claimed by him, nor bind himself to take and pay for it at the price stipulated. He took no title to the timber, only an option to buy, which he failed to exercise, therefore he acquired no right or title to the timber to assert against plaintiff. The question is one of law, therefore, for the court, and not for the jury, and it is unnecessary to remit the parties to an action in ejectment to try title, if plaintiff has shown good title.

The bill we think good on demurrer, and contains all the necessary averments entitling plaintiff to relief, namely, good title in plaintiff, threatened and wrongful destruction of the timber by defendant, and irreparable injury. *Fluharty v. Mills*, 49 W. Va. 446, 38 S. E. 521; *Pardee v. Camden Lumber Company*, 73 S. E. 82.

[1] The lease contract and the assignment thereof to plaintiff, we think, proves good title to the timber, at least such right thereto as entitles the plaintiff to protection against the defendant's trespass. It is said the legal title to the timber is in the lessor, Reader. But the lease is for ninety-nine years, with mining, lumbering and riparian rights. The lease is a deed granting these rights. Lumbering rights could mean nothing less, and the parties thereto have construed the contract as granting the right to

take the timber and convert it into lumber at the election of the lessee or its assignee at any time during the term of the lease. Such a sale of the timber is in legal effect a conveyance of so much of the timber in place as may be removed within the term of the contract. *McRae v. Stillwell*, supra; *Null v. Elliott*, 52 W. Va. 229, 43 S. E. 173; *Adkins v. Huff*, 58 W. Va. 645, 52 S. E. 773, 3 L. R. A. (N. S.) 649, 6 Ann. Cas. 246; *Keystone Co. v. Brooks*, 65 W. Va. 512, 64 S. E. 614; *Brown v. Gray*, 68 W. Va. 555, 70 S. E. 276.

[3] The right to the timber with privilege of removing it, or using it for mining purposes, as the bill alleges plaintiff has contracted its use, we think, upon the rules and principles enunciated in *Pardee v. Camden Lumber Co.*, supra, entitle it to protection by injunction against the trespasses of defendant. It is unnecessary here to do more than refer to that case for the reasoning and the rules and principles controlling this case.

Our conclusion is to reverse the decree below, and to enter such decree here as we think the circuit court should have entered, perpetually enjoining the defendant as prayed for in the bill.

(70 W. Va. 787)

**BUMGARNER et al. v. FIRST NAT. BANK OF PARKERSBURG.**

(Supreme Court of Appeals of West Virginia.  
April 25, 1912.)

(Syllabus by the Court.)

**1. TAXATION (§ 722\*)—REDEMPTION FROM TAX SALE—PROCEEDINGS—BURDEN OF PROOF.**

In a proceeding under Code 1906, c. 31, § 16 (section 874), by a tax purchaser to contest the right of a creditor of the delinquent taxpayer to redeem the land sold for taxes, the burden is on the creditor to prove that his debtor has an interest in the property sold for taxes chargeable with his debt, and that the creditor has right to redeem.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. §§ 1449-1453; Dec. Dig. § 722.\*]

**2. JUSTICES OF THE PEACE (§ 129\*)—PROCEEDINGS—JUDGMENT—COLLATERAL ATTACK.**

Though the transcript from a justice's docket does not show that five days elapsed between the date of service of the summons and a judgment, yet, if the justice has jurisdiction, the judgment is not void and open to collateral attack only for the failure of the docket to show such fact.

[Ed. Note.—For other cases, see *Justices of the Peace*, Cent. Dig. §§ 408-411; Dec. Dig. § 129.\*]

**3. JUSTICES OF THE PEACE (§ 138\*)—PROCEEDINGS—JUDGMENT—DOCKET ENTRIES.**

If a justice has jurisdiction of a case, there is a presumption that due steps and proceedings were had in the proceedings of the action; and a failure of the docket to show that proceedings were regular will not make a judgment void.

[Ed. Note.—For other cases, see *Justices of the Peace*, Cent. Dig. §§ 449-464; Dec. Dig. § 138.\*]

**4. TAXATION (§ 697\*)—REDEMPTION FROM TAX SALE—PERSONS ENTITLED TO REDEEM.**

It is not essential that a judgment be docketed in the judgment lien docket to enable the judgment creditor to redeem land sold for taxes.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. §§ 1394-1400; Dec. Dig. § 697.\*]

**5. TAXATION (§ 697\*)—REDEMPTION FROM TAX SALE—PERSONS ENTITLED TO REDEEM.**

To enable a judgment creditor of one of two or more partners to redeem partnership land sold for taxes in the name of the firm, it is not required that such creditor shall show that after payment of partnership liabilities a surplus of assets will remain.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. §§ 1394-1400; Dec. Dig. § 697.\*]

Error to Circuit Court, Wirt County.

Action by C. D. Bumgarner and another against the First National Bank of Parkersburg. Judgment for plaintiffs, and defendant brings error. Reversed and rendered.

T. A. Brown, of Parkersburg, for plaintiff in error. Walter Pendleton, of Spencer, and Bruce Ferrell and Albert Smith, both of Grantsville, for defendants in error.

BRANNON, P. [1] The First National Bank of Parkersburg obtained a judgment before a justice against R. B. Graham. John P. Bumgarner made a deed conveying two lots of land in the town of Elizabeth to "Graham & Co." These lots were sold for taxes in the name of Graham & Co., and were purchased by D. H. Bumgarner. The said bank, claiming that its debtor, R. B. Graham, had an interest in the said lots as one of the firm of Graham & Co., and claiming as his creditor by said judgment a right to redeem the property from said tax sale, tendered the money to Bumgarner in redemption of said lots; but Bumgarner refused to receive it and denied the right of redemption, and the bank deposited the money with the clerk of the county court. Later Bumgarner gave the bank notice that he disputed the bank's right to redeem, and requiring it to appear before the circuit court of Wirt county and prove its right to redeem from the tax sale. This proceeding is allowed by Code 1906, c. 31, § 16 (section 874). The case was tried by the court, and the court refused to allow redemption, and directed a deed to be made under the tax sale by the clerk to Bumgarner, and the bank has sued out a writ of error.

The section of the Code just referred to in words places the burden of proof of the right to redeem on the person claiming such right, as it authorizes a notice to him to appear "and prove his or their right to redeem," and says that, if he "fail to prove to the satisfaction of the court that he has right to redeem," the court shall make an order accordingly and direct a deed to be made to the tax purchaser. Bumgarner claims that the bank failed to prove its right to redeem. He says that the bank has

not shown that R. B. Graham, its debtor, was one of the firm of Graham & Co. The lots were purchased by D. H. Bumgarner, and he died, and the proceeding was revived in the name of Claud D. Bumgarner, his heir, as plaintiff. A deed was made by Graham & Co. to Claud D. Bumgarner for the lots, and this recites that the partnership of Graham & Co. was composed of Richard B. Graham and D. N. Graham. This recital of the fact by a deed to which Claud D. Bumgarner was a party, with some other evidence, proves that R. B. Graham was one of the firm owning the lots.

[5] The plaintiff says that the bank failed to show that after payment of partnership debts there would be a surplus belonging to the partners, so as to say that R. B. Graham had an interest in the lots entitling his creditor to redeem. We are cited to *Conaway v. Stealey*, 44 W. Va. 163, 28 S. E. 793, holding that "partnership assets must be first applied to the extinguishment of partnership debts, and a partner has no leviable interest, so far as individual debts are concerned, until the partnership debts are satisfied." That case only means that social debts must be first paid. It recognizes an interest in the partner after them. So does *Kenneweg v. Schilansky*, 45 W. Va. 521, 31 S. E. 949. It is surely true that an execution against one of the firm can create a lien on his contingent interest. A judgment would create a lien on his interest in the firm—that interest in him after firm debts. 30 Cyc. 599. We cannot say that this contingent or probable, or even possible, interest will not entitle a creditor of one of the firm to redeem land sold for taxes in the name of the firm. The debtor may have an interest, a large interest. We can hardly demand that the creditor of one of the partners must have the partnership settled, or enter into illimitable evidence to show a surplus after payment of social debts. The interest is enough for a basis of redemption.

[2, 3] The plaintiff attacks the bank's judgment as void. The Code of 1906, c. 50, § 26, says, as to trials in a justice's court, that "no trial shall be had or judgment rendered in less than five days after the summons has been served on the defendant." The exhibit from the justice's docket does not show the date of service, and this is said to make the judgment void. A justice's court is statutory, limited in jurisdiction, not a court of record. *Roberts v. Hickory Camp*, 58 W. Va. 276, 52 S. E. 182. And we are cited *Mayer v. Adams*, 27 W. Va. 244, saying that there is no presumption of jurisdiction in a magistrate's court; but all facts essential to jurisdiction must appear. *Shank v. Ravenswood*, 43 W. Va. 242, 27 S. E. 223. But here there is clear jurisdiction; but the question is: As the statute prohibits trial in less than five days after service, must the docket show the fact that such time elapsed? It is argued that it is

not a mere ordinary requirement that such fact be shown; but the statute expressly prohibits judgment in less than five days after service, giving defendant that time for defense, and, as this judgment is by default, the docket does not show a fact without which the justice could not proceed; and as section 179, c. 50, requires the return to be stated, there is no more important fact to be stated than the date of service. This position impressed me. But we have two cases which we conclude rule on this point. *Moren v. American Fire-Clay Co.*, 44 W. Va. 42, 28 S. E. 728, holds that a justice's docket, noting return of a summons, is not so conclusive as to render a judgment void, for the reason that such return, as set out in the transcript, is defective, as the justice is not required to make other than a brief note of the return on his docket. The whole record was not present, and, if present, it might show a proper return. In *Horner v. Huffman*, 52 W. Va. 40, 43 S. E. 132, this identical question was up; that is, that the justice's transcript failed to show that the summons was served at least five days before judgment. It was claimed that the judgment was void; but it was held otherwise. The opinion discusses the subject. It was held that when once jurisdiction is shown there is a presumption that the steps in the proceeding were proper, the contrary not appearing, and the judgment could not be collaterally attacked for the failure of the docket to show the fact. It would be taken to be the fact until the contrary be shown. In this case, the summons is not in the record to show date of service. There is no question that the justice had jurisdiction; and, this being shown, mere omissions and irregularities in procedure will not render the judgment void any more than in courts of record. This should be so. Such omissions do occur in justice's courts, and if such rigid rule is applied many, many judgments would fall. The docket shows that the summons was executed. If we hold this to make the judgment void, how many judgments would be affected? The case of *Moren*, above, would say this is sufficient to repel collateral attack. So does *Horner v. Huffman*.

[4] The judgment does not appear to have been docketed in the judgment lien docket. It is argued that the tax purchaser is a purchaser for value, without notice of the judgment; and therefore the bank could not redeem. We do not think that this is a point relevant to the case, or that the subject of purchaser for value has any place in the case. The statute gives an absolute right to a judgment creditor to redeem from tax purchaser. We say that a judgment creditor may redeem, whether the tax purchaser have notice of the judgment or not. The statute gives the creditor right to redeem from the purchaser; and it is no matter whether the purchaser have notice of the judgment or not. There is an absolute right

given him to redeem from tax purchaser, not conditional upon docketing or notice of the judgment. Such purchaser is not a purchaser for value under the equity rule of purchaser, without notice.

We reverse the judgment, and consider that the bank had right to redeem from D. H. Bumgarner the lots purchased by him at the tax sale in the record mentioned, and that the bank has effectually redeemed the same from such tax sale, and that D. H. Bumgarner had in his lifetime, and since his death Claud D. Bumgarner, his heir, has, no right to have the said lots conveyed to him by the clerk of the county court of Wirt county, under such tax sale, and said lots are freed from said tax sale. Claud D. Bumgarner has right to receive from said clerk the money deposited with said clerk by the bank in redemption of said lots.

(70 W. Va. 772)

#### STATE v. ANGUS.

(Supreme Court of Appeals of West Virginia.  
April 23, 1912.)

#### (Syllabus by the Court.)

#### 1. INDICTMENT AND INFORMATION (§ 140\*)—MOTION TO QUASH—LIMITATIONS.

On a motion to quash an indictment for a misdemeanor, showing the date of the offense, but not the date of the finding, the order of the court, showing the date of the return of the indictment, may be read in negation of the claim of a defense under the statute of limitation, apparent upon the face of the record, and also as showing indictment within statutory time.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 474, 475; Dec. Dig. § 140.\*]

#### 2. GRAND JURY (§ 40\*)—ADMINISTRATION OF OATH—PRESUMPTIONS.

An order, showing a grand jury by whom an indictment was found were sworn as such, is aided by a presumption that the oath administered was such as the law requires, and is sufficient, unless the order shows the contrary.

[Ed. Note.—For other cases, see Grand Jury, Cent. Dig. §§ 83-85; Dec. Dig. § 40.\*]

#### 3. CRIMINAL LAW (§ 200\*)—FORMER JEOPARDY—MERGER OF OFFENSE.

The offense of carrying an unlawful weapon is not merged in an indictment for maiming with the weapon alleged to have been so carried; the two offenses being wholly separable and legally independent.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 347, 388-409; Dec. Dig. § 200.\*]

Error to Circuit Court, Raleigh County.

Bill Angus was convicted of carrying deadly weapons, and brings error. Affirmed.

File & File, of Beckley, for plaintiff in error. Wm. G. Conley, Atty. Gen., for the State.

POFFENBARGER, J. Bill Angus, convicted of violation of the statute inhibiting the carrying of pistols and other deadly weapons, sentenced to a six months' term of imprisonment, and adjudged to pay a fine

of \$50, complains of the rulings of the court on his demurrer to the indictment and his motion to quash the same, both of which the court overruled, and also of other rulings which will be noticed later in this opinion.

So much of the indictment as relates to the charge of the offense conforms to the requirements of the decision in *State v. Welch*, 72 S. E. 649. It alleges the prisoner "on the 6th day of November, 1910, did unlawfully carry about his person a certain pistol without a state license therefor." The statute makes it unlawful for any person without a state license to carry about his person any revolver or other pistol, or any one of certain other kinds of deadly weapons. Those having licenses are excepted in the enacting clause of the statute, wherefore it is necessary to put this exception in the indictment. Persons other than licensees, under certain circumstances, are also excepted by a proviso; but the rules of criminal pleading do not require negation in the indictment of the character or circumstances, authorizing the carrying of such weapons without a license, under the proviso. Thus far the indictment is clearly good.

[1] Failure of the indictment to show on its face commission of the offense within one year preceding the finding thereof is relied upon as a fatal defect. Though it gives the date of the offense, it does not show on its face the date of the finding. Hence it does not appear from the face thereof that it was found within such period. Two opinions of this court say an indictment for a misdemeanor must show this on its face. *State v. Ball*, 30 W. Va. 382, 4 S. E. 645, and *State v. Bruce*, 26 W. Va. 153. In the former, the indictment set forth the date of the commission of the offense, and the court said it showed upon its face that the offense was committed more than one year before it was found. As that indictment was in the usual form, containing the recital, "Found at the April term of said court for the year 1884," etc., it did disclose upon its face the charge of an offense which had been barred by the statute of limitations at the time of the indictment. In the latter case, *State v. Bruce*, the indictment failed to show the time of the commission of the offense and to charge, in general terms, that it had been committed within one year. Neither of these cases presented the exact question raised here. This indictment gives the date of the offense, but does not show it was more than a year before the finding. The trouble arises from the failure of the grand jury to fill the blank left in the printed form of indictment for the term of court at which it was found. Under the principle declared in *State v. Bruce*, requiring the indictment to show an offense not barred by the statute, this one

is bad, unless the record showing when it was found can be read and considered upon the motion to quash. If it can be, the date of the finding of the indictment, as well as that of the offense, making it clearly good, will appear; for the indictment was found at the January term of the court, 1911, less than one year after the date of the offense. The question raised, therefore, was not decided by either of the two cases relied upon for the plaintiff in error. The general terms used in the opinions and in the syllabi, importing necessity of disclosure of the two dates or their equivalent on the face of the indictment itself, and not otherwise, went beyond the questions submitted for decision and may be regarded as obiter. In the Ball Case, it was unnecessary to look elsewhere than to the indictment for the essential facts appeared on its face. In the Bruce Case, an order showing the date of the indictment would not have aided that instrument, if it could have been adverted to; for neither the indictment nor the order showed the date of the offense. Here the indictment shows one date and the order the other. As the cases are not parallel, and the question here under consideration has not been actually decided, we are not bound by the general terms used in those two cases, and are at liberty to inquire whether the order may be read and considered as showing one of these two essential facts.

Bishop on Criminal Procedure, at section 741, says: "And a demurrer puts the legality of the whole of the proceedings in issue, as far as they judicially appear; for the court is bound to examine the whole record, to see whether they are warranted in giving judgment upon it, and it is open to objections, not only to the subject-matter of the indictment, but also to the jurisdiction of the court in which the indictment was found." Under this principle, the prisoner may avail himself of any fatal defect disclosed by the record. The rule should work both ways. If his demurrer brings up the record, to discharge him, in case it is defective, there is no reason why it should not come up to sustain the state. Omissions of vital matter from the indictment could not be supplied by the recitals of an order, since the indictment must charge an offense. Here the charge is complete. The demurrer and motion to quash set up a defense in the nature of a plea of confession and avoidance, as shown by the indictment, read alone, but utterly destroyed by the reading of the order with the indictment. The orders pertaining to indictments may be read for other purposes in resistance of motions to quash. *State v. Groves*, 61 W. Va. 697, 700, 57 S. E. 296; *State v. Compton*, 13 W. Va. 852. In some jurisdictions, the indictment need not negative defense under the statute. *Thompson v. State*, 54 Miss. 740; *United States v. Cook*, 17 Wall. 168, 21 L. Ed. 538; *Bish. Crim. Pro.* §§ 405, 638. Requirement thereof

is contrary to the rules of common-law pleading, and we do not feel warranted in extending the principle of *State v. Bruce* and *State v. Ball* beyond the application thereof therein made. To do so here would release the prisoner on a bare technicality, and in violation of the common-law rules of criminal pleading.

[2] Failure of the order, impaneling the grand jury, to disclose the form of the oath administered, or to recite administration of the oath required by law, is relied upon to sustain the motion to quash. It says the members of the jury "were sworn a grand jury in and for the body of the county." Sufficiency of a recital in almost the exact terms of this one was declared in *State v. Tucker*, 52 W. Va. 420, 429, 44 S. E. 427. Nothing to the contrary appearing, it is presumed the usual oaths were administered. The recital shows no oath different from that required by law. Impliedly it says the legal oaths were administered, since it declares the men were sworn a grand jury in and for the body of the county of Raleigh. In *Territory v. Woolsey*, 3 Utah, 470, 24 Pac. 765, the recital rebutted the presumption of regularity by disclosure of an oath different from that required by law.

[3] The prisoner had been tried on a charge of maiming one Canterbury, whom he had shot through the hand, with the pistol in question, in the course of a combat with one Stover, and acquitted. These agreed facts are the basis of pleas of former jeopardy and former acquittal, which the court, trying the case in lieu of a jury by agreement, thought were not sustained by the facts. The offense here charged, though connected with the alleged maiming, the subject-matter of the former trial, was no part of it in the legal sense of the term. The doctrine relied upon to sustain this assignment of error is that of inclusion of offenses, not applicable here. In the former case, there might have been a conviction, though the pistol was carried under a license, or the shooting occurred on the prisoner's own premises, and there could have been an acquittal, as there was, though the pistol had been admittedly carried unlawfully. In none of the instances given in Judge Green's opinion in *Moundville v. Fountain*, 27 W. Va. 182, is there such latitude. If, on a trial for murder, the evidence proves only an assault and battery, or manslaughter, the jury must convict of the lower offense or refuse to perform their sworn duty. These lower offenses are included in the charge of murder and inseparable from it. The offense here charged was complete before the shooting occurred, and constituted no part of the alleged maiming. That the shooting was part of the maiming and done with the pistol is immaterial. Had it been done with a pistol snatched from the hand of a bystander, or picked up in the store in

which the altercation took place, the result would have been the same. Thus it plainly appears the antecedent unlawful carrying is completely separable, in a legal sense, from the shooting; but the shooting was inseparable from the maiming as charged. Hence the findings of the court on the issues raised by the special pleas were correct.

Seeing no error in the judgment, we affirm it.

(138 Ga. 137)

**SIMMONS v. STATE.**

(Supreme Court of Georgia. May 14, 1912.)

(Syllabus by the Court.)

**1. CRIMINAL LAW (§ 1064\*)—NEW TRIAL—RULINGS ON EVIDENCE.**

A ground of a motion for new trial, complaining of the ruling of the judge in admitting evidence, over objection, which fails to set forth the testimony, or its substance, and the objections urged to its admissibility at the time it was submitted, presents no question for decision. *Moore v. State*, 130 Ga. 322, 60 S. E. 544; *Summerlin v. State*, 130 Ga. 791, 61 S. E. 849; *Butts v. State*, 118 Ga. 750, 45 S. E. 593; *Simmons v. State*, 126 Ga. 632, 55 S. E. 479.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2676-2684; Dec. Dig. § 1064.\*]

**2. CRIMINAL LAW (§ 918\*)—TRIAL—REMARKS OF COURT.**

Upon the trial of one charged with the offense of murder, a witness testifying on behalf of the accused, and as to the relation that a certain witness bore to the deceased, testified that he heard several named persons talk about her reputation. The solicitor general, on cross-examination, propounded the following questions to the witness: "Q. Did you hear anybody else? A. Well, myself. Q. How can you hear yourself talk about a woman?" When the court said: "Do you know what Mr. Norman is asking you? A. Yes, sir. By the Court: Q. Why don't you answer it? A. I am trying to. By the Court: No; you are not." The judge, in the same connection, stated: "I am not intimating an opinion; am just trying to get at what this witness means." Held, that the statement of the court to the witness, "No, you are not," was not cause for a new trial, upon the ground that the judge "expressed an opinion as to the witness' evidence," and discredited the same.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2163-2192, 2196, 2219-2224; Dec. Dig. § 918.\*]

**3. SUFFICIENCY OF EVIDENCE.**

The evidence was sufficient to support the verdict, and there was no error in refusing a new trial.

Error from Superior Court, Bryan County; *W. W. Sheppard*, Judge.

Elizah Simmons was convicted of murder, and brings error. Affirmed.

W. F. Slater and W. W. Gordan, Jr., both of Savannah, for plaintiff in error. N. J. Norman, Sol. Gen., of Savannah, and T. S. Felder, Atty. Gen., for the State.

**ATKINSON, J.** Judgment affirmed. All the Justices concur.

(138 Ga. 135)

**TOLIVER v. STATE.**

(Supreme Court of Georgia. May 14, 1912.)

(Syllabus by the Court.)

**1. CRIMINAL LAW (§ 814\*)—INSTRUCTIONS—CIRCUMSTANTIAL EVIDENCE.**

Where the prosecution introduces testimony that the deceased was heard to have made certain exclamations at the time the mortal wound was inflicted, indicating an unprovoked assault upon him by the accused, and his dying declaration that the accused shot him, and testimony that the accused admitted the killing, stating that he did not know "how come him to shoot him" (the deceased), a conviction does not depend entirely upon circumstantial evidence; and therefore it is not erroneous to omit an instruction on the law of circumstantial evidence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1821, 1833, 1839, 1860, 1865, 1883, 1890, 1924, 1979-1885, 1987; Dec. Dig. § 814.\*]

**2. VOLUNTARY MANSLAUGHTER.**

The evidence did not authorize a charge on the law of voluntary manslaughter.

**3. CRIMINAL LAW (§ 1159\*)—APPEAL.**

The evidence warranted the verdict. The charge was explicit and comprehensive, and no reason appears for the granting of a new trial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3074-3083; Dec. Dig. § 1159.\*]

Error from Superior Court, Miller County; *W. C. Worrell*, Judge.

Aus Toliver was convicted of murder, and brings error. Affirmed.

W. I. Geer, of Colquitt, for plaintiff in error. J. A. Laing, Sol. Gen., of Dawson, R. R. Arnold, of Atlanta, and T. S. Felder, Atty. Gen., for the State.

**EVANS, P. J.** Judgment affirmed. All the Justices concur.

(128 Ga. 135)

**NORTH ATLANTA LAND CO. et al. v. PORTNESS et al.**

(Supreme Court of Georgia. May 14, 1912.)

(Syllabus by the Court.)

**1. REFERENCE (§ 100\*)—EXCEPTIONS TO REPORT—SUBMISSION TO JURY.**

In equity cases submitted to an auditor, to whose report exceptions of law and fact are filed, the trial judge can, in his discretion, decline to submit the exceptions of fact to a jury, unless he approves them. He may disapprove the exceptions and thereupon enter a decree. *Stone v. Risner*, 111 Ga. 809, 35 S. E. 648; *Hogan v. Walsh*, 122 Ga. 283, 50 S. E. 84; *Austin v. Southern Home Association*, 122 Ga. 440 (7), 50 S. E. 382.

[Ed. Note.—For other cases, see Reference, Cent. Dig. §§ 157-168; Dec. Dig. § 100.\*]

**2. REFERENCE (§ 99\*)—EXCEPTIONS OF FACT.**

Where, in an equity case referred to an auditor, the evidence supported his findings, the trial judge did not err in overruling the exceptions of fact thereto. *Rogers v. Stern*, 112 Ga. 624-626 (3), 37 S. E. 877; *Cranston v. Bank of the State of Georgia*, 112 Ga. 617,



37 S. E. 875; *Fowler v. Davis*, 120 Ga. 442 (2), 47 S. E. 951.

[Ed. Note.—For other cases, see Reference, Cent. Dig. §§ 148-156; Dec. Dig. § 99.\*]

### 3. EXCEPTIONS OF LAW AND FACT.

While several exceptions of law and fact were filed to the auditor's report, substantially they hinged upon the general question whether, under the law and the evidence, the report was sustainable. Upon a careful review of the evidence and consideration of the law, it is held that the findings of the auditor were all supported; and there was no error committed in overruling the exceptions of law and fact, nor in entering the decree complained of.

Error from Superior Court, Fulton County; J. T. Pendleton, Judge.

Action between the North Atlanta Land Company and others and S. V. Portness and others. From the judgment, the Atlanta Land Company and others bring error. Affirmed.

J. E. & L. F. McClelland, of Atlanta, for plaintiffs in error. Westmoreland Bros., of Atlanta, for defendants in error.

HILL, J. Judgment affirmed. All the Justices concur.

(128 Ga. 153)

### CENTRAL OF GEORGIA RY. CO. v. WAX-ELBAUM.

(Supreme Court of Georgia. May 15, 1912.)

(*Syllabus by the Court.*)

#### INTERLOCUTORY INJUNCTION.

Under the evidence and pleadings, there was no abuse of its discretion by the court below in granting an interlocutory injunction in the case.

Error from Superior Court, Bibb County; W. H. Felton, Judge.

Action by L. J. Waxelbaum against the Central of Georgia Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Ellis & Jordan, of Macon, for plaintiff in error. Jesse Harris, of Macon, for defendant in error.

BECK, J. Judgment affirmed. All the Justices concur.

(128 Ga. 133)

### WEBB v. STATE.

(Supreme Court of Georgia. May 14, 1912.)

(*Syllabus by the Court.*)

#### 1. CRIMINAL LAW (§ 1156\*)—NEW TRIAL—INCOMPETENCY OF JUROR—CONFLICTING EVIDENCE.

Where, after a verdict of guilty is rendered in a criminal case, in the motion for a new trial the competency of one of the jurors is attacked on the ground that the juror was not impartial and that he was biased and prejudiced, and the evidence as to the disqualification of the juror before the trial judge is conflicting, this court will not reverse the finding, unless it appears that the judge below abused the discretion with which the law invests him

in passing upon the conflicting evidence and holding that the juror was not incompetent under the evidence. *Hackett v. State*, 108 Ga. 40, 33 S. E. 842.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3067-3071; Dec. Dig. § 1156.\*]

#### 2. SUFFICIENCY OF EVIDENCE.

The evidence authorized the verdict.

Error from Superior Court, Early County; W. C. Worrill, Judge.

Johnson Webb was convicted of crime and brings error. Affirmed.

Rambo & Wright, of Blakely, for plaintiff in error. J. A. Laing, Sol. Gen., of Dawson, R. R. Arnold, of Atlanta, and T. S. Felder, Atty. Gen., for the State.

BECK, J. Judgment affirmed. All the Justices concur.

(128 Ga. 154)

### SLOAN v. SLOAN.

(Supreme Court of Georgia. May 15, 1912.)

(*Syllabus by the Court.*)

#### 1. DEMURRER.

There was no error in overruling the demurrer to the petition and amended petition in this case.

#### 2. SUFFICIENCY OF EVIDENCE.

No error of law appears on the trial of the case; and the evidence is amply sufficient to support the verdict.

Error from Superior Court, Jenkins County; B. T. Rawlings, Judge.

Action by Q. A. V. Sloan against Mollie Sloan. From an order overruling a demurrer to the petition, defendant brings error. Affirmed.

E. L. Brinson, of Waynesboro, and W. Woodrum, of Millen, for plaintiff in error. Wm. H. Fleming, of Augusta, for defendant in error.

HILL, J. Judgment affirmed. All the Justices concur.

(128 Ga. 124)

### JONES v. STATE.

(Supreme Court of Georgia. May 14, 1912.)

(*Syllabus by the Court.*)

#### 1. WITNESSES (§ 225\*)—EXAMINATION—ADMONITION OF COURT.

Where a female witness is hesitant to testify concerning a matter of delicacy, which is relevant to the case, it is not error for the court to admonish her to answer the question, however unpleasant it may be to her.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 789; Dec. Dig. § 225.\*]

#### 2. SUFFICIENCY OF EVIDENCE.

The evidence supports the verdict.

Error from Superior Court, Upson County; R. T. Daniel, Judge.

S. T. Jones was convicted of crime, and brings error. Affirmed.

W. Y. Allen and Hugh Thurston, both of Thomaston, for plaintiff in error. J. W. Wise, Sol. Gen., of Atlanta, and T. S. Felder, Atty. Gen., for the State.

**EVANS, P. J. 1.** The accused was convicted of the offense of rape, and recommended to mercy. The prosecution submitted testimony to the effect that the accused sent a message to the female upon whom the assault was alleged to have been committed, requesting her to come to his home for a letter from her uncle, which his wife had brought from Columbus. She appeared at the house of the accused in response to his summons, where she found him alone, and he had carnal knowledge of her forcibly and against her will. She was 18 years of age, and had little use of her right arm, as a result of an illness when an infant. She returned to her home crying, and immediately reported to her mother what had happened.

[1] When the mother was testifying as a witness, on the cross-examination, she was asked the result of the examination of the person of her daughter. The court said to her: "Tell those gentlemen [meaning the jury] all about it, no matter how unpleasant; just tell what her condition was when you found it." Exception is taken to this remark of the court. There is no direct statement in the record that the remark was addressed to the witness when she was apparently loath to discuss the subject-matter of the inquiry; but the nature of the question, and the whole environment of the trial indirectly, though surely, indicate that the court's remark was made at a time when the witness shrank from the ordeal of publicly stating facts of such delicacy, and so trying to virtuous modesty. We find nothing in the remark prejudicial to the accused. The court was simply admonishing the witness of her duty to answer a relevant question.

■ [2] 2. The testimony was sufficient to authorize the verdict.

Judgment affirmed.

(138 Ga. 135)

**SEAGRAVES et al. v. BLAKE.**  
(Supreme Court of Georgia. May 14, 1912.)

*(Syllabus by the Court.)*

**ACTION ON NOTES.**

The evidence authorized a finding in favor of the plaintiff; and, as against the defendants, there was no error in overruling the motion for a new trial and allowing the verdict to stand, after being reduced as to the amount of interest and attorney's fees due on the notes upon which the suit was based.

Error from Superior Court, Pike County; R. T. Daniel, Judge.

Action by D. P. Blake against S. E. Sea-

graves and others. Judgment for plaintiff, and defendants bring error. Affirmed.

E. C. Armistead, of Zebulon, for plaintiffs in error. Cleveland & Goodrich, of Griffin, for defendant in error.

**LUMPKIN, J.** Judgment affirmed. All the Justices concur.

(11 Ga. App. 164)

**BROWN v. STATE.** (No. 3,977.)  
(Court of Appeals of Georgia. May 22, 1912.)

*(Syllabus by the Court.)*

**1. CRIMINAL LAW (§ 918\*)—NEW TRIAL—WITNESSES—EXAMINATION BY JUDGE.**

While the trial judge has the right to examine a witness in a criminal case, he should, in doing so, be careful not to discredit the evidence of the witness, or to suggest the inference by the jury that he entertains an opinion unfavorable to the accused. The questions propounded by the judge to the witness in the present case were an infraction of the above-stated rule, and, under section 1058 of the Penal Code of 1910, require the grant of another trial. *Sharpton v. State*, 1 Ga. App. 542, 57 S. E. 929.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2163-2192, 2195, 2196, 2219-2224; Dec. Dig. § 918.\*]

**2. ASSIGNMENTS OF ERROR.**

The other assignments of error are without merit.

Error from City Court of Sylvester; J. B. Williamson, Judge.

Julius Brown was convicted of crime, and brings error. Reversed.

Tison & Bell, of Sylvester, for plaintiff in error. W. E. Wooten, Sol. Gen., of Albany, and J. H. Tipton, of Sylvester, for the State.

**HILL, C. J.** Judgment reversed.

(11 Ga. App. 176)

**KENT v. KENNETT.**

**KENNETT v. KENT.**

(Nos. 4,048, 4,047.)

(Court of Appeals of Georgia. May 22, 1912.)

*(Syllabus by the Court.)*

**SALES (§§ 363, 441\*)—ACTION FOR PRICE—DIRECTING VERDICT.**

This being an action to recover the agreed price of a lot of household furniture, sold under an entire contract, and it appearing, from the testimony offered by defendant in support of his plea of failure of consideration, that no complaint was made in reference to quality until several months after delivery, and until a large portion of the goods had been resold at retail, and there being no sufficient data furnished by the evidence to prove the extent to which the consideration had failed, there was no error in directing a verdict in favor of the plaintiff. In view of the fact that the goods were bought by sample (*Carolina Portland Cement Co. v. Turpin*, 128 Ga. 677, 55 S. E. 925), and of the absence of affirmative evidence

that the goods delivered were not equal in quality to the sample, and of the uncertain and indefinite character of the evidence in other respects, the mere opinion of the defendant that the goods were worth only 15 per cent. of the price contracted to be paid did not entitle him to an abatement of the purchase price. As the defendant was in no event entitled to prevail, the ruling to which exception is taken by the plaintiff, allowing an amendment to the plea, becomes immaterial.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1064, 1277-1283; Dec. Dig. §§ 363, 441.\*]

Russell, J., dissenting.

Error from Superior Court, Brooks County; W. E. Thomas, Judge.

Action by F. S. Kennett against A. Kent. Judgment for plaintiff, and defendant brings error, and plaintiff signs a cross-bill. Judgment on main bill of exceptions affirmed, and cross-bill dismissed.

Grover C. Edmondson, of Quitman, and W. B. Kent and C. P. Thompson, both of Mt. Vernon, for plaintiff in error. M. Baum, of Quitman, for defendant in error.

POTTLE, J. Judgment on the main bill of exceptions affirmed; cross-bill dismissed.

RUSSELL, J. (dissenting). I think the judgment upon the main bill of exceptions should be reversed, because the court erred in directing a verdict.

(11 Ga. App. 173)

J. I. CASE THRESHING MACH. CO. v. FAISON. (No. 4,021.)

(Court of Appeals of Georgia. May 22, 1912.)

(Syllabus by the Court.)

APPEAL AND ERROR (§ 1094\*)—REVIEW—CONFLICTING EVIDENCE.

This was a suit in a justice's court, to recover for services under an alleged verbal contract. The services were rendered; but the evidence was in conflict as to the execution of a binding contract of employment. The justice rendered judgment in favor of the plaintiff, and on appeal, a jury in the superior court rendered a like verdict, which, on motion for a new trial, was approved by the trial judge. No error of law is complained of, and the verdict settles the conflict in the evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4322-4352; Dec. Dig. § 1094.\*]

Error from Superior Court, Fulton County; W. D. Ellis, Judge.

Action by H. L. Faison against the J. I. Case Threshing Machine Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Payne & Jones, of Atlanta, for plaintiff in error. J. A. Branch and W. H. Lewis, both of Atlanta, for defendant in error.

HILL, C. J. Judgment affirmed.

(11 Ga. App. 158)

TINCH v. STATE. (No. 3,759.)

(Court of Appeals of Georgia. May 22, 1912.)

(Syllabus by the Court.)

1. RECEIVING STOLEN GOODS (§ 7\*)—INDICTMENT—EVIDENCE.

The court did not err in overruling the demurrer to the accusation. The defendant being charged with misdemeanor, in that he received certain personal property knowing it to have been stolen, it was not necessary to allege that the real thief had been taken and convicted, or to state any reason why he had not been convicted. The offense of receiving stolen goods, under our statute, is a substantive offense, and an offender under this statute is not, in a strict technical sense, an accessory.

[Ed. Note.—For other cases, see Receiving Stolen Goods, Cent. Dig. §§ 9-14; Dec. Dig. § 7.\*]

2. CRIMINAL LAW (§ 1160\*)—REVIEW—REFUSAL OF NEW TRIAL.

The court did not err in the rulings upon the admissibility of testimony, nor in the charge; and, while the jury would have been authorized to have acquitted the defendant, there was some evidence to warrant the conviction, and therefore this court cannot hold that it was error to refuse a new trial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3084; Dec. Dig. § 1160.\*]

Error from City Court of Griffin; J. J. Flynt, Judge.

Ruff Tinch was convicted of a misdemeanor, and brings error. Affirmed.

W. E. H. Searcy, Jr., of Griffin, for plaintiff in error. Wm. H. Beck, Sol., of Griffin, for the State.

RUSSELL, J. Judgment affirmed.

POTTLE, J., not presiding.

(11 Ga. App. 180)

SPIKES v. WALLIS. (No. 4,053.)

(Court of Appeals of Georgia. May 22, 1912.)

(Syllabus by the Court.)

INSURANCE (§ 183\*)—ACTION ON PREMIUM NOTE.

The action was upon a promissory note alleged to have been given for an insurance premium. The evidence for the plaintiff consisted of the note and the policy of insurance. The defendant pleaded and testified that he could neither read nor write; that he signed the note with his mark, in ignorance of the fact that it was a note, and upon the assurance of the plaintiff that it was an application for insurance, which he wanted the defendant to sign, "to see if it would pass," although the defendant stated at the time that he did not want any insurance at all; that, after the suit was brought, the defendant learned for the first time that a policy of insurance had been issued and sent to him. Held that, this testimony being undisputed, a verdict for the defendant was demanded and his certiorari should have been sustained.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 245, 402-407; Dec. Dig. § 183.\*]

Error from Superior Court, Tattnall County; W. W. Sheppard, Judge.

Action by F. C. Wallis against Steve Spikes. Judgment for plaintiff, and defendant brings error. Reversed.

H. H. Elders, of Reidsville, for plaintiff in error. H. C. Beasley, of Reidsville, for defendant in error.

POTTLE, J. Judgment reversed.

(11 Ga. App. 186)

PEARCE v. CENTRAL OF GEORGIA RY. CO. (No. 4,077.)

(Court of Appeals of Georgia. May 22, 1912.)

*(Syllabus by the Court.)*

APPEAL AND ERROR (§ 1005\*)—REVIEW—DISCRETION OF COURT—NEW TRIAL.

No error of law being complained of, and the evidence, though conflicting, being sufficient to authorize the verdict, the discretion of the trial judge in overruling the motion for a new trial will not be controlled.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3860-3876, 3948-3950; Dec. Dig. § 1005.\*]

Error from City Court of Macon; Robt. Hodges, Judge.

Action by Charles F. Pearce against the Central of Georgia Railway Company. From the judgment, Pearce brings error. Affirmed.

Guerry, Hall & Roberts, of Macon, for plaintiff in error. Ellis & Jordan and Harris & Harris, all of Macon, for defendant in error.

POTTLE, J. Judgment affirmed.

(11 Ga. App. 162)

EDWARDS BOTTLING WORKS v. JARNAGIN & WRIGHT. (No. 3,974.)

(Court of Appeals of Georgia. May 22, 1912.)

*(Syllabus by the Court.)*

1. ACCORD AND SATISFACTION (§ 8\*)—WHAT CONSTITUTES.

"An agreement by a creditor to receive less than the amount of his debt cannot be pleaded as an accord and satisfaction, unless it be actually executed by the payment of the money, or the giving of additional security, or the substitution of another debtor, or some other new consideration."

[Ed. Note.—For other cases, see Accord and Satisfaction, Cent. Dig. §§ 65, 84, 87; Dec. Dig. § 8.\*]

2. ACCORD AND SATISFACTION (§ 26\*)—EVIDENCE.

The evidence offered by the defendants in support of their plea of accord and satisfaction was wholly insufficient for the purpose, and, in connection with the evidence for the plaintiffs, demanded the verdict in behalf of the latter for the full amount sued for.

[Ed. Note.—For other cases, see Accord and Satisfaction, Cent. Dig. §§ 162-165; Dec. Dig. § 26.\*]

Error from Superior Court, Warren County; B. F. Walker, Judge.

Action by the Edwards Bottling Works against Jarnagin & Wright. Judgment for

defendants, and plaintiff brings error. Reversed.

L. D. McGregor, of Warrenton, for plaintiff in error. M. L. Felts, of Warrenton, for defendant in error.

HILL, C. J. Suit was brought by the Edwards Bottling Works against Jarnagin & Wright on an open account, and the defendants relied upon the following facts to prove accord and satisfaction: The attorney for Jarnagin & Wright testified that, when the partnership of Jarnagin & Wright was dissolved, he endeavored to secure a settlement of the claims against them on the basis of 25 per cent., with the exception of the claim of the Edwards Bottling Works, the plaintiff; that he offered them by letter a settlement of their claim for 25 per cent., inclosing in the letter a check for that amount (it not appearing what the amount of the check was), and stating in the letter that, if the creditors did not see fit to reply to the letter within four or five days, the writer would conclude that they had accepted the check in payment of their claim against Jarnagin & Wright. The letter was not replied to, nor has the check ever been returned or paid. This attorney also testified that he subsequently offered to pay the plaintiffs 40 cents on the dollar, which offer was refused. The plaintiffs denied receiving any letter as testified to by the attorney for the defendants, but said that, if they had received it, they would have declined the offer, as they did decline the offer to accept 40 cents on the dollar. This was all the evidence. The jury in the justice's court where the suit was tried returned a verdict for the defendants, and on certiorari the superior court sustained the verdict.

[1] Even if the facts as testified to by the attorney for the defendants were admitted, they fail to show an accord and satisfaction. "An agreement by a creditor to receive less than the amount of his debt cannot be pleaded as an accord and satisfaction, unless it be actually executed by the payment of the money, or the giving of additional security, or the substitution of another debtor, or some other new consideration." Civ. Code (1910) § 4329; Stewart Bros. v. Langston & Woodson, 103 Ga. 290, 30 S. E. 35. But, even if this principle of law was not controlling, the jury in the justice's court would clearly have had the right to believe the testimony of the plaintiffs that they had never received the letter containing the check. Hamilton & Co. v. Stewart, 108 Ga. 476, 34 S. E. 123. Besides, there was no proof that the check, even if it had been received, was ever paid, and it is well settled that a check is not payment of a debt until it is itself paid, unless expressly so agreed. Parker-Fain Grocery Co. v. Orr, 1 Ga. App. 631, 57 S. E. 1074; Watt-

**Harley-Holmes Hardware Co. v. Day**, 1 Ga. App. 646, 57 S. E. 1033. It is only where there is a dispute as to the amount due, and one party tenders and the other accepts the check reciting that it is in payment in full of a demand, and the check is subsequently paid, that the reception and retention of a check can be set up as accord and satisfaction. *Copeland v. Montgomery*, 8 Ga. App. 633, 70 S. E. 30.

[2] But here there was no evidence that the check had even been received, or paid, or accepted in full settlement, and there was no dispute as to the amount of the account. Indeed, construing their evidence most strongly in their favor, when considered in connection with the plaintiffs' evidence, a verdict was demanded for the plaintiffs and not for the defendants, and the judge of the superior court should have sustained the certiorari and remanded the case for another trial.

Judgment reversed.

(11 Ga. App. 185)

**BARNESVILLE COAL & LUMBER CO. v. E. L. ROBERTS & CO.** (No. 4,075.)  
(Court of Appeals of Georgia. May 22, 1912.)

*(Syllabus by the Court.)*

**NEW TRIAL (§ 70\*)—INSUFFICIENCY OF EVIDENCE.**

There being no evidence for the plaintiff which justified the allowance of interest in its favor, and the evidence also being too uncertain and indefinite in reference to the amount of freight for which the defendants were entitled to credit, the judgment refusing a new trial is reversed, in order that upon another trial the evidence may be made more certain and definite as to these matters.

[Ed. Note.—For other cases, see *New Trial*, Cent. Dig. §§ 142, 143; Dec. Dig. § 70.\*]

Error from City Court of Zebulon; E. F. Dupree, Judge.

Action by E. L. Roberts & Co. against the Barnesville Coal & Lumber Company. Judgment for plaintiff, and defendant brings error. Reversed.

C. J. Lester, of Barnesville, for plaintiff in error. Jas. M. Smith, of Barnesville, for defendant in error.

**POTTLE, J.** This was a suit on account for goods sold and delivered. The defendant filed a general denial, but amended by admitting an indebtedness of about half the sum claimed in the petition. There was no evidence as to when the goods were to be paid for, and consequently the presumption would be that the purchase price was due upon delivery of the goods. *McCarthy v. Nixon Grocery Co.*, 126 Ga. 762, 56 S. E. 72. But there was no evidence as to when the goods were delivered. Plaintiff's witness testified simply that the goods were shipped out as soon as possible after the order was received, and were delivered at different dates, from time to time,

as speedily as possible. There was therefore no data from which the jury could calculate interest, and the verdict in the plaintiff's favor is not supported by the evidence, in so far as the interest is concerned. In addition to this, the plaintiff's witness testified that the defendants were entitled to a credit for freight paid by them. The only testimony on the subject of the amount of freight was that given by the plaintiff's attorney, who testified as follows: "The amount of freight which the defendant is entitled to credit for is \$112.50. I only know this from the statement which is attached to the plaintiff's petition in this case. This is more than Mr. Hahr thought it was. I could have settled the freight matter with him at one time for \$75." Presumably Mr. Hahr is connected with the defendant company, but there is nothing in the record to show that this is true. This testimony was wholly insufficient to indicate the amount of freight which had been paid by the defendants, and for which they were entitled to credit. If the only vice in the verdict had been the amount of interest awarded against the defendant, this might be cured by a direction to write off; but, in view of the entire character of the testimony, and particularly that with reference to the amount of freight for which the defendants were entitled to a credit, a more just result will be reached by granting a new trial generally, in order that both sides may have an opportunity to make the evidence more certain on another trial.

Judgment reversed.

(11 Ga. App. 186)

**PERRY v. WEAVER.** (No. 4,082.)  
(Court of Appeals of Georgia. May 22, 1912.)

*(Syllabus by the Court.)*

**DEDICATION (§ 44\*)—EVIDENCE.**

Evidence that an alley in a city had been used by the public continuously for a period of 37 years, without objection from those in whom the legal title was vested, and that the municipal authorities had, during this period, kept the alley in repair as one of the public streets of the city, constitutes such proof of dedication of the alley to the public use, and of acceptance by the public, as to authorize the municipal authorities to require one claiming to be the owner to remove an obstruction in the alley, placed there by him to prevent use of it by the public. *Carlisle v. Wilson*, 110 Ga. 360, 36 S. E. 54.

[Ed. Note.—For other cases, see *Dedication*, Cent. Dig. §§ 85-87; Dec. Dig. § 44.\*]

Error from Superior Court, Terrell County; W. C. Worrill, Judge.

Action between B. B. Perry and J. D. Weaver. From the judgment, Perry brings error. Affirmed.

M. C. Edwards, of Dawson, for plaintiff in error. H. A. Wilkinson and M. J. Yeomans, both of Dawson, for defendant in error.

**POTTLE, J.** Judgment affirmed.

(11 Ga. App. 187)

**MORROW TRANSFER CO. v. HEARD.**  
(No. 4,102.)

(Court of Appeals of Georgia. May 22, 1912.)

*(Syllabus by the Court.)***COSTS (§ 260\*)—WRIT OF ERROR—AFFIRMANCE—DAMAGES.**

No error of law being complained of, and under well-established rules of law, the verdict in the plaintiff's favor being amply supported by evidence, the judgment is affirmed, and 10 per cent. of the amount thereof is taxed against the plaintiff in error as damages, because of the inference that the writ of error was sued out for delay only.

[Ed. Note.—For other cases, see Costs, Cent. Dig. §§ 983-996, 1002, 1003; Dec. Dig. § 260.\*]

Error from City Court of Atlanta; H. M. Reid, Judge.

Action by W. J. Heard against the Morrow Transfer Company. Judgment for plaintiff, and defendant brings error. Affirmed, with damages.

J. S. Slicer and Danl. MacDougald, both of Atlanta, for plaintiff in error. Colquitt & Conyers, of Atlanta, for defendant in error.

**POTTLE, J.** A man nearly 70 years of age, with defective vision, went out into the middle of Broad street in Atlanta, to ascertain if an approaching street car was one which would take him to his destination. Finding that it was not, he turned to go back to the sidewalk. As he did, horses attached to a large transfer wagon of the defendant, and driven by one of its drivers, came suddenly upon the old man from the rear, and touched the back of his head. Not having time to get out of the way, he attempted to catch the bridle bit and stop the horses. He missed the bridle and caught the harness or traces, and began hollering. The driver was talking to somebody over on the sidewalk, and did not see or hear the old man, who was thrown and caught in the wagon and dragged 35 or 40 feet, and, in consequence, his hip was broken, and he was otherwise injured. Upon this state of facts, a verdict for \$1,500 was returned in the old man's favor, and the case has been brought here for review upon the sole complaint that the verdict is without evidence to support it.

We are at a loss to understand how it can be seriously insisted that this verdict is not supported by evidence. The driver was guilty of gross negligence in driving along a crowded public thoroughfare of a populous city, looking in another direction, talking to a man in the rear, and apparently totally indifferent to his surroundings or the possibility of injury to pedestrians. Under the evidence, the plaintiff could not have avoided the driver's negligence after it became apparent; nor was he guilty of negligence in the manner in which he attempted to avoid the injury. We have not the slightest inclination to dis-

turb this verdict; and, if we had, it would be beyond our constitutional power to do so.

While it may not be so in fact, legally speaking, we can reach no other conclusion than that the case was brought to this court for delay only. It results that the motion of the defendant in error to assess against the plaintiff in error 10 per cent. of the verdict as damages for frivolous appeal must be sustained; and it is so ordered. *Rogers v. Tiedeman*, 9 Ga. App. 811, 72 S. E. 285.

Judgment affirmed, with damages.

(11 Ga. App. 194)

**HAYSLIP v. STATE.** (No. 4,135.)

(Court of Appeals of Georgia. May 22, 1912.)

*(Syllabus by the Court.)***1. CRIMINAL LAW (§ 600\*)—CONTINUANCE—ABSENCE OF WITNESS.**

The accusation charged the offense of selling intoxicating liquor, alleging that the offense was committed on October 1, 1910. The accused made a motion for a continuance, on the ground that he had three witnesses absent who had been subpoenaed, and that he expected to show by them that on that day he did not sell the liquor as alleged. To meet this the Solicitor General stated in open court that he did not expect to prove that the liquor was sold by the accused on that day, but expected to prove that it was sold in the previous month of August. *Held* that, in the light of the explanatory note of the trial judge, there was no error in overruling the motion for a continuance.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1342-1347, 1604; Dec. Dig. § 600.\*]

**2. SUFFICIENCY OF EVIDENCE.**

No error of law is complained of, and the verdict is supported by the evidence.

Error from Superior Court, Tift County; W. E. Thomas, Judge.

Ben Hayslip was convicted of selling intoxicating liquors, and brings error. Affirmed.

J. B. Murrow and C. C. Hall, both of Tifton, and J. B. Williamson, of Sylvester, for plaintiff in error. J. A. Wilkes, Sol. Gen., of Moultrie, for the State.

**HILL, C. J.** Judgment affirmed.

(11 Ga. App. 159)

**WALTON v. MITCHELL.** (No. 3,930.)

(Court of Appeals of Georgia. May 22, 1912.)

*(Syllabus by the Court.)***1. APPEAL AND ERROR (§ 1001\*)—REVIEW—QUESTIONS OF FACT.**

Although the testimony was in conflict, the verdict for the claimant is supported by the evidence, the court did not err in ruling as to the admissibility of testimony, and there was no abuse of discretion in overruling the motion for new trial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3979-3982, 4024; Dec. Dig. § 1001.\*]

*(Additional Syllabus by Editorial Staff.)***2. EVIDENCE (§ 273\*)—DECLARATIONS—ADMISSIBILITY.**

On a claim to personal property levied on under a mortgage *fi. fa.*, evidence of a declaration of the defendant in *fi. fa.* that the property was his was properly excluded.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1108-1120; Dec. Dig. § 273.\*]

**3. APPEAL AND ERROR (§ 1058\*)—REVIEW—HARMLESS ERROR—EXCLUSION OF EVIDENCE.**

Any error in the exclusion of evidence was not harmful, where it was subsequently admitted in the course of the trial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4195, 4200-4206; Dec. Dig. § 1058.\*]

**4. EVIDENCE (§ 314\*)—HEARSAY—ADMISSIBILITY.**

On trial of a claim to mules levied on under a mortgage *fi. fa.*, testimony of the plaintiff in *fi. fa.* that he gave defendant in *fi. fa.* money to pay for the foaling of one of the mules, and that he had paid another mortgagee a mortgage *fi. fa.*, which had been levied upon the mules, was properly excluded, being dependent on mere hearsay as to ownership by the defendant in *fi. fa.*

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1168-1173; Dec. Dig. § 314.\*]

**5. EVIDENCE (§ 158\*)—BEST AND SECONDARY EVIDENCE—LEVY OF *FI. FA.***

In the absence of evidence that a mortgage or *fi. fa.* based thereon had been lost, evidence of a levy of the *fi. fa.*, or of its discharge or transfer, should be in writing.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 472-473, 474½-504, 506-526; Dec. Dig. § 158.\*]

**6. ANIMALS (§ 20\*)—TITLE—INCREASE.**

Under Civ. Code 1910, § 3851, providing that the increase of all animals belongs to the owner of the mother at the time of birth, the mere fact that the defendant in mortgage *fi. fa.* has paid the foaling fee or fed the colts does not give him the title, where the mother is owned by the claimant, unless there was an express contract to that effect.

[Ed. Note.—For other cases, see Animals, Cent. Dig. § 39; Dec. Dig. § 20.\*]

Error from City Court of Madison; K. S. Anderson, Judge.

On the levy of a mortgage *fi. fa.* by P. W. Walton, Sr., Kizzie Mitchell filed a claim to the property. Judgment for claimant, and plaintiff in *fi. fa.* brings error. Affirmed.

M. C. Few, of Madison, for plaintiff in error. E. H. George, of Madison, for defendant in error.

RUSSELL, J. [1] The plaintiff in error caused mortgage *fi. fa.* to be levied upon certain personal property, which was thereupon claimed by the defendant in error. There was ample testimony to have authorized the jury to find the property in dispute subject to the levy, but, on the other hand, there was, in behalf of the claimant, testimony which, if credible, equally justified the verdict rendered in her favor. For this reason, under the invariable rulings of this court, we cannot disturb the verdict, unless there appears

in the record some error prejudicial to the losing party, which necessarily affected and contributed to the result reached. The claimant testified that the mules levied upon were the increase of a gray mare which she had herself purchased, and which had never been the property of her husband, who was defendant in *fi. fa.* She and her witness also testified that the cattle involved in the litigation were the progeny of a cow originally given her by a female relative. The jury evidently took this view of the case; and therefore the only question involved is whether the court erred in those rulings which are made the basis of the special assignment of error in the motion for a new trial.

[2] The court repelled the evidence of a witness who sought to testify that Joe Mitchell, the defendant in *fi. fa.*, told him that the gray mules were his. The court did not err in this ruling, because it does not appear when Joe Mitchell made the statement; and the declarations of a defendant in *fi. fa.* after a levy are never admissible. The defendant in *fi. fa.* cannot be permitted to talk away the rights of either the plaintiff in *fi. fa.* or the claimant. If these admissions of Joe Mitchell were made before the levy, they were declarations in his own interest; and, if made after the levy, for the reason just stated, they would not be admissible at all.

[3, 4] The court refused to allow the plaintiff in error to testify that he gave defendant in *fi. fa.* money to pay for the foaling of one of the gray mules, and that he paid Mr. Tucker a mortgage *fi. fa.*, which had been levied upon the mule. In regard to this testimony, it is sufficient to say that, if the ruling was erroneous, it could not have been harmful to the plaintiff in error; for he was, later in the trial, permitted to testify that he gave a check to Kilpatrick for foaling the gray mule. But it was not error to exclude the testimony, as it is apparent that it is necessarily dependent upon mere hearsay as to Joe Mitchell's ownership. That the plaintiff in *fi. fa.* tried to get the defendant in *fi. fa.* at the time of Tucker's levy, to give the mare up, and that he refused to do so, and that thereupon the plaintiff in *fi. fa.*, paid off Tucker's mortgage, was irrelevant to the issue, and not in any way inconsistent with the claimant's assertion of title.

[5] Furthermore, evidence of a levy of a *fi. fa.*, or of its discharge or transfer, should be in writing; and there was no effort made to show that the Tucker mortgage, or the *fi. fa.* based upon it, had been lost. The fact that Joe Mitchell did mortgage the mule in question would not of itself affect the claimant's title, if the mule was in fact her property; for it must be borne in mind that, according to the uncontradicted testimony, the claimant was in possession, and that the plaintiff in *fi. fa.*, upon this theory, assumed

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

the burden of proof and took the opening and closing in this case.

As to the testimony of Tucker as to a conversation which was said to have occurred between himself, Mrs. Callie Spearman, and Joe Mitchell in 1896, it appears, from a note of the trial judge, that the assignment of error is not so approved and verified as to enable us to consider it.

The portion of the testimony which was rejected by the court was properly repelled, because the statements purporting to have been made were not made in the presence of the claimant, whom it was sought to charge thereby, and were inadmissible as hearsay. The court certifies that after the jury returned no effort was made to introduce that portion of the testimony mentioned in the assignment of error which the court held to be competent.

[6] The refusal of the written request to charge was not error, because, under the provisions of section 3651 of the Civil Code of 1910, the right of ownership in the increase of animals follows the title to the mother; and the mere fact that the defendant in *fi. fa.* might have paid the foaling fee or fed the colts could not give him title, unless there was an express contract to this effect. This conduct on the part of the defendant in *fi. fa.* would only have created an indebtedness to him on the part of the claimant. But, even if this were not true, the refusal of the court to charge as requested cannot be reviewed by exceptions pendente lite. Error should have been assigned in the motion for a new trial.

Judgment affirmed.

(11 Ga. App. 161)

**HARPER et al. v. PEEPLES.** (No. 3,966.)  
(Court of Appeals of Georgia. May 22, 1912.)

(*Syllabus by the Court.*)

**1. APPEAL AND ERROR (§ 773\*)—BRIEFS—FILING.**

As repeatedly held by the Supreme Court of this state and this court, the failure of counsel to observe the rules of the court applicable to furnishing and filing briefs is not cause for dismissal of the writ of error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 8104, 8108-8110; Dec. Dig. § 773.\*]

**2. BILLS AND NOTES (§§ 462, 467, 210\*)—INDORSEMENT—ACTIONS—PLEADING.**

Where a promissory note made payable to the Merchants' & Farmers' Bank or bearer is sued by the holder thereof, it is unnecessary to allege where the Merchants' & Farmers' Bank was located, or what particular Merchants' & Farmers' Bank was referred to as

the payee of the note, although there may be a number of banks known as the Merchants' & Farmers' Bank. Nor is it necessary to allege when and where the holder of the note purchased it from the bank, or the amount and value paid for the note. "The holder of a note is presumed to be such bona fide and for value." Civil Code 1910, § 4288. Neither is it necessary to allege and prove the indorsement or assignment of a negotiable note, when the same is sued on by the holder thereof, unless the indorsement or assignment is denied on oath. Civil Code 1910, § 4290. In the present case where the note is payable to a named payee or bearer, no indorsement or assignment was necessary to pass the title.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1444, 1445, 1461, 1464-1466, 1480-1488, 1490, 424, 425; Dec. Dig. §§ 462, 467, 210.\*]

Error from City Court of Nashville; W. D. Buie, Judge.

Action by T. M. Peebles against J. J. Harper and another. Judgment for plaintiff, and defendants bring error. Affirmed.

T. M. Peebles sued E. G. Solomons and J. J. Harper as makers for the amount of a promissory note payable to the Merchants' & Farmers' Bank or bearer (a copy of which was attached to the petition), alleging that the note was his property. The defendants demurred as follows: (1) The petition does not state where the Merchants' & Farmers' Bank is located, or to which particular Merchants' & Farmers' Bank it refers. (2) The petition does not state when and where the plaintiff purchased the note from the bank, or the amount and value paid for it, if any. It does not affirmatively appear that the plaintiff purchased the note sued upon for value before maturity and without notice of the defense. (3) It does not affirmatively appear that the plaintiff had the title and was the owner of the note at the time it was sued upon, and is now the owner. The court overruled the demurrer, and the defendant excepted.

When the case was called in this court, a motion was made to dismiss the writ of error because counsel for the plaintiff in error had not served counsel for the defendant in error with a copy of his brief or written argument as required by rule of this court (Civil Code of 1910, § 6339).

H. J. Quincey, of Ocilla, Hendricks & Christian, of Nashville, and Walter M. Rogers, of Ocilla, for plaintiffs in error. J. A. Alexander and W. G. Harrison, both of Nashville, for defendant in error.

HILL, C. J. Judgment affirmed.



(91 S. C. 485)

## STATE v. TURNAGE.

(Supreme Court of South Carolina. May 28, 1912.)

## GRAND JURY (§ 8\*)—JURY (§ 62\*)—DRAWING—ILLEGALITY OF JURY.

Where one of the jury commissioners who prepared the jury list and assisted in drawing the grand jury was the father of the deceased for whose murder an indictment was found against one other than the defendant, the array, while not legally drawn as against the one accused of homicide, is legal as to defendant, who was accused of an offense wholly unconnected with the homicide.

[Ed. Note.—For other cases, see Grand Jury, Cent. Dig. §§ 16-20; Dec. Dig. § 8;\* Jury, Cent. Dig. §§ 273-275; Dec. Dig. § 62.\*]

Appeal from General Sessions Circuit Court of Marlboro County; John S. Wilson, Judge.

"To be officially reported."

Sidney Turnage was indicted for assault and battery with intent to kill. From an order overruling a challenge to the array of grand and petit jurors, and a motion to quash the indictment, he appeals. Appeal dismissed, and case remanded.

Townsend & Rogers and J. J. Evans, all of Bennettsville, for appellant. J. Monroe Spears, of Darlington, for the State.

GARY, C. J. This is an appeal from an order refusing to sustain the challenge to the array of grand and petit jurors.

The facts are thus stated in the record:

"This is an indictment against the defendant, charging him with assault and battery with intent to kill; the indictment being in the usual form. Upon the call of the case the defendant filed a challenge to the array of grand and petit jurors in regular form upon the grounds set forth in the order of the circuit judge, which is as follows:

"The defendant in the above-entitled case has formally filed a challenge to the array of grand jurors, which found the true bill in this case, and also to the array of petit jurors in attendance upon this court, upon the ground that the said grand jury and petit jury were drawn by the jury commissioners of Marlboro county from a jury box prepared by the said jury commissioners, and that N. B. Rogers, county treasurer for Marlboro county, and ex officio a jury commissioner, had actively participated in preparing and placing the names in the said jury box and in drawing the said grand jury and petit jury therefrom, and that the said N. B. Rogers was the father of Guy Rogers, who was alleged to have been killed by one Joe Malloy in 1910, and had been indicted therefor, and the case against whom would necessarily be submitted to said grand jury, and to a panel drawn from said petit jury, and for that reason that he, the said N. B. Rogers, was disqualified to act as a commissioner in preparing said jury box, or in draw-

ing the names of the grand or petit jury therefrom, and upon the further ground that in the case of State v. Joe Malloy, charged with the murder of said Guy Rogers, and in the case of the state against the said Joe Malloy, charged with the murder of one Prentiss Moore, this court had already quashed the indictment, in so far as those two cases were concerned, on the ground above stated. The statements of fact as above set forth are admitted to be true and correct. It is proper to note, however, that the court in quashing the indictment in the cases against Joe Malloy sustained the motion only in so far as those cases were concerned, and expressly limited the scope and effect of said orders to said cases, and it might be well to incorporate said orders in this recital in order that the question now made may be brought squarely before the appellate court. The two orders are identical, and following is a copy of one: "State of South Carolina, Marlboro County. (In General Sessions.) State v. Joe Malloy, charged with the murder of Prentiss Moore. On motion of Stevenson, Stevenson, and Prince, it is ordered that the indictment be quashed, on the ground that the grand jury finding the bill was drawn by a board of jury commissioners, one of whom was an active prosecutor, and employed counsel in this case, and his connection therewith invalidates the same, in so far as this case is concerned, but it does not affect the acts of the grand jury, or the jury in other cases not connected therewith. John S. Wilson, Presiding Judge. March 13, 1912." The motion now made in this case now brings in question the correctness of that order in continuing said jurors in office after having quashed the indictments in those particular cases upon the ground stated. The situation is anomalous and unusual. The reason for quashing the indictment in the Malloy Case is apparent, but the same reason does not appear to affect any other case. It is urged in argument that the jury box and jurors having been once shown to be tainted, or even clouded by a suspicion of taint, their creation and validity is gone. This argument is ingenious and has apparent force, but is not convincing to the court. The state has already announced its purpose to appeal from the order granted in the Malloy Case, and this case will likewise probably be taken to the Supreme Court, and for this reason the facts have been carefully stated and incorporated herein, in order that the Supreme Court may settle this vexed question. This motion is refused. [Signed] John S. Wilson, Presiding Judge. Bennettsville, S. C., March 14, 1912."

The defendant appealed from said order, and the practical question presented by the exceptions is whether the defendant, Sidney Turnage, had the same right as Joe Malloy to challenge the array of grand and petit

jurors on the ground that N. B. Rogers, one of the jury commissioners, was disqualified by reason of the relationship between him and Guy Rogers who was killed, although this defendant had no participation whatever in the killing of Guy Rogers or Prentiss Moore.

There was certainly no moral wrong in merely assisting in the said drawing; and in the case of the State v. Malloy it was conceded that there was no ground on which to base a charge of any actual wrongdoing on the part of the jury commissioners. In the order of his honor, Judge Wilson, he says: "It is urged in argument that the jury box and jurors having been once shown to be tainted, or even clouded by a suspicion of taint, their creation and validity is gone." The indictment against Malloy was not quashed on the ground that the jury commissioner N. B. Rogers was guilty of any moral or intentional wrong in the drawing of the jurors, but solely on account of the relationship between him and Guy Rogers. The contention of the appellant "that the jury box and jurors had been once shown to be tainted" is without foundation; and as N. B. Rogers was not related to the party, upon whom this defendant is alleged to have committed the assault and battery with intent to kill, we are unable to discover any reason why he should be allowed to challenge the array of grand and petit jurors. Appeal dismissed.

WOODS, HYDRICK, WATTS, and FRASER, JJ., concur.

GARY, C. J. Let the remittitur be sent down at once.

(91 S. C. 344)

**PARRIS v. CAROLINA MUT. FIRE INS. CO.**

WETMORE v. SHUMAN.

(Supreme Court of South Carolina. May 1, 1912.)

**1. INSURANCE (§ 70\*)—MUTUAL INSURANCE COMPANY—EFFECT OF RECEIVERSHIP.**

The obligations of a mutual fire insurance company, as well as those of its members, became fixed when it went into the hands of a receiver; the court's action in taking charge of the company through a receiver being to enforce such obligations and adjust the equities between the parties.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 93; Dec. Dig. § 70.\*]

**2. INSURANCE (§ 70\*)—MUTUAL INSURANCE COMPANY—PREMIUMS—LIENS.**

Civ. Code 1902, § 1916, gives mutual insurance companies a lien on the buildings, etc., insured to the amount of the premium notes or liability of the assured; but Act Feb. 23, 1910 (27 St. at Large, p. 695), provides that any fire insurance company, claiming a lien upon the property insured for the premiums, shall, upon an action being brought upon the lien, or to collect the premium, establish that protection has been had by the insured, and

that the company was solvent during the period of insurance. *Held* that, since the act of 1910 would be unconstitutional, as impairing a contractual obligation, if it purported to deprive an insolvent mutual insurance company of the right to enforce its liens to secure payment of the premiums for the benefit of the members suffering loss, it will not be construed as retroactive, so as to require a mutual company, which went into the hands of a receiver in 1908, to show that it was solvent during the period of insurance, in order to enforce its lien for premiums.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 93; Dec. Dig. § 70.\*]

**3. STATUTES (§ 263\*)—CONSTRUCTION—RETROACTIVE CONSTRUCTION.**

A statute should not be construed retroactively, unless such construction is required by the express language of the statute, or by necessary implication.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 344, 349; Dec. Dig. § 263.\*]

Appeal from Common Pleas Circuit Court of Spartanburg County; Ernest Gary, Judge. "To be officially reported."

In the matter of J. H. Parris against the Carolina Mutual Fire Insurance Company. Action by S. M. Wetmore, receiver, against M. H. Shuman. From a judgment for plaintiff, defendant appeals. Affirmed.

Warren & Warren, of Hampton, for appellant. J. W. Nash, of Spartanburg, for respondent.

WOODS, J. In this action, brought by the plaintiff as receiver of Carolina Mutual Fire Insurance Company, the allegations of the complaint are that assessments were duly levied on the members of the company; that the defendant, one of the members, refused to pay his assessments of \$28.67 and \$21.33; and that, under section 1916 of the Civil Code, a lien exists on the property insured and the land on which it is situated, to secure the payment of the assessments. The defendant demurred to the complaint, on the ground that it failed to state a cause of action, in that: "(1) The complaint does not allege that the said insurance company is and was solvent during the period of insurance covered by the policy covered in the complaint. (2) That the complaint does not allege that protection had been had by the insured during the period of insurance alleged in the complaint. (3) That it appears upon the face of the complaint that the said insurance company was and is insolvent." To sustain the demurrer, the defendant relies on the statute, enacted February 23, 1910 (27 Stat. 695), which provides: "That any fire insurance company doing business in this state, claiming a lien upon the property insured for the premium for such insurance, shall, upon an action being brought upon such lien, or to collect such premium, establish that protection had been had by the insured and that such company during the period of insurance was solvent."

[1] The Carolina Mutual Fire Insurance Company went into the hands of a receiver in 1908. All the obligations of the company and of its members then became fixed; the act of the court in taking charge of it through a receiver being for the purpose of enforcing these obligations and adjusting all the equities of the parties. *Wetmore v. Scalf*, 85 S. C. 285, 67 S. E. 298. The demurrer depends on the proposition that the General Assembly, by an act passed more than a year afterwards, changed the legal relations and the rights of the parties.

[2] We think it perfectly clear that the statute has no application. Mutual insurance companies have no capital stock and no funds, except such as are collected on assessments to be immediately paid out. The members assume contractual obligations to each other; and when one member suffers a loss by fire, and an assessment is duly made, the obligation becomes fixed, and cannot be removed without a violation of the obligation of contract. The law under which the Carolina Mutual Fire Insurance Company did business, and which was a part of the obligation of the contract assumed by the defendant, was that he should pay the assessments duly levied; and that the company should have a lien on his property for such assessment. If the act purported to deprive the company of the right to collect assessments, or of the lien to secure payment for the benefit of those who had suffered loss, it would be unconstitutional as impairing the obligation of a contract. In *Hawthorne v. Calef*, 2 Wall. 10, 17 L. Ed. 776, the Supreme Court of the United States held: "A state act repealing the individual liability clause of the charter of a corporation is, as to debts contracted before the repeal, a law impairing the obligations of the contracts, within the Constitution of the United States, and void." Some courts have held that the obligation of a contract is not impaired by a statute which purports to destroy the lien acquired under a previous statute, on the faith of which the contract was made and the service rendered. But such a doctrine we think opposed to reason and the great weight of authority. *Pacific Steamship Co. v. Jolliffe*, 2 Wall. 450, 17 L. Ed. 805; *Merchants' Bank v. Ballou*, 98 Va. 112, 32 S. E. 481, 44 L. R. A. 306, 81 Am. St. Rep. 715; *Waters v. Manufacturing Co.*, 106 Ga. 592, 32 S. E. 636, 71 Am. St. Rep. 281; *Buser v. Shepard*, 107 Ind. 417, 8 N. E. 280; *Weaver v. Sells*, 10 Kan. 609; *Craig v. Herzman*, 9 N. D. 140, 81 N. W. 288.

The act does not purport to destroy the obligations assumed and the rights acquired by the members of fire insurance companies, but it very materially changes them; for surely it would be difficult to prove as an affirmative fact the solvency of a corporation, which must almost always have un-

discharged obligations, and which has no capital, except the liability of its members to pay assessments, and to prove, further, that the member sued for his assessment would have been paid, had he incurred loss.

[3] It seems, therefore, very doubtful whether the General Assembly could have made such a statute retroactive in its application. The statute contained no indication that it was to have retroactive effect; and the rule is familiar that such a construction should not be given, unless it is required by the express words of the statute, or must necessarily be implied from the language used. The rule applies with peculiar force in this case, where the rights of interested parties are so materially affected by the change in the statute. It has been strongly argued that the statute was not intended to apply to mutual fire insurance companies; but upon that question we express no opinion.

It is the judgment of this court that the judgment of the circuit court be affirmed.

GARY, C. J., and HYDRICK and WATTS, JJ., concur. FRASER, J., concurs in the result.

(159 N. C. 382)

HERRING et al. v. CUMBERLAND LUMBER CO. et al.

(Supreme Court of North Carolina. May 28, 1912.)

1. CONTRACTS (§ 137\*)—EFFECT OF PARTIAL ILLEGALITY—PARTIES NOT IN PARI DELICTO.

Plaintiff contracted to sell standing timber to a company for which it agreed to pay a stated price less than it was reasonably worth, and also to construct a railroad at a location beneficial to plaintiff's land to be completed by a certain time on penalty of 10 per cent. of the price paid and 2½ per cent. thereon for each year of default not exceeding five years, and the purchaser afterwards conveyed to a lumber company "the timber and tree rights, property rights, and easements" acquired under plaintiff's deed to it. Both companies failed to construct the railroad and, in an action for the penalty, contended that its construction was not within their charter powers and was expressly prohibited by statute. *Held*, that the plaintiff was not in pari delicto, since relief could be given without enforcing the alleged illegal part of the contract on the ground of a promise created by law to repay money of the plaintiff unjustly retained.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 701-712; Dec. Dig. § 137.\*]

2. RAILROADS (§ 46\*)—LEGALITY OF CONTRACT—ADMISSIBILITY OF EVIDENCE.

In an action to recover a penalty provided by contract for defendant's failure to construct a railroad at or near plaintiff's land, where the complaint stated facts sufficient to authorize judgment for plaintiff for the difference between what he received from defendant for timber sold and its true value, evidence that defendant purchased the timber at a greatly reduced price because of his promise to construct the railroad was admissible.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. § 105; Dec. Dig. § 46.\*]

### 3. PLEADING (§ 72\*) — COMPLAINT — PRAYER FOR RELIEF.

The form of the prayer for judgment is not material, as it is the facts alleged that determine the nature of the relief to be granted; and plaintiff can unite two causes of action relating to the same transaction and have alternative relief by judgment upon either one or the other causes of action.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 143, 144; Dec. Dig. § 72.\*]

Appeal from Superior Court, Sampson County; G. W. Ward, Judge.

Action by A. R. Herring and others against the Cumberland Lumber Company and others. Judgment for defendants, and plaintiffs appeal. New trial.

Geo. E. Butler, for appellants. Stevens, Beasley & Weeks, for appellees.

**WALKER, J.** This action was brought to recover the amount of a penalty imposed by a contract between the plaintiff and the Wallace Manufacturing Company for failure to comply with one of its stipulations. The question involved arose upon the following facts: Plaintiff and certain other neighboring landowners agreed to sell the timber on their lands to the said company for a stated price, and defendant agreed to pay the price and also to construct a standard gauge railroad from Delway to Wallace, and to complete the same for use and transportation on or before March 15, 1908, and, upon failure to do so, it is provided by the contract that the Wallace Manufacturing Company shall forfeit and pay to the said landowners, as a penalty, an amount equal to 10 per cent. of the price paid for the timber, and 2½ per cent. on said price for each additional year of its default during the next five years, making 22½ per cent. in all if the default should continue as long as five years after March 15, 1908. The parties conveyed the timber by deeds to the Wallace Company, coupled with the right to cut timber of a certain fixed dimension, and to build on the land roads, tramroads, and railroads for the purpose of cutting and removing the timber. There is a provision in the deed that the trees sold to the company shall not be removed except by the standard gauge railroad. The Wallace Company conveyed to the defendant Cumberland Lumber Company "the timber and tree rights, property rights, and easements" acquired under the deed of the plaintiff to it. The standard gauge railroad has never been constructed, and plaintiff sues to recover the penalty alleged to be due to him by the terms of his deed to the Wallace Company.

[1] The defendants' counsel contend that the building of a standard gauge road is not within the chartered powers and privileges of the defendants, and that it is also expressly forbidden by Revisal, § 2598. We need not decide whether or not this is a correct position, as we are of the opinion

with the plaintiff upon another view of the matter. It appears in the case that the plaintiff and his neighbors, who joined with him in the agreement to sell their timber to the Wallace Manufacturing Company, one of the defendants, were influenced in fixing the price of the same by the stipulation of the said company to construct this road, and that they sold the timber at much less than its reasonable worth because of this agreement, believing that, if the road was built and put into operation, the benefit or advantage they would derive therefrom would compensate them for the loss of the difference between the price charged by them for the timber and the real value thereof. This being so, it would seem to be very unjust and inequitable that the defendants should repudiate their agreement and rely on its invalidity for the purpose of evading the payment of a reasonable price for the timber; in other words, that they should be allowed to keep the amount of the difference between the price paid for the timber and its true value, and at the same time refuse to execute their part of the contract to build the road, even upon the ground that it is *malum prohibitum*. If the stipulation to construct the road is invalid, the plaintiff, if *particeps criminis*, is not in *pari delicto*. He can recover the amount of his loss without declaring upon the alleged illegal stipulation, and relief can be given without enforcing this part of the contract. In such a case, the action, it may be said, is not based on the agreement alleged to be illegal or invalid, but on the promise created by law to repay money of the plaintiff improperly obtained. 9 Cyc. p. 547.

The principle governing such cases is well stated in *Lester v. Howard Bank*, 33 Md. 558, 3 Am. Rep. (Anno. Ed. 1912) 211: "The rule of law is well settled that no action will lie to enforce a contract *malum in se*, nor, if executed, to recover money paid under it. In all such cases the maxims '*ex turpi causa non oritur actio*,' and '*in pari delicto potior est conditio defendantis et possidentis*,' apply. In regard to contracts not immoral or criminal in themselves, but prohibited by statutory law, the same general rule may be said to apply, not, however, universal in its application, but subject to certain exceptions as binding in authority as the rule itself. Public policy, it must be borne in mind, lies at the basis of the law in regard to illegal contracts, and the rule is adopted, not for the benefit of parties, but of the public. It is evident, therefore, that cases may arise even under contracts of this character, in which the public interest will be better promoted by granting than by denying relief, and in such the general rule must lead to this policy. Hence Judge Story admits that, even between parties '*in pari delicto*,' relief will sometimes

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

be granted if public policy demands it. 1 Story's Eq. Jur., §§ 298-300. Other cases are to be found arising under contracts made in violation of a statute, in the application to which of the general rule courts have been governed by the plain and obvious purposes of the law, and in such it has been repeatedly held that an action would lie against a party receiving money under such a contract upon a promise implied by law to refund it. Thus in *Smith v. Bromley*, Doug. 697, note, Lord Mansfield said: 'If the act is in itself immoral, or a violation of the general laws of public policy, there the party paying shall not have this action. \* \* \* But there are other laws which are calculated for the protection of the subject against oppression, extortion, deceit, etc. If such laws are violated, and the defendant takes advantage of the plaintiff's condition or situation, there the plaintiff shall recover.'"

Lord Mansfield said in *Browning v. Morris*, 2 Cowp. 790: "It is very material that the statute itself, by the distinction it makes, has marked the criminal, for the penalties are all on one side—upon the office keeper." This view of the case is not in conflict with what was decided in *Edwards v. Goldsboro*, 141 N. C. 60, 53 S. E. 652, 4 L. R. A. (N. S.) 589, 8 Ann. Cas. 479, as in that case there was an illegal agreement which was contrary to public policy, if not contra bonos mores, and the action was for the recovery of money actually paid to carry out the illegal transaction, which was not only forbidden by law, but injurious to the public, and the parties were in pari delicto. In this case the defendants have acquired the plaintiff's timber at an under-value, upon a promise which they refuse to perform, and seek to shelter themselves behind its alleged illegality. There is nothing contravening public policy in permitting plaintiff to recover at least what he had lost by not receiving a fair and full price for his property, not exceeding the amount named in the contract. *Bond v. Montgomery*, 56 Ark. 563, 20 S. W. 525, 35 Am. St. Rep. 119; *White v. Franklin Bank*, 22 Pick. (Mass.) 181; 1 Pom. Eq. Jur. § 403; *Sykes v. Beadon*, L. R. 11 Ch. Div. 170; 9 Cyc. 546; *Bishop on Contracts*, § 628 et seq.; *Prescott v. Norris*, 32 N. H. 101; *Parkersburg v. Brown*, 106 U. S. 487, 1 Sup. Ct. 442, 27 L. Ed. 238.

The case of *Morville v. Am. Trust Society*, 123 Mass. 129, 25 Am. Rep. 40, is much like the one at bar, and the court there said: "The money of the plaintiff was taken and is still held by the defendant under an agreement which it is contended it had no

power to make, and which, if it had power to make, it has wholly failed on its part to perform. It was money of the plaintiff, now in the possession of the defendant, which in equity and good conscience it ought now to pay over, and which may be recovered in an action for money had and received. The illegality is not that which arises when the contract is in violation of public policy or of sound morals, and under which the law will give no aid to either party. The plaintiff himself is chargeable with no illegal act, and the corporation is the only one at fault in exceeding its corporate powers by making the express contract. The plaintiff is not seeking to enforce that contract, but only to recover his own money and prevent the defendant from unjustly retaining the benefit of its own illegal act. He is doing nothing which must be regarded as a necessary affirmation of an illegal act."

The case of *Jacques v. Golightly* (2 W. Bl. 1073) was an action to recover back money paid for insuring lottery tickets. The defendant kept an office for insurance, contrary to the statute (14 Geo. III, ch. 76). It was urged that the plaintiff, being particeps criminis, and having knowingly transgressed a public law, was not entitled to relief, but the action was sustained by the unanimous opinion of the court. Blackstone, J., said: "These lottery acts differ from the stock-jobbing act of Geo. II, ch. 8, because there both parties are made criminal and subject to penalties." See, also, *Tracy v. Talmage*, 14 N. Y. 182, 67 Am. Dec. 132.

[2] The plaintiff offered to show that the defendants purchased the timber at a greatly reduced price because of the promise to construct the railroad, which evidence the court excluded, and afterwards intimated that the plaintiff could not recover, and compelled him to submit to a nonsuit. We think there was error in both rulings, and a new trial is ordered. There are facts stated in the complaint sufficient, if established, to authorize a judgment in favor of the plaintiff for the difference between what he received for the timber and its true value.

[3] The form of the prayer for judgment is not material. It is the facts alleged that determine the nature of the relief to be granted. *Voorhees v. Porter*, 134 N. O. 597, 47 S. E. 31, 65 L. R. A. 736. The plaintiff can unite two causes of action relating to the same transaction and have alternative relief; that is, a judgment upon either one or the other of the causes.

New trial.

HOKE, J., concurs in result.

(159 N. C. 470)

**STATE v. DUNN.**

(Supreme Court of North Carolina. May 28, 1912.)

**1. HABEAS CORPUS (§§ 4, 27\*)—WHEN REMEDY LIES.**

Habeas corpus lies to discharge a prisoner held under a sentence shown by the record to have been imposed by a court having no jurisdiction, but the writ cannot be used in the nature of a writ of error.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. §§ 4, 22; Dec. Dig. §§ 4, 27.\*]

**2. HABEAS CORPUS (§ 32\*)—WHEN REMEDY LIES.**

A superior court could not discharge a prisoner on habeas corpus from a conviction on the ground that he was convicted upon evidence illegal because authorized by a statute claimed to be unconstitutional, especially where the conviction has been affirmed on appeal to the Supreme Court.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. § 29; Dec. Dig. § 32.\*]

**3. HABEAS CORPUS (§ 4\*)—SCOPE OF REMEDY.**

When a federal question arises in a criminal case, it must be presented by exception at the trial on the merits and cannot be presented by habeas corpus after final determination of the case on appeal.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. § 4; Dec. Dig. § 4.\*]

Certiorari to the Superior Court, Cumberland County; Peebles, Judge.

Habeas corpus proceeding by John Dunn. From a judgment refusing to discharge him, petitioner brings certiorari. Affirmed.

The Attorney General and T. H. Calvert, for the State. R. W. Winston and E. G. Davis, for defendant.

**CLARK, C. J.** [1, 2] The defendant was convicted upon an indictment, in the usual form, for illegal sale of intoxicating liquors. On appeal to this court, the judgment was affirmed. The defendant then sued out a writ of habeas corpus before a judge of the superior court alleging that the conviction had been obtained upon illegal evidence. The judge refused to discharge the prisoner whereupon he appealed to this court. Afterwards, in deference to the decision in *Re Holley*, 154 N. C. 164, 69 S. E. 872, he withdrew said appeal and applied to this court for a writ of certiorari. This was granted, and the question now presented is whether there was error in refusing to discharge the petitioner upon habeas corpus.

It is true that, when it appears upon the inspection of the record itself that the court imposing the sentence was without jurisdiction, the prisoner can be discharged upon habeas corpus upon the ground that the judgment is void, but the writ cannot be used in the nature of a writ of error. If the petitioner is in custody by virtue of the judgment of a competent court, the statute forbids the writ to be issued. *Rev. 1822 (2); State v. Webb*, 155 N. C. 426, 70 S. E. 1064; *Howie v. Spittle*, 156 N. C. 180, 72 S. E. 207; *Ledford v. Emerson*, 143 N. C. 536, 55 S. E.

969, 10 L. R. A. (N. S.) 362. The remedy is by appeal from the original judgment. In this case the indictment and judgment are in every respect regular upon their face. The court below could not go behind the record and find that the defendant was convicted upon evidence which was illegal because authorized by an alleged unconstitutional statute. This would be for one superior court judge to examine into the proceedings before another judge, upon parol evidence, and review his action. Besides, in this case the defendant had appealed to this court which had adjudged no error, and this proceeding is in effect an attempt to procure a rehearing of the cause upon a habeas corpus before another judge of the superior court.

[3] The point is not before us for the reasons above given, but we may say that the statute thus irregularly attempted to be called in question was passed upon and construed in *State v. McIntyre*, 139 N. C. 599, 52 S. E. 63, and, as there construed, no federal question can arise in regard to it. When a federal question arises, it must be presented by an exception taken at the trial upon the merits and be reviewed on the appeal in that case. It could not be presented in this irregular method.

The judgment in refusing to discharge the prisoner is affirmed.

(159 N. C. 160)

**WHITFORD v. BOARD OF COM'RS OF CRAVEN COUNTY.**

(Supreme Court of North Carolina. May 28, 1912.)

**1. CIVIL RIGHTS (§ 9\*)—DISCRIMINATION AS TO SCHOOLS—COUNTY FARM-LIFE SCHOOLS—STATUTES.**

Pub. Laws 1911, c. 84, providing that there shall not be more than one farm-life school in any county, means that there shall not be more than one school for the instruction of both races, in separate buildings, with equal facilities, and the having of two or more buildings for the purpose of racial separation does not constitute two legally distinct schools; so that the act, so construed, does not deprive the local authorities of the power to provide equal facilities for the two races.

[Ed. Note.—For other cases, see Civil Rights, Cent. Dig. § 6; Dec. Dig. § 9.\*]

**2. CONSTITUTIONAL LAW (§ 48\*)—STATUTES—VALIDITY—PRESUMPTIONS.**

The court may not declare a statute void, unless it is clearly so beyond any reasonable doubt; and there is always a strong presumption in favor of the validity of a statute, which must be overcome by some convincing reason to induce the court to declare it void.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 46; Dec. Dig. § 48.\*]

Appeal from Superior Court, Craven County; Whedbee, Judge.

Action by G. A. Whitford against the Board of Commissioners of Craven County. From a judgment sustaining a demurrer to the complaint, plaintiff appeals. Affirmed.

R. A. Nunn, for appellant. E. M. Green, for appellee.

WALKER, J. This action was brought to restrain the collection of a tax and the issue of bonds by the county of Craven and township No. 1 in the said county. The tax was levied and the bonds are proposed to be issued for the establishment, support, and maintenance of a county farm-life school in the county and township, under and by virtue of Public Laws of 1911, c. 84, the provisions of which have been fully complied with. Elections were duly held in the county and township; and by a majority of the qualified voters the levy of a tax of \$2,500 and the issue of bonds by the county to the par value of \$5,000, and by the township to the amount of \$10,000, was authorized for the purposes mentioned in the statute. These and other facts, not necessary to be stated, were alleged in the complaint, to which the defendants demurred. His honor, Judge Whedbee, sustained the demurrer, and the plaintiff appealed.

[1] The plaintiff attacks the validity of the tax levy and the bonds proposed to be issued, upon the ground that in section 17 of the act it is provided that not more than one farm-life school shall be established in any county, and by this prohibition it is argued that the local authorities are deprived of the power to provide equal facilities for the two races; but we do not think this follows. What the statute means is that there shall not be more than one school of this kind for the instruction of both races, in separate buildings, with equal facilities. Having two or more buildings for the purpose of racial separation does not constitute two legally distinct schools. It is all one school, though consisting of two divisions, one for each race. The plaintiff contended that the principle announced in *Williams v. Bradford*, 158 N. C. —, 73 S. E. 154, applies to this case; but we think the two cases are widely different. In the *Williams* Case, it was clear that provision was made for one race only; but in this case the statute does not provide for each race exclusively, and it might just as reasonably be argued that the benefit of the school was confined to the colored race, as it can be that it is restricted to the white race.

[2] We are not at liberty to declare a legislative act void, as being unconstitutional, unless it is clearly so, beyond any reasonable doubt. There is always a strong presumption in favor of the validity of legislation, which must be overcome by some convincing reason to induce a court to declare it void. The act under consideration makes no discrimination between the races; and there is no expression in it which leads us to think that the school was intended for the exclusive benefit of the one race or the other. In this respect, the language of the act is not unlike that which we construed in *Lowery v. School Trustees*, 140 N. C. 33, 52 S. E.

267, favorably to a provision establishing a graded school, in which Justice Connor said: "While, in other acts which we have examined, the plural is used, we see no difficulty in finding in the act a positive direction to establish one school, in which the children of each race are to be taught in separate buildings and by separate teachers. The Constitution expressly commands it to be done; this was well known to the draftsman and the Legislature."

There was no error in sustaining the demurrer, and this affirms the judgment.

Affirmed.

(159 N. C. 163)

BOARD OF EDUCATION OF GRAHAM  
COUNTY v. UNION DEVELOPMENT  
CO. et al.

(Supreme Court of North Carolina. May 28, 1912.)

1. QUIETING TITLE (§ 10\*)—TITLE OF PLAINTIFF—GRANTOR—DEED IN ESCROW.

Until the condition upon which a deed is placed in escrow is performed, title remains in grantor, and he may bring an action to remove a cloud from the title.

[Ed. Note.—For other cases, see *Quieting Title*, Cent. Dig. §§ 36-42; Dec. Dig. § 10.\*]

2. QUIETING TITLE (§ 10\*)—TITLE TO SUSTAIN ACTION.

Plaintiff sued defendant company and the individual defendants to remove a cloud from the title of land claimed by the latter. It appeared that plaintiff had executed a deed for the land in controversy to defendant company, and placed it in escrow to be delivered when the company had executed a deed to plaintiff for an acre of land for a school site, to be selected by plaintiff, and that such site had not been selected nor the deed therefor executed by the company at the time of trial. The court ruled that plaintiff, having executed the deed, had no title to authorize it to maintain the action. *Held* that, since grantor and grantees and the adverse claimants were all before the court, if the parties desired, the action should have proceeded, especially in view of the equitable nature of the action, and the scope of the relief in such actions having been enlarged by Revisal 1905, § 1589.

[Ed. Note.—For other cases, see *Quieting Title*, Cent. Dig. §§ 36-42; Dec. Dig. § 10.\*]

Appeal from Superior Court, Graham County; Lane, Judge.

Action by the Board of Education of Graham County against the Union Development Company and others. From a judgment of nonsuit, plaintiff appeals. Reversed.

Morphew & Phillips, for appellant. A. D. Raby and Dillard & Hill, for appellees.

HOKE, J. As we understand the record, this is an action to remove a cloud from the title to an acre of land held and claimed by plaintiff for school purposes, and arising by reason of an adverse claim made to said land by the individual defendants B. M. Orr et al. During the progress of the trial it appeared that plaintiff board had prepared a deed for the land in controversy to the de-

fendant, the Union Development Company, and deposited the same as an escrow with Mr. George B. Walker, to be delivered when said company had executed a deed to plaintiff for one acre of the company's land for school purposes to be selected by the school board, and that this site had not been selected nor the deed therefor made by the company at the time of trial. Upon these facts we think that the action should have been allowed to proceed.

[1] It is very generally held that, in case of an escrow until condition performed, the title remains in the grantor and the ordinary actions for the protection of the property and preservation of the title may be brought by him. *County of Calhoun v. Emigrant Co.*, 93 U. S. 124, 23 L. Ed. 826; *Fuller v. Hollis*, 57 Ala. 435; *Merchants' Ins. Co. v. Nowlin* (Tex.) 56 S. W. 198; 3 *Washburne on Real Property* (5th Ed.) p. 321; *Hopkins on Real Property*, p. 135; 16 *Cyc.* p. 578. The case of *Arrington v. Arrington*, 114 N. C. 116, 19 S. E. 278, does not antagonize the principle, and *Craddock v. Barnes*, 142 N. C. 89, 54 S. E. 1003, is in direct recognition of it. Thus at page 97 of 142 S. C., at page 1006 of 54 S. E., Associate Justice Walker delivering the opinion says: "It is therefore the performance of the condition, and not the second delivery, that gives it vitality as a deed sufficient to pass the title," etc.

[2] Apart from this an action of this character is in the nature of an equitable proceeding; the scope of the relief having been somewhat enlarged and extended by the provisions of our statute. *Revisal*, § 1589; 6 *Pomeroy's Eq. Jurisprudence*, § 724 et seq., and, even in case of conditions performed pending suit, the grantor and grantee and adverse claimants being all before the court, there seems to be no reason, if the parties so desire, why the trial of the cause should not be proceeded with. There was error in the ruling of the court, and this will be certified that the order of nonsuit be set aside and the issues raised properly determined.

Error.

(159 N. C. 455)

**RICHARDS v. W. M. RITTER LUMBER CO.**  
(Supreme Court of North Carolina. May 28, 1912.)

On motion for rehearing. Former judgment reformed.

For former opinion, see 73 S. E. 485.

**PER CURIAM.** Upon consideration of the opinion and judgment at last term, the court is of opinion, as alleged in the petition to rehear, that the conclusion and judgment at last term should be reformed by striking out the judgment "defendant's appeal dismissed" and substituting in lieu thereof,

after the word "record," the words "in both appeals, new trial," as prayed in the petition to rehear.

Judgment reformed accordingly.

(159 N. C. 456)

# STATE v. AVERY.

(Supreme Court of North Carolina. May 28, 1912.)

## 1. INTOXICATING LIQUORS (§ 219\*)—INDICTMENT—SUFFICIENCY.

An indictment, charging that the defendant did unlawfully and willfully sell spirituous and intoxicating liquors to a person or persons, to the jurors unknown, for gain, was sufficient as against an objection that it failed to state the names of the persons to whom the sale was made.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. §§ 237-239; Dec. Dig. § 219.\*]

## 2. CRIMINAL LAW (§ 878\*)—VERDICT—DIFFERENT COUNTS.

A general verdict upon an indictment containing several counts will be sustained, if one count is good.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 2098-2101; Dec. Dig. § 878.\*]

## 3. CRIMINAL LAW (§ 1129\*)—APPEAL AND ERROR—ASSIGNMENTS OF ERROR—NECESSITY.

Exceptions to rulings upon the evidence and to the instructions given cannot be considered, in the absence of assignments of error.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 2954-2964; Dec. Dig. § 1129.\*]

Appeal from Superior Court, Lenoir County; Justice, Judge.

E. L. Avery was convicted of unlawfully selling intoxicating liquors, and he appeals. No error.

The defendant was convicted upon an indictment containing three counts. The first count charges that the defendant "did unlawfully and willfully engage in the business of a retail liquor dealer;" the second that he "did sell and retail to a person or persons unknown a quantity of spirituous liquors by the small measure, to wit, by a measure less than a quart, without having a license from the state of North Carolina to so sell;" and the third that he "did unlawfully and willfully sell spirituous and intoxicating liquors to a person or persons, to the jurors unknown, for gain." The defendant moved to quash the bill of indictment, and in arrest of judgment, and excepted to the denial of each motion, and these motions are renewed in this court. There was a verdict of guilty, and from the judgment pronounced thereon the defendant appealed.

T. O. Wooten and Murray Allen, for appellant. Attorney General Bickett and T. H. Calvert, for the State.

**PER CURIAM.** [1, 2] The form of the third count in the indictment is approved in *State v. Dowdy*, 145 N. C. 434, 58 S. E.



1002, and a general verdict, as in this case, upon an indictment containing several counts, will be sustained, if one is good. *State v. Tisdale*, 61 N. C. 220; *State v. Holder*, 133 N. C. 710, 45 S. E. 862; *State v. Dowdy*, 145 N. C. 432, 58 S. E. 1002. The motions to quash the indictment and in arrest of judgment were therefore properly overruled.

[3] There are several exceptions in the record to rulings upon evidence, and to parts of his honor's charge, but, as there are no assignments of error, they cannot be considered.

No error.

(159 N. C. 165)

### ROBINSON v. JARRETT.

(Supreme Court of North Carolina. May 28, 1912.)

#### JUSTICES OF THE PEACE (§ 47\*) — WIFE'S DEBTS—LIABILITY.

Under Revisal 1906, § 2094, which prohibits contracts by a married woman, except as to necessities, her contract for necessities for the support of herself and family is enforceable in a justice court to the same extent as if she were a feme sole.

[Ed. Note.—For other cases, see *Justices of the Peace*, Cent. Dig. §§ 184-188; Dec. Dig. § 47.\*]

Hoke, J., dissenting.

Appeal from Superior Court, Macon County; Webb, Judge.

Action by J. S. Robinson against Mrs. H. H. Jarrett. From the judgment, plaintiff appeals. New trial granted.

The following issues were submitted to the jury:

"(1) Is the defendant indebted to the plaintiff?" Answer: "Yes."

"(2) If so, what amount?" Answer: "\$21.31."

Johnston & Horne, for appellant. J. F. Ray and R. D. Sisk, for appellee.

**BROWN, J.** This action was brought before a justice of the peace against the defendant for the recovery of \$200 alleged to be for necessities of life furnished to the defendant for the use of herself and her immediate family. This is the only assignment of error. The defendant offered no evidence. The evidence of the plaintiff tends to prove that the defendant had brought suit against her husband in October, 1909, for divorce from bed and board. At Spring term, 1910, the defendant amended her complaint, charging adultery upon the part of the husband, and obtained a judgment for divorce a vinculo May 7, 1910. This action was instituted June 11, 1911.

The plaintiff's evidence tended to prove that the defendant had purchased a part of the goods, to wit, \$21.31, after the decree of divorce was entered. His honor held that the justice of the peace had no jurisdiction

as to the remainder of the debt, and directed the jury to enter a verdict for \$21.31. The plaintiff excepted and appealed. The evidence offered for the plaintiff tended to prove that the entire debt, except the aforesaid \$21.31, for which the suit was brought, was incurred by the defendant pending the divorce proceedings between herself and her husband for the necessities of life for herself and her family, for food and clothing. The evidence also tended to prove that for some time prior to the institution of the divorce proceedings the defendant and her husband had not lived together as man and wife, and that the defendant had contracted debts for the necessities of life for the support of herself and children.

We are of opinion that his honor erred in holding that the justice of the peace had no jurisdiction. It is true that it has been held in a great many cases that a justice of the peace has no jurisdiction to render a judgment against a married woman upon a contract entered into with the written consent of her husband, and that the remedy is to proceed in equity in the superior court to charge the separate estate of the married woman if the facts justify. *Dougherty v. Sprinkle*, 88 N. C. 301; *Flaum v. Wallace*, 103 N. C. 298, 9 S. E. 567; *Bank v. Benbow*, 150 N. C. 784, 64 S. E. 891. These cases proceeded upon the theory that at law a married woman is incapacitated to bind herself personally, and hence her contract will not be enforced against her in personam, but equity will so far recognize it as to make it bind her separate estate, and will proceed in rem against it. The law regards such estate as a sort of artificial person, created by the courts of equity, and that the estate is debtor and liable for her engagements. *Dougherty v. Sprinkle*, supra. Statute Revisal, § 2094, prohibited prior to the act of 1911 (Pub. Acts 1911, c. 109) a married woman during coverture from making any contract affecting her real or personal estate without the written consent of her husband, unless she be a free trader. In this statute there are two notable exceptions, and these are debts for her necessary personal expenses, or for the support of her family, and such as may be necessary in order to pay her debts existing before marriage. These two exceptions are recognized in *Bank v. Benbow*, supra, and as to them the feme covert has always had, since the passage of the statute, unrestricted power to contract as if she was a feme sole. It is upon this principle that the case of *Neville v. Pope*, 95 N. C. 346, and similar cases were decided, and it is based upon one of the exceptions contained in the statute. In that case it is held that a feme covert may be sued in the court of a justice of the peace for a debt due by her, or on a contract made by her before marriage, or for a debt contracted by her as a free trader.

We base our decision upon a construction

of the statute (Rev. § 2094), which gives by plain implication to a married woman the unqualified and unrestricted right to contract for necessities for the support of herself and family, which contract may be enforced to the same extent and by the same courts as if she were a feme sole.

New trial.

HOKE, J. (dissenting). Whatever might be my opinion if it were an open question I think the disposition made of the present appeal is contrary to every decision of the court construing the statute regulating the contracts of married women since same was enacted by the Legislature of 1871-72, c. 193, beginning with *Pippen v. Wesson*, 74 N. C. 437. The question as to subsequent transactions having ceased to be of importance by reason of the Martin Act (chapter 109, Public Laws of 1911) it would serve no good purpose to make extensive reference to the cases or the reasons upon which they were made to rest. I therefore enter my dissent without further comment.

(159 N. C. 462)

#### STATE v. PACE.

(Supreme Court of North Carolina. May 28, 1912.)

##### 1. CRIMINAL LAW (§ 145\*)—VENUE—CHANGE—APPLICATION—TIME FOR MAKING.

Where on the preliminary hearing of a person charged with seduction it appeared that the act was committed in N. county, accused waived his objection to the venue by not filing a plea in abatement until after he had pleaded not guilty and entered on the trial in C. county.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 258½, 259; Dec. Dig. § 145.\*]

##### 2. CRIMINAL LAW (§ 1149, 279\*)—INDICTMENT AND INFORMATION (§ 139\*)—PLEAS IN ABATEMENT—TIME FOR.

The allowance of a plea in abatement or motion to quash a bill of indictment after a plea of not guilty is in the discretion of the trial court and cannot be reviewed by the Supreme Court.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3039-3043, 3058, 643, 644; Dec. Dig. § 1149, 279.\* Indictment and Information, Cent. Dig. § 473; Dec. Dig. § 139.\*]

##### 3. SEDUCTION (§ 46\*)—CRIMINAL OFFENSES—EVIDENCE—CORROBORATION.

In a prosecution for seduction, declarations of the prosecuting witness to other parties that she and accused were going to be married were competent to corroborate her testimony as to the promise of marriage.

[Ed. Note.—For other cases, see Seduction, Cent. Dig. §§ 83-86; Dec. Dig. § 46.\*]

##### 4. SEDUCTION (§ 46\*)—CRIMINAL OFFENSES—EVIDENCE—SUFFICIENCY.

Evidence in a prosecution for seduction held to sufficiently corroborate the prosecuting witness' testimony as to the promise of marriage.

[Ed. Note.—For other cases, see Seduction, Cent. Dig. §§ 83-86; Dec. Dig. § 46.\*]

##### 5. WITNESSES (§ 414\*)—CORROBORATION OF IMPEACHED WITNESS.

When a witness has been impeached by cross-examination or otherwise, and it is nec-

essary to corroborate her testimony, declarations by her similar to the testimony may be proved by the witness or by those to whom they were made.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1287, 1288; Dec. Dig. § 414.\*]

Appeal from Superior Court, Craven County; Carter, Judge.

H. N. Pace was convicted of seduction under promise of marriage, and he appeals. Affirmed.

Moore & Dunn, for appellant. Attorney General Bickett and Assistant Attorney General Calvert, for the State.

BROWN, J. 1. At the conclusion of the testimony of Henriette Dougherty, the prosecutrix, who testified for the state, the defendant filed a plea in abatement averring that the said indictment could not be maintained in the county of Craven, but should be tried in the county of New Hanover where the alleged act of seduction, according to the testimony of the said witness, occurred. His honor overruled the plea. The defendant excepted.

[1] The findings of the judge show that, at the preliminary hearing of this case when the defendant was bound over, all of the facts set out in the plea of abatement appeared in evidence, and the defendant was present and represented by counsel. He knew at the time when the indictment was tried and before the jury was impaneled what the testimony of the prosecuting witness would be. He had ample opportunity to file his plea in abatement in apt time.

[2] It is well settled that a plea in abatement or a motion to quash a bill of indictment made after the plea of not guilty is entered is only allowed in the discretion of the court. His honor declined in his discretion to permit the plea to be filed. The exercise of his discretion is not reviewable by us. *State v. Jones*, 88 N. C. 672. Assuming that the county of New Hanover was the proper venue, the defendant, having full knowledge of the facts which the state relied upon, is deemed to have waived the point by not filing his plea in abatement in apt time. *State v. Holder*, 133 N. C. 709, 45 S. E. 862; *State v. Woodard*, 123 N. C. 710, 31 S. E. 219.

2. It is contended by the defendant that there is not sufficient corroborating evidence to the testimony of the prosecutrix. The statute provides that "the unsupported testimony of the woman shall not be sufficient to convict," but it in no sense limits or defines the character of the corroborating testimony required. That is to be determined by the ordinary rules of evidence.

There are three essentials to a conviction under this statute: First, the criminal act; second, that it was the seduction of an innocent and virtuous woman; and, third, that

it was done under promise of marriage. The first is admitted by the defendant; the second is proven practically by all the evidence in the case, and is really not disputed so far as the character of the woman is concerned; the promise of marriage is testified to by the prosecutrix and corroborated fully by her declarations made before the seduction as well as afterwards.

[3] It is settled that statements to others that the prosecutrix and the defendant were going to be married are competent for the purpose of corroborating the testimony of the prosecutrix that the defendant had offered and promised to marry her. *State v. Kincaid*, 142 N. C. 657, 55 S. E. 647; *State v. Whitley*, 141 N. C. 823, 53 S. E. 820.

[4] The evidence tends to prove that the defendant was a married man working in the railroad shops at New Bern, and that his wife and children were living with his father at Richmond; that the prosecutrix was employed as a waitress at a hotel, and that she first became acquainted with the defendant in February of that year; that she testified positively that she did not know that he was a married man, and that he represented himself as a single man and repeatedly offered to marry her; that they went on excursions together to Morehead City and other places; that they were engaged to be married in January; that he told her that he could not wait until January, and desired her to marry him in August; he called regularly to see her on Sunday and Wednesday nights; they frequently went out together in public; they went to Wilmington on Sunday to get married, the defendant stating that he had prepared to have the marriage license ready and the marriage take place. At Wilmington they went to a hotel; the defendant registered as "H. M. Pace and wife"; they were assigned to a room when the alleged seduction was accomplished. Immediately afterwards the defendant said that there was some miscarriage about the marriage license and they would have to go somewhere else to be married. He constantly made excuses, deferring the marriage.

All of these details were communicated by the prosecutrix to others and corroborated by them after she found the defendant could not marry her. The promise of marriage and the attention of the defendant to her were made known to her friends before the trip to Wilmington. We think that the evidence corroborates the testimony of the prosecutrix in every particular, and that upon all the evidence the verdict of the jury was well warranted.

[5] It is well settled in this state that, when a witness is impeached upon cross-examination or otherwise, and it is necessary to sustain the testimony by corroborative evidence, proof of declarations made

to others similar to the testimony given in evidence on the trial may be proved by the witness who made them and the persons to whom they were made. *State v. George*, 30 N. C. 324, 49 Am. Dec. 392; *March v. Harrell*, 46 N. C. 329; *State v. Whitfield*, 92 N. C. 831.

In addition to this character of corroborating evidence, we think there is evidence of admissions by the defendant, and of his conduct towards the prosecutrix while he was in jail, which tends to corroborate the charge of the state that the seduction took place under promise of marriage, and the prosecutrix being ignorant of the fact that the defendant was married.

Upon a review of the whole record, we find no error which we think is of sufficient importance to justify us in ordering another trial. We have carefully examined the remaining assignments of error, and find them without merit.

No error.

(159 N. C. 404)

ANDERSON v. MEADOWS et al.

(Supreme Court of North Carolina. May 28, 1912.)

1. NEW TRIAL (§ 39\*)—GROUNDS—CONFLICTING INSTRUCTIONS.

Where the instructions, in part correct and in part erroneous, are so blended that the court cannot tell which one influenced the jury to give its verdict, a new trial must be granted.

[Ed. Note.—For other cases, see *New Trial*, Cent. Dig. §§ 57-61; Dec. Dig. § 39.\*]

2. PUBLIC LANDS (§ 164\*)—PURCHASE OF INDIAN LANDS ACQUIRED BY TREATIES—EFFECT.

A purchase under the act of 1819, c. 997, providing for the sale of land acquired by treaties with Indians, gives the purchaser paying the price the right of a purchaser from the state, and the land is no longer vacant and subject to entry under Acts 1852, c. 119, and Code, c. 11; and one making an entry on the land and obtaining a grant prior to the issuance of a grant to the purchaser does not acquire title as against the purchaser.

[Ed. Note.—For other cases, see *Public Lands*, Cent. Dig. §§ 466-476; Dec. Dig. § 164.\*]

Appeal from Superior Court, Macon County; Webb, Judge.

Action by A. I. Anderson against Emlus Meadows and another. From a judgment for plaintiff, defendants appeal. Reversed, and new trial granted.

Johnston & Horn, for appellants. Robertson & Benbow, for appellee.

WALKER, J. This is an action for the recovery of land. Plaintiff claimed title under a grant, No. 2,596, issued to Jacob Shope in 1862, upon an entry made by him in 1859, and the will of Jacob Shope devising the land to her. Defendants claimed under a purchase made by Clark Byrd from the state under the act of 1819, c. 997, providing for the sale of the lands acquired by treaties

with the Cherokee Indians of 1817 and 1819. They connected themselves with Byrd by mesne conveyances. A grant was issued by the state to Clark Byrd as purchaser in 1864, and recites the fact that the tract is a part of the land acquired by treaty from the Cherokee Indians and sold under the provisions of the act of the General Assembly to Clark Byrd, who had paid the purchase money. The grant to Jacob Shope recites the fact that the tract therein described is a part of the land acquired by treaty from the Cherokee Indians and sold under the act of the General Assembly aforesaid, but it does not state that it was bought by Jacob Shope, but that he entered it. Both grants were duly registered, and it was admitted that they covered the land in dispute. It was also admitted that the land described in the grant to Clark Byrd, No. 2,934, was section No. 11, district No. 17, in Macon county, acquired by treaty from the Cherokee Indians, surveyed by the state in 1820, and bought at a sale made by the commissioner for the state by Clark Byrd, to whom the said grant issued in accordance with the statute concerning the sale of Cherokee lands. And the grant which was issued to Jacob Shope in 1859 upon his entry was for the same land as that described in the grant issued to Clark Byrd.

The court charged the jury that if they found as a fact that the plaintiff, Mrs. Anderson, is the same person to whom the land was devised by Jacob Shope, the plaintiff would be entitled to recover the locus in quo, as the grant to Jacob Shope was issued more than two years before the grant was issued to Clark Byrd under whom the defendants claim. The court therefore made the plaintiff's right to recover depend solely upon the seniority of the grant to her father, who devised it to her.

[1] All of the charge is not set out, but whatever else the judge may have said to the jury, and however correct it may have been, if there was error in the instruction as to the grants, there must be a new trial, as the instructions were so blended that we cannot tell which one influenced the jury to give their verdict for the plaintiff. *Tillett v. Railroad*, 115 N. C. 663, 20 S. E. 480; *Edwards v. Railroad*, 129 N. C. 80, 39 S. E. 730. The instruction as to the grants was erroneous.

[2] It appeared upon the face of both that the land which plaintiff's father had entered, and upon which his grant was issued, was not the subject of entry, as the act of 1852 only authorized the entry of those Cherokee lands which were then vacant, and lands which had been sold by the state no longer belonged to it and were not therefore vacant and subject to entry. By his purchase at the sale which was made pursuant to the statute, the grantee, Clark Byrd, acquired not a mere option, such as an enterer under the general law would get by his entry, but the

right or interest of a purchaser; the relation being that of vendor and vendee. The act of 1852, under which Jacob Shope made his entry, permitted an entry only of those lands when vacant or which had not been previously sold under the Cherokee land statutes. *Frazier v. Gibson*, 140 N. C. at marg. page 275, 52 S. E. 1035; Acts of 1852, c. 119; Code, c. 11.

As it appears that the land in dispute had already been sold, it was not the subject of entry, and any grant issuing upon such an entry is void. The case cannot be distinguished from *Harshaw v. Taylor*, 48 N. C. 513. In that case the facts were that plaintiff made an entry of the locus in quo in 1852. The defendant purchased the same from the Indian land commissioners under the acts of 1836-7; it being Cherokee land. Referring to the right to attack a grant collaterally, and stating that it depends upon whether the jurisdiction of the officer to issue it is general or special, Judge Pearson said: "Upon these two distinctions our case is easily disposed of. The act of 1852 confers a general authority. It extends to all unsold land at a fixed price per acre. But it was properly admitted by the plaintiff's counsel that the grant to him could not be supported by the aid of that statute (act of 1852); (because) the statute only authorizes the entry and grant of vacant and unsold land, whereas the land in controversy had been previously surveyed and sold according to the provision of the statutes in reference to land lying in the county of Cherokee."

Speaking to a like question, Justice Connor said in *Janney v. Blackwell*, 138 N. C. 437, 50 S. E. 857: "The statutes in force in this state for more than a century have permitted 'all vacant and unappropriated lands belonging to the state,' with certain well-defined exceptions, to be entered and grants taken therefor. Code, § 2751. To be subject to entry under the statute, lands must be such as belong to the state and such as are vacant and unappropriated." *Hall v. Hollifield*, 76 N. C. 476; *State v. Bevers*, 86 N. C. 588. By making the entry as prescribed by law, the enterer does not acquire any title to the land, but only a 'pre-emption right,' or, as it is sometimes called, an 'inchoate equity' or right to call for a grant upon compliance with the statute. The grant when issued relates to the entry and vests the title in the grantee. The land when granted is no longer subject to entry as 'vacant and unappropriated lands.' *Featherston v. Mills*, 15 N. C. 596; *Hoover v. Thomas*, 61 N. C. 184; *State v. Bevers*, supra; *Newton v. Brown*, 134 N. C. 439, 46 S. E. 994. It follows therefore that, if one lay an entry upon and procure a grant for land covered by a grant, he acquires no title thereto, for the reason that the state has by the senior grant parted with its title. *Stanmire v. Powell*, 35 N. C. 312. If the land be open to entry and a grant be issued therefor, such grant

may not be attacked collaterally for fraud, irregularity, or other cause. This can be done only by the state or by pursuing the provisions of section 2786 of the Code. But if the land be not subject to entry, the grant is void, and may be attacked collaterally."

We think therefore that the instruction of the court was erroneous. There were questions discussed as to the statute of limitations with special reference to the bearing of *Ritchie v. Fowler*, 132 N. C. 788, 44 S. E. 616, and *Frazier v. Gibson*, supra, upon the case, but the facts of those cases and this one are not alike. In the two former cases there was a conflict between entries made under the act of 1852 and subsequent modifying statutes, while in this case the land had been sold under the act of 1819 and subsequent enabling statutes, and was therefore not the subject of entry under the other acts mentioned. Whether Clark Byrd complied with the statute is a question not presented. He paid the purchase money, though it does not appear when it was paid, if that be material. *Kimsey v. Munday*, 112 N. C. 830, 17 S. E. 583, citing *Gilchrist v. Middleton*, 108 N. C. 705, 13 S. E. 227.

With the facts now before us, we are of the opinion that there was error in the instruction given to the jury.

New trial.

(159 N. C. 366)

RUSSELL et al. v. TOWN OF TROY et al.  
(Supreme Court of North Carolina. May 28, 1912.)

### 1. STATUTES (§ 21\*)—ENACTMENT—PARTICULAR CLASSES OF ACTS.

Pub. Laws 1903, c. 441, created a graded school district including a town, and authorized a vote on the question of issuing bonds. This act was amended by Priv. Laws 1909, c. 54, and further amended by Priv. Laws 1911, c. 69, so as to provide that the bonds should be for 30 instead of 20 years, should be based on a levy of 60 instead of 30 cents on the \$100, and should amount to \$20,000 instead of \$15,000. This last act was not passed in accordance with Const. art. 2, § 14, requiring laws imposing a tax on the people of the state, or allowing the counties, cities, or towns to do so, to be read three times in each house, and to pass three several readings on three different days; the vote being entered on the journal. After its passage, a vote was taken on the issuance of 30-year bonds amounting to \$20,000, which was carried. *Held*, that this last act was invalid, and did not authorize the issuance of any bonds.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 18-27; Dec. Dig. § 21.\*]

### 2. SCHOOLS AND SCHOOL DISTRICTS (§ 97\*)—BONDS—AUTHORITY TO ISSUE.

The issuance of 20-year bonds amounting to \$15,000, and based on a 30-cent tax rate, as authorized prior to the enactment of such act of 1911 (Priv. Laws 1911, c. 69), was unauthorized, because the people had not voted to authorize such issuance.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. §§ 224-232; Dec. Dig. § 97.\*]

### 3. STATUTES (§ 64\*)—REPEAL—INVALIDITY OF REPEALING ACT.

Such issuance of 20-year bonds was also unauthorized, because the legislative authority therefor was repealed by the act of 1911 (Priv. Laws 1911, c. 69), that act being valid as a repealing act, although invalid as a law imposing a tax and amending a law imposing a tax, without compliance with the constitutional requirement of three readings of the law as enacted.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 58-66, 195; Dec. Dig. § 64.\*]

Appeal from Superior Court, Montgomery County; O. H. Allen, Judge.

Action by L. M. Russell and others against the Town of Troy and another. From a judgment for defendants, plaintiffs appeal. Reversed.

J. A. Spence and Jerome & Price, for appellants. W. A. Cochran and R. T. Poole, for appellees.

CLARK, C. J. Chapter 441, Laws 1903, created a graded school district including the town of Troy, and authorized a vote on the question of issuing \$5,000 in bonds to establish the school and provided machinery for holding the election. Chapter 54, Private Laws 1909, amended the above act of 1903 by striking out \$5,000 and inserting \$15,000. Both the above acts were passed in the manner required by Const. art. 2, § 14. Chapter 69, Private Laws 1911, § 1, amended the act of 1903 by "striking out the word 'twenty' and inserting in lieu thereof the word 'thirty.'" The effect of this was to repeal and strike out the authority given by the act of 1903 to issue 20-year bonds. Section 3 of the act of 1911 further amended the act of 1903 by "striking out the word 'thirty' in line eleven and inserting the word 'sixty.'" The effect of this was to strike out the authority conferred by the act of 1903 to issue bonds based upon a levy of 30 cents on the \$100 of property and requiring the bonds to be based upon a levy of 60 cents on the \$100. The act of 1911 further amended the act of 1903 by striking out "\$5,000" and inserting "\$20,000" as the amount of bonds authorized to be issued, and amended the machinery for holding the election.

[1, 2] After the act of 1911, and under the authority and machinery of said act, an election was held at which the town voted to issue \$20,000 of 30-year bonds, and has contracted for the sale of \$20,000 in 30-year bonds. The said act of 1911 is invalid as an authority to issue the bonds, because it was not passed in the mode required by the Constitution (article 2, § 14). The defendants contend, however, that \$15,000 of the bonds are valid under the acts of 1903 and 1909. But it will be seen at once that an authority given at the ballot box to issue \$20,000 in 30-year bonds, based upon a tax rate of 60 cents per \$100, will not authorize the is-

suance of \$15,000 in 20-year bonds, based upon a 30-cent tax rate. The people have not voted their assent to the latter proposition.

[3] Besides, the authority to issue "20-year" bonds is not in existence. It was repealed by the act of 1911. The legislative act to that effect was valid, though the attempt to substitute \$20,000 in 30-year bonds was invalid for failure to comply with the Constitution.

In *Glenn v. Wray*, 128 N. C. 733, 36 S. E. 167, 169, this court held that, though an act had passed in the constitutional mode under article 2, § 14, the three readings in both houses, and with the aye and nay vote on second and third readings in each house duly recorded, but there was a material amendment upon the last reading in the second house, the act was invalid. The court said that when such amendment is in a material matter "it would be necessary that the amended bill should be read over again three times in each house, with yea and nay vote on the second and third readings entered on the journals. It is the bill in its final shape, not in another and different form, which requires these preliminaries to its validity. It would be a clear evasion of the constitutional guaranties and of the restrictions upon legislative power if, after a bill had passed one house and two readings in the other in the required manner, it could then be amended into something else. \* \* \* In ordinary legislation, material amendments may be made even on the last reading in the second house; and when concurred in by the other house the bill is law. In such cases, the ratification is conclusive of the passage of the act. But it is otherwise as to legislation which the Legislature is restricted from passing, except in a manner specifically pointed out and prescribed. In the latter case, any substantial amendment requires the passage of the amended bill in the prescribed manner de novo. *Norman v. Kentucky* [93 Ky. 537, 20 S. W. 901, 14 Ky. Law Rep. 529], 18 L. R. A. 557."

This being so, even where the amendment is made in the passage of the bill itself, and when the bill has passed three readings in each house, with the aye and no vote recorded on the journals on the second and third readings in each house, for a stronger reason, the bonds are invalid when the material amendment is made in a subsequent act.

The act of 1911, striking out "20 years," was one which the Legislature, in 1911, could enact without recording the ayes and noes, as was also the provision striking out \$5,000 and inserting \$20,000, and was valid as ordinary legislation.

There is no authority to issue \$15,000 in 20-year bonds, both because the people have not voted for such bonds, and because the

provision authorizing such bonds has been stricken out by the Legislature of 1911. It is true the people have voted to issue \$20,000 in "30-year bonds," but they are not authorized, because the act of 1911 was not passed in the constitutional mode. The bonds are therefore invalid, and the injunction should have issued as prayed for.

Reversed.

(159 N. C. 299)

**THOMASON v. HACKNEY & MOALE CO.**  
(Supreme Court of North Carolina. May 28, 1912.)

**DAMAGES (§ 55\*)—BREACH OF CONTRACT—MENTAL ANGUISH—PERSONS ENTITLED TO RECOVER.**

P., plaintiff's sister, having left with defendant films and contracted for the development of them and the making of photographs from them, without any suggestion or notice to defendant that she was acting for plaintiff, but merely said that they were pictures of her sister's little girl who was dead, and that they were the only films there were of her, plaintiff cannot recover for mental anguish for their loss.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. § 100; Dec. Dig. § 55.\*]

Clark, C. J., dissenting.

Appeal from Superior Court, Buncombe County; Long, Judge.

Action by Mrs. R. M. Thomason against the Hackney & Moale Company. Judgment for plaintiff, and defendant appeals. Reversed, and new trial granted.

Merrick & Barnard, for appellant. H. C. Chedester, for appellee.

**WALKER, J.** This is an action upon contract. The plaintiff alleges that, having been advised that her infant child was about to die, she caused a number of photographic negatives to be made by a friend with her kodak, and that said negatives or films were taken to defendant to be developed and finished, and the films returned and the photographs delivered to the plaintiff; the defendant at the time being engaged in the business of developing such negatives and making photographs from them. The defendant received the films and undertook to develop and finish the same for a price to be paid by the plaintiff, but, having lost them, he failed to return them with the photographs according to the contract. The plaintiff further alleges that these negatives were the only ones she had of the deceased child, and she had no other pictures or likenesses of her, and defendant received and accepted the films or negatives with full knowledge of the facts. He knew the child was dead, and that, if the films were lost and the photographs not delivered, the plaintiff would not be able to have a likeness of her child taken. The evidence shows that the films were taken to the defendant on July 10, 1906, by

Mrs. Dora Phillips, a sister of the plaintiff, who delivered them to a clerk of the defendant at its place of business, and he promised to develop them and make photographs from them. The plaintiff, it seems from her complaint, seeks to recover damages for mental anguish suffered by her resulting from the loss of the films and photographs from them of her child who died. It may be that, by a very liberal construction of the complaint, we may gather that the plaintiff has alleged that she suffered other damage by the breach of the contract, but this, perhaps, is immaterial, as the recovery was confined by the judge's charge to damages for the mental anguish which she suffered. The jury rendered a verdict for the plaintiff, upon which judgment was rendered, and the defendant appealed.

In order to determine whether there was error in allowing the recovery of damages for mental anguish, it will be necessary to set out particularly what was said by Mrs. Dora Phillips when she delivered the films to the clerk of the defendant. She testified as follows: "When I went in, he said, 'Lady, can I wait on you?' and I answered, 'Yes; I have some films to be developed of my sister's little girl.' He was behind the counter and had waited on me before, when I bought some books from him. I left the films with him and told him that I wanted them developed, that they were pictures of my sister's little girl, and that she was dead. I told him there were several of them and I hoped some would be good, and he replied, 'You can get them Monday,' and I said that it was the last we had of them, and, if any were good, to finish a dozen and put them on the cards they had, and that I would want more if they were good. He laid the films on the counter and I said, 'Be careful of them, as they are the only films we have of the little dead girl.' The films or pictures were taken with a kodak on July 3d, and the child died the next day." As the films were delivered to the defendant by Mrs. Dora Phillips, and the contract was to develop them and make photographs from them for her, without any suggestion or notice to the defendant that she was acting for her sister, Mrs. Thomason, who is the plaintiff, we do not think that, under the cases recently decided by this court, the latter can recover damages solely for mental anguish.

We held in *Helms v. Telegraph Co.*, 143 N. C. 386, 55 S. E. 831, 8 L. R. A. (N. S.) 249, 118 Am. St. Rep. 811, 10 Ann. Cas. 643, that a party who is not mentioned in a telegraphic message, or whose interest therein is not otherwise disclosed to the company, cannot recover substantial damages for mental anguish alleged to have been sustained by reason of the nondelivery of the message, and it was said by Justice Brown, who spoke for the court in that case, that the principle thus announced is supported by the "over-

whelming weight of authority." The evidence in that case of the company's knowledge as to who was the principal, or, in other words, as to the identity of the person in whose behalf the message was sent, was quite as strong as, if not stronger than, the evidence in this case, to fix the defendant with notice of the fact that Mrs. Phillips was acting in behalf of her sister, the plaintiff. In the course of the opinion in the *Helms Case*, Justice Brown says: "The same principle applies where the message is sent for the benefit and at the instance of any one whose name does not appear on its face. The well-known rule laid down in *Hadley v. Baxendale*, 9 Exch. 345, decided in 1854, has been applied by the Supreme Court of the United States to telegraph cases, and it is held that where the telegraph company is not informed of the nature of the transaction to which the message relates, or of the position which the plaintiff in the action would probably occupy, the measure of damages for negligence is the sum paid for sending. *Primrose v. Telegraph Co.*, 154 U. S. 29 [14 Sup. Ct. 1098, 38 L. Ed. 883]; *Hall v. Telegraph Co.*, 124 U. S. 444 [8 Sup. Ct. 577, 31 L. Ed. 479]. Our own court has adopted the same principle of law as applicable to this class of cases. In *Williams v. Telegraph Co.*, 136 N. C. 82 [48 S. E. 559, 1 Ann. Cas. 359], it is said: 'The principle uniformly sustained by the cases upon the subject, some of which we have cited, is that, unless the meaning or import of a message is either shown by its own terms or is made known by information given to the agent receiving it in behalf of the company for transmission, no damages can be recovered for failure to correctly transmit and deliver it beyond the price paid for the service.' In *Cranford v. Telegraph Co.*, 138 N. C. 162 [50 S. E. 585], the plaintiff was not permitted to recover because her interest in the telegram was not shown upon the face of it, and was not brought to the attention of the company, and it is specifically held that 'there can be no recovery of damages for delay in the transmission and delivery of a telegram when it does not appear in any way that the plaintiff was the intended beneficiary of the message.' See, also, *Kennon v. Telegraph Co.*, 126 N. C. 232 [35 S. E. 468]."

We have more recently affirmed the same doctrine in *Holler v. Telegraph Company*, 149 N. C. 336, 63 S. E. 92, 19 L. R. A. (N. S.) 475, and, in so far as it is applicable to telegraphic messages, the rule is settled by that case which cites and reviews all prior cases in this court upon the subject. A careful reading of that case will show that it was not intended to decide that the beneficial interest of a third party or party not named in the message should be ascertained and appear by answer to a distinct issue containing an inquiry as to the fact. We were there dealing with issues inadequate to sup-

port the judgment. It would clearly be sufficient if it appeared from the evidence, the charge of the court, and the verdict upon the issues, when considered and construed together, that the defendant had notice of such beneficial interest at the time of making the contract, or, as held in *Peanut Co. v. Railroad*, 155 N. C. 148, 71 S. E. 71, at some intermediate time, under certain circumstances and restrictions therein indicated. The last-cited case sustains the proposition hereinbefore stated. Referring to the matter, Justice Hoke says, in substance, that in the *Helms Case*, supra, the contract had been finally broken and was not in the course of performance, and the sole question at issue being the amount of damages for mental anguish suffered, and due to the defendant's negligent act or breach of the contract, "the personality of the party and his relationship to the subject of the message" was material and should have appeared.

Applying the principle thus established to this case, there was nothing said by Mrs. Phillips to defendant's clerk which would lead him to suppose that she was acting for her sister and not solely for herself. There was nothing unusual in having the films developed and the photographs made for herself. The child was her niece and it was perfectly natural that she should place a special and peculiar value upon the films, and desire to preserve a photograph of her. The jury might have guessed or conjectured that she was acting for her sister, but this will not do. *Byrd v. Express Co.*, 139 N. C. 273, 51 S. E. 851.

The plaintiff, if she establishes her cause of action, will be entitled at least to nominal damages, and she may recover the value of the films if she can prove the same. Whether, in ascertaining this value, the jury may consider the "pretium affectionis," that is, an imaginary value placed upon a thing by the fancy of its owner, growing out of his or her attachment for the specific article, its associations, and so forth, which, perhaps, may not inaptly be called its sentimental value, we need not say, as there was no recovery for the value of the films, but it may not be irrelevant to refer to the question, and, this being so, we cannot do better than to quote what is said in *Hale on Damages* at page 184: "In most cases the market value of the property is the best criterion of its value to the owner, but in some its value to the owner may greatly exceed the sum that any purchaser would be willing to pay. The value to the owner may be enhanced by personal or family considerations, as in the case of family pictures, plate, etc., and we do not doubt that the 'pretium affectionis,' instead of the market price, ought then to be considered by the jury or court in estimating the value. When analyzed, the damage caused by the loss or destruction of property of this nature consists

of two elements: First, the loss of the real property value; second, the grief or mental suffering at the loss of the cherished article. From this we gather what we apprehend to be the true rule, which is that, where property is of such a nature that its loss or destruction, under the circumstances, naturally and proximately causes mental suffering, compensation for such mental suffering may be recovered in a proper action in addition to the actual value of the property." *Suydam v. Jenkins*, 3 Sandf. (N. Y.) 621.

There is some conflict in the authorities relating to this matter, and we will not now attempt to reconcile them or decide what is the correct principle. It has been held that the sentimental value of property, the "pretium affectionis" as it is called, cannot be recovered as compensation for the destruction or conversion of such property. *Moseley v. Anderson*, 40 Miss. 49. It has been said that the satisfaction and pleasure which the possession of an article gives, like the satisfaction which comes from having a contract respected and performed, is of a nature that the law does not recognize as a subject for compensation. *Sedgwick on Damages*, § 251. We find it stated in *Parsons on Contracts* (3d Ed.) 209, that this pretium affectionis cannot be recovered unless in cases where the conversion or appropriation of the property by the defendant was actually tortious. *Hale on Damages*, supra. We barely allude to the subject in *Lumber Co. v. Cedar Co.*, 142 N. C. at pages 416 and 417, 55 S. E. at page 306, when discussing the jurisdiction of courts of equity in cases of injunctions, as follows: "The courts of equity finally assumed jurisdiction for the prevention of torts or injuries to property by means of an injunction, under certain safeguards and restrictions, and two conditions were required to concur before it would thus interfere in those cases, namely, the plaintiff's title must have been admitted or manifestly appear to be good, or it must have been established by a legal adjudication unless the complainant was attempting to establish it by an action at law and needed protection during its pendency, and, secondly, the threatened injury must have been of such a peculiar nature as to cause irreparable damage, as, for instance, in the case of the destruction of shade trees or of any wrongful invasion of property which, by reason of the character of the property or the form of the injury, rendered the wrong incapable of being atoned for by compensation in money, such as torts committed on property and things having a value distinct from their intrinsic worth; for instance, a pretium affectionis, though not a merely imaginary value." Of course damages which are merely imaginary or have no real or substantial existence, should not be allowed. In this case the question is purely academic as it is not presented by any exception, but we con-



sidered it proper that we should make some reference to it, as it is contended that the films had a value peculiar to plaintiff, apart from their intrinsic value.

There was error in the charge under which damages for mental anguish were awarded. New trial.

CLARK, C. J. (dissenting). Upon this evidence, the reasonable inference was that the plaintiff in desiring to get the films of the "little dead girl" developed was acting as agent of her sister, the mother of the little girl, and that the defendant's agents must have understood as much. The court left that issue of fact to the jury, and they found that such was the case. Indeed this is the only natural inference to be drawn from the evidence.

The defendant's agent was told that the little girl was dead and that these films had been taken, some just before and some just after her death, and that they were the only films there were of the child. The defendant's agent must have known that there would be mental anguish if these films were negligently destroyed. Any knowledge of a mother's heart would have told him that.

In *Young v. Telegraph Co.*, 107 N. C. 370, 11 S. E. 1044, 9 L. R. A. 669, 22 Am. St. Rep. 883, this court said: "Damages for injury to feelings, such as mental anguish, are given, though there may be no physical injury in many cases. They are allowed where a party is wrongfully put off a train; in action for breach of promise of marriage; for slander; for libel; for criminal conversation; for seduction; for malicious prosecution; for false arrest; and for wrongfully suing out an attachment." Such damages have been allowed in many other cases where the natural result of the breach of contract or a tort was the infliction of mental anguish.

The verdict and judgment of \$400 should be sustained.

(159 N. C. 283)

**H. BREWER & CO. v. ABERNATHY,  
LYERLY & CO.**

(Supreme Court of North Carolina. May 28, 1912.)

**PARTIES (§ 75\*)—OBJECTIONS—NAMES OF  
PARTNERS—TIME OF OBJECTION.**

Defendant, by waiting until the close of plaintiff's evidence in an action apparently brought by a partnership before attempting to take advantage of the failure to set out the names of the partners in the title of the case, waived any right to object thereto, and cannot first raise the question on demurrer to the evidence.

[Ed. Note.—For other cases, see *Parties*, Cent. Dig. §§ 115, 116, 167; Dec. Dig. § 75.\*]

Appeal from Superior Court, Burke County; Long, Judge.

Action by H. Brewer & Co. against Abernathy, Lyerly & Co. From a judgment of

nonsuit, plaintiff appeals. Reversed, and new trial ordered.

At the close of plaintiff's evidence, the defendant moved for judgment as of nonsuit. This is an extract from the record: "At the close of plaintiff's testimony the defendant demurs ore tenus to the evidence and insists the plaintiff should be nonsuited for that there has no evidence been offered tending to show the names of the partners of the plaintiff's company, if they are partners, and no evidence tending to show that the plaintiff company is an incorporation. Upon an inspection of the record, such as the court is able to make, it fails to find any evidence as to whether it is a partnership or incorporation. The court also fails to find anything in record, summons, or pleading disclosing whether the plaintiff is an incorporation or partnership. The court, therefore, being left in the dark in this matter, upon all the evidence, and upon the record, directs a judgment of nonsuit against the plaintiff, and to such order the plaintiff excepts and appeals to the Supreme Court."

J. T. Perkins, for appellant. Avery & Ervin and A. A. Whitener, for appellees.

BROWN, J. The record discloses two assignments of error: (1) The exclusion of the affidavit of the plaintiff showing that the notes were given for goods sold and delivered as set forth in plaintiff's first assignment of error. (2) The order of nonsuit of plaintiff, and the sustaining of the defendant's demurrer to the evidence as set forth in the plaintiff's second exception.

It is not necessary to consider the first assignment of error, as we are of opinion that the court below erred in ordering a nonsuit on the ground that it did not appear whether the plaintiff was a partnership or a corporation, and, if a partnership, who the partners were. The ruling of his honor was made as stated in the briefs of the counsel upon the authority of *Heaton v. Wilson*, 123 N. C. 398, 31 S. E. 671.

We do not think that case is by any means decisive of the question presented here. It was an action for the recovery of the possession of certain logs accompanied with the ancillary proceedings of claim and delivery, and was not brought in the name of the partnership but in the name of W. H. Heaton alone. While the evidence showed that the logs belonged to Heaton and W. W. Avery, and the court held that "Heaton could not recover all the logs, if a partner, more than he is entitled to," the idea of the court seemed to have been that, inasmuch as the action was brought in the name of Heaton as an individual and not in the name of the partnership to which the logs belonged, therefore Heaton could not recover. We do not think the case is any authority for

the position that motion to nonsuit can be sustained upon the grounds set out in his honor's judgment quoted above.

[1] This question was carefully considered and decided by us in the recent case of *Kochs v. Jackson*, 156 N. C. 327, 72 S. E. 382, in an opinion by Mr. Justice Allen. In that case it is held that a demurrer *ore tenus* will not be sustained on the ground that the plaintiffs' name appeared to be either that of an incorporated company or a partnership, and that neither the fact of incorporation nor the names of the partners were alleged.

This is in accordance with the statute wherein such objections are deemed to be waived unless taken advantage of by a written demurrer or answer. In this case the suit is brought in the name apparently of a partnership, and the transaction seems to have been had with H. Brewer & Co. who are the plaintiffs. It is that title which appears in the written correspondence between the parties.

If the defendant desired to take advantage of the fact that the names of the copartners were not set out, he should have done so in apt time. By waiting until the close of the plaintiff's evidence, the defendant waived any right to object to the fact that the names of the individual copartners were not set out in the title of the case. A new trial is ordered.

Reversed.

(138 Ga. 205)

**STRICKLAND v. STRICKLAND et al.**  
(Supreme Court of Georgia. May 16, 1912.)

(Syllabus by the Court.)

**JUDGMENT (§ 460\*)—RELIEF AGAINST SALE—PLEADING.**

An equitable petition sought to enjoin a sale which was advertised to be held under a decree rendered in a former proceeding, also of an equitable character. It was alleged that the plaintiff in the present case was the plaintiff in the former case, but was absent when it came on for trial, and that the decree was taken by consent of counsel, without his authority. Certain detached excerpts from the former decree were set out and attacked as illegal; but the decree as a whole was not set out, nor was the former litigation set forth at all, either by attaching a copy of the record as an exhibit or by stating its substance, and it is impossible to understand its nature, allegations, and prayers. It appeared that the former decree was rendered more than three years before the present petition was filed. There was nothing to show when the plaintiff first had knowledge of its rendition, or whether he acquiesced in it, or why he had not sooner moved to set it aside, if it was improperly rendered. There was no prayer to set it aside in the present petition. The presiding judge refused to sanction the petition or to grant any order on it. *Held*, that while some of the excerpts from the former decree appear to be peculiar, and perhaps not in accord with the law as to determining amounts and making sales, this court is unable, under the fragmentary and uncertain allegations of

the petition, to hold that the presiding judge erred.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 879, 880, 882-891; Dec. Dig. § 460.\*]

Error from Superior Court, Lowndes County; W. E. Thomas, Judge.

Action by L. J. Strickland against B. F. Strickland and others. Judgment for defendants, and plaintiff brings error. Affirmed.

Hendricks & Christian and W. G. Harrison, all of Nashville, for plaintiff in error. O. M. Smith, of Valdosta, for defendants in error.

**LUMPKIN, J.** Judgment affirmed. All the Justices concur.

(128 Ga. 146)

**EDWARDS v. MAYOR AND ALDERMEN OF MILLEDGEVILLE.**

(Supreme Court of Georgia. May 15, 1912.)

(Syllabus by the Court.)

**APPEAL AND ERROR (§ 1005\*)—PRESENTING QUESTION IN TRIAL COURT—AMOUNT OF RECOVERY.**

Suit was brought against a municipal corporation, seeking to recover the price of certain building stone, at the rate of \$1.35 per cubic foot. The defendant pleaded that the price agreed upon was 81 cents per cubic foot, instead of that for which suit was brought; that it tendered the correct amount to the plaintiff, who refused to receive it; that the tender was made by check, and a tender in actual cash was rendered unnecessary by the fact that the plaintiff notified the defendant that he would not receive such sum; that "defendant says that the amount so offered plaintiff was the true amount to which plaintiff was entitled, which this defendant has held subject to the plaintiff's order at all times, and is still ready and willing to pay"; and that defendant should not be charged with costs. Upon the trial, the evidence was directed to the point as to whether the plaintiff was entitled to recover at the rate of 81 cents per cubic foot or at a higher rate. The mayor testified that the amount due, at 81 cents per cubic foot, "has been tendered to" the plaintiff. At the close of the brief of evidence occurs this statement: "It was admitted in open court by the plaintiff that a tender of the amount claimed to be due at 81 cents per cubic foot was made and declined." The jury found for the plaintiff the amount admitted to be due by the defendant. A motion for a new trial was made by the plaintiff, on the general grounds that the verdict was contrary to law and evidence, without evidence to support it, and against the weight of the evidence. The motion was overruled, and the plaintiff excepted. It does not appear that any point was specially raised in the court below, either by request to charge or otherwise, as to whether the plaintiff was entitled to recover interest. In this court it was contended that the verdict was contrary to law and evidence, because the evidence of tender was not sufficient to stop the running of interest; and that the plaintiff was entitled to a new trial, because the verdict did not find interest in his favor. *Held* that, in view of the admission made in open court in connection with the plea of tender and the fact that it does not appear that any

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

interest was claimed in the court below or any contention made on that subject, the admission will be construed as made for the purpose of obviating the necessity for introducing further evidence on the subject of tender, and as including the continuing tender pleaded. And the verdict, approved by the presiding judge, will not be set aside and a new trial granted under the general grounds of the motion.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3860-3876, 3948-3954; Dec. Dig. § 1005.\*]

Error from Superior Court, Baldwin County; J. B. Park, Judge.

Action by M. M. Edwards against the Mayor and Aldermen of Milledgeville. Judgment for defendant, and plaintiff brings error. Affirmed.

Allen & Pottle, of Milledgeville, for plaintiff in error. Livingston Kenan, of Milledgeville, for defendant in error.

LUMPKIN, J. Judgment affirmed. All the Justices concur.

(138 Ga. 153)

NEIL et al. v. DOW LAW BANK et al.  
(Supreme Court of Georgia. May 15, 1912.)

(Syllabus by the Court.)

PARTIES (§§ 88, 92\*)—BILL—SPECIAL DEMURRER.

Where an equitable petition is defective because of a misjoinder of parties, the same is subject to a special demurrer filed at the first term; but the petition should not be dismissed on a motion in the nature of a general demurrer made at the trial term and based upon this ground alone. Georgia Railroad, etc., Co. v. Tice, 124 Ga. 459, 52 S. E. 916.

[Ed. Note.—For other cases, see Parties, Cent. Dig. §§ 146-147, 150-152; Dec. Dig. §§ 88, 92.\*]

Error from Superior Court, Houston County; W. H. Felton, Judge.

Action by the Dow Law Bank and others against Z. H. Neil and others. Judgment for plaintiffs, and defendants bring error. Reversed.

H. A. Mathews, of Ft. Valley, for plaintiffs in error. Miller & Jones, of Macon, for defendants in error.

BEOK, J. Judgment reversed. All the Justices concur.

(138 Ga. 164)

HUNT v. CITY OF ROME.  
(Supreme Court of Georgia. May 15, 1912.)

(Syllabus by the Court.)

APPEAL AND ERROR (§ 1004\*)—REVIEW—VERDICT—DAMAGES.

The suit being for damages, alleged to have resulted to the real property of the plaintiff by reason of the raising of the grade of the street in front of it, and there being involved no question of the taking of property, but only the question of consequential damages, or consequential benefits thereto, and

the evidence of the plaintiff tending to show damages and loss of rental value, and the testimony for the defendant tending to show that the benefits arising from the change in grade were greater than the injury caused thereby, there was no error in overruling the motion for a new trial, made by the plaintiff in error, on the ground that the verdict was contrary to law and the evidence, although the verdict for the plaintiff was for a less sum than any of his witnesses estimated the damages to be.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 8944-8947; Dec. Dig. § 1004.\*]

Error from Superior Court, Floyd County; Jno. W. Maddox, Judge.

Action by D. G. Hunt against the City of Rome. Judgment for defendant, and plaintiff brings error. Affirmed.

M. B. Eubanks, of Rome, for plaintiff in error. Max Meyerhardt, of Rome, for defendant in error.

HILL, J. Judgment affirmed. All the Justices concur.

(138 Ga. 177)

PICKETT v. CENTRAL OF GEORGIA RY. CO.  
(Supreme Court of Georgia. May 16, 1912.)

(Syllabus by the Court.)

1. CARRIERS (§ 317\*)—INJURY TO PASSENGERS—EVIDENCE.

In an action against a railroad company by a passenger for an injury received by him while alighting from a train at a place a short distance from the depot or station, evidence tending to show a custom of alighting from trains at such place, with the knowledge or consent of the carrier, is admissible.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1295-1306; Dec. Dig. § 317.\*]

2. DAMAGES (§ 216\*)—PERSONAL INJURIES—INSTRUCTIONS.

Where, in an action to recover on account of a personal injury, it is sought to recover damages on account of loss of time, physician's bills incurred, pain and suffering, and permanent impairment of capacity to labor and earn money, the charge should not confuse the methods for estimating the different elements of damages, or be so shaped as to lead the jury to conclude that there can be no recovery, if the injury to the plaintiff is not permanent.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 548-555; Dec. Dig. § 216.\*]

3. CARRIERS (§ 339\*)—INJURY TO PASSENGERS—CONTRIBUTORY NEGLIGENCE.

There was no error in charging to the effect that, if the injured person and the company were equally negligent in the transaction, there could be no recovery.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1353; Dec. Dig. § 339.\*]

Error from Superior Court, Marion County; S. P. Gilbert, Judge.

Action by J. M. Pickett against the Central of Georgia Railway Company. Judgment for defendant, and plaintiff brings error. Reversed.

J. M. Pickett brought suit against the Central of Georgia Railway Company to recover damages for a personal injury. He claimed that while he was alighting from a train of the defendant the engineer caused it to move forward suddenly and without warning, throwing him down and injuring him. The place where the injury occurred was not immediately at the station which was his point of destination, but at a point a short distance before reaching it, and where the train, which was composed of freight cars and passenger cars, stopped to shift a freight car onto a siding. The plaintiff testified: "I thought it had stopped for me to get off. \* \* \* I have got off there a thousand times." And again: "They had been in the habit of stopping for people to get off right where I got off at." The conductor testified: "The rule is to call station when you stop at a station. We did not call it when we stopped at the switch, because we did not stop there for passengers to get off." The jury found for the defendant. The plaintiff moved for a new trial on the following, among other, grounds:

(1) Because the court refused to allow a witness for the plaintiff to answer the question: "What is the custom of stopping that train there, when there is a long freight train, for passengers to get off?" The jury were caused to retire, and the witness stated that he would testify as follows: "I got off there going this way very frequently, and going from Columbus also. There is a very heavy grade from Kinchafoonee creek, about a mile and a half above there to this place, just about all they can pull; and almost invariably the conductor requests, if they have got any freight to set or any cars, they request, when they stop there, that the passengers get off. Now, when there is no freight to stop there, they pull up till the passenger car gets up even with the station, or by the road. There is a road crossing just west of there, just right at it. If the engine has got to stop there to leave any freight car or any freight, I don't think I ever came in my life but that the conductor requested that we get off down near that little trestle. The grade is so heavy, if they have to leave a car or reduce freight and then pull up to stop for passengers to get off, it would make a considerable delay, because the grade coming this way is so heavy. When they go the other way, it is a downgrade. I don't think I ever got off at the station in my life, when they left any freight there, but what the conductors would request us to get off down there; and that is right close to a little trestle just beyond the station from here; and it was their custom, whenever they had freight to put off, to let them get off down there." The court rejected this evidence.

(2) Because the court charged as follows: "The plaintiff in this case claims general damages for pain and suffering and for in-

juries alleged to have [been] done him by the defendant. General damages are such that the law presumes to flow from any tortious acts, and may be recovered without proof of any amount. Damages are given as compensation for injury done; and generally this is the measure, where the injury is of a character capable of being estimated in money. If the injury is small, or the mitigating circumstances be slight, nominal damages only are given. There is no fixed rule by which the jury must be governed in estimating damages for personal injuries, permanent injuries, nor pain and suffering. The amount of such general damages is for the enlightened conscience of an impartial jury. You must determine, of course, first, whether there has been any permanent injuries or general damages. You must determine whether or not there has been any pain and suffering; and, in order to determine that, you must look to the evidence and see what was done, and you must draw your conclusions from the facts established by the evidence. If you find that there has been no such damage, then the rules of law that I have given you would apply; and, if there has been none such, there can be no recovery. In other words, if no injury has been done, no permanent injury has occurred, then no damage could be awarded to the plaintiff."

(3) Because the court charged as follows: "Gentlemen, if both parties were equally negligent, then the plaintiff cannot recover, and you would have to find a verdict for the defendant in the case. In other words, where both parties are negligent, in order for the plaintiff to recover at all, the defendant company (the railroad company) must be guilty of greater negligence than the plaintiff."

The motion was overruled, and the plaintiff excepted.

J. J. Dunham and W. D. Crawford, both of Buena Vista, for plaintiff in error. C. E. Battle and Howell Hollis, both of Columbus, for defendant in error.

LUMPKIN, J. (after stating the facts as above). [1] 1. If an act is obviously negligent, it cannot be justified by proof of a custom to do it. Where the quality of the act as to negligence or diligence is not clear, there is more reason for admitting evidence of custom as throwing light on the subject. It is not necessary here to discuss fully the cases in which it has been held that proof of a custom is admissible, and those in which it has been held to be inadmissible. Confining our consideration to cases like the one in hand, or closely analogous thereto, it is generally held that evidence tending to show a custom or habit of alighting from trains elsewhere than at a depot, with the knowledge or consent of the carrier, is admissible, in an action by a passenger for

injuries received while so alighting. *Pennsylvania Co. v. McCaffrey*, 173 Ill. 169 (6), 50 N. E. 713; *Chicago City Ry. v. Lowitz*, 218 Ill. 24, 75 N. E. 755; *Keating v. New York Central R. Co.*, 49 N. Y. 673; *McGee v. Missouri Pacific Ry. Co.*, 92 Mo. 208, 4 S. W. 739, 1 Am. St. Rep. 706; *Baltimore & Ohio R. Co. v. Kane*, 69 Md. 11, 22, 13 Atl. 387, 9 Am. St. Rep. 387; *McDonald v. Chicago & Northwestern R. Co.*, 26 Iowa, 139, 142; *Nicholson v. Lancastershire & York-shire Ry. Co.*, 3 Hurl. & Colt. (Exch.) 534. The fact that the witness, who offered to testify as to the custom of stopping at a place a short distance from the station and permitting passengers to alight there, also stated that the conductor requested them to do so did not render the evidence inadmissible. It tended to show that the company not only stopped its train at that point, when there was shifting to be done, and permitted passengers, with its knowledge, to alight there, but that its conductor asked that they do so. That the conductor did not make such a request on the occasion when the plaintiff was injured did not render the evidence inadmissible as tending to show the existence of the custom and the knowledge of it and acquiescence in it on the part of the company's conductors.

In *Auld v. Southern Ry. Co.*, 136 Ga. 266, 71 S. E. 426, a similar principle to that now being considered was involved. A passenger brought suit against a carrier on account of an injury, caused by being precipitated from a moving train while crossing from one coach to another. It was held that testimony of a known usage or custom of passengers to cross from coach to coach was competent evidence, not to justify or excuse the passenger from attempting to cross when it would be obviously hazardous to do so, but as illustrating the character and nature of the act as bearing on the passenger's alleged contributory negligence in crossing. The difference between evidence of this character and such as was offered in *Metropolitan Street R. Co. v. Johnson*, 91 Ga. 466, 18 S. E. 816, is patent. There a woman was injured in consequence of the running of a dummy engine against her while she was endeavoring to cross a street in front of a train. It was sought to prove what was the usual custom of pedestrians when they undertook to cross a street on which cars drawn by dummy engines were passing; and such evidence was held not to be admissible. So in *Mayfield v. Savannah, G. & N. A. R. Co.*, 87 Ga. 374, 13 S. E. 459, it was held that evidence of a custom or usage obviously dangerous, and so shown to be in the plaintiff's petition, was not admissible to excuse contributory negligence by the plaintiff. It was added that this was especially true where it did not appear that such custom or usage had been adopted by the defendant company, or that

it prevailed at the place or on the particular road concerned.

[2] 2. Exception was taken to the portion of the charge on the subject of damages and their measure. Such charge did not clearly state the rules of law in reference to the measure of damages recoverable. It was especially inaccurate in its closing sentence, where it was said: "If you find that there has been no such damage, then the rules of law that I have given you would apply; and if there has been none such there can be no recovery. In other words, if no injury has been done, no permanent injury has occurred, then no damage could be awarded to the plaintiff." This was calculated to lead the jury to believe that the plaintiff was entitled to no recovery, unless he had received permanent injuries.

[3] 3. It has been held that, in a suit against a railroad company by a person who has received an injury from the operation of one of its trains, if the injured person and the company were equally negligent in the transaction, there can be no recovery. *Willingham v. Macon & Birmingham Ry. Co.*, 113 Ga. 374, 38 S. E. 843; *Brunswick & Western R. Co. v. Wiggins*, 113 Ga. 842, 39 S. E. 551, 61 L. R. A. 513; *Wrightsville & Tennille R. Co. v. Gornto*, 129 Ga. 204 (8), 58 S. E. 769. The giving of a charge to this effect was therefore not error.

Judgment reversed. All the Justices concur.

(138 Ga. 171)

## GORE v. GORE.

(Supreme Court of Georgia. May 15, 1912.)

(Syllabus by the Court.)

**DIVORCE (§ 286\*)—TEMPORARY ALIMONY—REVIEW OF AWARD.**

Where, on the hearing of an application for temporary alimony, the evidence is conflicting as to the cause of the separation, the wife contending that she separated from her husband because of his cruelty, and the husband contending that his conduct was kind and considerate, the discretion of the court in awarding a reasonable sum for alimony and attorney's fees will not be disturbed.

[Ed. Note.—For other cases, see *Divorce*, Cent. Dig. §§ 769, 770; Dec. Dig. § 286.\*]

Error from Superior Court, Randolph County; W. C. Worrill, Judge.

Action between A. F. Gore and R. H. Gore for divorce. From an order awarding temporary alimony, the husband brings error. Affirmed.

M. O. Edwards, of Dawson, and Geo. H. Perry, of Cuthbert, for plaintiff in error. Jas. W. Harris, of Cuthbert, for defendant in error.

EVANS, P. J. Judgment affirmed. All the Justices concur.

(138 Ga. 159)

**DYER & GHEESLING v. DYER.**

(Supreme Court of Georgia. May 15, 1912.)

*(Syllabus by the Court.)***PARTNERSHIP (§ 232\*)—DISSOLUTION—FIRM DEBTS—MORTGAGE.**

M. A. Dyer and J. T. Gheesling were partners doing a mercantile business under the firm name of Dyer & Gheesling. The latter sold his entire interest in the business and the firm assets to the other partner, it being stipulated that the purchaser of the retiring partner's interest "is to pay the partnership debts." Subsequently to the sale Dyer, the purchaser, executed a mortgage covering the entire stock of merchandise; and, when this mortgage was foreclosed and the mortgage *fi. fa.* levied, Gheesling filed a claim thereto in the name of the former partnership, Dyer & Gheesling. *Held*, that the court, to whom the case was submitted under the law and the facts without the intervention of a jury, did not err in finding the property subject. Whether Gheesling could have maintained an equitable action or not, to compel the application of the assets to the payment of the firm debts, he could not maintain a claim in the name of the firm, although Dyer was insolvent, and had not complied with his obligation to pay the firm debts.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 481, 482; Dec. Dig. § 232.\*]

Error from Superior Court, Warren County; B. F. Walker, Judge.

Action by Dyer & Gheesling against B. C. Dyer. Judgment for defendant, and plaintiff brings error. Affirmed.

L. D. McGregor, of Warrenton, for plaintiff in error. M. L. Felts, of Warrenton, for defendant in error.

BECK, J. Judgment affirmed. All the Justices concur.

(138 Ga. 127)

**ATKINSON v. FIRST NAT. BANK OF HAWKINSVILLE.**

(Supreme Court of Georgia. April 11, 1912. Rehearing Denied May 14, 1912.)

*(Syllabus by the Court.)***1. BILLS AND NOTES (§ 97\*)—ACTIONS—DEFENSES—FAILURE OF CONSIDERATION.**

To a suit by the holder of a negotiable note, the maker pleaded as failure of consideration that the consideration of the note was the exclusive right to sell within certain territory a mechanical tool manufactured by the payee, and that the payee contracted in writing that he would furnish at a certain price the article contracted to be sold, which was to be in every way equal to and perfect as the sample, or purchase price would be refunded; that the tools furnished were unmerchantable and not reasonably suited to the uses intended; that he asked the holder to discount the note for him at 50 cents on the dollar, and notified him that he would not protect the note further than to the extent of 50 per cent. of the note, as it was quite likely that the consideration of the note would partially or totally fail, and urged upon the holder not to buy the note unless he procured the same at 50 cents on the dollar, and that the holder agreed to discount the note

for the maker at 50 cents on the dollar. *Held*, that the plea set up no meritorious defense.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 166-212, 1372-1376; Dec. Dig. § 97.\*]

**2. NEW TRIAL (§ 85\*)—GROUNDS — SETTING ASIDE.**

To authorize the setting aside of a verdict on account of the defendant's having been providentially prevented from being present at the trial, it must appear that he had a meritorious defense to the action. *Peacock v. Uary*, 52 Ga. 353.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 170-172; Dec. Dig. § 85.\*]

Error from Superior Court, Pulaski County; T. A. Parker, Judge.

Action by the First National Bank of Hawkinsville against C. C. Atkinson. Judgment for plaintiff, and defendant brings error. Affirmed.

H. F. Lawson, of Hawkinsville, for plaintiff in error. W. L. & Warren Grice, of Hawkinsville, for defendant in error.

EVANS, P. J. Judgment affirmed. All the Justices concur.

(138 Ga. 166)

**MACON, D. & S. R. CO. v. CALHOUN.**

(Supreme Court of Georgia. May 15, 1912.)

*(Syllabus by the Court.)***1. STATUTES (§ 98\*)—SPECIAL ACTS—CONSTITUTIONAL LAW.**

That part of the act approved August 6, 1909 (Acts 1909, p. 279), abolishing the city court of Mt. Vernon, which provides for the transfer of all cases from that court to the superior court, does not contravene article 1, § 4, par. 1, of the Constitution of this state (Civ. Code 1910, § 6391), which provides that "no special law shall be enacted in any case for which provision has been made by an existing general law. No general law affecting private rights shall be varied in any particular case by special legislation."

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 110, 111; Dec. Dig. § 98.\*]

**2. COURTS (§ 42\*)—ABOLITION OF CITY COURT — CONSTITUTIONAL LAW — UNIFORMITY OF PROCEDURE.**

Nor does the above-recited act violate article 6, § 9, par. 1, of the Constitution (Civ. Code 1910, § 6527), which provides for uniformity of procedure and practice in all courts of the same grade and class.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 163-170, 181-183; Dec. Dig. § 42.\*]

**Certified Question from Court of Appeals.**

Action between the Macon, Dublin & Savannah Railroad Company and C. H. Calhoun. From the judgment, the railroad company brought error to the Court of Appeals, which certified the case to the Supreme Court. Questions propounded answered in the negative.

The Court of Appeals has certified to the Supreme Court the following questions:

(1) "Is that part of the act approved August 6, 1909 (Acts 1909, p. 279), abolishing the city court of Mt. Vernon, which pro-

vides for the transfer of all cases from that city court to the superior court, and for the trial of them in the superior court, unconstitutional, because violative of article 1, § 4, par. 1, of the Constitution of Georgia (Civil Code 1910, § 6391), which provides that 'no special law shall be enacted in any case for which provision has been made by an existing general law. No general law affecting private rights shall be varied in any particular case by special legislation.' In this connection, counsel presenting the constitutional question make the point that there are general laws which provide for the institution and trial of suits in the superior court, among others the following, which are repugnant to the special scheme contemplated by the act in question: 'All suits in the superior courts shall be by petition to the courts. To every petition the clerk shall annex a process requiring the appearance of the defendant at the return term of the court. All suits must be filed with the clerk at least twenty days before the return term thereof. Process returnable to said superior courts must be served upon the defendant at least fifteen days before the return term. No trial in any civil case shall be had at the first term.'

(2) "Is the above-recited act unconstitutional, because it is violative of article 6, § 9, par. 1, of the Constitution of Georgia (Civil Code 1910, § 6527), which provides that the proceedings and practice of all courts of the same grade and class, so far as regulated by law, shall be uniform, on the ground that the act in question provides a different method of proceedings and practice in the institution and trial of a case in a superior court from that provided by general law, differing in this respect from the following, among other, general laws: 'All suits in the superior courts shall be by petition to the court. To every petition the clerk shall annex a process requiring the appearance of the defendant at the return term of the court. All suits must be filed with the clerk at least twenty days before the return term thereof. Process returnable to said superior courts must be served upon the defendant at least fifteen days before the return term. No trial in any civil case shall be had at the first term?'"

Minter Wimberly, of Macon, W. L. Wilson, of Mt. Vernon, and Akerman & Akerman, of Macon, for plaintiff. M. B. Calhoun, of Mt. Vernon, and Graham & Graham, of McRae, for defendant.

ATKINSON, J. [1] 1. It is provided in article 6, § 1, par. 1, of the Constitution of this state (Civil Code, § 6497): "The judicial powers of this state shall be vested in a Supreme Court, a Court of Appeals, superior courts, courts of ordinary, justices of the peace, commissioned notaries public, and such other courts as have been or may be

established by law." A different section of the same article of the Constitution provides: "All courts not specially mentioned by name in the first section of this article may be abolished in any county, at the discretion of the General Assembly." Article 6, § 20, par. 1 (Civil Code, § 6549). Thus it appears from section 1 that the General Assembly has power to create other courts than those specially mentioned therein by name, and therefore power to create city courts, and from section 20 that the General Assembly has power to abolish such courts as are not specially mentioned in section 1, and therefore has power to abolish city courts, as they are not specially mentioned by name in section 1. The city court of Mt. Vernon was established by the act approved August 15, 1906 (Acts 1906, p. 288), and was merely a statutory court, which could be abolished at the pleasure of the General Assembly. When, in the exercise of such power, a law is enacted abolishing such a court, it is necessary to make some provision for the disposition of the business pending in the court at the time of its abolition. No express reference to such necessity is made in the Constitution; but, as an incident to and growing out of the power to abolish the court, there is the power to provide for the disposition of the pending business. In other words, such power is necessarily implied from those which are expressed. It is not essential to the exercise of the implied power that, on abolition of the statutory court, the General Assembly should create some other court to dispose of the unfinished business. It could just as well transfer such business to some existing court having jurisdiction. In such cases, the transferred business would be disposed of under the rules of procedure and practice of the court to which it was transferred. See *Brooks v. Mair*, 107 Ga. 738, 33 S. E. 650. In view of this affirmative grant of power by the Constitution, it cannot be said that the legislation in question is violative of the clause of the Constitution mentioned in the first question propounded by the Court of Appeals. Moreover, there is no general law covering the method of disposing of unfinished business pending in statutory courts at a time when, by law, they might be abolished. That is a matter which the General Assembly has seen fit to deal with separately as occasion arises. It is contended that the provisions recited in the first question, relative to the manner in which suits in the superior court shall be instituted and served and the time of their trial, are general laws applicable to all cases; and hence the existence of them would prevent the enactment of other laws providing for the transfer to the superior court and trial therein of cases which had been originally instituted in a city court. The laws mentioned are general laws; but they refer to the institu-

tion, service, and time of trial of suits which might be originally instituted in the superior court, and were not designed to relate to the manner of transferring and the time of trial of any case instituted in a statutory court which the General Assembly, upon abolition of such court, might see fit to have transferred for trial in the superior court.

[2] 2. The act referred to in the preceding division does not violate that part of the Constitution which provides for uniformity of procedure and practice in all courts of the same grade and class. Laws providing for the transfer of cases for trial in the superior court do not in any manner affect the rules of procedure and practice of the superior courts. This is merely an instance of where the Legislature, in the exercise of constitutional authority, transfers cases to the superior court for trial under the existing procedure and practice of that court, without any suggestion of a change of procedure in that particular court.

It follows that both of the questions propounded by the Court of Appeals should be answered in the negative. All the Justices concur.

(188 Ga. 128)

**J. C. McCASKILL & CO. v. STEARNS.**

(Supreme Court of Georgia. April 9, 1912.  
Rehearing Denied May 14, 1912.)

*(Syllabus by the Court.)*

**1. DEEDS (§ 114\*)—CONSTRUCTION—DESCRIPTION OF LAND.**

Early county was laid out by virtue of an act approved December 15, 1818, which provided that its territory shall be laid off into districts, and subdivided into lots of 250 acres each. Decatur county was formed from Early county in 1823, and embraced the Fifteenth district; and Baker county was formed from Early county in 1825, after Decatur county was carved out of it. A deed executed in 1842, conveying "those tracts or parcels of land being in the county of Baker, formerly Early county, as follows: In the 15th district, lots \* \* \* 76, 77, 83 and 84, each containing 250 acres, more or less"—is to be construed as conveying the lots in the Fifteenth district of Decatur, formerly Early, county. The statement that the land "being in the county of Baker" is matter of general description, and must yield to the more particular description in the deed, which locates the land in Decatur county.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 316-322, 326-329, 388; Dec. Dig. § 114.\*]

**2. VENDOR AND PURCHASER (§ 231\*)—PRIORITY—RECORD.**

A deed to described wild land by the executors of a general devisee of the deceased former owner, taken by the vendee therein for value and without notice of a deed to the same land by the testator, although recorded before the registry of the older deed, does not obtain priority over such senior conveyance.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 487, 531-539; Dec. Dig. § 231.\*]

Error from Superior Court, Decatur County; Frank Park, Judge.

Action by F. M. Stearns against J. C. McCaskill & Co. Judgment for plaintiff, and defendant brings error. Affirmed.

Russell & Custer and T. S. Hawes, both of Bainbridge, for plaintiff in error. Pope & Bennet, of Albany, W. D. Sheffield, of Arlington, and R. G. Hartsfield, of Bainbridge, for defendant in error.

EVANS, P. J. Grants were issued by the state of Georgia to Farrish Carter to lots of land 76, 77, 83, and 84, in the Fifteenth district of originally Early county, on July 16, 1842. On the same day, Farrish Carter conveyed, by deed, to Kerr Boyce certain lots of land described as follows: "Those tracts or parcels of land being in the county of Baker, formerly Early county, as follows: In the 15th district, lots 2, 5, 7, 8, 9, 37, 38, 45, 46, 76, 77, 90, 83, 84, 87, 107, 132, 276, 339, 340, 347, 349, each lot containing 250 acres, more or less." By intermediate deeds, lots 76, 77, 83, and 84, in the Fifteenth district of originally Early, now Decatur, county, were conveyed to F. M. Stearns, who brought an action of trespass against J. C. McCaskill to recover damages for cutting the timber from these lots of land. On the trial of the case, the defendant objected to the deed from Farrish Carter to Kerr Boyce going in evidence, on the ground that it did not convey the property in controversy; that the deed purports to convey land in Baker county, and the lots of land had never been in Baker county, but at the time the deed was executed the lots were in Decatur county. The objection was overruled. A verdict was returned for the plaintiff, and the defendant brings error.

[1] 1. The controlling point in this case is the sufficiency of the deed from Farrish Carter to Kerr Boyce as a conveyance of lots of land 76, 77, 83, and 84, in the Fifteenth district of originally Early county, now Decatur, county. In 1818 the state of Georgia formed three counties out of the territory lately ceded by the United States, which had been obtained from the Creek and Cherokee Nations of Indians. Early county is one of them. It was provided by the act defining its boundaries that the county of Early should be laid off into districts of 12 miles and 40 chains square; and that the districts shall be divided into squares of 50 chains, containing 250 acres. Lamar's Digest, page 416. Under legislative authority, the land was laid out into districts and lots, as defined in the act creating the county of Early. In the year 1823, the county of Early was divided, and all of the territory lying south of a line "beginning where the district line dividing the Fourteenth and Twenty-Sixth districts strikes the Chattahoochee



river, and continuing said district line east to the corner of districts number ten and seventeen, in said county of Early, on the Irwin county line," was formed into the county of Decatur. Dawson's Comp. page 126. In 1825 Early county was again divided, and the county of Baker was created, and included all the territory east of a line "beginning at the corners of the twelfth and thirteenth districts of said county, on the Decatur line; thence north on the district line between said districts and districts six and seven, until said district line shall strike the Pechtler creek; thence up the main prong of said creek to the county line between the county of Early and the territory lately acquired of the Creek Nation of Indians." Dawson's Comp. page 130. The courts of this state will "take judicial notice of the boundaries and relative location of its various counties, as originally laid off; of the governmental survey of its territory, whereby the same was, agreeably to lawful authority and direction, divided into districts, each containing land lots of a given shape and size, designated by numbers; and also of the effect of all legislative enactments creating new counties and fixing the boundary lines thereof." *Stanford v. Bailey*, 122 Ga. 404, 50 S. E. 161.

Inspection of the survey made pursuant to legislative authority discloses that lots 76, 77, 83, and 84, in the Fifteenth district of Early county, are located in the territory embracing Decatur county, and are not located within the territory organized into the county of Baker. The deed purports to convey land which was located in originally Early county. It is stated that the land was in the county of Baker. One or the other of these descriptions is incorrect. Either the location of the county or the land district is to govern. If only lands located in Baker county passed under this description, then no land at all was conveyed, because there is no land lot or land district in Baker county answering to this description. But, if we reject the more general description of Baker county, by reference to the public laws and records of this state, the particular lots and district can be located with definiteness in the county of Decatur.

A case much in point is *Wilt v. Cutler*, 38 Mich. 189. There the description of a deed, made in 1840, stated that the land was situated in the county of Lenawee and territory of Michigan, and part of the land conveyed was assigned to a certain township and range. The township and range described were in Monroe county, and not in Lenawee county, and Michigan was no longer a territory at the time at which the deed bore date. In the construction of the deed, it was held to convey the land in the township and range

mentioned, and the general description by the name of the county was rejected.

A deed should not be construed so as to render the act of the maker a vain thing, if a construction can be given to it which will effectuate the maker's intention, and at the same time not be prejudicial to the rights of others. A deed will not be held void for uncertainty from the fact that the description in part is false or incorrect, if there are sufficient particulars given to enable the premises intended to be conveyed to be identified. 2 Devlin on Deeds, § 1016. Now, it would seem to be clear that the purpose of the grantor was to convey the land which had been granted to him, and which was known by certain lots numbers, and as located in the Fifteenth district of originally Early county. The grantor erroneously believed that the newly formed county of Baker embraced this territory. It is certain that he was mistaken. We give effect to his intention by applying the particular description to the land conveyed, and rejecting the more general description that it is located in the county of Baker. Third parties cannot be prejudiced by this construction, for the reason that there is no land in Baker county which would answer to the description; but there is land in Decatur county which the description will fit. We therefore hold that the deed was an effective conveyance of land lots 76, 77, 83, and 84, in the Fifteenth district of originally Early, now Decatur, county.

[2] 2. The defendant also traced his title from Farrish Carter. It appeared that Farrish Carter died testate, and that his will was duly probated; and in it he made numerous devises and various bequests, but did not mention the property in controversy. Samuel Carter was made the residuary devisee. In 1903 the executors of Samuel Carter leased to the defendant the right to turpentine the property in controversy by virtue of an order from the court of ordinary, describing the land as wild land. The deed from Farrish Carter to Kerr Boyce was recorded a few months subsequent to the lease to the defendant from the executors of Samuel Carter; and it is the defendant's contention that under the recording acts his lease, being recorded prior in time, is superior to the deed from Farrish Carter to Kerr Boyce. "A deed to described wild land, executed by the general devisees of the deceased former owner, taken by the vendee therein for value and without notice of a deed to the same land executed by the testator, although recorded before the registry of the older deed, does not obtain priority over such senior conveyance." *Henderson v. Armstrong*, 128 Ga. 804, 58 S. E. 624.

Judgment affirmed. All the Justices concur, except ATKINSON, J., disqualified.

(11 Ga. App. 181)

**HOME MILL & GRAIN CO. v. SOUTHERN FLOUR & GRAIN CO.** (No. 4,060.)

(Court of Appeals of Georgia. May 22, 1912.)

*(Syllabus by the Court.)***FORMER DECISION CONTROLLING.**

The case is controlled by the decision in *Small Co. v. Liberty Mills*, 137 Ga. 565, 73 S. E. 846.

Error from City Court of Atlanta; H. M. Reid, Judge.

Action between the Home Mill & Grain Company and the Southern Flour & Grain Company. From the judgment, the Home Mill & Grain Company bring error. Reversed.

Dorsey & Shelton, of Atlanta, for plaintiff in error. Walter McElreath, of Atlanta, for defendant in error.

**POTTLE, J.** The decision of the Supreme Court, referred to in the headnote, was rendered after the trial of the instant case. The point presented was not free from difficulty, and if the trial judge had had that decision before him, his ruling would have been different. It results, however, from that decision, that the court erred in directing a verdict in favor of the defendant, and also erred in striking the plaintiff's amendment filed January 23, 1912, and in ruling out evidence as to market value. Judgment reversed.

(11 Ga. App. 177)

**PEEPLES et al. v. CITIZENS' NAT. LIFE INS. CO.** (No. 4,056.)

(Court of Appeals of Georgia. May 22, 1912.)

*(Syllabus by the Court.)***CONTRACTS (§ 54\*)—REQUISITES AND VALIDITY—CONSIDERATION.**

A promise, though a mere nudum pactum when made, and consequently unenforceable against the promisor at the time when made, may become binding and enforceable, if the promisee subsequently furnishes the consideration contemplated by doing what he was expected to do. Accordingly, where one made to another, residing in a different state, written application for a loan of money, and therein stipulated that if the lender would incur the expense necessary to inspect and examine the security described in the application, and, after such inspection, should reject the application because of the insufficiency of the security, the applicant would pay a specified sum of money, this promise of the applicant, though a mere nudum pactum when made, became binding and enforceable as a contract when the lender, before the offer was withdrawn, examined the property in the manner described in the application, and rejected the application on account of the insufficient value of the security offered.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 233-239, 243-251, 254, 255, 291-315; Dec. Dig. § 54.\*]

Error from City Court of Tifton; R. Eve, Judge.

Action by the Citizens' National Life Insurance Company against J. E. Peeples and others. Judgment for plaintiff, and defendants bring error. Affirmed.

Fulwood & Skeen, of Tifton, for plaintiffs in error. H. S. Murray, of Tifton, for defendant in error.

**POTTLE, J.** The plaintiffs in error signed a written application to the defendant in error for a loan of \$15,000, to be secured by a mortgage or deed of trust to certain land described in the application. It was stated in the application that the land and the buildings thereon were worth \$35,000. The application also contained the following stipulation: "As compensation for the examination of said property and its title, and the expense incident thereto, the undersigned agrees to pay to the Citizens' National Life Insurance Company the sum of \$326.25 and local expenses. If the Citizens' National Life Insurance Company shall decline to make such loan before the title has been examined, because the security offered is not satisfactory, the undersigned will pay said company, as compensation for its investigation, the sum of \$201.25 and local expenses." Suit was brought by the company against the plaintiffs to recover \$201.25. The petition alleged that, relying upon the statements of the applicants as to the value and nature of the security, and relying on the proposition and contract made by the applicants to pay to petitioner the fixed sums, specified in the application as compensation for the examination and investigation of the security offered for the loan, the plaintiff caused its treasurer to go from his office in Mayfield, Ky., into Georgia, and upon the lands described in the application, for the purpose of making a bona fide inspection and investigation of the property offered as security; that, upon receiving the report of this inspection, the plaintiff did not consider the security of sufficient value to justify the loan applied for, but that it did offer to loan upon said security, and upon the terms and conditions stated in the application, the sum of \$9,000; that the plaintiff was in a position, able and authorized and willing, to make the \$15,000 loan, had the security, in the judgment of its officers, been sufficiently valuable, and was likewise able to make the loan of \$9,000 upon the security offered by the defendants; that the defendants refused to accept the loan of \$9,000, and thereupon the defendants became justly indebted to the plaintiff in the sum of \$201.25. Defendants demurred to the petition, on the ground that the contract was unilateral and wanting in mutuality, and was therefore unenforceable. The demurrer was overruled, and this is the error assigned.

It is well settled that a promise, although

a nudum pactum when made, because the promisee is not bound, may become binding when he subsequently furnishes the consideration by doing that which he was expected to do. *Brown v. Bowman*, 119 Ga. 153, 46 S. E. 410; *Purcell v. Armour Co.*, 4 Ga. App. 253, 256, 61 S. E. 138. The proposition contained in the written application of the defendants was no more than an offer; and, inasmuch as the plaintiff did nothing at the time the offer was made, to render any obligation on its part enforceable on behalf of the defendants, the promise, when made, was a mere nudum pactum; and hence no action for specific performance could have been brought by either party. *Peacock v. Deweese*, 73 Ga. 570. But, while this is true, when the plaintiff accepted the offer of the defendants, which was, in effect, that if the plaintiff would cause the defendants' property to be inspected and examined, and incur the expense necessary for this purpose, and if, upon such examination, it should be determined by the plaintiff that "the security offered is not satisfactory," the defendants would pay to the plaintiff the sum of \$201.25 and local expenses, the mere naked promise or offer of the defendants became a binding contract upon them, by reason of the fact that the plaintiff, by doing what it was expected to do, supplied the necessary consideration for the promise contemplated in the offer made by the defendants. If the application had been withdrawn by the defendants at any time before performance by the plaintiff in accordance with the offer, and before the expense had been incurred by it, then, of course, the transaction would have been at an end, and no performance could have been compelled by either party.

The plaintiff in error relies upon the decision of the Supreme Court in *Morrow v. Southern Express Co.*, 101 Ga. 810, 28 S. E. 998, and especially upon the proposition that "a promise, however, is not a good consideration for a promise, unless there is an absolute mutuality of engagement, so that each party has the right at once to hold the other to a positive agreement; and in case of mutual promises, where the promise of one party is relied on as a consideration for the other, the promises must be concurrent and obligatory upon each at the same time, in order to render either binding." There is no question as to the correctness of this proposition of law, which is supported by a long line of authorities cited in the opinion in the case just referred to; but the principle announced is wholly inapplicable where the consideration has been supplied by the other party, and that which in the beginning was a mere naked promise has thereby become a binding and enforceable contract.

This distinction is clearly pointed out in the very decision relied on by the counsel for the plaintiff in error, as may be seen from the following excerpt from the opinion: "The rule above announced applies in all cases where the contract remains wholly executory and nothing is done to divest it of its unilateral character. There are instances in which a promise, though a mere nudum pactum when made, because the promisee is not bound, may become binding on his afterwards furnishing the consideration contemplated. Thus, where one promises to see another paid if he will sell goods to a third person, or promises to give a certain sum if another will deliver up certain documents or securities, or if he will forbear a demand or suspend legal proceedings, or the like, while the party making the promise is bound to nothing, and may withdraw his promise, or, more accurately speaking, proposition, at any time, yet, if the promisee, acting on the faith of the promise, within a reasonable time, does the thing which it was contemplated he should do, then the promisor is bound, on the ground that the thing done is a sufficient and completed consideration; and the original promise to do something, if the other party would do something, is a continuing promise until that other party does the thing required of him. Or, if the promisee begins to do the thing in a way which binds him to complete it, here, also, is a mutuality of obligation. 1 *Parsons on Contracts*, \*450; *Clark on Contracts*, pp. 168, 169; *Story on Contracts*, § 569; *Lindsay v. Warnock*, 93 Ga. 619, 21 S. E. 127. In such cases, it is not necessary that each promise should be absolute, so that either party could enforce it against the other; for a promise, conditional on the doing of some act, may be rendered binding by the act, while it may give no right to compel the doing of it. *Story on Contracts*, § 569, and authorities cited."

If, as a matter of fact, the inspection made by the plaintiff was colorable only, and not made in good faith, and the application was arbitrarily rejected without sufficient reason and in bad faith, and for the sole purpose of creating a liability against the defendants for the sum of \$201.25, this would be a matter of defense, to be set up by plea and sustained by proof; but the petition alleges that the inspection was made in good faith; that the plaintiff honestly reached the conclusion that the security was not of sufficient value to justify the loan of \$15,000; that it was willing and able and did offer to make a loan of \$9,000; and that this offer was rejected by the defendants. Under these allegations, we are very clear that the defendants' demurrer was properly overruled.

Judgment affirmed.

(11 Ga. App. 190)

**KISER v. OGLESBY.** (No. 4,111.)

(Court of Appeals of Georgia. May 22, 1912.)

*(Syllabus by the Court.)***1. PLEADING (§ 259\*)—PLEA TO JURISDICTION—AMENDMENT.**

A plea to the jurisdiction, in which it is alleged that the defendant is not a resident of the county in which the suit is brought, but is a resident of another county, the courts of which have jurisdiction of the case, is amendable, so as to specify the courts which it is claimed have jurisdiction to entertain the petition.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 783-792; Dec. Dig. § 259.\*]

**2. DOMICILE (§ 10\*)—RESIDENCE OF DEFENDANT—EVIDENCE.**

The evidence demanded a verdict in favor of the plea to the jurisdiction; and there was no error in directing the jury so to find.

[Ed. Note.—For other cases, see Domicile, Cent. Dig. § 39; Dec. Dig. § 10.\*]

*(Additional Syllabus by Editorial Staff.)***3. PLEADING (§ 104\*)—PLEA TO JURISDICTION—REQUISITES.**

Under the express provisions of Civ. Code 1910, § 5666, a plea to the jurisdiction must allege facts showing that another court in the state has jurisdiction of the case.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 213-217; Dec. Dig. § 104.\*]

**4. EVIDENCE (§ 40\*)—JUDICIAL NOTICE—COURTS.**

Judicial notice will be taken of the fact that there are two courts in B. county, and only two, which have jurisdiction of a cause of action for injuries, alleged to have been sustained by the negligent operation by defendant of an automobile.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 54, 55; Dec. Dig. § 40.\*]

**5. EVIDENCE (§ 40\*)—JUDICIAL NOTICE—JURISDICTION OF LOWER COURTS.**

The Court of Appeals will take judicial notice that the city court of Q. has jurisdiction over the whole county of B.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 54, 55; Dec. Dig. § 40.\*]

Error from City Court, Hall County; Robert Hodges, Judge.

Action by J. Kiser against J. W. Oglesby, Jr. Judgment for defendant, and plaintiff brings error. Affirmed.

Kiser sued Oglesby in the city court of Hall county for damages, alleged to have been sustained by the plaintiff in consequence of the negligent operation of an automobile by the defendant. At the first trial, the defendant filed a plea to the jurisdiction, averring that at the time of the commencement of the suit "the defendant resided in the county of Brooks, in said state, and is now a resident of said county of Brooks, and is not a resident of the county of Hall, and that the courts of Brooks county have jurisdiction of this case, and this court has not." There was no demurrer to this plea; but when the case was called for trial the defendant offered an amendment to the plea, which was allowed, over objection of the plaintiff, naming the courts in Brooks

county which had jurisdiction of the case. Exception has been taken to the allowance of this amendment. Evidence was submitted in support of the plea. The plaintiff testified that he was a single man, and resided in Brooks county, and had resided there for 15 years; that he had never resided in Hall county; that he had had employment in Brooks county for the last 2 years; that his father and mother lived in Brooks county, and that he lived with them; that he voted in that county and paid his taxes there. It further appeared from the evidence that the defendant's father owned a hotel in Hall county, which was used as a summer resort, being open about the 1st of June of each year, and remaining open for three or four months. The defendant had been accustomed for several years to come to Hall county and assist in the management of the hotel remaining in that county the larger part of the summer season, but returning to Brooks county and spending about one week in the month to look after business there in the latter county. The defendant was secretary for his father at the latter's office in Brooks county. He testified: "I never came to Hall county with the intention to live. When coming up here and spending the summers, I always intended to return to Brooks county. I did not intend to change my residence from Brooks county to Hall county." There was some other evidence; but the testimony of the defendant was without substantial conflict. Upon this evidence, the judge directed a judgment in favor of the plea to the jurisdiction, and this judgment has been made the subject of an assignment of error in this court.

Wm. M. Johnson, of Gainesville, for plaintiff in error. B. P. Gaillard and W. A. Charters, both of Gainesville, for defendant in error.

POTTLE, J. [3] 1. "In all pleas to the jurisdiction of the court, it must appear that there is another court in this state which has jurisdiction of the case." Civil Code 1910, § 5666. The plea must allege "that another court in this state has jurisdiction." Kahn v. Southern Loan Association, 115 Ga. 459, 41 S. E. 648. "It must appear in such a plea that there is another court in this state which has jurisdiction of the case." Akers v. High Co., 122 Ga. 279, 50 S. E. 105. See, also, Riddling v. Stewart, 77 Ga. 539. The original plea in this case alleged that the courts of Brooks county had jurisdiction of the case.

[4, 5] Judicial knowledge is taken of the fact that there are two courts in Brooks county, and only two, which have jurisdiction to enforce a cause of action, such as that set forth in the petition in this case. To wit, the city court of Quitman and the superior court of Brooks county. It would seem,

therefore, that the original plea to the jurisdiction in this case ought to be sufficient; and that it would not be necessary to specify in the plea a thing which the court knows judicially without proof. If the cause of action had been one in which a justice court had jurisdiction, as in *Ridling v. Stewart*, supra, and *Akers v. High Co.*, supra, then, of course, it would be necessary for the defendant to name the militia district in which he resided and the particular justice court in the county which had jurisdiction of the case. But the court knows judicially that the city court of Quitman has jurisdiction over the whole county of Brooks and has authority to enforce a cause of action, such as that set forth in the petition. It likewise knows judicially that the superior court of Brooks county has the same power and authority; and that these are the only two courts in the county which have the jurisdiction to enforce the cause of action.

[1] But, even if the decisions of the Supreme Court are to the effect that a plea to the jurisdiction, in order to be good, must on its face, in all cases, name the court which has jurisdiction of the case, there can, we think, be no serious question as to the right of the defendant to perfect his plea by amendment. The only limitation fixed by the Code as to the right of amendment, either as to the form or substance, is that there shall be enough in the plea to amend by Civil Code 1910, § 5681. In the present plea, it was alleged that the city court of Hall county did not have jurisdiction of the defendant; that he was a resident of Brooks county; and that the courts of that county had jurisdiction of the case. Certainly it was competent for him to amend by naming the courts in Brooks county which had jurisdiction to enforce the cause of action.

[2] 2. The direction of a verdict in favor of the plea to the jurisdiction was not error. Plaintiff in error relied upon section 2182 of the Civil Code of 1910, and especially that portion which provides that "a person who habitually resides a portion of the year in one county and another portion in another shall be deemed a resident of both, so far as to subject him to suits in either for contracts or torts committed in such county." By its terms, this portion of the section presupposes residence; and, to make it applicable, it must appear that the person involved made his residence for a part of the year in the county in which suit was brought. There was, however, no evidence that the defendant really resided in Hall county at all. His home was in Quitman; his parents lived there, and he made his home with them; and his business was there. For a number of years he had been spending the greater portion of the hot months at his father's summer resort in Hall county, returning home for a week in each month to attend to necessary business there. The mere fact

that while in Hall county he may have assisted to some extent in the management of the hotel, by making purchases and the like, makes no difference. He says he never intended to change his domicile; and there are no facts proved to authorize a finding that he did. See *Knight v. Bond*, 112 Ga. 828, 38 S. E. 206; *Smith v. Smith*, 136 Ga. 197, 71 S. E. 153. The evidence demanding a finding in favor of the plea to the jurisdiction, there was no error in directing the jury to so find.

Judgment affirmed.

(11 Ga. App. 164)

FOOTE & DAVIES CO. v. SOUTHERN WOOD PRESERVING CO. (No. 3,994.)

(Court of Appeals of Georgia. May 22, 1912.)

(Syllabus by the Court.)

1. SALES (§ 77\*)—CONSTRUCTION OF CONTRACT—QUANTITY.

The trial court properly construed the contract of sale. There is no merit in any of the special assignments of error; and the evidence fully authorized, if it did not demand, the verdict.

[Ed. Note.—For other cases, see *Sales*, Cent. Dig. §§ 208-212; Dec. Dig. § 77.\*]

(Additional Syllabus by Editorial Staff.)

2. EVIDENCE (§ 413\*)—PAROL EVIDENCE AFFECTING WRITINGS—STATUTORY PROVISION.

Under Civ. Code 1910, §§ 4268, 5792, matters extrinsic to a contract may be looked to to explain, but never to vary, its terms.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 1855-1857, 1859, 1860; Dec. Dig. § 413.\*]

Error from City Court of Atlanta; H. M. Reid, Judge.

Action by the Southern Wood Preserving Company against the Foote & Davies Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Payne & Jones, of Atlanta, for plaintiff in error. E. V. Carter, of Atlanta, for defendant in error.

POTTLE, J. The defendant, Foote & Davies Co., entered into a contract with the plaintiff, of which the following is a copy: "Southern Wood Preserving Co., Fort McPherson, Ga. Gentlemen: Confirming my telephone message of Wednesday, the 26th instant, you have been awarded the contract to furnish the necessary amount of wood block for paving the Foote & Davies Co. publishing house on corner of Capitol Ave. and Wayman Ave., amount to be determined later, but being approximately 5,000 sq. yards, same to be furnished f. o. b. cars on the side track at 76¢ per sq. yard and of long leaf yellow pine thoroughly steam dried and coated with a high grade creosote oil, 5 pounds to the cubic foot, blocks to be surfaced on two sides and in size 3" wide, 2½" deep, and about 8" long, conforming to the sample left in my office, with the exception that approximately 60%

of this wood is to be heart, all of it answering to the requirement of square edged and sound. Delivery to begin on the 10th day of June and to continue as rapidly as shall be required to keep employed all men who may be employed upon it in this material. Test satisfactory to the architect shall be made showing that the blocks offered contain the amount and quality of creosote oil as above specified. Also Mr. White and Mr. Finley, in making this proposal, have bound themselves to give expert superintendence to laying of this block, to the extent of advice to the architect covering any point upon which he may need advice, and visit the work as it progresses twice daily. It affords me pleasure to place this contract with you, and I am especially pleased to be able to use long leaf yellow pine, as advocated by yourselves. Yours very truly, [Signed] Charles Edward Choate. Accepted: Southern Wood Preserving Co., by R. H. White, Pres't." The plaintiff delivered 4,355 yards of blocks, and only about 3,679 yards were used and paid for. The suit is for the balance. The plaintiff prevailed, and the case is here upon exceptions to the overruling of a demurrer to the petition, the disallowance of an amendment to the defendant's answer, and the overruling of its motion for a new trial.

[1] The case turns upon the proper construction to be placed upon the contract. The defendant contends that, construed in the light of the surrounding circumstances, the situation of the parties, and the purpose for which the wooden blocks were to be used, the contract really means that an indeterminate quantity of blocks were ordered, the exact number to be ascertained later; that at the time of the execution of the contract defendant did not know just how much floor space it would cover with the wooden blocks, and its purpose in executing the contract was to obtain whatever quantity of blocks it might subsequently decide would be needed; that the plaintiff furnished more blocks than were needed or used; and that the defendant is not liable for the balance claimed to be due under the contract. On the other hand, the plaintiff contends that the quantity to be furnished was fixed by the contract; and that the number of blocks actually delivered was authorized by the contract. There is no plea of failure of consideration, or that the blocks furnished did not in every respect measure up to the specifications in the contract. The sole defense is that too many were furnished.

[2] Ambiguities and words of doubtful meaning are often explained and made clear by considering the surrounding circumstances. Civil Code 1910, §§ 4288, 5792. Matters dehors the contract are frequently looked to, when they can aid construction. In other words, they may be looked to to explain, but never to vary. A contract free from

ambiguity is conclusively presumed to express the intention of the parties.

The contract under consideration is lacking in definiteness, but clear in meaning. In the first place, the plaintiff bound itself to furnish, and the defendant obligated itself to take, "the necessary amount of wood blocks for paving" the defendant's publishing house. The necessary quantity was unknown to both parties; but, instead of waiting to find out, they closed negotiations by an engagement of one to furnish and the other to take "approximately 5,000 square yards," the exact quantity to be determined later. Delivery was to begin on June 10th, "and to continue as rapidly as shall be required to keep employed all men who may be employed upon it in this material." Manifestly the fair and plain meaning of the engagement is that the plaintiff should begin on June 10th and furnish, as rapidly as it desired (at all events, with sufficient rapidity to keep the labor employed), a quantity of blocks approximating 5,000 square yards. If it furnished a few less than 5,000 or exactly 5,000, and more were needed, it must furnish the excess. If it furnished a few more than 5,000, and exactly that number or a few less were needed, the plaintiff would stand the loss. The word "approximately" is akin to the words "more or less." The exact excess or deficiency which might be allowed by the use of the word would depend upon each case, the quantity or number called for, and the nature of the article or property. Ordinarily this would be a jury question. It would seem that it might be held, as a matter of law, in a case of the character now in hand, that 10 per cent. would be a sufficient margin; but, since the jury have said by their verdict that it was, this matter may properly be left to be determined as an issue of fact.

The provision in the contract in reference to the rapidity with which the blocks were to be delivered was for the benefit of the purchaser. Certainly it was not a violation of the contract for the seller to deliver even more rapidly than it was bound to do under its engagement. It was the duty of the defendant to have ascertained the exact quantity needed and notified the plaintiff before delivery was completed. In the absence of notice, the plaintiff had a right to deliver approximately 5,000 square yards. The jury could well find that 4,355 square yards was not more than "approximately" 5,000. They could also find, from the evidence, that no notice as to the quantity desired was given until after delivery was completed.

The trial judge properly construed the contract. There is no merit in any of the special assignments of error; and the evidence warranted, if, indeed, it did not demand, the verdict.

Judgment affirmed.

(11 Ga. App. 158)

SEWELL et al. v. GLORE. (No. 3,909.)  
(Court of Appeals of Georgia. May 22, 1912.)*(Syllabus by the Court.)*

## 1. WITNESSES (§ 370\*)—CREDIBILITY—VOLUNTARY TESTIMONY.

That a woman, without a subpoena, voluntarily attended court from outside the county in which the case was tried, and testified for the plaintiff, was only a circumstance to be considered by the jury in determining the weight of her testimony; and they were authorized to believe her, notwithstanding her willingness to testify.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 1189; Dec. Dig. § 370.\*]

## 2. NO ERROR OF LAW—ISSUE OF FACT—COMPENSATION OF BROKER.

No error of law is complained of, and the only question in the case was the issue of fact as to whether the broker had procured a purchaser for the real estate listed with him for sale, who was ready, able, and willing to buy, and who actually offered to buy on the terms stipulated by the owner; and on this issue the evidence fully supports the verdict in favor of the plaintiff.

Error from City Court of Atlanta; H. M. Reid, Judge.

Action by J. P. Glore against O. T. Sewell and others. Judgment for plaintiff, and defendants bring error. Affirmed.

Mozley & Moss, of Marietta, for plaintiffs in error. Etheridge & Etheridge, of Atlanta, for defendant in error.

HILL, C. J. Judgment affirmed.

(11 Ga. App. 194)

WILLIAMS v. CITY OF HAZLEHURST.  
(No. 4,142.)

(Court of Appeals of Georgia. May 22, 1912.)

*(Syllabus by the Court.)*

## 1. CRIMINAL LAW (§ 668\*)—COMPETENCY OF WITNESS—ACCUSED.

One on trial in a police court for the violation of a municipal ordinance cannot be sworn as a witness in his own behalf. The provisions of section 1036 of the Penal Code of 1910 are applicable to such a trial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1594-1599; Dec. Dig. § 668.\*]

## 2. CONSTITUTIONAL LAW (§ 267\*)—RIGHT TO TRIAL BY JURY—DUE PROCESS OF LAW.

One convicted in a police court of violating a municipal ordinance and sentenced to a term of penal servitude is not deprived of his liberty without due process of law within the meaning of either the state or the federal Constitution because denied the right of trial by jury.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 754; Dec. Dig. § 267.\*]

## 3. SUFFICIENCY OF EVIDENCE.

The evidence authorized the verdict.

Error from Superior Court, Jeff Davis County; C. B. Conyers, Judge.

Henry Williams was convicted of violating an ordinance of the city of Hazlehurst, and brings error. Affirmed.

P. L. Smith and J. R. Grant, both of Hazlehurst, and W. W. Bennett, of Baxley, for plaintiff in error. J. Mark Wilcox, of Hazlehurst, for defendant in error.

POTTLE, J. The plaintiff in error was convicted of violating a municipal ordinance prohibiting the keeping of intoxicating liquors for illegal sale. Upon appeal, the board of aldermen sustained the conviction, as did the judge of the superior court on certiorari. The last appeal permissible under the law is now being prosecuted in this court.

[1] 1. There is only one point which need be discussed. The aldermen refused to allow the accused to testify as a witness in his own behalf. At common law no party to a case, either civil or criminal, was a competent witness, but by statute in perhaps nearly all of the states parties in civil cases have been made competent witnesses, and in such cases the party may be called either in his own behalf or by his adversary. Many of the states have conferred upon persons indicted for crime the privilege of testifying in their own favor. It is uniformly held, however, that this is a privilege which may be exercised or not, as the prisoner elects. He cannot be compelled by the state to testify. In Georgia the right of the prisoner to offer himself as a witness exists only to a qualified extent. The right to make an ex parte statement in his own defense was at first confined to felony cases. Acts 1868, p. 24. Later the word "felony" was stricken, and the words "in all criminal trials in this state" were inserted. Acts 1874, p. 22. And later still the words "and the jury may believe such statement in preference to the sworn testimony in the case" were added. Acts 1878, 1879, p. 53. Since this act, the statute has stood as thus amended. Penal Code 1910, § 1036.

In *Brown v. State*, 58 Ga. 215, Judge Bleckley suggested that, while the prisoner's counsel could not, as matter of right, interrogate him, the court might in its discretion permit this to be done. In *Wilson v. State*, 69 Ga. 227 (20), 245, it was held that, even where the prisoner was cross-examined by his counsel as the statute permitted, the judge could properly tell the jury "to give his statement just such force and weight as they saw proper." It is doubtless true that, under the provisions of our statute, one on trial for crime in this state may, with his consent and by permission of the court, offer himself as a witness in his own behalf and be examined both in chief and on cross. Whether this would amount to a waiver of his constitutional exemption from furnishing incriminating evidence against himself need not be decided. Perhaps the correct rule would be that, if he offers himself as a witness, he could be com-

pelled to answer any pertinent question in relation to his connection with the crime for which he was being tried, but not as to any other criminal transaction not involved in the indictment. See 1 Bishop, New Criminal Procedure, §§ 1181-1187. But, without reference to the prisoner's right to become a witness or the rules to be applied when he does, it is certain that he cannot be sworn, for the statute expressly says his statement "shall not be under oath," and, since the privilege of offering himself at all is dependent entirely upon the statute, the right must be exercised in strict accordance with its provisions.

But it is said that the statute does not apply to cases tried in a police court, since a violation of a municipal ordinance is not a crime. If counsel's premise be sound, one on trial for the violation of a municipal ordinance could neither testify nor make an ex parte statement unless the charter permitted it, and, as the charter of Hazlehurst is silent on the subject, the plaintiff in error could not have been heard in his own defense at all. But we do not agree either with the premise or the conclusion. In a broad sense, of course, a crime is an offense against the laws of the state, though it has been held that the word "crime," as used in article 1, § 1, par. 17, of the Constitution, comprehends all penal offenses, including those against municipal ordinances. *Pearson v. Wimblsh*, 124 Ga. 708, 52 S. E. 751, 4 Ann. Cas. 501. A case tried in a police court may not be a "criminal case" in the strict and technical sense, but it is a "criminal trial" within the meaning of the statute permitting the prisoner "in all criminal trials" to make an unsworn statement. As it appears from the record that the accused was sworn and then offered to give testimony having the sanction of an oath, there was no error in refusing to permit him to testify.

[2] 2. The sentence was that the accused pay a fine of \$300 or labor for 180 days up-

on the public streets. It is contended that, by the imposition of this sentence, the prisoner was deprived of his liberty without due process of law in violation of both the state and federal Constitutions, in that a term of penal servitude was imposed without a trial by jury. The point here made is too well settled to require any discussion, nor is there any necessity that it be certified to the Supreme Court. *Haney v. Commissioners*, 91 Ga. 770, 18 S. E. 28; *Tilley v. Cox*, 119 Ga. 867, 47 S. E. 219; *Little v. Fort Valley*, 123 Ga. 503, 51 S. E. 501; *Loeb v. Jennings*, 133 Ga. 796, 67 S. E. 101, 18 Ann. Cas. 376.

3. The evidence authorized the verdict. It was shown that on several occasions the accused had delivered to various persons intoxicating liquor and received money in exchange therefor. A sale was thus prima facie shown, and his conviction for keeping whisky on hand for unlawful sale was authorized.

Judgment affirmed.

(11 Ga. App. 197)

WOODWARD v. CITY OF HAZLEHURST.  
(No. 4,141.)

(Court of Appeals of Georgia. May 22, 1912.)

(Syllabus by the Court.)

TRIAL BY JURY.

There was no error in refusing to sanction the certiorari. This case is controlled by the ruling of this court in *Williams v. City of Hazlehurst*, 74 S. E. 1039, decided this day.

Error from Superior Court, Jeff Davis County; C. B. Conyers, Judge.

Dause Woodward was convicted of violating an ordinance of the city of Hazlehurst, and brings error. Affirmed.

P. L. Smith and J. R. Grant, both of Hazlehurst, and W. W. Bennett, of Baxley, for plaintiff in error. J. Mark Wilcox, of Hazlehurst, for defendant in error.

RUSSELL, J. Judgment affirmed.



(159 N. C. 409)

WESTFELDT et al. v. ADAMS et al.

(Supreme Court of North Carolina. May 28, 1912.)

**1. PUBLIC LANDS (§ 164\*)—LAND OF STATE—DISPOSAL—STATUTES—IMPLIED REPEAL.**

Courts must harmonize statutes dealing with the same subject-matter, where it can be reasonably done, so that where Acts 1836-37, c. 9, providing that lands "lately acquired" by treaty with an Indian tribe should be sold by the state, and should not be subject to entry, can be construed to apply to lands acquired by the last-made purchase from the tribe, it will not be held to have repealed by implication an existing statute (Acts 1835-36, c. 6) providing that certain lands acquired from the same tribe by earlier treaties should be subject to entry.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 466-476; Dec. Dig. § 164.\*]

**2. STATUTES (§ 167\*)—REPEAL—EFFECT OF REVISAL.**

Where the chapter of the Revised Statutes of 1837, providing for the entry of public lands included an earlier statute (Acts 1835-36, c. 6) providing for the entry on certain lands acquired by treaty from an Indian tribe, did not take effect until after Acts 1836-37, c. 9, purporting to withdraw from entry the lands in question, it would repeal such act, and the lands were thereafter subject to entry.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 242, 243; Dec. Dig. § 167.\*]

**3. PUBLIC LANDS (§ 164\*)—DISPOSAL OF STATE LANDS—GRANT—COLLATERAL ATTACK.**

While a grant of public lands cannot be attacked collaterally for fraud or irregularity, it may be so attacked on the ground that lands included were not subject to entry.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 466-476; Dec. Dig. § 164.\*]

**4. PUBLIC LANDS (§ 164\*)—GRANTS BY STATE—LOCATION—ENTRY AS EVIDENCE OF.**

While the description in a grant of public lands is paramount in locating the land, and must override the description in the entry where there is a conflict, where, in an action to determine conflicting claims, the description in the defendant's survey and grant was vague and indefinite, the entry should have been admitted as evidence of location.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 466-476; Dec. Dig. § 164.\*]

**5. TRIAL (§ 139\*)—INSTRUCTIONS—PROVINCE OF COURT AND JURY.**

In an action to determine conflicting claims to land, the court improperly ordered the jury to find in the affirmative an issue whether the defendants were entitled to hold under particular state grants, where there was testimony that they were so entitled, for, though the evidence was not conflicting, issues of fact and the credibility of witnesses are essentially for the jury.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 332, 333, 338-341, 865; Dec. Dig. § 139.\*]

**6. EJECTMENT (§ 86\*)—ACTION—BURDEN OF PROOF.**

Where, in an action to recover possession of land, the plaintiffs denied the defendants' title, the burden was on the latter to establish it in every particular.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. §§ 238-245; Dec. Dig. § 86.\*]

**7. APPEAL AND ERROR (§ 879\*)—REVIEW.**

The court on appeal will not review an error in favor of a party who did not except and appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 8581-8583; Dec. Dig. § 879.\*]

**8. TRIAL (§ 350\*)—VERDICT—SPECIAL INTERROGATORIES.**

In the trial of a cause, the ordinary issues raised by the pleadings should be submitted, unless the parties agree upon special issues.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 828-833; Dec. Dig. § 350.\*]

Appeal from Superior Court, Haywood County; Justice, Judge.

Action by G. R. Westfeldt and others against W. S. Adams and others. From a judgment for defendants, plaintiffs appeal. New trial.

This action was brought by the plaintiffs to recover the possession, and damages for the detention, of a tract of land in the county of Swain, on the waters of the Tennessee river, known as section No. 2325, containing 640 acres, and described as follows: "Beginning at a chestnut on the west side of the Jenkins Trail leading to the Smoky Mountains, and runs thence east four hundred and ninety (490) poles to a stake; thence south two hundred and five (205) poles to a stake; thence west four hundred and ninety (490) poles to a white oak; thence north two hundred and five (205) poles to the beginning." There are allegations in the complaint that the plaintiffs are the owners in fee of the land and entitled to the possession, and that the defendants are in possession of the same, and unlawfully and wrongfully withhold the possession from the plaintiffs. These allegations are denied in the answer, and the defendants specially aver, as a defense and counterclaim: That they are seised in fee, as owners, of two tracts of land in the county of Macon, bounded and described as follows: (1) Beginning at a mountain oak on the Little Fork Ridge and runs south 45° west, 100 poles, to a stake; thence north 45° west, 160 poles, to a stake; thence north 45° east, 100 poles, to a stake; thence south 45° east, 160 poles, to the beginning—being state grant No. 1,545, issued November 10, 1854. (2) Beginning at a birch, and runs north 160 poles to a stake; thence west, 100 poles, to a stake; thence south, 160 poles, to a stake; thence east, 100 poles, to the beginning—being state grant No. 1,546, issued November 10, 1854. That said two tracts of land are located on the ridge lying between Sugar Fork creek and Haw Gap creek, commonly known as the Little Fork Ridge, and so called, and are the lands whereon the defendants were conducting mining operations at the date of the commencement of this action. It is further alleged in the answer: "That the plaintiffs unlawfully and wrongfully claim an interest in said land, and to be the owners of the

same, pretending that they are embraced within the boundaries of the tract of land described in the complaint herein, which said pretended claim the defendants say has no foundation in fact." Judgment is prayed that the plaintiffs take nothing by their suit, and that the defendants go without day, and further that defendants are the owners of the said two tracts of land, and that plaintiffs and their privies in estate be enjoined perpetually from hereafter making any claim or asserting any title thereto.

When the case was called for trial, plaintiffs tendered the following issues: "(1) Are the plaintiffs the owners of the lands described in the complaint and indicated on the official plat by lines H. P. O. N. in black? (2) Are the defendants in wrongful possession of said lands? (3) What damage, if any, are plaintiffs entitled to recover?" The court refused to adopt these issues and, instead thereof, submitted issues to which the jury responded, as follows: "(1) Are the plaintiffs the owners and entitled to the possession of the land described in the complaint, without regard to its location, provided the defendants' grants Nos. 1,545 and 1,546 are not located on it? Ans. Yes. (2) Is the tract of land described in plaintiffs' complaint, grant No. 2,325, located as designated on the maps, beginning at the point marked 'H' and to P. O. N. in black letters on the maps? Ans. No. (3) Is the plaintiffs' tract, grant No. 2,327, located as designated on the maps, beginning at the point marked 'H' and to I. R. Q. in black letters on the maps? Ans. No. (4) Are the defendants the owners and entitled to the possession of the two tracts of land described in the answer, grants Nos. 1,545 and 1,546, without regard to their location? Ans. Yes. (5) Is the tract, grant No. 1,545, located as designated on the maps, beginning at point marked Mountain Oak, 'W' and to X. Y. Z. in red letters on the maps? Ans. Yes. (6) Is the tract, grant No. 1,546, located as designated on the maps, beginning at point marked birch 'S' and to T. U. V. in red letters on the maps? Ans. Yes." Plaintiffs excepted to the ruling of the court upon the issues. There was much evidence taken in the case and many exceptions noted to the rulings of the court, which we will consider in the order of their statement in the record. Judgment was entered on the verdict for the defendants, and the plaintiffs appealed.

A. C. Avery, F. A. Sondley, T. F. Davidson, and J. C. Martin, for appellants. J. H. Merrimon, Moore & Rollins, Aycock & Winston, and J. J. Hooker, for appellees.

WALKER, J. It is conceded that the land in controversy is a part of the land acquired by the state under treaty with the Cherokee Indians. The fact is recited in the grant, under which the plaintiffs claim, that the land therein described is "a part

of the land lately acquired by treaty from the Cherokee Indians," and the defendants, in their brief, thus refer to the grants under which they claim: "It seems clear, therefore, that the lands embraced in grants numbered 1,545 and 1,546 were of 'vacant and unsurveyed lands acquired by treaty of 1817 and 1819,' and made subject to entry from May 1, 1836, by Public Laws of 1835-36, c. 6, p. 7." The plaintiffs' grant was issued to E. H. Cunningham, assignee, on April 28, 1860, upon an entry made by Daniel L. McDowell, of 640 acres, which the grant recites was sold for \$64, as Indian land, under an act of the Legislature. The grants of the defendants, Nos. 1,545 and 1,546, and each for 100 acres, were issued on November 10, 1854, upon entries made on February 15, 1850. The grants so recite, and the entries, upon which they are based, were put in evidence by the plaintiffs. There was no attack made by the defendants upon the title of the plaintiffs to the lands claimed by them, so far as the validity of the grant issued to their predecessor, E. H. Cunningham, is concerned; but the defendants contended solely that the plaintiffs had failed to locate their grant and to show that it embraced any of the lands in dispute. There was a sharp and protracted controversy between the parties as to the true location of the several grants introduced by them; the defendants denying that the plaintiffs' grant, No. 2,325, which was alleged by them to include the locus in quo, or grant No. 2,327, upon which plaintiffs relied to show the location of grant No. 2,325, had been correctly located, and the plaintiffs denying that grants 1,545 and 1,546 had been correctly located by the defendants. There was much testimony introduced by the parties to support their respective contentions; but we will not refer to any of it at present, as we deem it proper to consider, in the beginning, the validity of the defendants' grants 1,545 and 1,546, which are assailed by the plaintiffs, for, if they are invalid, the question of location as to them will become immaterial, except in so far as the evidence upon that question and the charge of the court with respect thereto may have been prejudicial to the plaintiffs in the location of their grants. The validity of the defendants' grants must depend upon the proper construction of the Cherokee laws. As said in the defendants' brief: "The Indian title, or right of occupation, was extinguished by the following treaties made and concluded between the United States and the Cherokee Nation or Tribe of Indians, to wit: The treaty of Holstein of July 2, 1791, 7 U. S. Stat. 39; the treaty of Tellico of October 2, 1798, 7 U. S. Stat. 62; the Treaty of July 8, 1817, 7 U. S. Stat. 156; the Treaty of February 27, 1819, 7 U. S. Stat. 195; the Treaty of New Echota of December 29, 1835, 7 U. S. Stat. 478."

At a very early period, the entry of lands

within the Indian hunting grounds, or of any lands either ceded by the Indians or conquered from them, was forbidden by statute, and the bounds of such Indian lands were carefully delineated. Act of 1778, c. 132; Act of 1783, c. 185—which will be found in Potter's Revisal, pp. 354, 484. By the Act of 1809, c. 774 (Potter, p. 1161), it was provided as follows: "The land lying west of the line run by Meigs and Freeman, within the bounds of this state, shall not be subject to be entered under the entry laws of this state; but the same, when the Indian title shall be extinct, shall remain and inure to the sole use and benefit of the state; any law to the contrary notwithstanding. All entries made, or grants obtained, or which may hereafter be made or obtained, shall be null and void." The last act, as its preamble, and even the language we have quoted, evidently show, was intended to apply to Indian lands only, and there may not have been any other land west of the Meigs and Freeman line. By the treaties of 1817 and 1819, the state acquired a large area of land from the Cherokee Indians, which by the Act of 1819, c. 10, were directed to be disposed of by sale, after being surveyed, except such as would not command a certain price, and these lands, which were called the "residue," were "reserved" for future disposal by the Legislature, and the act prohibited the entry of lands so acquired. In 1823 the state acquired by purchase from certain individuals of the Cherokee Tribe of Indians, the lands which, under the treaties of 1817 and 1819, had been allotted to them and did not, of course, pass to the state by the treaties. The policy of the state from the beginning, in regard to the Indian lands acquired by treaty, had been, and continued to be until the year 1835, that none of said lands should be subject to entry, but should be disposed of by sale only, as provided in the several acts of the Legislature relating thereto, which, however, differed in some particulars or details from each other, though substantially alike and enforcing the general purpose to withhold them from entry. But by the Act of 1835-36, c. 6, it was provided that the lands acquired by the treaties of 1817 and 1819, and which were "vacant and unsurveyed," should be subject to entry as other lands in the state, and by Act of 1836-37, c. 7, the lands purchased from the Indians in 1823 were excepted from the operation of the Act of 1835, or, to be more accurate, the latter act was declared not applicable to them, and the Legislature had made no provision for their disposal by sale or otherwise. They were simply owned by the state, but not subject to entry. So far the legislation of the state relating to the Cherokee lands is comparatively easy of construction, and we may say that the legislative meaning is plain and unmistakable.

In 1835, by treaty with the Cherokees, the

state acquired additional lands, and by Act of 1836-37, c. 9, provided for the survey and sale of such part of the lands, lately acquired by treaty with the Cherokee Indians, as would bring a certain price, and reserved the residue for the future disposal of the Legislature, and prohibited entry of the same. This act provides further, in sections 20 and 21, as follows: "It shall be the duty of the commissioner to be appointed by virtue of this chapter, to cause to be surveyed and offered for sale, all the reservations remaining undisposed of in the county of Macon, under the same rules and regulations that are provided for the surveying and selling the lands lately acquired by treaty from the Cherokee Indians. And it shall be the duty of the said commissioners of sale, to expose again to sale, all the lands already surveyed and now remaining unsold in the county of Macon aforesaid." The Act of 1835-36 was inserted in the first volume of the Revised Statutes of 1837, as a part of section 1 of chapter 42 on Entries and Grants, which reads as follows: "All vacant and unappropriated lands belonging to this state shall be subject to entry in the manner herein provided, except in the cases hereinafter mentioned. It shall not be lawful for any entry taker to receive an entry for any lands lying to the westward of the line run by Meigs and Freeman in the year one thousand eight hundred and two, as the then boundary line between this state and the Cherokee Nation, except the vacant and unsurveyed lands that have been acquired by treaty from the Cherokee Indians in the years one thousand eight hundred and seventeen and one thousand eight hundred and nineteen." The Act of 1835-36, was amended by Acts of 1836-37, c. 7, which provided that it should not apply to the land reserved or allotted to the Indians in the treaties of 1817 and 1819, which therefore were not subject to entry, and the amending Act of 1836-37 was inserted in the Revised Statutes as section 36 of chapter 42, which is as follows: "Nothing in this act contained shall be so construed as to authorize or allow the entry of any portion of the Cherokee lands, which were reserved or allotted to any Indian or Indians under the Cherokee treaties, which the state has since acquired by purchase; and the Secretary of State is hereby directed to issue no grant for any portion of the lands of the latter description, until the General Assembly shall otherwise order and direct." The "act concerning the Revised Statutes" provided that certain enumerated acts therein contained, including the chapter or act on Entries and Grants, but not including the Act of 1836-37, relating to the survey and sale of Indian lands, should take effect on January 1, 1838. It also provided that the acts of a public nature passed by the Legislature in 1836-37, with one exception, should be published in the first volume of the Revised Statutes with the

acts enumerated therein, and to which we have referred, and other acts were required to be published in the second volume. The chapter concerning Entries and Grants was published in the first volume of the Revised Statutes, and the Act of 1836-37, relating to the survey and sale of Indian lands, in the second volume, under the title, "Cherokee Lands," with other laws upon that subject. The Act of 1836-37, amending the Act of 1835-36, so as to exclude the lands purchased from the Indians from its operation and prohibiting the entry of them, was ratified January 10, 1837, the other act of 1836-37 on January 20, 1837, and the Revised Statutes on January 23, 1837.

This gives, as briefly we can state it, the legislative history of these several statutes. The plaintiffs contend that the Act of 1835-36, authorizing the entry of the vacant and unsurveyed Indian lands, was repealed by the Act of 1837 passed January 20th, because by the twentieth section of the latter act the commissioners are required to survey and sell all the Indian reservations in Macon county undisposed of at that time, while the defendants contend that the Act of January 20, 1837, § 20, refers to the land known as the Indian reservations, which had been acquired by contract or purchase in 1823 (Acts of 1823, c. 9), which contract was ratified by Acts of 1824, c. 11, § 2 (2 Revised Statutes, pp. 196, 198), and they rely upon subsequent statutes recognizing the fact that there were lands in the county of Macon which were subject to entry under the general law, viz.: Act 1852, c. 70, recites that William Tatham, former entry taker of Macon county, had received entries, in 1850 and 1851, after the expiration of his term of office, and the Legislature provided that entries made in the entry taker's office of said county, and all warrants, surveys, and grants based thereon, in the past or the future, should be valid, as if William Tatham had rightfully held said office. Acts of 1852, c. 169, authorized entries of lands in Macon and Haywood counties under the provisions of that act, at the present rates, and declared that all lands theretofore entered in said counties and not paid for could be paid for as therein provided for lands lying in Cherokee county; the money received by the entry takers of said county to be paid "to the contractors for making the Western Turnpike Road, on the certificate of the proper agent." It is also contended that Acts of 1850-51, c. 25, §§ 5, 6, clearly show that there was land in Macon county which was subject to entry immediately prior to the passage of that statute. The lands in dispute lie in the county of Swain, the territory of which was taken from the county of Macon in 1871. It is argued that, as there were no lands in Macon county which were not acquired from the Cherokee Indians, whether by treaty or purchase, and none west of the Meigs and Free-

man line, the lands thus subject to entry must, of necessity, have been Indian lands, and, if this be true, it follows that they were the lands opened for entry by the Act of 1835-36. We are satisfied, from a careful examination of this question in every conceivable aspect, that the contention of the defendants is justified by the facts. We are convinced that there were no lands west of the Meigs and Freeman line which were the subject of entry prior to 1851, other than the lands mentioned in the Act of 1835-36, which were acquired by the treaties of 1817 and 1819 from the Cherokees.

[1] Section 20 of the Act of 1836-37 evidently referred to the lands reserved to certain individuals of the Cherokee Tribe; otherwise the statutes upon this subject cannot well be harmonized, and it is our duty to reconcile them, if it can reasonably be done.

[2] The chapter on Entries and Grants in the Revised Statutes will appear, by reference to the Legislative Journals of 1836-37, to have been what was called one of the "revised acts," and was passed one or two days after the Act of 1836-37, requiring the Indian reservations to be surveyed and sold. It also appears that the chapter on Entries and Grants of the Revised Statutes (which includes the Act of 1835-36) did not take effect, by the terms of the first chapter of that revision, until January 1, 1838, whereas the Act of 1836-37 was ratified January 20, 1837, and took effect 30 days after the rise of the General Assembly of that year, which adjourned on January 23, 1837, as will appear by the journals. If, therefore, the Act of 1836-37 is in conflict with the Act of 1835-36, it was repealed by the Revised Statutes; the first section of the chapter on Entries and Grants, authorizing the entry of vacant and unsurveyed Indian lands acquired by the treaties of 1817 and 1819, having taken effect with the other Revised Statutes on January 1, 1838, much later in date than the time when the Act of 1836-37 was ratified and in force. It further appears, as we have already shown, that, by several subsequent acts of the Legislature, the fact is established that lands were being entered in Macon county in 1850 and 1851, if not prior to those years. The warrants of survey, under the entries upon which grants 1,545 and 1,546 issued, were signed by William Tatham on February 15, 1850, and these entries and warrants were put in evidence by the plaintiffs. The act passed in 1836-37 providing for the sale of the Indian lands refers to those acquired by the last treaty in 1835. We conclude, therefore, that the vacant and unsurveyed lands, acquired by the treaties of 1817 and 1819, were the subject of entry in February, 1850, when defendants' entries were made, and we must assume, in the absence of any proof to the contrary, that the lands entered by Jonathan Hill in February, 1850, were a part of

those lands. *Harshaw v. Taylor*, 48 N. C. 513; *Dosh v. Lumber Co.*, 128 N. C. 84, 38 S. E. 284. The Act of 1852, c. 169, opened land in the Cherokee boundary to entry in a restricted way, and it was not until 1883 (Code, vol. 2, §§ 2478, 2479) that all of the Cherokee lands were made the subject of entry and grant under the general law of the state relating to the subject. Plaintiffs' counsel contend that this court, in *Stanmire v. Powell*, 35 N. C. 312, *Lovingood v. Burgess*, 44 N. C. 407, and *Frazier v. Gibson*, 140 N. C. 272, 52 S. E. 1035, has decided that no entry of any of the Cherokee lands could be made prior to 1852; but we do not so construe those cases. The first two related to land in Cherokee county, which was not affected by the Act of 1835-36, as it was not acquired by the treaties of 1817 and 1819, but by the treaty of 1835, and the Act of 1836-37 provided for the survey and sale of the lands in that county. What was said in *Frazier v. Gibson* had reference to the lands acquired by treaty of 1835 and to the Act of 1836-37, authorizing a survey and sale of them. The immediate context clearly shows that this is what was meant by the learned justice, who wrote the opinion of the court, and it is now fully conceded, and it must be admitted, that the Act of 1835-36 did authorize the entry of a part of the lands acquired by the treaties of 1817 and 1819. It would be strange indeed that an office was open in Macon county in 1850 for the purpose of receiving entries of land, if there were no lands in the county which were subject to entry, and plaintiffs introduced in evidence several entries made during that year. No satisfactory reason has been given for this strange anomaly. Besides, we cannot think that the Legislature would validate entries filed with William Tatham because his term of office had expired, as it did by the Act of 1852, c. 70, if it was not lawful to make entries of land in Macon county at that time, and the entries thus made and the warrants of survey issued thereon were void. That act purports to validate all entries made in Macon county prior to 1852, though the reason assigned is that the official term of Tatham had expired.

[3] It is true that a grant cannot be attacked collaterally for fraud or irregularity. There is a presumption that a grant is valid and that all preliminary steps have been taken which are required by law. Chief Justice Marshall stated the rule clearly in *Polk v. Wendal*, 9 Cranch, 87, 3 L. Ed. 665, as follows: "The laws for the sale of public lands provide many guards to secure the regularity of grants, to protect the incipient rights of individuals, and also to protect the state from imposition. Officers are appointed to superintend the business, and rules are framed prescribing their duty. These rules are in general directory, and when all the proceedings are completed by a

patent issued by the authority of the state, a compliance with these rules is presupposed. That every prerequisite has been performed is an inference properly deducible, and which every man has a right to draw from the existence of the grant itself." *Lovingood v. Burgess*, 44 N. C. 407; *Strother v. Cathey*, 5 N. C. 164, 3 Am. Dec. 683; *Stanmire v. Powell*, 35 N. C. 312. But all this presupposes that the officer had power or jurisdiction to issue the grant. "If they (the lands) never were public property or had previously been disposed of, or if Congress had made no provision for their sale, or had reserved them, the department would have no jurisdiction to transfer them, and its attempted conveyance of them would be inoperative and void, no matter with what seeming regularity the forms of law may have been observed. The action of the department would, in that event, be like that of any other special tribunal not having jurisdiction of a case which it had assumed to decide." *Smelting Co. v. Kemp*, 104 U. S. 636, 26 L. Ed. 875. "When the lands are not, in fact vacant and unappropriated, or when the law forbids entry of vacant land in a particular tract or country, a grant for a part of such land is absolutely void; and that may be shown on the trial in an action of ejectment." *Board of Education v. Makeley*, 139 N. C. 37, 51 S. E. 784. These being Cherokee lands, therefore we do not see why the plaintiffs may not show, if they can, that the lands described in the defendants' entries and grants were not a part of the vacant and unsurveyed lands acquired by treaties with the Indians in 1817 and 1819, and therefore was not subject to entry. *Janney v. Blackwell*, 138 N. C. 437, 50 S. E. 857. This course was taken and approved in *Harshaw v. Taylor*, 48 N. C. 513. Justice Connor said, in *Janney v. Blackwell*, supra: "It follows therefore that if one lay an entry upon and procure a grant for land covered by a grant, he acquires no title thereto, for the reason that the state has by the senior grant parted with its title. *Stanmire v. Powell*, 35 N. C. 312. If the land be open to entry and a grant be issued therefor, such grant may not be attacked collaterally for fraud, irregularity, or other cause. This can be done only by the state or by pursuing the provisions of section 2786 of the Code. But if the land be not subject to entry, the grant is void, and may be attacked collaterally." And Judge Pearson said, in *Harshaw v. Taylor*, supra: "But it was properly admitted by the plaintiff's counsel that the grant to him could not be supported by the aid of that statute (Act of 1852) because the statute only authorizes the entry and grant of vacant and unsold land, whereas the land in controversy had been previously surveyed and sold according to the provision of the statutes in reference to land lying in the county of Cherokee." The defendants' counsel admit that there

were no lands in Macon county, other than those acquired from the Indians in 1817 and 1819, which could be entered in the year 1840.

The statutes which have any material bearing upon the questions herein discussed are collected, in the order of their enactment, in the Code of 1883, c. 11, except the Act of 1835-36, the Act of 1836-37 exempting land purchased in 1823 from the operation of that act, and the Act of 1852 relating to entries filed in the office of William Tatham, to which full reference has been made.

[4] But while the court correctly held the defendants' grants to be valid, upon the evidence as it now appears, there was error in other respects. Upon a careful examination of the charge, we think the court substantially told the jury that, in locating the several grants, they need not consider the entries. It is true that, in a certain sense, the entry is not a part of the documentary title, and that the survey and description in the grant must control; but that is no reason why the entry should be disregarded altogether, and especially in a case like this one, where the location of the land is not positively and clearly shown by the survey and grant. All of the grants call for trees—chestnut, mountain oak, and birch—as the beginning corners of the several tracts, and the remaining description is equally as indefinite. The plaintiffs contended that the defendants' land, as described in grants 1,545 and 1,546, were on the waters of Eagle creek, as described in the entries, and not on or near the waters of Haw Gap creek and Sugar Fork creek, and that the Little Fork Ridge, mentioned in grant 1,545, was far north of the place at which defendants located their two grants, and near the waters of Eagle creek. The plaintiffs further contended that their grant, No. 2,325, should be located on the west or northwest side of Hazel creek, and not where the defendants say it should be located; that is, considerably north of Hazel creek and at a place which would not be designated as lying west or northwest of Hazel creek, in describing its true location. For these reasons, the plaintiffs have argued before us that the court should not have excluded the entries from the consideration of the jury, and in this position we concur. It is true that the description in the grant is paramount in locating the land, and must override that in the entry if the latter is in conflict with it; but the entry may be considered in determining the location of the land described in the grant, at least in cases of doubt as to the true location. The language of the court must have produced the impression upon the jury that they could only consider the description in the grant and what the surveyor did in locating the land, as they were told, among other things equally objectionable, that "the description in the grant constitutes the real location of the land, with-

out regard to the entry." This was correct in one respect; but, in order to ascertain what the grant really described and what the surveyor really did, it was competent to consider the entry, in this case at least, as the description in the grant would fit a tract of land on Eagle creek as well as one on or near Haw Gap creek at the place where defendants contend their entries were surveyed.

[5] The court directed the jury to answer the fourth issue in the affirmative, without permitting them to pass upon the oral testimony introduced by the defendants to show that the title, which had been vested in Stephen Munday by the grants 1,545 and 1,546 and mesne conveyances, had passed out of him and had been acquired by them. This was an error, if we are to follow numerous decisions of this court to the effect that the court cannot find any fact, but must leave even the credibility of the witnesses to the jury, however plain, direct, and conclusive the proof may appear to be, as the following cases will show: "It is the province of the jury to find the fact involved in the issue or issues presented in the pleadings, and in all cases the credibility of witnesses is exclusively for the jury to consider." *Burrus v. Insurance Co.*, 121 N. C. 62, 28 S. E. 62. "The present case is not like either of these, for the state had not made out a case, unless the state's witness was believed, and the credibility of a witness must be passed on exclusively by the jury. It is true, from the case as made out, there could be but little room to doubt that both defendants were guilty, and the wonder is why the jury should have hesitated about convicting both. Still that was a matter for the jury, and its being a plain case, although it accounts for, does not legalize, this novel mode in entering a verdict." *Justice Clark, in State v. Riley*, 113 N. C. 648, 18 S. E. 168. "Both the issue and the credibility of the evidence offered tending to establish the position of either party in reference to it were for the jury and not for the court." *Justice Hoke, in Bank v. Fountain*, 148 N. C. 590, 62 S. E. 738. "The jury are the constitutional judges, not only of the truth of testimony, but of the conclusions of fact resulting therefrom. The evidence may, in the opinion of the court, have been ever so strong against the defendant, yet it was for the jury to find the ultimate fact of guilt, without any suggestion from the court, direct or indirect, as to what the finding should be." *State v. Railroad*, 149 N. C. 470, 62 S. E. 755; *State v. Simmons*, 143 N. C. 618, 56 S. E. 701; *Bank v. Pugh*, 8 N. C. 206; *State v. Lilly*, 116 N. C. 1049, 21 S. E. 563. Such an instruction is expressly forbidden by statute. "No judge, in giving a charge to the petit jury, either in a civil or a criminal action, shall give an opinion whether a fact is fully or sufficiently proven, such matter being the true office and province of the jury; but he shall state in a plain

and correct manner the evidence given in the case and declare and explain the law arising thereon." Revisal, § 535. Where the facts are undisputed, the judge may direct a verdict in civil, but not in criminal, cases, and he cannot do so in either where facts are not admitted and the credibility of the witnesses is involved. There was no admission of facts in this case. The statement is that there was oral evidence, in addition to the documentary, tending to prove certain facts. The evidence is not set out, and this, perhaps, is not material, as it would still remain for the jury to decide as to the credibility of the witnesses, even if the evidence strongly tended to prove the facts in issue.

[6, 7] The plaintiffs had denied the defendants' title, and the burden therefore was upon the latter to establish it in every particular. The same error was committed in charging the jury as to plaintiffs' title; but the defendants did not except and appeal, and we cannot review the judge in this respect.

There are other errors assigned by the defendants, but it is not necessary to discuss them. The error as to the entries permeated the entire case and was not confined to the defendants' title. It was just as competent for the plaintiffs to use their entry in locating the land described in grant 2,325, as it was for them to use defendants' entries in order to show that they had not properly located their land. But an error on either side would induce us to award a general new trial, as the two locations are so closely related.

[8] The issues do not strongly commend themselves to us. They are unusual, somewhat involved, and may have misled the jury. It is better to follow the beaten path and submit the ordinary issues in such cases. Issues are raised by the pleadings, and should be framed accordingly, unless the parties agree upon special issues; but that is not so in this case. The plaintiffs objected to each of the issues, and they are not those made by the pleadings.

New trial.

(159 N. C. 280)

**MECHANICS' BANK & TRUST CO. v. WHILDEN.**

(Supreme Court of North Carolina. May 28, 1912.)

**EVIDENCE (§ 317\*)—HEARSAY EVIDENCE.**

Where, in an action to remove a cloud from title, the location of a grant of land was in controversy, the testimony of a witness that he had heard three persons say that a certain location was a corner of the grant was hearsay and incompetent in the absence of preliminary evidence fixing the time when the declarations were made, or showing that the parties making them were disinterested or were dead at the time of the trial.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 1174-1192; Dec. Dig. § 317.\*]

Appeal from Superior Court, Graham County; Webb, Judge.

Action to remove cloud on title by Mechanics' Bank & Trust Company against H. B. Whilden. From a judgment for plaintiff, defendant appeals. New trial.

This is an action to remove a cloud from title. The plaintiff claims under a grant issued to F. H. Busbee, trustee, of date August 18, 1885, and the defendant under a grant issued to D. F. Goodhue, of date May 27, 1872, and both parties introduced evidence to sustain their respective claims.

The principal controversy between the parties is as to the location of the Goodhue grant; the plaintiff contending that its beginning corner is at H. on the plat, in which event it would cover only a small part of the land in the plaintiff's grant, and the defendant contending that it is at A. on the plat, which location would cover nearly all of the land in the plaintiff's grant. There was a locust tree at A. and one at H., and his honor permitted a witness for the plaintiff to say that he had heard three persons say that the locust at H. was a corner of the Goodhue tract, and the defendant excepted.

There was no evidence fixing the time when the declarations were made, or that those making them were disinterested, or that they were dead at the time of the trial.

There was a verdict and judgment in favor of the plaintiff, and the defendant appealed.

Bryson & Black, for appellant. W. T. Crawford and Felix E. Alley, for appellee.

ALLEN, J. The evidence of the declarations of certain persons as to the location of the Goodhue corner was incompetent because hearsay and should have been excluded. "The restrictions on hearsay evidence of this character—declarations of an individual as to the location of certain lines and corners—established by repeated decisions are: That the declarations be made ante litem motam; that the declarant be dead when they are offered; and that he was disinterested when they were made." *Hemphill v. Hemphill*, 138 N. C. 506, 51 S. E. 43. None of these requirements were met by the plaintiff, and, as the declarations are condemned under the general rule excluding hearsay evidence, it was its duty to prove the facts bringing the evidence within the exception.

In *Dobson v. Finley*, 53 N. C. 499, Chief Justice Pearson says: "In the latter, to wit, hearsay evidence, it is necessary as a preliminary to its admissibility to prove that the person whose statement it is proposed to offer in evidence is dead, not on the ground that the fact of his being dead gives any additional force to the credibility of his statement, but on the ground that if he be alive he should be produced as a witness"—and this language is quoted with approval in *Shaffer v. Gaynor*, 117 N. C. 15, 23 S. E. 154; *Westfelt v. Adams*, 131 N. C. 379, 42 S. E.

823; and *Yow v. Hamilton*, 136 N. C. 358, 48 S. E. 782.

The question discussed by the defendant as to the right to maintain an action to remove a cloud from title, when the deeds of the defendant, if located according to the plaintiff's contention, are outside the lines of the plaintiff's deeds, is not presented because the deeds of the defendant cover a part of the land in the deeds of the plaintiff in any event.

For the error pointed out, there must be a new trial.

New trial.

**BROWN, J.** (concurring). I concur in the ruling of the court that the evidence of the declarations of certain witnesses admitted by the court as to the location of the Goodhue corner was incompetent as hearsay testimony and should have been excluded. But I am of opinion that instead of a new trial being ordered the action should be dismissed.

The suit is one according to the language of the complaint brought to remove a cloud upon the plaintiff's title when in fact there is no cloud upon the title to the property claimed by him as located by the jury. The defendant claimed title under grant 3522 containing 640 acres. The plaintiff claimed title to his land under grant 7315.

The whole controversy was one of boundary and centered entirely upon the true beginning corner indicated by the letter "A" on the map, while the plaintiff contended that the beginning corner was not at "A" but at the point indicated by the letter "H" on the map, and asked that grant 3522 be canceled as a cloud on plaintiff's title. The two grants adjoined each other, and one could not possibly constitute a cloud upon the title to the other since the only question involved was the true location of the two grants.

There is no question of lappage involved, and no claim that one grant, properly located, covers any part of the other grant. As commonly understood, a cloud on title to property is an outstanding claim or incumbrance which, if valid, would impair the title of the owner of a particular estate such as conveyance of the identical property or a part of it or a mortgage, judgment, tax levy, etc. *Black's Law Dic.* (2d Ed.) p. 210.

Before equity will undertake to remove a cloud upon title, it must assume some semblance of a title, either legal or equitable, to the property in question. *Cyc.* vol. 32, p. 1314. A mere verbal claim to or assertion of ownership in land does not constitute a cloud on title, and neither can a dispute about the true location of the beginning corner of two adjoining grants constitute a cloud on the title to either. *Waters v. Lewis*, 106 Ga. 758, 32 S. E. 854; *Waits, Actions and Defenses*, vol. 3, p. 189.

I do not think the act of 1893, c. 6 (Rev.

§ 1589), has any bearing upon this case. It was not intended to substitute an action, remove a cloud on title for a processioning proceeding, or for an action of trespass quare clausum fregit to try title to land. *McNamee v. Alexander*, 109 N. C. 242, 13 S. E. 777; *Pearson v. Borden*, 86 N. C. 535.

The statute referred to was intended simply to remove the restriction that, before a plaintiff could maintain an action to remove a cloud upon his title, he must affirmatively show that he was in the rightful and actual possession of the land and allow the bringing of the action by one not in the actual possession thereof. *McLean v. Shaw*, 125 N. C. 492, 34 S. E. 634.

To show the irregularity of this proceeding, although the jury have located the plaintiff's grant according to his contention, and therefore the defendant's grant covers no part of it according to such location, yet his honor has given judgment that the defendant's grant constitutes a cloud upon the title of the plaintiff and decrees that the defendant's grant, together with all mesne conveyances thereunder which the defendant claims title to said land, are hereby adjudged and declared to be void.

For these reasons I think the action should be dismissed.

**WALKER, J.**, concurs with me in this opinion.

(159 N. C. 335)

#### **BUNCH v. COMMISSIONERS OF RANDOLPH COUNTY.**

(Supreme Court of North Carolina. May 28, 1912.)

##### **1. COUNTIES (§ 160\*) — CONSTRUCTION — APPROPRIATION OF COUNTY MONEY.**

Under Const. art. 7, § 2, and Revisal 1905, § 1318 et seq., giving boards of county commissioners general supervision and control of governmental matters in the several counties, and under Revisal 1905, § 1379, investing these boards with power to expend county funds for any good and necessary purpose for the use of the county, the various boards are empowered to appropriate money from the general county funds to aid in the construction of public roads.

[Ed. Note.—For other cases, see *Counties*, Cent. Dig. § 219; Dec. Dig. § 160.\*]

##### **2. COUNTIES (§ 160\*) — CONSTRUCTION — POWER TO APPROPRIATE COUNTY MONEY.**

Pub. Laws 1909, c. 567, purporting to provide for the construction and repair of public roads in Randolph county, and designed to establish a township system for working roads which lie wholly within a given township, but leaving with the county board control over roads which extend through two or more townships, does not repeal Revisal 1905, § 1379, investing the board of county commissioners with power to expend county money for any good and necessary purpose for the use of the county; nor does it take away from the board its power to appropriate money from the general county funds to aid in constructing a pub-



tic road through two or more townships of the county.

[Ed. Note.—For other cases, see Counties, Cent. Dig. § 219; Dec. Dig. § 160.\*]

**3. STATUTES (§ 158\*)—REPEAL BY IMPLICATION.**

The repeal of statutes by implication is not favored.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 228; Dec. Dig. § 158.\*]

Appeal from Superior Court, Randolph County; Allen, Judge.

Action by W. A. Bunch against the Commissioners of Randolph County. From a judgment for plaintiff, defendants appeal. Reversed.

The action was instituted by W. A. Bunch, Esq., a citizen and taxpayer of Randolph county, to restrain the board of commissioners of said county from making a proposed appropriation of \$3,500 out of the general county funds in aid of the construction of a public road through two or more townships of said county, and extending from Ashboro, the county seat, to the Montgomery line. There was judgment restraining the appropriation, and defendants, the county commissioners, excepted and appealed.

H. M. Robins, for appellants. J. A. Spence, for appellee.

HOKE, J. (after stating the facts as above). [1] Under the Constitution and Public Laws of the state, except where changed by special enactments, the boards of county commissioners are given supervision and control of governmental matters in the several counties (Constitution, art. 7, § 2; Revisal, § 1318 et seq.); and, in addition to powers conferred generally throughout the Revisal, and in more especial reference to the fiscal affairs of the county, section 1379 enacts: "The board of commissioners is invested with full power to direct the application of all moneys arising by virtue of this chapter for the purposes herein mentioned and to *any other good* and necessary purpose for the use of the county." There are numerous decisions of this court to the effect that the well ordering and maintenance of the public roads of the county is to be properly considered and dealt with as a "necessary expense," within the meaning of our Constitution and Statutes (Board of Trustees v. Webb, 155 N. C. 383, 71 S. E. 520; Crocker v. Moore, 140 N. C. 429, 53 S. E. 229; Tate v. Commissioners, 122 N. C. 812, 30 S. E. 352); and the appropriation in question here comes well within the powers generally conferred on defendant board, and the same must be upheld, unless there is some public local law, enacted under article 7, § 14, of the Constitution, making contrary provision.

[2] It is earnestly contended for defendant that this very condition exists here by reason of chapter 567, Laws 1909, purporting

to provide for the "constructing and keeping in repair the public roads of Randolph" county, and adopted by the board of commissioners at a regular meeting, as the act itself requires. The statute is designed to establish a system of working the public roads of the county, to a large extent by the township system; and, when the roads lie wholly within a given township, the power to lay out, order, or discontinue such road, and to maintain or repair the same, is vested primarily in a board of township trustees appointed by the board of commissioners, subject to an appeal to said last-mentioned board in proper cases. Where a road extends through two or more townships, the power to lay out, alter, or discontinue the same remains in the county commissioners as heretofore; but, where this action has been had, the road is considered as divided into sections, and the control thereof, as to its repair, etc., is referred by the act to the local boards as in other cases. Section 5. By section 15, the commissioners of the county are authorized and directed to lay a tax of not less than 8½ cents, nor more than 15 cents, on the \$100 worth of property, to be collected as other taxes, the amount to be kept separate and apportioned to the several townships, to be paid out in maintenance and repair of the roads in that township, on the written order of the chairman and secretary of the board of trustees.

On the hearing it was made to appear by the admission of the parties, as follows: "That the public roads of Randolph county are in very poor condition and badly in need of improvement; that there are no roads in the county permanently improved by macadam, gravel, top soil, or sand clay, according to modern methods; and the road which is to be improved under order of the commissioners in question is a rough road, and is in very bad condition. And the defendants propose, as far as they can, to assist in the improvement of other roads in the different parts of the county in the same manner; and the boards of road trustees of the different townships through which the road runs that is to be built or improved under said order have consented, and do consent, that the improvements be made in accordance with the terms of said order. It is further agreed that the funds derived from the 8½ cents tax levied under and in accordance with chapter 567 of the Public Laws of North Carolina, session 1909, are insufficient, and will in the future be insufficient, to do all the work needful and proper to be done upon the public roads of said county; nor would sufficient funds for that purpose be secured by raising the tax to the 15 cents on the \$100 valuation, as authorized by the provisions of said act."

Upon these, the facts chiefly relevant to the controversy, the court is of opinion that

there is nothing unlawful in the proposed appropriation, the same to be made out of the general county funds available for the purpose and raised by taxation, within the constitutional and general statutory limitations bearing on the subject. On perusal of this local statute, there is doubt if it permits the construction that the officers and agents of the county, in carrying out its provisions, are confined to the means afforded under the terms of the law. In various sections of the act, it is clearly contemplated that these general county funds may be used when required, and more especially where, as in this case, the road is to extend through two or more townships. In such case, the power to lay out, alter, or discontinue a highway, as heretofore stated, remains with the board of commissioners. Section 25 requires board of commissioners to "purchase the road machinery, tools and implements, which are to remain the property of the county." In section 33, the commissioners are given supervision and control of all bridges, their location, construction, and maintenance, etc., and the general county funds are made available for the purpose. Section 34. When the road extends into two or more townships, the county commissioners are to employ the engineer or surveyor, to "be paid out of general county funds," etc. And, even if a contrary view should ordinarily prevail, there is no recognized rule that would sanction or uphold the interpretation that the statute was intended to withdraw from the county commissioners the right to expend the general county funds to the best interests of the county, and repeal the powers expressly conferred by section 1379 and other cognate provisions of the Revisal.

[3] There is no express repealing clause contained in the law; and it is well understood that implied repeals are not favored as a general rule. *State v. Railroad*, 141 N. C. 846, 54 S. E. 294; *Winslow v. Morton*, 118 N. C. 486, 24 S. E. 417; *Black on Interpretation of Laws*, p. 112; *Sedgwick on Statutory and Constitutional Law*, p. 126. In this last citation, the author says: "But, though it is thus clearly settled that statutes may be repealed by implication, and without any express words, still the leaning of the courts is against the doctrine, if it be possible to reconcile the two acts of Legislature together. 'It must be known,' says Lord Coke, 'that, forasmuch as acts of Parliament are established with such gravity, wisdom, and universal consent of the whole realm, for the advancement of the commonwealth, they ought not, by any constrained construction out of the general and ambiguous words of a subsequent act, to be abrogated; sed hujusmodi statuta tanta solemnitate et prudentia edita (as Fortescue speaks, cap. 18, fol. 21) ought to be maintained and supported with

benign and favorable construction.' So in this country, on the same principle, it has been said that laws are presumed to be passed with deliberation, and with full knowledge of all existing ones on the same subject; and it is therefore but reasonable to conclude that the Legislature, in passing a statute, did not intend to interfere with or abrogate any prior law relating to the same matter, unless the repugnancy between the two is irreconcilable, and hence a repeal by implication is not favored; on the contrary, courts are bound to uphold the prior law, if the two acts may well subsist together."

We do not consider that the case of *Hornthall v. Commissioners*, 126 N. C. 28, 35 S. E. 191, to which we were referred by counsel, is in necessary antagonism to our present ruling. In that case, a system had been provided for working the public roads by contract; and a fund was created by the law, especially designated as applicable to the purpose. A contractor, having an amount due him for work done under the law, sued on his demand, and, the commissioners resisting payment, recovery was denied. The decision seems to have been made to rest on the ground that, the fund applicable to the claim having been exhausted, and the statute having been repealed by which any further sum could be raised, collection of the claim, as a matter of right, could not be enforced. There was a strong and earnest dissent by Judge Furches, concurred in by Chief Justice Faircloth, and the position of the court, in denying all relief, may be open to some question; but the power of the county commissioners to dispose of general county funds, in their discretion, for the county's best interests, was in no way presented, and the authority is not in contravention of our present decision.

There is error, and this will be certified, that the restraining order be dissolved and the appropriation by the commissioners be upheld.

Reversed.

(159 N. C. 443)

#### MIDGETT v. GRAY.

(Supreme Court of North Carolina. May 28, 1912.)

#### 1. QUO WARRANTO (§ 44\*)—TITLE TO TRY OFFICE—CONDITION PRECEDENT.

Quo warranto to try title to office cannot be maintained in the name of the state on the relation of a private citizen not claiming the office unless he first obtains the permission of the Attorney General to institute the proceeding as required by Revisal 1905, § 823, and the giving of such permission prior to the commencement of the proceeding may be proved, and, when it is not, the proceeding must be dismissed.

[Ed. Note.—For other cases, see *Quo Warranto*, Cent. Dig. § 37; Dec. Dig. § 44.\*]

**2. OFFICERS (§ 55\*)—ACCEPTANCE AND QUALIFICATION OF ONE OFFICE AS VACATING A PRIOR OFFICE.**

The acceptance and qualification for one office vacates an office already filled by the same incumbent.

[Ed. Note.—For other cases, see *Officers*, Cent. Dig. §§ 76-84; Dec. Dig. § 55.\*]

**3. OFFICERS (§ 55\*)—QUALIFICATION—ESTOPPEL.**

A person who held himself out and who acted as an officer is estopped to deny his qualification when the acceptance of such office is relied on to vacate a prior office filled by him, and that he was not sworn on the Bible when he qualified for the second office is not available.

[Ed. Note.—For other cases, see *Officers*, Cent. Dig. §§ 76-84; Dec. Dig. § 55.\*]

**4. OFFICERS (§ 55\*)—QUALIFICATION—ESTOPPEL.**

A person who held himself out and who acted as an officer, and who signed his name as such, and who in writing resigned the office, is estopped from denying that he accepted the office, and he vacated a prior office filled by him.

[Ed. Note.—For other cases, see *Officers*, Cent. Dig. §§ 76-84; Dec. Dig. § 55.\*]

On rehearing. Granted. Former opinion canceled and new trial ordered.

For former opinion, see 73 S. E. 791.

This issue was submitted to the jury: "Did defendant accept and qualify and enter upon the duties of school committeeman of district No. 15, white race, as alleged in the complaint? Answer: No."

**PER CURIAM.** [1] 1. It does not appear in the record that the relator has ever obtained the permission of the Attorney General to institute this proceeding, which is a condition precedent to the right of plaintiff, who personally does not claim the office, to maintain the action. Rev. 1905, § 828.

Since the former opinion in this case was published but not certified down, we are informed that such permission was given in writing as required by law, but that the record of it was inadvertently omitted in the transcript of appeal. As the case is to be tried again, proof of such permission given anterior to the commencement of the action may then be offered, and for failure to do so the action may be dismissed. No such objection is taken by defendant, and therefore we presume the permission of the Attorney General was regularly obtained.

2. The plaintiff in apt time asked the court to charge the jury: "If you believe all the evidence in this cause, it will be your duty to answer the issue, 'Yes.'" This was refused. Plaintiff excepted. We think the court should have given the instruction. The defendant offered no evidence. The evidence offered for the plaintiff is uncontroverted, and, if believed, proves these facts.

The defendant was duly elected and qualified as clerk of the superior court of Dare county. Afterward on July 5, 1911, while

holding said office, he was duly elected school committeeman of Dare county for school district No. 15. On July 22, 1911, defendant qualified as school committeeman and took the oath of office. On August 15, 1911, he resigned the office of school committeeman in these words: "To the Honorable Board of Education, Dare County, N. C.—Gentlemen: I hereby respectfully tender my resignation as school committeeman for the fifteenth district, to take effect from date hereof. This 15th day of August, 1911. W. R. Gray, School Committeeman." In the meantime he had talked with A. W. Price, county superintendent of public instruction, about the schools. He had had a meeting in his office with the other two committeemen and with Professor Eason present, who was present upon invitation of W. R. Gray.

[2] It is well settled that the acceptance and qualification for one office vacates eo instanti an office already filled by the same incumbent. *Barnhill v. Thompson*, 122 N. C. 493, 29 S. E. 720.

[3] That the defendant was not sworn on the Bible when he qualified as school committeeman will not avail him. He is estopped to deny his qualification. *State v. Long*, 76 N. C. 254; *State v. Cansler*, 75 N. C. 442.

[4] The defendant, if the evidence is to be believed, held himself out and acted as school committeeman. He signed his name as such and in writing resigned the office of school committeeman. Having resigned such office, the defendant cannot be heard to say that he did not accept it. He could not resign an office which he had never accepted or qualified to discharge its duties.

The former opinion in this case is canceled.

New trial.

(159 N. C. 375)

**YOUNG v. CHAMPION FIBRE CO. et al.**

(Supreme Court of North Carolina. May 28, 1912.)

**1. TRIAL (§§ 165, 178\*)—NONSUIT—DIRECTED VERDICT.**

On motions for nonsuit or for directed verdict for defendant, the evidence must be construed in the light most favorable to plaintiff, and every fact which it tends to prove, and which is an essential of the cause of action, must be recognized as established.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 373, 374, 401-403; Dec. Dig. §§ 165, 178.\*]

**2. MASTER AND SERVANT (§§ 286, 288, 289\*)—INJURY TO SERVANT—NEGLIGENCE.**

Evidence in a servant's action for loss of an eye from a small particle of steel breaking off and flying, when, to adjust a die in a machine, he struck it with the hammer furnished therefor, it, as well as the die, being of highly tempered steel, and his face being near the work because of two of the three lights at such place being out of order, held sufficient to take the case to the jury; the issues being

negligence, contributory negligence, and assumption of risk.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1001, 1006, 1008, 1010-1015, 1017-1033, 1036-1042, 1044, 1046-1050, 1068-1088, 1089, 1090, 1092-1132; Dec. Dig. §§ 286, 288, 289.\*]

Appeal from Superior Court, Buncombe County; Long, Judge.

Action by G. W. Young against the Champion Fibre Company and William Batterson, its superintendent having general supervision of defendant company's pipe department and the laborers employed therein, to recover for loss of an eye alleged to have been caused by negligence of defendants. On issues submitted as to negligence, contributory negligence, assumption of risk, and damages, there was a verdict for plaintiff, on which he had judgment, and defendant company excepted and appeals. Affirmed.

Bourne, Parker & Morrison and Martin, Rollins & Wright, for appellant. Craig, Martin & Thomason, for appellee.

HOKE, J. [1] It was chiefly contended for defendant that the motion for nonsuit under the statute should have been allowed or the prayer given that, on the entire evidence if believed, the verdict should be for defendant and more especially on the first and second issues. It has been repeatedly held with us that, in either case, "the evidence must be construed in the view most favorable to plaintiff, and every fact which it tends to prove, and which is an essential ingredient of the cause of action, must be recognized as established" (Deppe v. Railroad, 152 N. C. 79, 67 S. E. 262; Edge v. Railroad, 153 N. C. 212, 69 S. E. 74); and on the facts in evidence when so considered the position cannot for a moment be maintained.

[2] There was allegation with evidence on part of plaintiff tending to show that he was an employé of defendant company working in the pipe department, and on the night of November 13, 1910, or in the early morning about 2 a. m., while plaintiff in obedience to orders of one of his superiors was engaged in adjusting a machine with a view of cutting a heavy piece of pipe, he gave one of the dies a slight tap with his hammer causing a small piece or particle to break and fly off from the die or hammer striking plaintiff in the eye and resulting in the loss of his sight. That the machine furnished him by defendant company and with which he was working at the time was badly worn and out of repair, and, as it did not work properly, plaintiff attempted to fix and adjust it, that he had no tools with which to do this except a hammer of hardened steel, and it was the duty of defendant to have furnished him some soft metal hammer to settle the dies; these being also of highly tempered steel. That defendant had provided no sufficient light and no one to help

plaintiff while he was attempting to operate and fix the heavy machine and to cut and fix the pipe, and, while attempting to fix it, it was necessary on account of the insufficient light and help for him to have his face in close proximity to the machine, and, as he struck with the hammer in his attempt to adjust it, a small piece of steel flew off and struck plaintiff's eye causing the loss of the sight as stated.

A very correct synopsis and partial excerpt from the testimony tending to support a right of recovery by plaintiff appears in the brief of counsel as follows: "Plaintiff replied, 'What about this pipe; can't we leave it here until morning; there will be two men here who can cut it'; Sears, plaintiff's superintendent, said 'he had to have it the first thing in the morning and could not wait' (12). Plaintiff testified that he 'needed help to use that machine on that pipe,' and continuing said: 'A. I was looking at the dies and I seen that one of the dies was a little bit higher than the other, and I took my hammer in my hand to see if I could knock it down, and I had the light in one hand, pulling it up. There was just one light over this machine that was burning. There were three lights, but something was the matter with the others; and I had my head close to it, and I tapped it one little tap with the hammer, and a piece flew into my eye (12). Q. What sort of a hammer was it? A. It was a steel hammer, I suppose. Q. How many lights over that machine? A. There were three lights over it, but only one of the lights would burn, and it was about eight feet from the machine. Q. What kind of a light was burning about eight feet from this machine? A. Just a small light. Q. What candle power, if you know? A. Not over 16. Q. Why did you have to hold your eyes so close to that machine? A. Because there was not much light around the machine, and I had to put it close up to see it (13). Q. You say there was one light over this machine—how many lights were over this machine that you got hurt on? A. Three. Q. How many were burning? A. One. Q. Why were the others not burning? A. They were out of fix. Q. What did you have to hold in your hand? A. I had to hold the light. Q. And what in the other hand? A. I had to do the work with the other hand. Q. If there had been more lights there, so that it would not have been necessary for you to hold the light over it, how could you have done the work? A. I could have taken both hands and I then could have done my work without getting hurt. Q. What was the condition of this machine? A. It was old and worn and hard to set. One could not hardly set it himself. I always had somebody to help me. I knew very little about how to do the work. Q. How many times had you tried to work it by yourself?

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

A. That was the first time I tried it; that night. Q. If there had been more lights there, how would it have been necessary for you to have held your face with reference to the machine? A. No, sir; I could have stood back further from it. Q. Do you know what kind of a hammer ought to have been provided at that machine? A. There ought to have been some soft metal hammer to settle the dies. Q. Did you ever see any one else settle the dies there? A. Yes. Q. What did they use? A. A steel hammer. Q. Hammer like this one you used? A. Yes, just like it. Q. What other instrument was provided for you to settle these dies except the steel hammer? A. None. Mr. Batterson gave me charge of the tools— Q. How did that machine work—did it work well, or badly, or how? A. It worked badly (14). Q. Why? A. Because it was worn out and stayed broken about half the time, and you could hardly cut a pipe with it. Half of the threads stayed out of fix all the time that I was there. Q. State the condition of the light there with reference to its illuminating effect. A. It was very dimly lighted. Q. You say a piece of steel flew from what? A. It was a piece of steel or a piece of iron. I reached over to the back part of the die to see if I could loosen it—to see what was the matter—and when I tapped the die a piece flew in my eye (15). The plaintiff said that he did not know that the die was made of tempered steel (18), nor did he know that it was dangerous to use the hammer (23) as that was the customary way of settling the dies (22, 23, 34, 64) by men of more experience than he had (64). He said that the lights had been out of fix a month (28); that he had tried to fix them that night and could not (28, 36); that the hammer belonged to the Champion Fibre Company (29); that he had complained of the lights and had asked the electrician to fix them (35). Batterson testified that the electrician was the proper person to whom he should report the defective condition of these lights (55). The defendant Batterson testified among other things in substance as follows: 'It is not safe to hit two highly tempered pieces of steel together; this is a matter of common knowledge among mechanics; this die was made of tempered steel (41). It was dangerous to hit this die with this hammer (42, 50). Q. And you had hammers to fix those dies with? A. Yes (50). Q. And you know—have learned—that it would have been a very improper thing to have done to put a man there to knock one of those dies with a hammer? A. Yes. Q. That would have been very negligent in the company to have done that? A. Yes (51). Batterson testified further that it was his duty to see that the lights were in proper condition; that all the lights ought to have been burning; and that he did not know whether they were in proper condition or not (52). Brown, a witness

for the defendant, testified that it was dangerous to hit two pieces of steel together, but could not say that this was common knowledge (55); that he had been engaged in the business 20 years (55)."

A perusal of this testimony affords a fair and reasonable inference that there has been a breach of duty on the part of the defendants, the proximate cause of plaintiff's injury, in failing to supply sufficient light and in furnishing an improper tool for the work in which plaintiff was then engaged. It was earnestly urged for defendants that the facts present a case of excusable accident within the principle of *House v. Railroad*, 152 N. C. 397, 67 S. E. 981, and other cases of like kind excusing the employer under given circumstances when the injury "occurred in the use of ordinary everyday tools and under ordinary everyday conditions requiring no especial care, preparation, or provision, where the defects are readily observable, and there was no good reason to suppose that the injury complained of would result," and *Martin v. Manufacturing Co.*, 128 N. C. 264, 38 S. E. 876, 83 Am. St. Rep. 671, is relied on as decisive in favor of defendants' position, that being a case where "an employé was hurt in the eye by a particle of flying steel knocked off by the blow of a hammer," but to allow this position on the facts presented here would be to ignore much of the significance of the evidence. The plaintiff, while saying that he was not aware of the extent of the danger or that he would likely be hurt by giving the light blow with the hammer as he did, testified directly that he should have been supplied with "some soft-mettled hammer to settle these dies." And the defendant Batterson, himself, testified and offered other evidence tending to show that, both the die and the hammer being of highly tempered steel, it was very dangerous to use the hammer for the purpose of settling the dies, and endeavored to impress upon the jury the view that the danger in such case was so obvious and of such common knowledge that plaintiff was guilty of contributory negligence in using the hammer for the purpose. This, then, was no instance of injury received in the ordinary use of a hammer, a proper tool for the purpose, and by reason of a defect therein, hidden or observable as in *Martin's Case*, but the facts present the case of supplying the employé with an improper tool for the work he was called on to do and one that was not unlikely to produce the result which followed; bringing the case clearly within the principle of *Mercer's Case*, 154 N. C. 399, 70 S. E. 742, Ann. Cas. 1912A, 1002; *Avery's Case*, 146 N. C. 592, 60 S. E. 646.

It was further insisted that the absence of sufficient light should not have been allowed to affect the result because there was no satisfactory evidence showing that such

condition in any way contributed to the injury; the position being that, as a light was only required to look into the slot when clearing it out in preparation for the die, plaintiff could only use for the purpose the one droplight, it being necessary in any event to hold it up close so as to see the aperture, but here, too, the argument is in disregard of the testimony making for plaintiff's right to recover. On this question the plaintiff testifying in his own behalf among other things said: "That the machine worked badly; that it was worn out and stayed broken about half the time and you could hardly cut a pipe with it; that it was hard to set and one man could hardly set it himself at all, and he always had had somebody to help him; that he himself knew little how to do the work. That the light was very dim, so much so that he had lodged a complaint about it, and for this reason he was compelled to hold the droplight in one hand and do the work with the other, and was compelled also to hold his eyes close to the machine, and but for this he could have taken both hands to the work and stood farther back and done the work without getting hurt.

Under a comprehensive and learned charge in which the principles of actionable negligence, contributory negligence, and assumption of risk have been correctly stated and applied according to approved precedents obtaining with us, the jury have accepted plaintiff's version of the occurrence, and, this being true, we are of opinion that an actionable wrong has been clearly established against defendants. *Avery v. Lumber Co.*, supra; *Mercer's Case*, supra; *Pritchett v. Railroad*, 157 N. C. 88-102, 72 S. E. 828; *Walker v. Manufacturing Co.*, 157 N. C. 131, 72 S. E. 874; *Rushing v. Railroad*, 149 N. C. 158, 62 S. E. 890; *Orr v. Telegraph Co.*, 132 N. C. 691, 44 S. E. 401; *Lloyd v. Haynes*, 126 N. C. 359, 35 S. E. 611. The objections to the ruling of the court on questions of evidence are without merit.

On careful examination of the record, we find no reversible error to defendant's prejudice, and the judgment in plaintiff's favor must therefore be affirmed.

No error.

(159 N. C. 388)

#### CITY OF CHARLOTTE v. AMERICAN TRUST CO.

(Supreme Court of North Carolina. May 28, 1912.)

#### 1. MUNICIPAL CORPORATIONS (§ 950\*) — STREET IMPROVEMENT BONDS—NATURE.

Bonds of a city, denominated "street improvement bonds," and reciting that they constitute a general, personal, and direct obligation of the city, and that, in addition thereto, the payment thereof is chargeable to the property on streets which have been laid out as permanent improvement districts, are the direct obligation of the city; and the assess-

ments specified are but additional security for their payment.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 902-910; Dec. Dig. § 950.\*]

#### 2. MUNICIPAL CORPORATIONS (§ 907\*) — "BONDS"—STATUTORY AUTHORITY.

Priv. Laws 1911, c. 251, amending Charlotte City Charter by giving the city power to tax the cost of street improvements against abutting property owners, and to issue street improvement bonds to be sold at not less than par, adds to the powers of the city to pave its streets at the cost of its general fund by authorizing the issuance of street improvement bonds, possessing the character of municipal bonds; and the provision in the act that the bonds shall contain recitals showing that they are chargeable to particular property does not affect the character of the bonds, but merely makes the property benefited specially liable to their payment—the word "bonds," when used in connection with municipal obligations, implying an obligation of a city, as obligor, bound to do what it has agreed shall be done.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1895; Dec. Dig. § 907.\*]

For other definitions, see *Words and Phrases*, vol. 1, pp. 830-834; vol. 8, p. 7592.]

#### 3. MUNICIPAL CORPORATIONS (§ 918\*)—STREET IMPROVEMENT BONDS—ISSUANCE—SUBMISSION TO VOTE OF PEOPLE.

The street improvement bonds authorized by Priv. Laws 1911, c. 251, amending charter of the city of Charlotte by authorizing the issuance of street improvement bonds, may be issued without any vote of the people.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1919-1923; Dec. Dig. § 918.\*]

#### 4. MUNICIPAL CORPORATIONS (§ 864\*) — INDEBTEDNESS — LIMITATIONS — STREET IMPROVEMENT BONDS.

The street improvement bonds authorized by Priv. Laws 1911, c. 251, amending the charter of the city of Charlotte by authorizing the issuance of street improvement bonds, are not within Revisal 1905, § 2977, limiting the extent to which a city may loan its credit for improvements.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1823-1835; Dec. Dig. § 864.\*]

Appeal from Superior Court, Mecklenburg County; Lyon, Judge.

Controversy, without action, between the City of Charlotte and the American Trust Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Controversy, without action, submitted to his honor, Judge Lyon, in the superior court of Mecklenburg county, spring term, 1912, to determine whether certain bonds contracted to be sold by plaintiff to the defendant are the obligations or bonds of the city of Charlotte, and binding upon the municipality. His honor adjudged the bonds to be the "general, personal, and direct obligation of the city of Charlotte," and rendered judgment against the purchaser, the defendant. A copy of the bond is set out in full in the records, and is marked "Exhibit B." The defendant excepted and appealed.

P. C. Whitlock, for appellant. Chase Brenizer and Tillett & Guthrie, for appellee.

BROWN, J. The bond in question is one of a series issued pursuant to an act of the General Assembly, ratified March 3, 1911, and are denominated "street improvement bonds." Each bond contains this clause: "This bond shall constitute a general, personal, and direct obligation of the city, and, in addition thereto, the payment thereof is chargeable to the property abutting upon certain streets which have been laid out by ordinances passed by the board of aldermen as permanent improvement districts or sections, and are as follows: [Here follows a list of assessments]."

[1] It is too plain for discussion that upon their face the bonds are the direct obligation of the city of Charlotte; and that the assessments specified on the face of the bond are but additional security for their payment.

[2] But it is contended that they are issued as such in violation of the terms of the statute, and are therefore *ultra vires*. It is agreed that they are issued pursuant to the terms of an act entitled "An act to amend the charter of the city of Charlotte, ratified on the 3d of March, 1911, being chapter 251 of the Private Laws of 1911."

The plaintiff, prior to this act, had the right to pave its streets as a necessary expense, and to pay for the same out of its general funds. *Tucker v. Raleigh*, 75 N. C. 287; *Hightower v. Raleigh*, 150 N. C. 569, 65 S. E. 279. We think the act of March 3, 1911, did not intend to curtail the power and means of the city to pave its streets, but to increase them.

Inasmuch as, prior to these special acts, the plaintiff had the right to contract debts for paving its streets, and to make the obligations issued for such purpose a part of its general and direct indebtedness, these special acts, giving it power to tax the cost of paving against abutting property owners, must be construed as enabling legislation intended to enlarge the ability of the city to pave its streets by giving an additional source of revenue, and, furthermore, to render the bonds more salable by giving the bondholder a specific charge and lien against the abutting property owners, in addition to the general obligation of the city. The Legislature could not have intended to authorize an unsalable security.

The bonds are required to be sold at not less than par; and such an obligation could not be sold at par, unless it constituted the direct debt of a solvent obligor. As Mr. Justice Harlan very forcibly says, in a case on all fours with this (*United States v. Ft. Scott*, 99 U. S. 152, 25 L. Ed. 348): "Experience informs us that the city would have met with serious, if not insuperable, obstacles in its negotiations, had the bonds upon their face, in unmistakable terms, declared that the purchaser had no security beyond the

assessments upon the particular property improved."

The act directs the board of aldermen to issue bonds of the city and sell them. The use of the word "bond" *ex vi termini* implies that the city is bound. As said by the United States Supreme Court, in *Davenport v. County of Dodge*, 105 U. S. 237, 26 L. Ed. 1018, a "bond implies an obligor bound to do what is agreed shall be done."

Also, in *Morrison v. Township of Bernards*, 36 N. J. Law, 219, Chief Justice Beasley, speaking of the force and effect of a direction in the statute that the township issue "bonds," says: "A similar implication, but one of greater force, arises from the direction that bonds are to be given under the hands and seals of the commissioners, for an instrument of that kind cannot be created without the presence of an obligor; and, indeed, it seems like a solecism to say that the statute calls for the making of a bond, but that nobody is to be bound by it."

Not only that, but it is also held by the authorities that when the word "bond" is used in connection with municipal obligations, designating what is commonly called "municipal bonds," then this means negotiable bonds. This is expressly held in the case of *Nalle v. City of Austin*, 85 Tex. 520, 22 S. W. 668. See, also, *McCless v. Meekins*, 117 N. C. 34, 23 S. E. 99; *City of Charlotte v. Shepard*, 122 N. C. 602, 29 S. E. 842.

These bonds, called "street improvement bonds" in section 12 of the act authorizing their issue, are specifically named such in that act. They are to be issued in 10 equal series, and each series shall consist of a like number of bonds. They bear interest at 6 per cent., fixed by the statute; and they are required to be signed by the mayor and attested by the city clerk. Thus it is seen that they possess all of the characteristics of a municipal bond, being payable to bearer, redeemable by the city at a stipulated time, and executed with all the formality of regular bonds by its chief officers.

It is true that the statute requires that the bonds shall contain such recitals as may be necessary to show that they are chargeable to particular property. We construe this to mean that these assessments are to be devoted by the city to the payment of these particular bonds; and it would be a violation of law to divert the proceeds arising from such assessment to any other purpose. The fact that these assessments are dedicated to the specific purpose of paying these bonds does not render the bonds any the less the general obligation of the city.

[3] It is also said that these bonds were not submitted to a vote of the people. In our opinion, that was not necessary. There are classes of bonds, other than these mentioned in this act of 1911, which are required to be submitted to a vote of the qualified voters; but there is no such provision or requirement in regard to these street improve-

ment bonds secured by the assessment. On the contrary, the board is invested with power to issue these bonds without any vote of the people.

We are advertent to the previous decisions of this court that, where the General Assembly specifically requires a proposition to incur an indebtedness, or issue bonds for a given purpose, to be submitted to the qualified voters for their approval, this, as said by Mr. Justice Hoke, "will amount to a statutory restriction, and such indebtedness shall not be incurred, unless the measure has been sanctioned and approved by the voters, according to the provisions of the statute; and this though such indebtedness is properly classed as necessary expense." *Ellison v. Williamston*, 152 N. C. 149, 67 S. E. 257. Inasmuch as the statute does not require this particular issue of bonds to be submitted to the qualified voters, the principle announced in that decision has no application here.

[4] Neither do we think this issue of bonds comes within the inhibition contained in Rev. § 2977, as they are issued for a necessary expense, and specifically authorized by special legislation. *Wharton v. Greensboro*, 146 N. C. 357, 59 S. E. 1043.

The judgment of the superior court is affirmed.

(159 N. C. 445)

**WILSON LUMBER CO. v. HUTTON et al.**  
(Supreme Court of North Carolina. May 28, 1912.)

**BOUNDARIES (§ 3\*)—VALUE OF CALLS—LINE OF ANOTHER BOUNDARY.**

When a fixed and established line of another tract is definitely called for as one of the termini of a call in a deed, it will control a call by courses or distances, whether such line is marked or unmarked.

[Ed. Note.—For other cases, see *Boundaries*, Cent. Dig. §§ 3-41; Dec. Dig. § 3.\*]

Clark, C. J., dissenting.

Appeal from Superior Court, Caldwell County; Long, Judge.

Action by the Wilson Lumber Company against G. N. Hutton and others. From a judgment for defendants, plaintiff appeals. Affirmed.

See, also, 152 N. C. 537, 68 S. E. 2.

Edmund Jones and Finley & Hendren, for appellant. W. C. Newland, J. T. Perkins, Mark Squires, and Councill & Yount, for appellees.

**PER CURIAM.** On a former appeal in this cause, reported in 152 N. C. 544, 68 S. E. 2, the facts will sufficiently appear to indicate the purport of the present decision. It was chiefly urged for error in the present trial that the court below had made unwarranted departure from the rulings made in the former opinion, by which the cause should be tried, and more especially in sub-

mitting the case on the position that, if the "Daniel Moore" line and the "Jesse Gragg line" and the line of John Crisp's own land, called for in defendant's grant and made two of the termini of the lines therein and the boundary of a third, "were known and established lines," they would control the calls by course and distance, also appearing in the grant. We are of opinion, however, that the objection rests on an erroneous concept of the former decision.

[1] It is a settled principle with us in the law of boundary that, when the line of another tract is definitely called for as one of the termini of a call in a grant or deed, and this line is fixed and established, it will control a call by course and distance. *Whitaker v. Cover*, 140 N. C. 280, 52 S. E. 581, and authorities cited. And where the line of another tract is the one called for, and is sufficiently "proved and established," the principle applies, whether such line is marked or unmarked. *Campbell v. Branch*, 49 N. C. 313; *Corn v. McCrary*, 48 N. C. 496. This position was fully recognized on the former appeal, and was well stated by the Chief Justice, as follows: "It is true that the general rule is that course and distance must give way to a call for a natural boundary, and that the line of an adjacent tract, if well known and established, is a natural boundary. But this is because such natural boundary is usually considered more certain, being at a fixed and definite place, if 'established and known,' and therefore unchangeable and more likely to be the true call in the deed than course and distance, which may, by inadvertence, be incorrectly written down. The reason of the law is the life thereof. 'Ratione cessante, cessat ipsa lex.' The rule of construction which ordinarily prefers the call for the boundary of another tract to course and distance is based upon the reason that the former is usually more certain than the latter, and only applies when the boundary of the other tract is established and well known."

On that appeal, however, a majority of the court were of opinion that the lines of adjacent tracts, called for and made the termini of two of the lines of defendant's grant and the boundary of a third, to wit, the Daniel Moore line and the Jesse Gragg line and John Crisp's own line, were not sufficiently established to require or permit the application of the principle, and the calls by course and distance afforded the safer guide to a proper location. On the present trial, additional evidence was offered by defendant tending to show that the Daniel Moore line was a well known and established line; and there were also additional deeds and testimony offered tending to show that the John Crisp line, referred to and made the last call of defendant's grant, was a well recognized and established line or lines clos-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes



ing the survey and boundary as contended for and claimed by defendant. This additional testimony, tending, as it did, to show that these lines of adjoining tracts, called for as termini and boundaries of defendant's grant, were sufficiently proved and established, was such as to permit and require that the question of location should be considered by the jury, on the principles referred to; and we find nothing in the charge of the court, or in the other features of the trial, which gives plaintiff any just ground of complaint.

There is no error, and the judgment for defendant is affirmed.

No error.

CLARK, C. J. (dissenting). This case was before us in 152 N. C. 537, 68 S. E. 2, where the map is set out, which shows the remarkable nature of the defendant's contention in this case. In accordance with that decision and its approval in the opinion by Hoke, J., in *Bowen v. Lumber Co.*, 153 N. C. 369, 69 S. E. 258, there is error on the present appeal for which there should be a new trial. "The reason of the law is the life thereof," and "when the reason ceases, the law ceases." These two rules are well recognized by sound common sense, and must be observed to save the law from degenerating into mere technicality.

At common law it was held that when a natural boundary is called for it will control course and distance. In *Cherry v. Slade*, 7 N. C. 82, this principle was extended, owing to "the peculiar situation and circumstances of the country at that time," to hold that the line of an adjacent tract, when called for, should be treated as a natural boundary. The proposition is not true as a matter of fact. The line of another tract is not a natural boundary. It lacks much of being so; for it is artificial, not natural and unchangeable and unmistakable. Hence it should only be treated as such when, in the nature of things, it is more certain than the course and distance. It ought not to apply when, as in the present case, there is much else in the description which will make the true boundaries beyond question, and when to apply the principle will negative the better evidence, and be a practical denial of the proper result.

In the present case, the patent was issued by the state to Crisp, under whom the defendant claims for 50 acres, with a plot laid down as a parallelogram on the grant, which describes the boundaries as running from the beginning (which is not disputed) "N. 35 W. 100 poles to a stake in Daniel Moore's line; then W. 80 poles to a stake in Jesse Gragg's line; then S. 35 E. 100 poles to a stake in his own line; thence E. with said line to the beginning." The defendant contends that the first line should be extended to Daniel Moore's line, though

this would make it 274 poles, instead of "100 poles," as stated in the grant; that, instead of the second call in the grant, "80 poles W. to a stake in Jesse Gragg's line," the second line should be run "S. 35 W. 319½ poles to a corner of Jesse Gragg's line," though in so doing both course and distance are wide of the mark, and the line would cross through two older surveys. The third line in the grant is, "S. 35 E. 100 poles to a stake in Crisp's own line," and the fourth line was, "and thence E. with said line to the beginning," which, of course, would be 80 poles. But if this third line is run according to the defendant's contention, it would cut in half another tract, and would run 338 poles, instead of 100 poles, as called for in the grant; and the fourth line, instead of being "east with said line to the beginning" 80 poles, would run five different courses, aggregating 400 poles, to get back to the beginning.

Instead of the 50 acres granted to Crisp, the defendant will get 700 acres, 650 of which the plaintiff has paid the state for, and for only 50 of which the grantor of the defendant paid the state. It is in evidence that the defendant has always listed this land for taxation under oath as 50 acres. To run the first line, as the defendant contends, "to a stake in Daniel Moore's line" not only disregards the limitation of 100 poles, which is a part of the description of that line, but it totally disregards the second, third, and fourth lines; it disregards the patent, and gives the plaintiff 14 times as much land as the state granted. It also disregards the plot laid down on the grant, as required by the statute, and the fact that the description in the grant and the plat alike call for a parallelogram, and that the defendant's contention will give us a most irregular tract with 8 sides, instead of 4, and whose boundaries will aggregate 1,313½ poles, instead of 360, as called for by the grant and plat. Such a reductio ad absurdum is its own refutation.

It would be more certain, indeed, it would be absolutely certain, to start at the beginning and reverse the course and distance, which our decisions permit when greater certainty can be ascertained thereby. *Norwood v. Crawford*, 114 N. C. 513, 19 S. E. 349, though the court does not favor reversing, unless it is necessary to avoid a palpable mistake, as here, in running the course and distance in regular order. But as was said in this case (152 N. C. 541, 68 S. E. 4), "when the plot, the courses, and distances and the acreage all correspond, as they do in this case, they are more certain than the wild result which would be obtained by departing from them in attempting to give the preference to the call for 'a stake in Daniel Moore's line,' when there was no actual survey, and the surveyor and grantees

did not know where it was," as was palpably the case.

On that same page (152 N. C. 541, 68 S. E. 4) this court said: "While acreage is usually postponed to other descriptions, there are cases in which the court has held that it was a potent, if not a conclusive, factor. It was so held in *Cox v. Cox*, 91 N. C. 256. In *Baxter v. Wilson*, 95 N. C. 137, it was held that the number of acres in some cases may have a controlling effect. In *Peebles v. Graham*, 128 N. C. 227, 39 S. E. 27, the court says: 'The general rule is that the quantity of land stated to be conveyed will not be considered in determining locations or boundaries. But there is a well-known exception to this: \* \* \* Where the location or boundary is doubtful, quantity becomes important. *Brown v. House*, 116 N. C. 866 [21 S. E. 938]; *Cox v. Cox*, 91 N. C. 256.' The court further said, quoting from *Mayo v. Blount*, 23 N. C. 283: 'A perfect description which fully ascertains the corpus is not to be defeated by the addition of further and false descriptions.' Certainly no stronger case for the application of this principle can be found than in this, where the courses and distances given in the grant of the tract, which was not actually surveyed, are found to agree exactly with the quantity of 50 acres described and conveyed, and with the plat attached to the grant, and where to discard them would increase the quantity of land to 14 times that for which the state was paid."

In *Brown v. House*, 116 N. C. 866, 21 S. E. 938, the court refused to extend a line to a stake in the boundaries of another tract, when it would have increased the acreage only twice; whereas, in this case, to do so would make the acreage 14 times as much. On the rehearing in that case (118 N. C. 870, 24 S. E. 786), the court reaffirmed its ruling, and cited *Harry v. Graham*, 18 N. C. 76, 27 Am. Dec. 226: "Where the distance called for gave out 30 poles short of the line of the other tract, the court refused to extend the line 30 poles, and held that it must terminate at the end of the distance called for." It also cited *Carson v. Burnett*, 18 N. C. 546, 30 Am. Dec. 143, which held that "the course and distance called for must control, unless there is another call more definite and certain than course and distance," and cited *Kissam v. Gaylord*, 44 N. C. 116, *Sprull v. Davenport*, 44 N. C. 134, *Cansler v. Fite*, 50 N. C. 424, and *Mizell v. Simmons*, 79 N. C. 182, all to the same effect.

In *Mizell v. Simmons*, 79 N. C. 190, where the call was "east," which was palpably erroneous, the court followed the rest of the description and read "west." So, in this case, the court should omit the palpable misdescription of a part of the first line "to a stake in Daniel Moore's line" and take the rest of the description of that first line, "100 poles," plus the description in the second

line, "80 poles W. to a stake in Jesse Gragg's line," plus the description of the third line, "then S. 35 E. 100 poles to a stake in Crisp's line," and plus the description of the fourth line, "then east with Crisp's line" to the beginning, and the acreage of 50 acres and the plot as laid down in the grant, and from these establish the land which was actually granted; for all of these are certain, and the erroneous part of the description in the first line, "to a stake in Daniel Moore's line," is as palpably erroneous as writing "east," when it should have been "west."

There is a maxim in war "not to leave an armed fort in the rear, without masking it or taking it." At the battle of Germantown, "Chew's House," a stone building, was taken possession of by a small body of the enemy's infantry, perhaps half a company, when their army was in full retreat. One of the American generals insisted on applying the above maxim of war, and halted our advancing line to take the "fort." The enemy rallied, and the American cause lost a splendid victory, and our independence was delayed several years thereby. To apply the above maxim of the land law, which is useful in appropriate cases, to the facts of this case, with the most remarkable results which would follow, is to discredit the rule itself, and will call for its abrogation altogether. It is merely a judicial opinion as to the weight of evidence. If held and understood in this case as an iron-bound rule of such devastating importance as to take precedence of and overthrow all other evidence that may be far more material and conducive to a correct result, and admitting of no exception, this will not make for the ascertainment, but for the concealment, of the true boundary in all cases where there is more certain evidence. This is to make a judicial opinion as to the weight a jury should give to evidence an ir-rebuttable rule admitting of no exceptions.

Upon the state of facts in this case, the true rule is as was laid down by us in 152 N. C. 537, 68 S. E. 2, and which has been reaffirmed by Hoke, J., speaking for a unanimous court, in *Bowen v. Lumber Co.*, 153 N. C. 369, 69 S. E. 258, where he says that this rule "is never departed from, unless accompanying data and relevant facts make it perfectly clear that its application would lead to an erroneous conclusion, as in the recent case of *Lumber Co. v. Hutton*, 152 N. C. 537 [68 S. E. 2]." After the facts of this case have thus been twice pronounced as not requiring the application of this rule, it ought not now to be held that they do require the application of the rule, notwithstanding the results above summed up.

It is to be doubted if in all the books of the law there can be found a single case where an arbitrary rule as to the weight to be given one description in a deed, which was expressed by judicial decision, and not by statute, as a matter of convenience and for the better

ascertainment of the truth, is upheld as irrebuttable and admitting of no exception whatever, even when its application will be to contradict all the other boundaries set out, and will increase the acreage fourteen-fold, and will reject entirely the plot which by statute is laid down on the grant. In its proper place and in proper cases, the rule is useful. To apply it here will be mischievous. Even in "the laws of the Medes and Persians" an exception was found, as there is to all rules. But the defendant contends that none shall be permitted to this, however palpably, even painfully, erroneous and wrong the result it shall bring about. If so, then this of itself is an exception to the general rule that "all rules have their exceptions;" for, "Exceptio probat regulam."

It was of such as this that Tennyson spoke:

"The old order changeth, yielding place to new,  
"Lest one good custom should corrupt the world."

As the old Latin maxim has it: "Qui hæret in litera hæret in cortice."

After the twice-repeated opinion of the court, that upon these facts the line could not be extended beyond the boundaries and acreage of the grant and plat, the court below should have so instructed the jury.

BROWN, J., concurs in dissenting opinion.

(159 N. C. 231)

#### VAN GILDER v. BULLEN.

(Supreme Court of North Carolina. May 28, 1912.)

#### 1. FRAUD (§ 31\*)—REMEDIES OF PURCHASER.

Where defendant transferred land by way of exchange, the contract being induced by fraud and conspiracy, he might either affirm the contract and sue for damages for the deceit, or set up his damages when sued on the contract, or he may rescind and sue for damages caused by the fraud, or recover back anything paid under the contract, or resist an action at law brought against him on the contract, or a suit in equity for specific performance, or he may himself sue in equity to have the contract canceled and set aside.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. § 27; Dec. Dig. § 31.\*]

#### 2. EXCHANGE OF PROPERTY (§ 5\*)—RESCISSION—RIGHT OF RESCISSION.

Where the owner of land was induced to exchange it by fraudulent representations that the other party to the exchange owned the fee in his land, he could not rescind the contract after delaying for two years after discovering the fraud, though his right of action for the damages survived.

[Ed. Note.—For other cases, see Exchange of Property, Cent. Dig. §§ 5, 6, 8-10; Dec. Dig. § 5.\*]

#### 3. FRAUD (§ 59\*)—DAMAGES — MEASURE OF DAMAGES.

Where the owner of land was induced to exchange it by fraudulent representations that the other party to the exchange held title in fee to the land to be transferred by him, his measure of damages, after a right to rescind had been waived, was the expense of procuring the outstanding title.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. §§ 60-62, 64; Dec. Dig. § 59.\*]

#### 4. FRAUDS, STATUTE OF (§ 18\*)—AGREEMENTS REQUIRING WRITING — PAYMENT OF DEBTS OF ANOTHER.

Where a deed granting land required the grantee to pay off the mortgage debt, the agreement does not fall within the statute of frauds and need not be in writing; for one who claims under a deed must assume its burden.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. §§ 27-31; Dec. Dig. § 18.\*]

#### 5. ESTOPPEL (§ 45\*)—ESTOPPEL BY DEED—SUBSEQUENTLY ACQUIRED TITLE.

A life tenant mortgaged the property by a deed purporting to convey a fee, and later granted the property by a deed purporting to convey a fee, with warranty of title, and requiring the grantee to assume payment of the mortgage. Held that, the grantee having failed to rescind, and having acquired the outstanding title, the mortgagee could not, after the death of the life tenant, foreclose on the land; the acquisition of the outstanding title by the grantee not inuring to the benefit of the mortgagee by estoppel.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. § 112; Dec. Dig. § 45.\*]

Appeal from Superior Court, Union County; Whedbee, Judge.

Action by W. C. Van Gilder against W. H. Bullen. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

Thomas S. Hemby, being the owner of the land hereinafter referred to, situate in Union county, died, leaving a will, of date April 23, 1883, in which he devised said land to W. S. Hemby for life, and after his death to his children, if he left any, and, if not, to D. J. Hemby. On the 23d day of October, 1903, the said W. S. Hemby conveyed said land to M. L. Dunlap, of the city of Chicago, by mortgage deed, to secure a note for \$2,000, payable to said Dunlap, which mortgage deed purported to be in fee, but contained no covenants. On the same day, October 23, 1903, the said W. S. Hemby executed a deed to the defendant, Bullen, purporting to convey said land in fee, subject to said mortgage, and with general covenants. The last-mentioned deed contained the following agreement, "subject to an incumbrance of two thousand (\$2,000) dollars, which the grantee assumes and agrees to pay as part of the purchase money; and subject also to the taxes of 1903 and thereafter," and was executed in consideration of the conveyance by the said Bullen to said Hemby of certain real property in Chicago, subject to a mortgage of \$4,000 thereon. On the 24th day of October, 1903, the said M. L. Dunlap executed a deed to the plaintiff, W. C. Van Gilder, by which he transferred to him said note for \$2,000 and the mortgage securing the same, and conveyed his interest in said land. The property in Chicago, conveyed to W. S. Hemby by the defendant, was sold under the mortgage, which was an incumbrance thereon at the time of the conveyance, and the said Hemby never realized anything therefrom.

W. S. Hemby is dead, but the date of his

death is not given, and the defendant has acquired the interest of D. J. Hemby in said land, for which he paid \$11; and the plaintiff and the defendant agree that the defendant owns the remainder interest in the land. This action is brought by W. C. Van Gilder against the said Bullen to foreclose the mortgage executed by W. S. Hemby, and the defendant entered a general appearance.

In his answer, the defendant admits that he promised to pay said note of \$2,000, secured by said mortgage; but he alleges that he was induced to enter into the contract with the said W. S. Hemby by reason of a conspiracy between said Hemby and the plaintiff to defraud him, and upon the representation that the said Hemby had title in fee to said land, which representation both the plaintiff and Hemby knew to be false. The defendant knew, nearly two years before this action was commenced, that W. S. Hemby had only a life estate at the time of his conveyance, and he at no time tendered a reconveyance; nor did he demand that the Chicago property be reconveyed to him, nor do any act showing that he elected to rescind the contract.

The defendant offered evidence tending to establish his allegations of fraud; but his honor held on the admitted facts, assuming fraud to be established, that the defendant had lost his right to rescission by delay; that his remedy was to recover damages upon the false representation; that the measure of his damages was the amount he paid for the remainder interest; that the plaintiff could not recover a personal judgment against the defendant, but was entitled to have the land sold to pay his debt. Judgment was rendered accordingly, and the defendant excepted and appealed.

Williams, Love & McNeely and Redwine & Sikes, for appellant. Adams, Armfield & Adams, Lemmond & Vann, and A. M. Stack, for appellee.

ALLEN, J. (after stating the facts as above). The rulings of his honor are upon the ground that the plaintiff is entitled to the judgment rendered, although the defendant may establish his contention that a fraud was practiced upon him, and that the plaintiff was a party to it; and we must consider the case and determine the rights of the parties as if these facts were proven.

Assuming, then, for the purposes of the appeal, that the plaintiff and W. S. Hemby conspired to defraud the defendant, that, pursuant to this conspiracy, they represented to him that Hemby was the owner in fee of the land conveyed to the defendant, that this representation was false, and that it was an inducement to the contract, is the plaintiff entitled to any relief, and, if so, to what relief?

[1] The answer to the question depends upon the conduct of the defendant after the

discovery of the fraud, as shown by the admitted facts.

As stated in Clark on Contracts (page 234): "Fraud does not render the contract void, but renders it only voidable at the option of the party defrauded. In other words, it is valid until rescinded. It is for the party defrauded to elect whether he will be bound. He therefore has several remedies on discovering the fraud: First. He may affirm the contract and bring an action for deceit to recover such damages as the fraud has occasioned him, or set up such damages by way of recoupment or counterclaim, if sued upon the contract by the other party. \* \* \* Second. He may rescind the contract and (1) sue, in an action of deceit, for any damages he may have sustained by reason of the fraud; (2) if he has paid money under the contract, he may recover it back; or (3) he may resist an action at law brought against him on the contract; or (4) he may resist a suit in equity by the other party for specific performance; or (5) he may himself sue in equity to have the contract judicially canceled and set aside."

It is also well established that the right to rescind must be exercised promptly; and, if there is unreasonable delay, the right is lost, and the party defrauded is generally relegated to his action for damages. *Alexander v. Utley*, 42 N. C. 242; *Knight v. Houghtalling*, 85 N. C. 17.

[2] In the first of these cases, a delay of 12 months was held to be fatal to the right; and in the second, *Ruffin, J.*, speaking for the court, says: "A party is not bound to abandon a contract brought about by fraud and imposition upon him; but he may, if he sees proper, adhere to the contract, and seek his compensation for the fraud in an action at law for damages. \* \* \* The law allows the purchaser in such a case to either abandon the contract absolutely, or else abide by it and sue at law for the deceit; and the only requirement it puts upon him is to make and declare his election the moment the knowledge of the fraud is attained by him. \* \* \* The rule of law is that he who would rescind a contract to which he has become a party must offer to do so promptly, on discovering the facts that will justify a rescission, and while he is able, of himself, or with the aid of the court, to place the opposite party substantially in statu quo; he must not only act promptly upon the first discovery of the fraud, if fraud be the cause assigned for the rescission asked, but he must act *decidedly*, so that his vendor may certainly know his purpose, and thereby have the opportunity afforded him to assent to the rescission, resume the property, and look out for another purchaser. In no case is he permitted to rescind when he has continued to treat with his vendor upon the basis of the contract after his discovery of the fraud practiced

upon him, and neither is it allowed him to rescind in part and to affirm in part; but, if done at all, it must be done in toto. This rule is founded on the plainest principles of justice, and has been universally recognized."

Applying these principles to the facts, we must hold that the defendant has no right to a rescission of the contract, as there was a delay of about two years after the discovery of the alleged fraud before this action was commenced, during which time the defendant retained the deed procured by the contract, and did no act indicating a purpose to rescind. On the contrary, his purchase of the title of the remainderman would suggest that he intended to perfect his title and abide by the contract.

[3] The defendant, having lost his right to a rescission of the contract, was entitled to recover damages; and, in our opinion, the rule adopted by his honor, limiting the recovery of damages to the amount paid out by the defendant to make his title as it was represented to be, was correct. *Bigelow on Estoppel*, 357; *Westall v. Austin*, 40 N. C. 1; *Kindley v. Gray*, 41 N. C. 445; *Ramsour v. Shuler*, 55 N. C. 487; *Bank v. Glenn*, 68 N. C. 35.

In *Kindley v. Gray*, *supra*, the court says: "Instead of availing himself of the power to annul the contract, the plaintiff took a deed from Cooper (who held the outstanding legal title against him), and then filed this bill, asking peremptorily, in the first place, to have the contract rescinded. But he cannot get that; for he has now a title to the thing he bought from the defendant. The plaintiff shall be reimbursed by the defendant what it cost him to get the legal title. That is the utmost he can claim."

[4] We do not, however, approve the judgment rendered. The defendant entered a voluntary appearance in the action; and he has accepted a deed in which it is stipulated that he agrees to pay the mortgage debt as a part of the consideration. This agreement, if not in writing, would not come within the statute of frauds (*Peele v. Powell*, 156 N. C. 553, 73 S. E. 234); and one who claims the benefit of a deed must assume its burdens. *Drake v. Howell*, 133 N. C. 166, 45 S. E. 539. We see no reason, therefore, for denying the plaintiff a personal judgment against the defendant.

[5] We are further of opinion that the plaintiff is not entitled to an order of sale or a decree of foreclosure. At the time W. S. Hemby executed the mortgage to Dunlap, which the plaintiff now owns, he had only a life estate in the land; and the only security for the debt was the conveyance of that estate. No decree can be rendered that will operate on the life estate, because Hemby is dead; and the remainder interest cannot be subjected to the payment of the debt, as it was not conveyed by the mortgage, unless because this interest was afterwards

purchased by the defendant, and we do not think the purchase by the defendant has this effect. The doctrine of feeding an estoppel by the acquisition of an interest or estate after the execution of a deed does not apply, because the defendant executed no deed for this land to the plaintiff, nor to any one under whom he claims; nor does the fact that both parties claim under W. S. Hemby prevent the defendant from claiming the remainder.

As stated in *McCoy v. Lumber Co.*, 149 N. C. 1, 62 S. E. 699, and approved in *Sample v. Lumber Co.*, 150 N. C. 161, 63 S. E. 731, 134 Am. St. Rep. 902, and in *Bryan v. Hodges*, 151 N. C. 414, 66 S. E. 345, the rule, enforced in the trial of title to land, that when both parties claim title under the same person it is not competent for either to deny the title of such person "is not in strictness an application of the doctrine of estoppel, but is a rule established for the convenience of parties in actions of this character, relieving them of the necessity of going back further than the common source, when it is apparent that both parties are acting in recognition of this common source as the true title," and is never permitted to prevent one from showing that he has acquired a better title. *Love v. Gafes*, 20 N. C. 498; *Copeland v. Sauls*, 46 N. C. 73; *Forbes v. Hunter*, 46 N. C. 231; *Ray v. Gardner*, 82 N. C. 146.

Practically the same doctrine is announced, in different language, and the reasons for it given by Chief Justice Marshall, in *Blight v. Rochester*, 7 Wheat. 540, 5 L. Ed. 516. He says: "It is contended that he is so restrained because John Dunlap sold to Hunter, and Hunter has conveyed to the present defendant. It is very certain that these sales do not create a legal estoppel. The defendant has executed no deed to prevent him from averring and proving the truth of the case. If he is bound in law to admit a title which has no existence in reality, it is not on the doctrine of estoppel that he is bound. It is because, by receiving a conveyance of a title which is deduced from Dunlap, the moral policy of the law will not permit him to contest that title. This principle originates in the relation between lessor and lessee, and, so far as respects them, is well established, and ought to be maintained. The title of the lessee is, in fact, the title of the lessor. He comes in by virtue of it, and rests upon it to maintain and justify his possession. \* \* \* The propriety of applying the doctrine between lessor and lessee to a vendor and vendee may well be doubted. The vendee acquires the property for himself; and his faith is not pledged to maintain the title of the vendor. The rights of the vendor are intended to be extinguished by the sale; and he has no continuing interest in the maintenance of his title, unless he should be called upon in consequence of some covenant or warranty

in his deed. The property having become, by the sale, the property of the vendee, he has a right to fortify that title by the purchase of any other which may protect him in the quiet enjoyment of the premises. No principle of morality restrains him from doing this; nor is either the letter or the spirit of the contract violated by it. The only controversy which ought to arise between him and the vendor respects the payment of the purchase money. How far he may be bound to this by law, or by the obligations of good faith, is a question depending on all the circumstances of the case; and in deciding it all those circumstances are examinable." The following authorities sustain the same view: *Merryman v. Browne*, 76 U. S. 592, 19 L. Ed. 683; *Osterhout v. Shoemaker*, 3 Hill (N. Y.) 518; *Sands v. Davis*, 40 Mich. 18; *Averill v. Wilson*, 4 Barb. (N. Y.) 185; *Mattison v. Ausmuss*, 50 Mo. 553.

For the reasons given, and because there is no agreed statement of facts upon which a judgment might be entered, there must be a new trial.

New trial.

(91 S. C. 496)

#### MOORE v. BEARD et al.

(Supreme Court of South Carolina. June 6, 1912.)

#### 1. MORTGAGES (§ 427\*)—FORECLOSURE—PARTIES.

Where, in an action to foreclose a purchase-money mortgage covering land conveyed to defendant by plaintiff and third persons, defendant in his answer did not state facts constituting a cause of action against the third persons or any of them, growing out of the transaction, the third persons were not necessary parties to a determination of the rights of defendant.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. §§ 1269, 1272-1287; Dec. Dig. § 427.\*]

#### 2. VENDOR AND PURCHASER (§ 299\*)—ABATEMENT OF PRICE—PRESUMPTIONS.

Where, in an action to foreclose a purchase-money mortgage covering land conveyed to defendant by plaintiff and third persons, defendant asked for a pro tanto reduction of the price because his grantors did not convey to him a good title to a part of the land, but he did not allege that he failed to obtain possession of all the land or that he had been evicted from any part, the court must presume that he obtained possession under his deed and that he remained in possession, and no pro tanto reduction of the price could be ordered.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. §§ 837-842; Dec. Dig. § 299.\*]

#### 3. VENDOR AND PURCHASER (§ 175\*)—BREACH OF WARRANTY—ABATEMENT OF PURCHASE PRICE.

Where a grantee, giving a mortgage on the land to secure the price, obtained possession, and has not been evicted by title paramount, he has no right to an abatement of the purchase price merely because of an alleged failure to convey a good title to a part of the land.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. §§ 360-363; Dec. Dig. § 175.\*]

Appeal from Common Pleas Circuit Court of Hampton County; Geo. E. Prince, Judge. "To be officially reported."

Action by D. F. Moore against Herbert A. Beard and others. From a judgment for plaintiff, defendant named appeals. Affirmed.

The following is the answer of defendant named:

"The defendant H. A. Beard, answering the complaint herein, for a first defense denies each and every allegation therein contained, except such as he hereinafter specifically admitted.

"For a second defense, this defendant alleges that for a complete determination of his rights and interests under and by virtue of the transactions referred to in the complaint J. W. Ragsdale, J. E. Ragsdale, Bertha V. Barnes, and Willie C. Blackburn are necessary parties to this action, as they own interests in and under the mortgage set up in the complaint.

"For a third defense, this defendant alleges that on the 15th day of February, A. D. 1910, D. F. Moore, M. D. Barnes, J. W. Ragsdale, J. E. Ragsdale, and W. C. Blackburn entered into a contract with this defendant, wherein and whereby they agreed on certain terms and stipulations, as set out in said contract, which contract is attached to the agreement entered into between this defendant and his codefendants, and is of record in office C. O. C. P. for Hampton county in Book 17 D, at page 298, and therein and thereby they agreed to sell and convey to this defendant the lands described in the complaint, and other property, said conveyance to be made within 30 days from February 17, 1910, as soon as the titles were examined and pronounced good by competent attorneys, which said attorney shall examine said titles and pass upon them within 30 days from the time he receives the abstracts and evidences of title to said property. And the said parties also further agreed in and by said contract to convey and deliver to the party of the second part 10 acres of land in Beaufort county, known as Dawson's Landing, and sawmill and other property now located on the said property referred to, and they agreed to correct all defects found in the titles of the land agreed to be conveyed, and to collect the rents, income, and profits, and apply the same to the said mortgage notes. They agreed, further, to convey certain timber known to the parties aforesaid as the 'leased timber,' and this defendant alleges that after the execution of said contract the said D. F. Moore, acting for himself and other parties interested herein, before named, introduced this defendant to W. B. De Loach, who is attorney for the plaintiff, and the said W. B. De Loach verified the abstracts and assured this defendant the title to the property was good, and this

defendant subsequently entered into contract with his codefendants, who employed other attorneys to examine said title, and upon examination the said titles were found to be defective in numerous respects.

"For a fourth defense, this defendant further alleges that the said D. F. Moore, and his associates hereinbefore named, parties to said contract, have not conveyed and did not convey to this defendant the 10 acres known as Dawson's Landing by good and sufficient deed; nor have they conveyed to this defendant the lands known as the 'Cooper lands,' nor have they, in numerous other respects, carried out and performed the contract entered into between the said parties, and this defendant alleges that upon presentation to him, D. F. Moore, of three deeds of conveyance, as follows, to wit: A deed executed by D. F. Moore to this defendant, which is of record in Hampton county in Book 17 D, p. 296, a deed executed by J. W. Ragsdale, J. E. Ragsdale, and W. C. Blackburn, which is of record in Hampton county in Book 17 D, p. 294, and a deed executed by Bertha V. Barnes to this defendant, which is of record in Hampton County in Book 17 D, at page 297, and which deeds this defendant alleges purported to convey all the property which he had purchased, this defendant executed to D. F. Moore his mortgage set up in the complaint herein, and this defendant is informed and believes that D. F. Moore was then, and still is, the agent and attorney in fact for the other parties interested with him, and he executed said deeds of conveyance.

"For a fifth defense, this defendant further alleges that the title to the tract of land known as 'Starke' was defective, and that the said parties hereinbefore named, who made said deeds of conveyance, did not convey the fee-simple title, nor did they own the same in and to the said tract of land known as 'Starke.'

"For a sixth defense, that the said note referred to in the complaint has not reached its maturity, and this defendant is not in default, inasmuch as he has been unable to handle said property or to make sale of same, or other disposition thereof, by reason of the defects and deficiencies in the titles aforesaid.

"For a seventh defense, this defendant alleges, on information and belief, that Sumter Loan & Trust Company is a necessary party to this action, as the Sumter Loan & Trust Company now holds legal title to parts and parcels of the mortgaged premises.

"For an eighth defense, this defendant alleges, on information and belief, that G. A. Lemmon and I. C. Strauss claim some equitable interest in the premises described in the complaint.

"For a ninth defense, this defendant alleges that as soon as the said D. F. Moore, and the other parties hereinbefore named,

carry out and perform their contract, and convey, or cause to be conveyed, to this defendant, or the Sumter Loan & Trust Company, assignee of this defendant, in fee simple, the lands purchased by him, and the timber purchased by him, including the 'leased' timber, Dawson's Landing, the sawmill, and other machinery, the note and mortgage set up in the complaint will be paid.

"For a tenth defense, this defendant alleges that there is open on record, and that there exists in fact certain liens and incumbrances against parts and parcels of the property described in the complaint, which liens were created by the said D. F. Moore and his associates, to wit, the parties conveying said premises to this defendant, and that the same are now valid, outstanding, and subsisting liens on said premises.

"For an eleventh defense, this defendant alleges that the said D. F. Moore has collected the rents, income, and profits from the mortgaged premises, and that he has made no accounting thereof or therefor, and that the same should be credited on the indebtedness aforesaid and that the same amount to more than the sum of \$1,900.

"For a twelfth defense, this defendant alleges that at the time of the execution of said deeds of conveyance certain of the timber leases referred to in the sixth paragraph of the complaint had expired or were about to expire, and the plaintiffs had agreed to obtain extensions thereof for at least five years.

"For a thirteenth defense, this defendant alleges that the conveyances made to him by D. F. Moore and others as hereinbefore named contained covenants of general warranty, and breach of said covenants of general warranty was made in the particulars hereinbefore named, and in various other particulars, and especially in that the said grantors did not own, and did not convey, in fee simple, Starke plantation, or Dawson's Landing.

"For a fourteenth defense, this defendant alleges that on the 15th day of February, 1910, Maner and Taylor delivered to this defendant an order drawn on said D. F. Moore, W. D. Barnes, J. W. Ragsdale, J. E. Ragsdale, and Mrs. W. C. Blackburn, thereby directing them to pay to this defendant the sum of \$2,000, due as commission from the sale of the property referred to in the complaint, and that defendant D. F. Moore, indorsed upon said draft his acceptance thereof, as follows: 'This draft is payable as a credit on the note of H. A. Beard for one hundred and twenty-eight thousand, seven hundred and twenty dollars, payable February 15th, 1911, and is accepted, provided balance of said note is paid'—said indorsement being made on the 17th day of June, 1910, and the said payment exceeding in amount the sum of \$1,900."

Lee & Moise, of Sumter, for appellant. W. B. De Loach, of Camden, for respondent.

HYDRICK, J. This is an action to foreclose a mortgage which was given to secure the payment of a note, of which the following is a copy: "\$128,720.00. Brunson, S. C., April 14, 1910. On or before the 15th day of February, 1911, I promise to pay to the order of D. F. Moore at Bank of Brunson, Brunson, S. C., the sum of one hundred and twenty-eight thousand, seven hundred and twenty dollars (\$128,720.00) with interest on the same from the 15th day of February, 1910, at the rate of five (5) per centum per annum, payable annually, until the whole has been paid, together with a reasonable sum of attorney's fees, in case this note is placed in the hands of an attorney for collection, but it is agreed that the sum of \$1,900.00 shall be paid on the said indebtedness on or before the 19th day of May, 1910, and placed on the mortgage indebtedness on the property deeded to D. F. Moore, et al., by me, said property situated near Richmond, Virginia, and default by me in the payment of the said sum of \$1,900.00 shall be a default in the payment of this note, the said sum of \$1,900.00 to be credited on this note when paid. Value received [Signed] Herbert A. Beard." The mortgage recites the fact that the note represents the purchase price of the lands therein described, and also the fact that all of said lands had been conveyed to defendant, by deeds of even date, by D. F. Moore, John W. Ragsdale, J. E. Ragsdale, Mrs. Willie C. Blackburn, and Mrs. Bertha V. Barnes. The mortgage then described 16 parcels or tracts of land, among others, a tract of 10 acres known as "Dawson's Landing," and a tract of 2,914 acres known as the "Starke lands," and a tract of 800 acres, known as the "Cooper lands," and some machinery. It also recites that the mortgagor had assigned to the mortgagee as further security for the payment of the mortgage debt certain timber leases which the mortgagor had purchased from the mortgagee or John W. Ragsdale, J. E. Ragsdale, Mrs. Willie C. Blackburn, Mrs. Bertha Barnes, or any other person on lands in Hampton or Beaufort county. The defendant Beard answered and set up 14 defenses. On plaintiff's motion the court struck out the second, third, fourth, fifth, all of the sixth after the word "maturity" in the seventh line thereof, ninth, tenth, twelfth, and thirteenth, as irrelevant and redundant. These defenses will be set out in the report of the case. The appeal questions the correctness of this order.

[1] Appellant argues only two propositions, and we shall confine our attention to these. His first contention is that the court erred in striking out the second defense. It will

be noted that it is therein alleged that the parties therein named are necessary parties to a complete determination of defendant's rights under and by virtue of the transactions referred to in the complaint, because they own interests in and under the mortgage. The exception assigning error in striking out this defense takes the same ground basing it upon the position that it appears from the complaint that said persons were grantors of parts of or interests in the property for the purchase money of which the note and mortgage were given, and therefore they had an interest in the note and mortgage, but it does not follow that because they owned the property and conveyed it they have any interest in the note and mortgage given for the purchase price. As appellant fails to state facts sufficient to constitute a cause of action against said parties, or any of them, growing out of the transactions set out in the complaint, whether they, or any of them, have any interest in the note and mortgage sued on, is a matter of no concern to him. Therefore, their presence is not necessary to a proper and complete determination of his rights.

[2] Appellant's next contention is that he is entitled under the allegations of the other defenses stricken out to a pro tanto reduction of the purchase price, because his grantors did not convey to him a good title to the "Starke lands" and "Dawson's Landing." It will be observed that nowhere does the defendant allege that he failed to get possession of either of said tracts, or that he has been evicted from either. It must be presumed that he got possession under his deed, and that he is still in possession, until the contrary is alleged.

[3] If he did get possession, and has not been evicted by title paramount, he has no right to ask for an abatement of the purchase price. The principle is too well settled and it would be a useless consumption of time to do more than refer to the decided cases. *Nathans v. Steinmeyer*, 57 S. C. 393, 35 S. E. 733, and cases cited; *Diseker v. Land, etc., Co.*, 86 S. C. 284, 68 S. E. 529, and cases cited. In the recent cases of *Godfrey v. Burton Lumber Co.*, 88 S. C. 132, 70 S. E. 396 and *Peake v. Renwick*, 86 S. C. 226, 68 S. E. 531, 33 L. R. A. (N. S.) 409, cited and relied on by appellant, it was alleged and proved that the purchasers of land failed to get possession of parts of the lands which they had purchased, and that such parts were in possession of others who were holding them under paramount title.

Affirmed.

GARY, C. J., and WOODS, J., concur. WATTS and FRASER, JJ., did not participate.



(91 S. C. 487)

**HOLLEY et al. v. STILL et al.**

(Supreme Court of South Carolina. June 5, 1912.)

**1. TRUSTS (§ 41\*) — INVALIDITY — PRESUMPTIONS—BURDEN OF PROOF.**

Where a weakened woman was induced by her strong-minded husband and her stepson to execute a trust deed to the stepson, transferring the control of valuable property and reserving only the right to rents and profits for life, and giving the trustee power to mortgage the property or sell the same in such parcels as he might see fit on her written consent, the law presumed, in view of the relations of the parties, that the husband and stepson were guilty of constructive fraud and exercised undue influence inducing the conveyance, and to uphold it they must show that there was no constructive fraud or undue influence.

[Ed. Note.—For other cases, see *Trusts*, Cent. Dig. § 60; Dec. Dig. § 41.\*]

**2. TRUSTS (§ 41\*) — INVALIDITY — PRESUMPTIONS—BURDEN OF PROOF.**

Where thereafter the husband and stepson divided the property into tracts in order that they might own the same and there was no necessity for such division, and subsequently induced her to sign her consent giving away her right of support to enable them to borrow money on the property, the subsequent transactions indicated the exercise of undue influence inducing the execution of the deed of trust and strengthened the presumption that the transaction was a constructive fraud on her and brought about by undue influence.

[Ed. Note.—For other cases, see *Trusts*, Cent. Dig. § 60; Dec. Dig. § 41.\*]

**3. PRINCIPAL AND AGENT (§ 177\*)—KNOWLEDGE OF AGENT—EFFECT.**

Where the agent of a mortgagor and mortgagee had notice of facts which, by the use of ordinary diligence, would lead to knowledge that a grantor in a deed of trust under which the mortgagor claimed was of weak mind and that the deed was intended to transfer her property to the dominion and control of her husband and stepchildren, the knowledge of the agent was the knowledge of the mortgagee, and he was not a purchaser for valuable consideration without notice, and the deed of trust could be set aside as against the mortgagee.

[Ed. Note.—For other cases, see *Principal and Agent*, Cent. Dig. §§ 670-679; Dec. Dig. § 177.\*]

**4. ESTATES (§ 7\*)—FEE CONDITIONAL — CONVEYANCE BY TENANT IN FEE CONDITIONAL —EFFECT.**

An alienation by a tenant in fee conditional, claiming under a devise to her for life and on her death to vest in the heirs of her body, made after the birth and death of issue, bars the reversion of the estate to the heirs of testator.

[Ed. Note.—For other cases, see *Estates*, Cent. Dig. § 7; Dec. Dig. § 7.\*]

**5. COURTS (§ 93\*) — DECISIONS — STARE DECISIS.**

The rule that an alienation by a tenant in fee conditional before the birth of issue does not prevent the reverter of the donor if the issue afterwards born dies in the lifetime of the tenant, but that an alienation after the birth and death of issue bars the right of the donor in the reversion is a rule of property and will not be reversed.

[Ed. Note.—For other cases, see *Courts*, Cent. Dig. §§ 336-339; Dec. Dig. § 93.\*]

Appeal from Common Pleas Circuit Court of Barnwell County; Geo. E. Prince, Judge.

Action by Olivia Holley and others against W. T. Still, trustee, and others. From a judgment for plaintiffs, certain of the defendants appeal. Modified.

See *Simms v. Buist*, 52 S. C. 554, 30 S. E. 400.

The following is the decree of the circuit court:

"This action came on to be heard before me at Barnwell, at the spring term of the court, upon the pleadings and proceedings, the case by a consent order had been referred to the master, Mr. O'Bannon, not only to take the testimony, but to report his conclusions on the law and facts, and with leave to report any special matter. The testimony, oral and documentary, is most voluminous, and has been read to me and most carefully considered. The able report of the master containing his conclusion of law and facts, as well as the able arguments of counsel on both sides, has also been considered. I do not deem it necessary in stating my conclusion to go into all of the questions of law and facts as fully as the master has, but I have considered all of the questions most carefully. I agreed fully with the master as to his conclusions that, inasmuch as it is admitted by all parties that the will of John Holley, the elder (which has been construed by the Supreme Court in the case of *Simms v. Buist*, 52 S. C. 554, 30 S. E. 400), gave to Eugenia Holley, afterward Eugenia Rountree, a fee conditional at common law in the tract of land in question, and although she had issue born of her body, yet inasmuch as she made no alienation during the lifetime of said issue, but only after the death of said issue executed the trust deed of 1905 in question, that she had no power to make said trust deed so as to bar the reverter of the estate to the heirs at law of John Holley, who are the claimants in the action.

"But I do not agree with the master that the words of Chancellor Dargan in *Barksdale v. Gamage*, 3 Rich. Eq. 279, are to be regarded simply as obita dicta. To the contrary, I think the chancellor intended to decide and did decide that case upon the idea that after the birth of issue, and after the death thereof, the tenants in fee conditional could make an alienation which would bar a reverter, but I am firmly of the impression that the chancellor was misled in construing the quotations which he made from *Blackstone*. I conceive the law to be that, upon the birth of issue, the condition is not gone only to the extent of alienation during the life of issue, but, if the issue dies before the alienation, the disability returns, and any alienation is void and cannot prevent the reverter. If it were otherwise upon the birth of issue, simply the tenant would have the power to devise the

property, and our courts have held frequently that no such power obtains.

"This conclusion of law within itself disposes of this important case because the trust deed made by Eugenia A. Rountree in 1905 to W. T. Still, trustee, was effective only to pass the title to the land in question during the lifetime of the said Eugenia A. Rountree, and consequently the subsequent deeds, papers, mortgages, and consents made pursuant to said trust deed are null and void as against the heirs of John Holley, the testator, and the claimants in this action are the legal owners of the real estate in question and are entitled to portion of same among themselves, or a sale and division of the proceeds.

[1] "Inasmuch, however, as it is an important case and has been fully considered by the master, I have considered the entire case and will now state my conclusions concerning the same. I confirm the conclusion of the master on this part of the case and with him agree that the trust deed of 1905, and all subsequent deeds and mortgages and consents, should be set aside in equity as null and void. I do not go to the extent of finding that Eugenia Rountree was out and out an idiot or imbecile, but I do find and am firmly convinced that what Dr. Kirkland, her physician, testified to is the truth; that at the time she executed the trust deed in question, and long previously thereto and ever afterwards, she was extremely weak-minded, decrepit, and that, in consideration of her state of mind, the border line between her weakmindedness and her imbecility and idlcy was but a shadow.

"Regarding her in such condition of mind on the 30th day of September, 1905, she was induced by her husband, John B. Rountree, who was a strong-minded man, and her stepson, W. T. Still, and her other stepchildren, to execute the trust deed in question which transferred from her control the valuable property in question, which was worth as the testimony shows from \$12,000 to \$15,000, reserving only in herself the right to rents and profits during her lifetime, and giving unto trustee the power to mortgage the property or sell and convey the same in such parcels as he saw fit upon her written consent. The law on this subject is properly stated by the master, and the relations of these parties to her—that is to say, her husband and her stepson, who had accepted the position as trustee—were such as to raise the presumption that constructive fraud was committed and undue influence was used to bring about this deed for the purpose of transferring the property from her control to the control of Rountree and his children, and to practically deprive her of the same. The law then placed the burden upon the parties interested to show that there was no such constructive fraud or undue influence, and I find that the evidence surrounding this transaction does not remove the

presumption; these parties were found under the law to show that it was an honest and just transaction \* \* \* and this they have failed to show and satisfy me.

[2] "To the contrary, whilst the subsequent transaction between the parties would not effect the legality of the trust deed, yet such conduct will throw light upon the intention of the parties at the time they had Mrs. Rountree to make the transfer. The subsequent transaction certainly established that, when there was no necessity to divide up her property during her lifetime to pay the Hill mortgage which could have been paid by mortgage upon a small portion of the valuable property, yet the trustee and the others acting with him obtain her consent and made deeds dividing up this valuable property into tracts in order that they could own same; the trustee's wife getting by the division more than she was entitled to by the deed.

"Further than this, when they could not borrow the money on the property without wiping out her right of support, they influenced her to sign her consent giving away her right of support on the border of the grave.

"All of these transactions reflect back upon the intention of the parties who unduly influenced her when she signed the trust deed in 1905, and strengthens rather than weakens the presumption that the transaction was a constructive fraud and brought about by undue influence.

[3] "The other question involved as to the agency of J. O. Patterson & Son of the Mortgage Company in question is very clear. I concur with the master that they were such agents; they were not only agents of the Mortgage Company, but they were agents of the mortgagors. There is no necessity to quote authority on that subject, as the authority quoted by him is sufficient. I also agree with the master in his finding of fact that as such agents they had knowledge or notice of such facts which, if they had used ordinary diligence, would have lead them up to the knowledge that this lady at the time she executed the trust deed was a person of very weak mind, and that said deed was intended to transfer her property to the dominion and control of John B. Rountree and his children. This is not imputing any fraud to Messrs. Patterson & Son, but simply imputing to them knowledge of the existence of facts which when known to them ought to have kept them from allowing the Mortgage Company to loan money upon that property. This being the case, the knowledge to them was knowledge to their clients, the Mortgage Company, and, they having such knowledge or facts sufficient to lead up to their knowledge, they have failed to establish their plea of purchaser for valuable consideration without notice.

"In so far as the defendants the Easter-

lings are concerned, they came into the case as purchasers from Frank Rountree and Mrs. Smith after the lis pendens were filed, and of course with full notice of all the rights of claimants in the case, and their deeds under the findings as aforesaid are null and void to say nothing of the fact that the prices which they paid of \$100 each to Mrs. Smith and Frank Rountree is a clear indication that they knew that there was invalidity in the title."

J. O. Patterson & Son, R. C. Holman, and R. A. Ellis, of Barnwell, and W. H. Townsend, of Columbia, for appellants. D. S. Henderson, of Aiken, James A. Willis and B. T. Rice, both of Barnwell, for respondents.

GARY, C. J. [4] The decree of his honor the circuit judge as reported is affirmed for the reasons therein stated except as to his conclusion "that, inasmuch as it is admitted by all parties that the will of John Holley, the elder, gave to Eugenia Holley, afterwards Eugenia Rountree, a fee conditional at common law in the tract of land in question, and although she had issue born of her body, yet inasmuch as she made no alienation during the lifetime of said issue, but only after the death of said issue executed the trust deed of 1905 in question, that she had no power to make said trust deed so as to bar the reverter of the estate to the heirs at law of John Holley, who are the claimants in the action."

Permission was granted upon the hearing of this appeal to review the case of *Barksdale v. Gamage*, 3 Rich. Eq. 271, which shows that the ruling of his honor the presiding judge is erroneous unless this court overrules the said case, in which the court uses this language: "Under the purely military system of tenures that existed under the earlier kings of the Norman dynasty, all feuds were granted for the life of the feudatory only. 2 Bl. Com. 55. In process of time they were extended beyond his life, and at length to the heirs of his body, and in some instances to his heirs general. The fee conditional is a remnant of these earlier tenures. 'It was called a fee conditional by reason of the condition expressed or implied in the donation of it that, if the donee died without such particular heirs (of his body), the land should revert to the donor.' But if he had such heirs 'it should remain in the donee.' 2 Bl. Com. 110. 'Now we must observe,' says Sir William Blackstone (2 Com. 110), 'that, when any condition is performed, it is thenceforth entirely gone, and the thing to which it was before annexed becomes thenceforth absolutely and wholly unconditional.' So that, as soon as the grantee had issue born, his estate was supposed to become absolute by the performance of the condition at least for these three purposes: (1) To en-

able the tenant to alien the land and thereby to bar not only his own issue but also the donor of his interest in the reversion; (2) to subject him to forfeit it for treason which he could not do, till issue born, longer than his own life; (3) to empower him to charge the land with rents, etc. The fee conditional, it would thus appear (to the extent laid down in the passage cited), is not different from other estates on condition, in regard to which a fundamental rule is that, when the condition is once performed, it is thenceforward gone forever."

[5] In speaking of the effect of alienation after the birth and before the death of issue, and alienation after the death of issue, the court says: "The distinction is nice and apparently arbitrary, but yet is found to be in harmony with the general rules of law in regard to estates upon condition." The doctrine announced in *Barksdale v. Ramage* has become a settled rule of property, is arbitrary in its nature like the rule in *Shelley's Case*, and we see no greater reason for changing one than the other, as the change in either would tend to unsettle property rights and lead to great confusion. This principle is affirmed in the case of *Dillard v. Yarboro*, 77 S. C. 227, 57 S. E. 841, wherein the court uses the following language: "Heirs of the body are words of limitation whereby the parties take by inheritance and not by purchase, therefore the conveyance of the property by defendant was as effectual to convey the fee as if the deed had been to her and her heirs generally, whether she conveyed before or after the birth of issue. The only difference between a conveyance of land by the tenant in fee conditional before and after the birth of issue is that, where the alienation is before the birth of issue and issue is subsequently born and dies during the life of the tenant in fee conditional, the reverter of the donor is not thereby prevented"—citing *Barksdale v. Ramage*, 3 Rich. Eq. 271.

Judgment modified.

(91 S. C. 417)

GIVENS v. NORTH AUGUSTA ELECTRIC & IMPROVEMENT CO.

(Supreme Court of South Carolina. May 23, 1912.)

1. DAMAGES (§ 142\*)—BREACH OF CONTRACT—ACTIONS—COMPLAINT.

In an action for a breach of a contract to furnish electricity, a motion to strike, for irrelevancy and redundancy, allegations of the complaint which stated plaintiff's business, the purposes for which he intended to use the electricity, and the consequent special damages from the failure to supply on the ground that it was not alleged that the defendant knew of these matters when the contract was made, was properly refused where in each paragraph in which special damages were alleged it was plainly and unequivocally averred that the defendant knew of such facts and circumstances, and it could be inferred from the entire com-

plaint that he had such knowledge at the time of the making of the contract.

[Ed. Note.—For other cases, see Damages, Cent. Dig. § 413; Dec. Dig. § 142.\*]

**2. PLEADING (§ 367\*)—COMPLAINT—MOTIONS TO MAKE MORE CERTAIN.**

Though a complaint charging a breach of a contract to furnish electricity and alleging special damages to plaintiff's business did not charge that the defendant knew of all the phases of such business when the contract was made, a motion to strike other material allegations which constituted the plaintiff's cause of action was properly refused as the remedy was by motion to make more definite and certain by alleging when defendant acquired such knowledge.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1173-1193; Dec. Dig. § 367.\*]

**3. DAMAGES (§ 5\*)—BREACH OF CONTRACT—SPECIAL DAMAGES.**

To recover special damages for breach of a contract, the defendant need not have contracted with reference thereto; it being sufficient if at the time of contracting he had knowledge of the special facts and circumstances out of which the damages arose.

[Ed. Note.—For other cases, see Damages, Cent. Dig. § 4; Dec. Dig. § 5.\*]

**4. DAMAGES (§ 208\*)—BREACH OF CONTRACT—SPECIAL DAMAGES—QUESTION FOR JURY.**

Whether special damages were within the contemplation of the parties at the time of making the contract is a question for the jury unless the evidence is susceptible of but one reasonable inference.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 54, 64, 68, 132, 144, 145, 205, 220, 533, 534; Dec. Dig. § 208.\*]

**5. PLEADING (§ 365\*)—MOTIONS—MOTION TO STRIKE—TIME FOR FILING.**

In an action for breach of a contract to supply electricity a motion to strike an allegation that the defendant breached the contract willfully and wantonly was properly refused, where it was not noticed within the time allowed by circuit court rule No. 20, i. e., before demurring or answering and within 20 days from the service of the pleading.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1163-1172; Dec. Dig. § 365.\*]

**6. PLEADING (§ 365\*)—MOTIONS—MOTION TO STRIKE—TIME FOR FILING.**

As motions to strike allegations in a pleading are of a dilatory nature, successive motions on different grounds will not be tolerated where all objectionable matter could be disposed of at once, so that the motion was properly refused where a former motion to strike other allegations had been interposed.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1165-1172; Dec. Dig. § 365.\*]

**7. PLEADING (§ 381\*)—ADMISSION OF EVIDENCE—IRRELEVANT ALLEGATIONS.**

Though irrelevant or redundant matter is left in a pleading by failure to move to strike, or by refusal of such a motion, the trial judge may consider the relevancy of testimony thereunder with regard to other proof in the case, and is not bound because such allegations have been allowed to remain to receive evidence in their support.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1238, 1253-1279; Dec. Dig. § 381.\*]

**8. APPEAL AND ERROR (§ 1032\*)—REVIEW—BURDEN OF SHOWING PREJUDICE.**

A party complaining of the admission of evidence to sustain allegations to which a motion to strike for irrelevancy or redundancy

was refused has the burden of showing prejudice.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4047-4051; Dec. Dig. § 1032.\*]

**9. PLEADING (§ 381\*)—EVIDENCE IN SUPPORT OF IRRELEVANT ALLEGATIONS.**

As the refusal of a motion to strike allegations of a pleading for irrelevancy or redundancy is not appealable, the trial judge may properly refuse to admit testimony bearing on allegations to which a motion to strike has been refused, as otherwise there might be prejudice without remedy.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1238, 1253-1279; Dec. Dig. § 381.\*]

**10. PLEADING (§ 367\*)—MOTIONS—MOTION TO MAKE MORE DEFINITE AND CERTAIN.**

A motion to require a complaint to be made more definite and certain was properly refused where sustaining it would have required plaintiff to set out in his complaint practically all the evidence on which he relied to prove his case.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1173-1193; Dec. Dig. § 367.\*]

**11. JURY (§ 31\*)—CASES WHICH MAY BE REFERRED.**

Code Civ. Proc. 1902, § 293, which authorizes the court in its discretion to order a reference in cases where the trial of an issue of fact shall require the examination of a long account on either side, is not applicable to an action for damages for breach of a contract, in which case the parties have a constitutional right to trial by jury.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 204-219; Dec. Dig. § 31.\*]

**12. DAMAGES (§ 89\*)—BREACH—PUNITIVE DAMAGES.**

Punitive damages are not recoverable for breach of a contract except where the breach was accompanied by an intent to defraud, even though it may have been wanton and willful.

[Ed. Note.—For other cases, see Damages, Cent. Dig. § 203; Dec. Dig. § 89.\*]

**13. APPEAL AND ERROR (§ 1053\*)—ADMISSION OF EVIDENCE—CURE OF IMPROPER ADMISSION.**

The improper admission of evidence to prove remote and speculative damages, under a claim for punitive damages, in an action for breach of a contract to supply electricity would be ground for reversal where, though the court instructed that punitive damages were not recoverable, and that many of the elements of damage as to which he had admitted evidence were remote and speculative, he did not definitely state what particular claims for remote and speculative damages in evidence should be excluded.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4178-4184; Dec. Dig. § 1053.\*]

**14. DAMAGES (§ 45\*)—BREACH OF CONTRACT—ELEMENTS.**

In an action for a breach of a contract to supply electricity, the plaintiff could not recover as damages expenses incurred in securing and providing means for securing current from another source of supply, where the expenses were not incurred before the expiration of the contract, but were caused after the expiration and from the defendant's refusal to renew the agreement.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 92-98; Dec. Dig. § 45.\*]

Appeal from Common Pleas Circuit Court of Aiken County; R. C. Watts, Judge.

"To be officially reported."

Action by John M. Givens against the North Augusta Electric & Improvement Company. From a judgment for plaintiff, defendant appeals. Reversed, and new trial granted.

Boykin Wright and Geo. T. Jackson, both of Augusta, Ga., and J. B. Salley, of Aiken, for appellant. Sawyer & Williams, of Aiken, for respondent.

**HYDRICK, J.** This is an action for damages for the breach of a contract whereby defendant agreed to furnish plaintiff with "all required electricity, not to exceed 100 horse power," for power and other purposes, for the period of two years, commencing September 1, 1906. Plaintiff wanted to use the current in the operation of his dairy farm and in the refrigeration of the products thereof; in the manufacture of ice, in the running of a public ginny, and for propelling other machinery in connection with his farming operations and other business enterprises. The complaint is very long, and it would incur this opinion too much to set it out in full. It is sufficient to say that it states in detail the various business enterprises in which the plaintiff was engaged, and the various purposes for which he intended to use the electricity contracted for in the conduct of his business; that defendant knew the nature of his business, and all the facts and circumstances detailed, and the special damages that would result to plaintiff by a breach of the contract. It also alleges that defendant willfully and wantonly broke the contract.

[1] The defendant moved to strike out certain allegations of the complaint as irrelevant and redundant. The grounds of the motion were, in substance, that the allegations sought to be stricken out set forth the plaintiff's business, the purpose for which he intended to use the electricity contracted for, and the special damages resulting to him from the failure of defendant to furnish the electricity, according to the contract, without alleging that defendant knew of these things when the contract was made, and that he contracted with reference to such special damages, also on the ground that some of the damages alleged are not recoverable because they are remote and speculative.

The motion was properly refused because it is plainly and unequivocally alleged in every paragraph of the complaint in which special damages are alleged that defendant knew all the facts and circumstances out of which such damages arose, and that defendant knew also that such damages would result from its breach of the contract. While it is not alleged in so many words that defendant knew all this when the contract was made, it is, by reasonable intentment, to be gathered from the complaint,

construed as a whole, that defendant did know it at that time.

[2] But, if there was any uncertainty as to that, the defendant's remedy was by motion to make the complaint more definite and certain by alleging when the defendant acquired knowledge of the facts and circumstances out of which the special damages arose, and not by motion to strike out the other material allegations which constitute the plaintiff's cause of action.

[3, 4] It is not necessary to allege in a complaint for special damages that defendant contracted with reference to such damages. It is sufficient to allege knowledge, at the time of contracting, of the special facts and circumstances out of which the special damages arose. From these it may be determined whether or not such damages were in the contemplation of both parties to the contract, and whether they contracted with reference thereto, which is ordinarily a question of fact for the jury unless the evidence is susceptible of only one reasonable inference, and then it is for the court. The rule as to the recovery of special damages for breach of contract is stated in the leading case of *Hadley v. Baxendale*, 9 Exch. 353: "Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, i. e., according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, and as the probable result of the breach of it. Now, if the special circumstances under which the contract was actually made were communicated by the plaintiffs to the defendants, and thus known to both parties, the damages resulting from the breach of such a contract, which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from a breach of contract under these special circumstances so known and communicated. But, on the other hand, if these special circumstances were wholly unknown to the party breaking the contract, he at the most could only be supposed to have had in his contemplation the amount of injury which would arise generally and in the great multitude of cases not affected by any special circumstances from such a breach of contract."

The complaint does contain some allegations of remote and speculative damages, and, if the motion to strike out had been directed exclusively at these, it is probable that it would have been granted. But we find on examination of the notice that defendant sought to strike out as irrelevant and redundant allegations of special damages, which may be recovered, if proved,

along with the allegations of remote and speculative damages. The ruling upon this matter becomes immaterial, as a new trial is granted upon other grounds.

[5, 6] The defendant's motion made at the trial to strike out the allegation that it broke the contract willfully and wantonly was also properly refused, first, because it was not noticed within the time allowed by rule 20 of the circuit court, to wit, before demurring or answering, and within 20 days from the service of the pleading; second, because it should have been embraced in the first motion to strike out. Such motions are necessarily of a dilatory nature, and successive motions on different grounds will not be tolerated where all the objectionable matter can be disposed of at once.

[7, 8] It does not follow, however, that, because irrelevant or redundant matter is left in a pleading, either because of a failure to move to strike it out or because of the refusal of such a motion, evidence must be admitted to prove it. The trial judge is not bound to admit evidence to prove an allegation which another judge has refused to strike out as irrelevant or redundant. The admission or exclusion of evidence to prove a given fact or circumstance frequently depends upon proof or lack of proof of some other fact or circumstance by which its relevancy or irrelevancy is made to appear. Therefore, even though another judge had refused a motion to strike out matter alleged to be irrelevant or redundant, the trial judge is not bound by such refusal to admit evidence to prove it. He is in a better position to determine its relevancy or irrelevancy, and, where a party conceives himself prejudiced by an allegation of such matter and takes the proper steps by motion to have it stricken out, and his motion is refused, he is then in position to ask this court to review the ruling of the trial judge in admitting, over his objection, evidence to sustain such allegation. Of course, the burden is upon him to show that he was prejudiced thereby. *Martin v. Railway*, 70 S. C. 8, 48 S. E. 616; *Bromonia Co. v. Drug Co.*, 78 S. C. 482, 59 S. E. 363.

[9] There is another reason why the trial judge may exclude evidence to sustain such an allegation even though a motion to strike it out has been refused. The refusal of such a motion is not appealable. *Woodward v. Woodward*, 87 S. C. 247, 69 S. E. 232, and cases cited. Therefore, if the refusal of the motion to strike out is held to conclude the matter and to be binding on the trial judge, a party might suffer prejudice by the erroneous refusal of such a motion, without any remedy, when the statute (section 181 of the Code of Procedure) recognizes the possibility of a party suffering prejudice by such allegations and provides a remedy by motion to strike them out.

[10] The defendant also made a motion to

require the plaintiff to make his complaint more definite and certain in a great many particulars which would have required the plaintiff to set out in his complaint practically all the evidence on which he relied to prove his case. There was no error in refusing the motion.

[11] As this is an action for damages for a breach of contract, the parties have a constitutional right to a trial by jury. Section 293 of the Code of Procedure, which authorizes the court in its discretion to order a reference in cases "where the trial of an issue of fact shall require the examination of a long account on either side," does not apply in a case like this. *Smith v. Bryce*, 17 S. C. 538; *Wilson v. York*, 43 S. C. 290, 21 S. E. 82; *Thames v. Rouse*, 85 S. C. 69, 69 S. E. 140.

[12] Evidence was admitted over defendant's objection to prove remote and speculative damages, the court holding that the complaint alleged a willful and wanton violation of the contract which, if proved, would entitle plaintiff to punitive damages. This was error. Punitive damages are not recoverable for breach of contract except where the breach is accompanied by an intent to defraud the other party to the contract. *Wellborn v. Dixon*, 70 S. C. 108, 49 S. E. 232, 3 Ann. Cas. 407. There is no allegation of fraud in this case. Therefore punitive damages are not recoverable, notwithstanding the allegation of a willful and wanton violation of the contract by the defendant.

[13] After hearing all the evidence, his honor instructed the jury that there was no evidence upon which punitive damages could be awarded, and that a good many of the elements of damage as to which he had admitted evidence were remote and speculative and were based on the claim for punitive damages, and must fall with that claim. But there was no definite instruction given as to what claims for remote and speculative damages should be excluded further than that such damages were not recoverable, and that they were "such as prospective profits, loss of reputation," etc. As evidence of remote and speculative damages other than loss of prospective profits and loss of reputation had been admitted, and as the jury were not instructed except in a general way what damages should be included in their verdict, if they found for the plaintiff, it appears very probable that defendant was prejudiced by the course of the trial in that respect.

The rule for the correct measure of damages in cases like this has been so recently considered by this court that it is unnecessary to do more than to refer to the cases. See *Martin v. Railway*, 70 S. C. 8, 48 S. E. 616; *Standard Supply Co. v. Carter & Harris*, 81 S. C. 181, 62 S. E. 150, 19 L. R. A. (N. S.) 155; *McMeekin v. Railway*, 82 S. C. 468, 64 S. E. 413, and cases therein cited.

[14] Plaintiff's contract with defendant ex-

pired September 1, 1908, and there was no provision for a renewal thereof. After the expiration of his contract with defendant, the plaintiff made a contract with the Carolina Light & Power Company to furnish him electricity. Owing to a difference in the kind of current supplied by these companies, plaintiff found it necessary to make certain alterations in his transmission lines and in his machinery and to get some new machinery before he could use the current furnished by the Carolina Light & Power Company. He was also put to some expense to obtain rights of way to connect with the last-named company. Against the objection of the defendant, plaintiff was allowed to introduce evidence of these expenses as elements of damages recoverable on account of defendant's breach of the contract. And the court refused defendant's request to instruct the jury that plaintiff was not entitled to recover these expenses because they were not caused by defendant's breach of the contract, but arose after the expiration of the contract and grew out of defendant's refusal to renew it. It was error to admit the testimony and to refuse the request referred to, for it is clear that these elements of damage did not result from defendant's breach of the contract. As the sixth paragraph of the complaint contains the allegations of these elements of damage, and as the defendant moved to strike out that paragraph as irrelevant, and as we have held that there was no error in refusing the motion, it is proper that we should say that it does not appear from the allegations of said paragraph when said expenses were incurred, whether before or after the expiration of defendant's contract, and it was not made to appear otherwise. From the language used, it is fairly inferable that these expenses were incurred before the expiration of defendant's contract and as the result of the breach thereof. If that had been so, of course, the allegations of that paragraph would have been pertinent.

What we have said practically disposes of all the exceptions which have sufficient merit to require special attention.

Judgment reversed, and new trial granted.

WOODS, J., concurs. GARY, C. J., concurs in the result.

(21 S. C. 503)

# DEAVER-JETER CO. v. SOUTHERN RY. CO.

(Supreme Court of South Carolina. June 6, 1912.)

## 1. EVIDENCE (§ 244\*)—ADMISSIONS—RECEIPT OF GOODS BY CARRIER.

A letter written by the local agent of a railroad company in response to an inquiry as to a shipment of goods, which stated that the goods had been destroyed by fire, is competent evidence that the railroad company received

the goods; the answer to such an inquiry being within the scope of the agent's duty.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 916-936; Dec. Dig. § 244.\*]

## 2. CARRIERS (§ 159\*)—CARRIAGE OF GOODS—NOTICE OF LOSS.

A stipulation in a bill of lading that claims for loss or damages must be made within a reasonable time after delivery is valid.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 668-672, 699-703½, 711-714, 718, 718½; Dec. Dig. § 159.\*]

## 3. CARRIERS (§ 159\*)—CARRIAGE OF GOODS—NOTICE OF LOSS—WAIVER OF NOTICE.

Where it appeared that a railroad company had notice that a shipment of goods was destroyed by fire, the failure of the consignee to give notice of nondelivery, as required by the bill of lading, is no bar to an action; there being no reason for the giving of such notice.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 668-672, 699-703½, 711-714, 718, 718½; Dec. Dig. § 159.\*]

## 4. CARRIERS (§ 76\*)—LOSS OF GOODS—PERSONS WHO MAY SUE—EVIDENCE OF TITLE.

The fact that the seller of goods, destroyed while in the hands of a carrier, has agreed to indemnify the buyer for the expenses of a suit against the carrier is not sufficient to overcome positive evidence of title in the buyer, so as to show that he was not entitled to sue.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 256-271, 363; Dec. Dig. § 76.\*]

Appeal from Common Pleas Circuit Court of Union County; Ernest Gary, Judge.

Action by the Deaver-Jeter Company against the Southern Railway Company. From an order of nonsuit, plaintiff appeals. Reversed and remanded.

John K. Hamblin and Wallace & Barron, of Union, for appellant. Sanders & De Pass, of Spartanburg, for respondent.

HYDRICK, J. This is an appeal from an order of nonsuit. In August, 1908, the Fehelmer-Kelfer Company, of Cincinnati, delivered to the Louisville & Nashville Railroad Company a case of clothing for transportation and delivery to plaintiff at Carlisle, S. C. The goods never reached destination. Plaintiff made inquiry for them of defendant's agent at Carlisle, and under date of September 14, 1908, he wrote plaintiff: "I am informed by our route agent, Mr. W. C. Wall, that a case of clothing consigned to you all shipped from Cincinnati, Ohio, was destroyed by fire at Hamburg, S. C., on account of high water and an act of God." There was testimony that Hamburg is on defendant's road, and that the fire was caused by the high water of the Savannah river, during the freshet of August, 1908, getting into a car load of quicklime. In October, 1910, plaintiff filed with defendant's agent, at Carlisle, a claim for the value of the goods, and in December, 1910, this action was brought to recover the value of the goods and the statutory penalty for failing to pay the claim therefor.

The nonsuit was granted upon two

grounds: (1) Because there was no evidence that defendant ever received the goods or lost them. (2) Because the claim therefor was not filed within the time stipulated in the bill of lading.

[1] We think the letter of defendant's agent at Carlisle was competent evidence that defendant had received the goods, and that they were destroyed while in its possession. If defendant received the goods, it was its duty to deliver them to plaintiff, or inform plaintiff what had become of them. It could discharge this duty only through its agents. Therefore the agent at Carlisle was acting within the scope of his duty and authority when he undertook to find out whether defendant had received the goods, and, if so, what had become of them, and in giving plaintiff the information.

[2,3] The bill of lading contains a stipulation that "claims for loss or damage must be made in writing to the agent at point of delivery promptly after arrival of the property, and if delayed for more than thirty days after delivery of the property, or after due time for the delivery thereof, no carriers hereunder shall be liable in any event." Such a stipulation, where the time limit is reasonable, is usually sustained by the courts. 5 A. & E. Enc. L. (2d Ed.) 321; 6 Cyc. 505. The principal ground upon which such a stipulation is held to be reasonable and valid is that carriers usually handle great numbers of shipments, which are liable, for various reasons, to be lost or misplaced or injured in transporting them; and, if part of a shipment has been lost or misplaced, unreasonable delay in informing the carrier of the fact tends to defeat an effort to trace the shipment and find and deliver the part lost or misplaced. If a shipment has been damaged in transportation, unreasonable delay in notifying the carrier tends to defeat any effort to ascertain the character and extent of the damage, and therefore subjects the carrier to the greater possibility of having to pay fraudulent or exorbitant claims for damages; therefore the carrier is entitled to reasonably prompt notice of the loss or damage for its own protection; and, where a shipment has passed through the hands of a number of connecting carriers, the last carrier, who is presumptively liable for the loss of a part of it, or for the damage done to it in transportation, is entitled to be informed with reasonable promptness of the loss or damage, in order that he may trace the shipment and find out which of the connecting carriers is actually liable for the loss or damage. But, as that presumption does not arise, unless the shipment or some part of it is delivered, that reason for prompt notice of loss or damage does not apply where there is no actual delivery. The authorities generally agree that a stipulation requiring the filing of claims within a given time after

delivery does not apply in cases where there is no delivery. *Porter v. Southern Express Co.*, 4 S. C. 135, 16 Am. Rep. 762; 6 Cyc. 506; 5 A. & E. Enc. L. (2d Ed.) 384. We are not called upon to pass upon the reasonableness of the time allowed for filing the claim under the stipulation in this case, because there can be no reason for requiring the filing of the claim, if the defendant already knew of the loss, and that it occurred while the goods were in its possession. If the facts be as stated in the letter, defendant could not have been prejudiced by the failure to file the claim within the time provided in the stipulation; hence the failure should not be allowed to defeat plaintiff's action. It was held in *Kelly v. Railway Co.*, 84 S. C. 251, 66 S. E. 198, 137 Am. St. Rep. 842, that, where the carrier was informed of the damage and examined the goods with a view of ascertaining the extent of it, such a stipulation did not apply.

[4] Respondent contends that the nonsuit should be sustained, because the evidence shows that plaintiff is not the owner of the goods. This contention is based solely upon the ground that the seller of the goods agreed to save plaintiff harmless and pay all expenses incurred on account of this suit. That agreement may tend to show what the parties thought their rights were as between themselves; but it does not alter the legal rights of either as against the defendant. There was positive evidence that plaintiff was the owner of the goods.

Judgment reversed.

GARY, C. J., and WOODS, J., concur. WATTS and FRASER, JJ., concur in the result.

(91 S. C. 473)

HICKSON LUMBER CO. v. STALLINGS.  
(Supreme Court of South Carolina. June 4, 1912.)

APPEAL AND ERROR (§ 901\*)—REVIEW—FINDINGS.

Where, on appeal in an equity case, issues of fact were involved, the appellant was bound to satisfy the appellate court, by a preponderance of the evidence, that the trial judge erred.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3670; Dec. Dig. § 901.\*]

Appeal from Common Pleas Circuit Court of Darlington County; S. W. G. Shipp, Judge.  
"To be officially reported."

Action by the Hickson Lumber Company against Sylvester Stallings. From a judgment for plaintiff, defendant appeals. Affirmed.

The decree of Judge Shipp referred to in the opinion is as follows:

"This cause came on to be heard before me at March term, 1911, of the court upon the pleadings and the testimony taken and



reported by the master under former order of court in this case.

"The complaint alleges that the defendant contracted with the plaintiff to erect and equip, upon a site to be furnished by plaintiff, a first-class sawmill and dry kiln capable of cutting and drying 10,000 feet of lumber per day, and to furnish defendant with orders for same, and to pay him at a stipulated price for all lumber so cut and dried, also furnishing defendant with standing timber convenient to said mill for said purpose; alleging, further, that the defendant utterly failed to carry out his part of said contract, was dilatory and incompetent, and that after many months' delay had cut only three cars of lumber, had violated contract, also, by cutting lumber for other parties, and asks he be enjoined and restrained from cutting the timber of plaintiff, from using said site, and that on account of the failure of defendant to comply with said contract that same be declared forfeited, and asks for damages. The answer of the defendant alleges that he had been prevented by various causes from cutting the timber promptly; that he had installed such plant as was called for by the contract, and was just about ready to cut and deliver the required amount of lumber when interfered with by the plaintiff; alleging, further, that he had gone to great expense to prepare to carry out said contract, and was greatly damaged by plaintiff's interference, and asks damages therefor. There seems to be no question of law involved upon which the attorneys in the cause do not agree; and the questions of fact upon the issues raised were very fully argued before me by counsel.

"It appears from the testimony that this contract was entered into by plaintiff with the expectation that the defendant would proceed with promptness to carry out same and use alertness in completing the preparations therefor; and this is shown, also, from the use of the words 'at once' in the contract.

"The relation sustained by the plaintiff to its customers demanded that it should be promptly furnished with this lumber that defendant had contracted to supply. The testimony further shows that the defendant did not comply with contract, or meet these expectations. He offered a number of excuses and reasons for not so doing; but these were largely based upon his own want of funds and unpreparedness for the work he had undertaken to do. The only delay for which the plaintiff was responsible was for about three weeks in the early part of the year, and was not at all sufficient to account for defendant's continued procrastination; it being only temporary and fully explained in the testimony.

"The testimony of witnesses, who appeared fully competent to so testify, being expert lumbermen of this section, shows that the plant, with such delays and hindrances in-

cident to such work, could have been placed in position and running in four or five months. It appears that the defendant, for lack of means and other causes, was unprepared to carry out this contract, and has utterly failed so to do, although it was almost 12 months after contract was made before this suit was brought.

"The question of damages was not before me, being reserved in a former order in the cause, and, in view of the findings of fact herein, goes out of the case.

"It is therefore ordered and decreed that the injunction heretofore granted in this cause by Judge R. C. Watts be made perpetual; that the contract set up in the pleadings be declared abrogated and annulled; and that the plaintiff have leave to enter judgment against the defendant for the costs of this case."

E. C. Dennis and E. O. Woods, both of Darlington, for appellant. R. T. Caston, of Cheraw, and Geo. E. Dargan, of Darlington, for respondent.

GARY, C. J. The following statement appears in the case: "This case was commenced by service of summons and complaint February 7, 1907, asking for rescission and cancellation of the contract set up in complaint and for injunction, upon which an order for a temporary injunction was granted by Judge R. C. Watts. After answer served by defendant, a motion was made in his behalf before Judge Memminger to dissolve the temporary injunction, which was refused, and the injunction continued until hearing of cause on its merits. From this order, defendant served notice of appeal to the Supreme Court, and thereafter docketed the cause for trial on calendar No. 1. The plaintiff's attorneys thereupon moved before Judge Watts to transfer the cause from calendar 1 to calendar 2, and from the order of Judge Watts granting this motion defendant appealed to Supreme Court. Upon hearing on appeal, the order of Judge Watts was sustained, and the cause docketed on calendar No. 2 for trial. The defendant then moved before Judge Klugh to have issues submitted to a jury, which motion was refused, and on motion of the plaintiff it was referred to the master to take and report testimony. Upon the coming in of this testimony, the defendant again moved before Judge Shipp to submit issues to jury, which motion was refused, and the case heard by Judge Shipp on the testimony reported, as well as that offered at the hearing at Darlington, S. C., spring term, 1911. This appeal is taken from decree of Judge Shipp."

The decree of his Honor, Judge Shipp, will be set out in the report of the case.

In his decree he says: "There seems to be no question of law involved upon which the attorneys in the cause do not agree; and the questions of fact upon the issues

raised were fully argued before me by counsel." And the appellant's attorneys, in their argument, mention "the fact that the law of the case is admitted," thus showing that only issues of fact are involved.

It was incumbent on the appellant, to satisfy this court, by the preponderance of the evidence, that his honor, the presiding judge, erred in his findings of fact, which he has failed to do.

The testimony is voluminous; and it would not subserve any useful purpose to discuss it in detail.

Judgment affirmed.

WOODS, WATTS, HYDRICK, and FRASER, JJ., concur.

(138 Ga. 214)

CLOUD et al. v. TALIAFERRO COUNTY.  
(Supreme Court of Georgia. May 17, 1912.)

(Syllabus by the Court.)

ATTORNEY AND CLIENT (§ 144\*)—COMPENSATION—CONSTRUCTION OF CONTRACT.

Under the contract between the client and attorneys and the admitted facts, the court erred in making the rule absolute against the attorneys.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 332-333; Dec. Dig. § 144.\*]

Error from Superior Court, Taliaferro County; B. F. Walker, Judge.

Rule by the County of Taliaferro against Hawes Cloud and others. From a judgment making the rule absolute, defendants bring error. Reversed.

Jno. C. Hart and Samuel H. Sibley, both of Union Point, for plaintiffs in error. Wm. H. Fleming, of Augusta, for defendant in error.

EVANS, P. J. The railroad of the Georgia Railroad & Banking Company, a domestic corporation, traverses the county of Taliaferro. It claimed a charter exemption from taxation of its physical properties. The proper authorities of Taliaferro county entered into the following contract with attorneys for the collection of these taxes: "Georgia, Taliaferro County. This contract made this August 1, 1905, between the board of commissioners of roads and revenues of said county, of the first part, and Samuel H. Sibley, J. A. Beasley, and Hawes Cloud, all of said county, of the second part, witnesseth: That said parties of the first part have this day employed said parties of the second part as attorneys at law to collect for said county any and all taxes to which said county may be entitled to from the Ga. R. R. and Banking Co., or the lessees of said railroad as back taxes, or in any way due said county, and agree to pay said parties of the second part 20% of the amount collected on the general claim for taxes, and

25% of the amount collected in proceedings especially against the Washington Branch of said railroad; said attorneys to have no claim for said fees except on the amount which they may collect, being hereby authorized to proceed in such way as may seem best to them." The attorneys collected the taxes, principal and interest, for the years 1896 to 1909, inclusive, and claimed commissions on the entire sum collected. The county denied the right of the attorneys to reserve commissions for taxes to become due subsequently to the date of the contract. A rule was brought against the attorneys, and, under the stipulation of facts between the parties, it was made absolute. The attorneys bring error.

The divergent contentions of the parties result from the construction given to the contract, wherein the county authorities employed attorneys to collect certain taxes from the railroad company. The county's contention is that the attorneys were employed to collect only the taxes which were due at the time of the execution of the contract. The attorneys contend that their employment extended to the establishment of the railroad company's liability to taxation; and the collection of all taxes anterior to the time that liability was legally established. The county authorities lay great stress on a literal interpretation of the contract, which they insist is plain and unambiguous that the only taxes the attorneys were engaged to collect were "back taxes," or taxes "in any way due said county" at the time of the contract, and insist that there is no language in the contract which would include taxes which would become "back taxes" at a future date. On the contrary, the attorneys insist that the language of the contract is to be interpreted in the light of its subject-matter and circumstances; that at the time the contract was made the railroad company, which for many years had operated a railroad through the county, had never paid any tax on its physical property within the county, claiming a charter exemption; and that the intention of the parties was to establish the taxability of the property and collect the taxes up to that time for the stipulated commission. "Courts, in the construction of contracts," say the Supreme Court of the United States, "look to the language employed, the subject-matter, and the surrounding circumstances; and may avail themselves of the same light which the parties enjoyed when the contract was executed. They are accordingly entitled to place themselves in the same situation as the parties who made the contract, in order that they may view the circumstances as those parties viewed them, and so judge of the meaning of the words and of the correct application of the language to the things described." Nash v. Towne, 5 Wall. 689, 18 L. Ed. 527.

It appears from the facts admitted in the stipulation of the parties that the main line, and a branch line, known as the Washington Branch, of the Georgia Railroad & Banking Company, a domestic corporation, traversed the county of Taliaferro. The railroad company, from its organization, had never paid to the county of Taliaferro any tax on its physical properties, when, in 1903, the comptroller general issued a tax execution for taxes claimed to be due the various counties for that year. On January 7, 1904, the railroad company filed its bill in equity in the Circuit Court of the United States for the Northern District of Georgia to enjoin the collection of the taxes demanded for the year 1903, on the ground that all of its property was exempted by its charter from taxation, except one-half of 1 per cent. on the net proceeds of the investment, which tax had already been paid. While this suit was pending, the county of Taliaferro, through its proper authorities, entered into the contract set out in the statement of facts. In pursuance of their contract, the attorneys, on March 16, 1906, intervened in the name of Taliaferro county, and set up the claim of that county to taxes on the main line and also on the Washington Branch. In the pleadings hitherto filed, no specific differentiation as to the liability to taxation of the main line and the Washington Branch was made. The comptroller general filed a demurrer and answer to the railroad company's bill, and the demurrer was overruled. A writ of error was sued out to the Supreme Court of the United States; and that court, on February 21, 1910, affirmed generally the decree of the Circuit Court, holding the railroad property exempt from taxation, but reversed it as to the Washington Branch, which was decreed to be subject to taxation. Immediately after the decision, counsel for the county caused executions to be issued for the years 1896 to 1909, inclusive. The railroad company and counsel for the county agreed upon a settlement, pursuant to which the railroad company paid over to counsel for the county the sum of \$14,751.42. Of this sum, the principal and interest for the years prior to 1905 amounted to \$7,615.41, and for subsequent years the principal and interest amounted to \$7,136.01. Upon receiving the sum of \$14,751.42, the attorneys deducted 25 per cent., and offered to pay the county the balance. The county authorities, contending that under the contract the attorneys were not entitled to retain any commission on the amount collected for 1905 and subsequent years, declined to accept the amount, and instituted a rule to require the attorneys to pay over the amount which was claimed by them to be due to the county. Pending the rule, the attorneys paid over to the county the amount collected, less 25 per cent., un-

der a stipulation that the payment was not to affect the legal rights of the parties.

It will be seen that at the time of the employment of the attorneys the railroad company disputed all liability for taxes. The laws for the summary enforcement of tax levies are so explicit that counties do not usually employ attorneys to collect their revenue from taxes. Railroad taxes are collected by the comptroller general; and the employment of special counsel indicates that the county authorities were concerned, not so much with the collection of tax for any particular year, as to establish the county's right to annually lay a tax upon the physical property of the railroad company. The railroad company was not disputing with the county the sufficiency or propriety of the collecting machinery, or the amount of the tax, or the legality of its levy; it was setting up exemption from taxation. Hence the principal object of any litigation to be instituted by the attorneys, as a means to the collection of a tax, was to establish the right of the county to exact the tax. The pending litigation between the railroad company and the comptroller general involved only the taxes for one year, and the county authorities were contracting in aid of the comptroller's effort in this direction. The comptroller general issued a *f. fa.* for only one year, when he could have issued and simultaneously pressed the taxes for other years. These circumstances are persuasive that the subject-matter of the contract comprehended primarily the establishment of the taxability of the physical property. When that was established, it followed as a matter of course that unpaid taxes were to be regarded as back taxes to be collected by the attorneys under the contract. After it was settled that the railroad property was taxable, subsequent taxes would be assessed and paid by the railroad company in the ordinary and usual course; or, if the company was delinquent, then payment would be enforced by the usual summary process.

But concede that another construction might be put upon the contract; that it was ambiguous. The attorneys acted on their construction of it. They were vigilant and energetic to obtain a decree assuring to their client an annual revenue from taxes to be laid on the railroad's property. They were successful as to the Washington Branch. So soon as the ultimate decision was announced by the Supreme Court, they were prompt to secure to their client the full fruits of their victory. They immediately caused *f. fas.* to be issued. Unless *f. fas.* were issued, the taxes would not draw interest. *Georgia R. R. Co. v. Wright*, 125 Ga. 589, 54 S. E. 52; *McWilliams v. Jacobs*, 128 Ga. 375, 57 S. E. 509. The settlement with the railroad company was made by the attorneys, and the interest actually collected ex-

ceeded the commissions of the attorneys, which are in dispute. The county, by bringing the rule against the attorneys, recognized that the money in controversy came into the attorneys' hands by virtue of the relation of attorney and client between it and the attorneys. It is true that after the decision of the Supreme Court, the chairman of the board of commissioners of roads and revenues of Taliaferro county directed the representative of the railroad company to make check for the total amount, payable to the county treasurer; but that this direction was ignored, and the money was paid over directly to the attorneys. But the fact is patent that the money in controversy represents the taxes, principal and interest, collected by the attorneys under their contract; and the county is contending that, although the whole was collected, they are not entitled to any compensation for collecting that part of the sum representing the taxes, principal and interest, for the years 1905 to 1909, inclusive. The county should not be permitted to accept the fruits of the attorneys' efforts, should not be permitted to demand money collected by their attorneys, thus ratifying their authority to collect, and at the same time deny the attorneys' authority to collect a portion of what was collected. When the county authorities demanded the money of the attorneys, they knew their construction of the contract; they knew that the attorneys claimed to have collected this money pursuant to their contract with the county; and, with this knowledge, they contend that the county may accept the benefits of the attorneys' labor and diligence under the contract, without the burden which the contract imposes. It is contrary to all legal principle that a client may accept the benefits of the acts of his attorney, and at the same time repudiate the authority of the acts which secured them. We think that the attorneys were entitled to their commissions on the full amount collected.

Judgment reversed. All the Justices concur.

(138 Ga. 154)

**CHARLESTON & W. C. RY. CO. v. BURCKHALTER.**

(Supreme Court of Georgia. May 15, 1912.)

(Syllabus by the Court.)

**1. DEMURRER TO COMPLAINT—GROUNDS.**

The declaration in this case was demurred to on numerous grounds, both general and special. It was amended in several particulars. The demurrers were again renewed, and a number of additional grounds of demurrer were added. The demurrers were overruled. *Held*, that there was no error in overruling the demurrers on the grounds therein set out, except as hereafter stated.

**2. PLEADING (§ 210\*)—DEMURRER—SPEAKING DEMURRER.**

A number of the grounds of demurrer were speaking in character and dependent on

facts not appearing on the face of the petition. There is nothing in the petition to show that the cars which were being coupled were engaged in interstate commerce, or whether they were or were not equipped with safety appliances for coupling, as required by the act of Congress as to cars falling within its purview; and the grounds of demurrer, which assumed that such were the facts, and sought to set up the contention that the plaintiff's intestate was himself negligent in view of the requirements of that act, were speaking in character.

[Ed. Note.—For other cases, see Pleading, Dec. Dig. § 210.\*]

**3. MASTER AND SERVANT (§ 258\*)—INJURIES TO SERVANT—ACTIONS—PETITION.**

Paragraph 18 of the petition alleges as follows: "That said defendant company was negligent in starting said train while the said [employé] was engaged in the act of uncoupling said cars, or in starting said train, while the said [employé] was in the act of coming from between the said cars after uncoupling the same, thereby crushing him so severely" that he died from the effects thereof. One ground of special demurrer attacked this paragraph for the reason, among others, that "plaintiff fails to allege \* \* \* why the engineer was negligent in starting the said train, and how he knew that said [employé] was between the said cars on the occasion in question. Defendant moves to strike said paragraph 18 from said petition, because it fails to specify any act of negligence upon which plaintiff could recover." *Held*, that paragraph 18 was subject to this ground of special demurrer, in that it failed to show that the engineer knew that this co-employé was engaged in coupling, or was between, the cars, or that he was put upon notice of such fact, or why it was negligent for him to start the train at that time.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 816-836; Dec. Dig. § 258.\*]

**4. MASTER AND SERVANT (§ 258\*)—INJURIES TO SERVANT—ACTIONS—PETITION.**

In another paragraph of the petition, it was alleged: "That on the date aforesaid the said [employé], in the performance of his duty, undertook to go between two box cars on said train, for the purpose of uncoupling them. That about 20 feet from the point where the said Burckhalter was engaged in the performance of the duty herein above described the track curves towards the river, and the engineer and the switchman on said train were on the south side of said train. That while the said [employé] was engaged in this work between the said two box cars, the engineer of said defendant negligently started said train in motion, without first having received any signal whatsoever from the said [employé], with the result that said [employé] was crushed," etc. While this paragraph was demurred to, no special demurrer was urged, on the ground that it failed to show why it was negligent for the engineer to start the train without a signal, or why it was his duty to await a signal before starting. The petition therefore was not subject to be stricken on general demurrer. *Seaboard Air Line Railway v. Pierce*, 120 Ga. 230, 47 S. E. 581.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 816-836; Dec. Dig. § 258.\*]

**5. MODIFICATION OF JUDGMENT ON APPEAL—DIRECTIONS—COSTS.**

Under the facts set out in the foregoing headnotes, direction is given that the grounds of special demurrer to the eighteenth paragraph of the petition be sustained, and this paragraph be stricken from the petition, and otherwise that the judgment overruling the de-

murrers be affirmed. The plaintiff in error, having obtained a material modification of the judgment to which exception is taken, is entitled to the costs of bringing the case to this court.

Error from Superior Court, Richmond County; H. C. Hammond, Judge.

Action by J. E. Burckhalter against the Charleston & Western Carolina Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed, with directions.

W. K. Miller, of Augusta, for plaintiff in error. C. Henry and R. S. Cohen, both of Augusta, for defendant in error.

HILL, J. Judgment affirmed, with directions. All the Justices concur.

(128 Ga. 145)

**CENTRAL OF GEORGIA RY. CO. v. NEWMAN.**

(Supreme Court of Georgia. May 16, 1912.)

(Syllabus by the Court.)

**1. APPEAL AND ERROR (§ 1066\*)—HARMLESS ERROR—INSTRUCTIONS—STATING CONTENTIONS OF PARTIES.**

A widow brought suit against a railway company, seeking to recover damages on account of the homicide of her husband, and setting out the manner in which it was alleged that he was killed by the train of the defendant. Upon the trial counsel for the defendant announced in open court that the defendant admitted liability for the homicide, that the only question which would be submitted to the jury was the amount for which the defendant was liable, and it was agreed that the plaintiff did not seek to recover punitive damages. In his charge the presiding judge stated in substance what the plaintiff alleged in her petition, informed the jury that the defendant admitted liability, but denied that the plaintiff was entitled to recover the amount which she claimed, and instructed them that their investigation would be only as to that question. Held that, while he might have more briefly stated the nature of the case, it was not error requiring a new trial that he stated in substance what the plaintiff alleged.

(a) The contention that this mode of informing the jury of the nature of the case was calculated to prejudice them, and to affect the amount of the damages allowed, is not sound, in view of the fact that the judge stated the allegations of the plaintiff only as such.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4220; Dec. Dig. § 1066.\*]

**2. DEATH (§ 104\*)—TRIAL (§ 255\*)—ACTIONS FOR CAUSING DEATH—INSTRUCTIONS—REQUESTS.**

Where, in a suit by a widow against a railway company for the homicide of her husband, liability was admitted, and the only question for submission to the jury was the measure of damages, it was not error to charge, in the language of Civil Code 1910, § 4425, that she was entitled to recover the full value of his life, "and that the full value of the life of the deceased, as shown by the evidence, is the full value of the life of the deceased, without deduction for necessary or other personal expenses of the deceased, had he lived."

(a) Such a charge was not erroneous because there was certain evidence as to farming operations, in addition to a salary received by him, and because the court, in the absence of any request therefor, did not charge that from the

gross production of his farm or other industries should be deducted the actual expenses of the operation thereof, or of such production, except his own personal or other necessary expenses. If such a charge had been desired, it should have been requested.

[Ed. Note.—For other cases, see Death, Cent. Dig. §§ 142-148; Dec. Dig. § 104;\* Trial, Cent. Dig. §§ 627-641; Dec. Dig. § 255.\*]

**3. SUFFICIENCY OF EVIDENCE—NO ERROR.**

The evidence was sufficient to authorize the verdict, and there was no error in overruling the motion for a new trial.

Error from Superior Court, Meriwether County; R. W. Freeman, Judge.

Action by J. D. Newman against the Central of Georgia Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Charlton E. Battle and Howell Hollis, both of Columbus, and McLaughlin, Jones & Jones, of Greenville, for plaintiff in error. W. L. Tuggle, of La Grange, and H. A. Hall, of Newnan, for defendant in error.

LUMPKIN, J. Judgment affirmed. All the Justices concur, except HILL, J., disqualified.

(128 Ga. 128)

**WILLIMAN v. WILLIMAN.**

(Supreme Court of Georgia. May 16, 1912.)

(Syllabus by the Court.)

**HABEAS CORPUS (§ 99\*)—CUSTODY OF CHILD.**

In a contest between a father and mother over the custody of their only child, a boy 4½ years old, where it appears that the mother voluntarily separated herself from her husband whose conduct towards her was kind and considerate, and where the evidence is uncontradicted that the father is a man of high character and financially able and willing to care for and educate the child, and is a proper and fit person to raise him, and the evidence preponderates that it will be to the best interest of the child that he be intrusted with the father, it is an abuse of discretion to refuse to award the custody of the child to the father.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. § 84; Dec. Dig. § 99.\*]

Error from Superior Court, Fulton County; Geo. L. Bell, Judge.

Habeas corpus by Jacob Williman against E. B. Williman. Judgment for defendant, and petitioner brings error. Reversed.

Geo. P. Whitman and Anderson, Felder, Rountree & Wilson, all of Atlanta, for plaintiff in error. J. McSwain Woods and R. H. Kimball, both of Atlanta, for defendant in error.

EVANS, P. J. A writ of habeas corpus was sued out by Jacob Williman to recover from his wife the possession of their only child, a boy 4½ years old. On the hearing it appeared from the evidence that plaintiff and defendant married in November, 1904, and lived together until November 4, 1910,

but for two years prior they had occupied separate sleeping rooms in the same house. On that day the wife left her husband to visit an aunt at Grahamville, S. C., but, without returning home, she went to Los Angeles, Cal., where she was located by her husband. He found her living in a small cottage on the outskirts of the city with a man named Taylor. Taylor and his wife had previously lived in the same house with the plaintiff and his wife, but Taylor had separated from his wife, who was suing him for a divorce, and he had left a position in Jacksonville, Fla., and accompanied the defendant to California. Here Taylor secured a position, living in the same house with the defendant. In January, 1911, the plaintiff went to Los Angeles, found his wife and Taylor there, and brought his wife and child back to his home. She remained there several weeks, then she left her husband for Atlanta, stating to him upon leaving that she expected to live with her aunt at Kirkwood, near Atlanta, and that she never intended to live with him again. The plaintiff sent his wife \$60 per month regularly for the support of herself and child. Taylor immediately gave up his position in California and came to Atlanta, where he frequently saw the defendant. The plaintiff is a member of one of the most highly respected families of Charleston, is himself a man of high character, making a good salary, and amply able to care for and educate the child.

The defendant testified: That she never loved the plaintiff, but married him to get a home; that she left this state and went to California for the purpose of getting a divorce from him; that the plaintiff had never been cruel to her, and had always provided for her in every way, and treated her in a kindly manner; that when she determined to leave she called on Taylor to assist her in making the trip, and he loaned her the money to go, and accompanied her from St. Louis, at which place he joined her, and they lived in the same house in Los Angeles until her husband came for her; that she then moved to Kirkwood and was living with her aunt, from which place she moved to Atlanta, because the child was under the treatment of a physician; and that her brother came into Atlanta to live with her. The defendant's aunt testified that she had invited the defendant to live with her, but that she had no source of income; and her brother, who was making \$10 per week, testified that he was willing to render her what financial aid he was able. The defendant owned some property in South Carolina, the extent and character of which was not disclosed. The court awarded the custody of the child to the mother.

Under the law of this state the father is the natural guardian of his minor child, and

the right to the custody of the child is primarily in the father. Civil Code, §§ 3020, 3021; *Miller v. Wallace*, 76 Ga. 479, 2 Am. Rep. 48. In that case the rule is thus stated: "Prima facie the right of custody of an infant is in the father; and where this is resisted upon the ground of his unfitness for the trust, or other cause, a proper regard for the sanctity of the parental relation will require that the objection be sustained by clear and satisfactory proofs, and a clear and strong case must be made to sustain an objection to the father's right." The right of the father is paramount, and should not be disregarded except for the best interest and welfare of the child. *Sloan v. Jones*, 130 Ga. 836, 62 S. E. 21. Under the evidence in this case, we think the father was entitled to the custody of the child, and that the court's refusal to so award was an abuse of discretion.

Judgment reversed. All the Justices concur.

(138 Ga. 172)

**BAIRD v. WOOD & HOBBS et al.**

(Supreme Court of Georgia. May 15, 1912.)

(Syllabus by the Court.)

**INTERLOCUTORY INJUNCTION.**

Under the evidence, there was no abuse of discretion in refusing an interlocutory injunction.

Error from Superior Court, Ware County; T. A. Parker, Judge.

Action by John C. Baird against Wood & Hobbs and others. From an order denying an interlocutory injunction, complainant brings error. Affirmed.

J. L. Sweat, of Waycross, for plaintiff in error. H. W. Wilson, of Waycross, for defendants in error.

LUMPKIN, J. Judgment affirmed. All the Justices concur.

(138 Ga. 159)

**SOUTHERN RY. CO. v. GREASON.**

(Supreme Court of Georgia. May 15, 1912.)

(Syllabus by the Court.)

**RAILROAD ACCIDENT—EVIDENCE—VERDICT.**

No errors of law are complained of. The evidence is sufficient to support the verdict.

Error from Superior Court, Gwinnett County; O. H. Brand, Judge.

Action by T. G. Greason against the Southern Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

E. O. Dobbs, of Buford, F. M. Byrd and J. J. & Roy M. Strickland, all of Athens, for plaintiff in error. N. L. Hutchins, of Lawrenceville, for defendant in error.

BECK, J. Judgment affirmed. All the Justices concur.

(138 Ga. 164)

**WEST v. SHACKELFORD.**

(Supreme Court of Georgia. May 15, 1912.)

*(Syllabus by the Court.)***INTERLOCUTORY INJUNCTION.**

Under the pleadings and evidence, the judge did not abuse his discretion in refusing to grant an interlocutory injunction.

Error from Superior Court, Clarke County; C. H. Brand, Judge.

Action by H. S. West against T. J. Shackelford. Judgment for defendant, and plaintiff brings error. Affirmed.

J. J. & Roy M. Strickland, of Athens, for plaintiff in error. J. A. B. Mahaffey, of Jefferson, and Cobb & Erwin, of Athens, for defendant in error.

ATKINSON, J. Judgment affirmed. All the Justices concur.

(138 Ga. 163)

**WEST v. SHACKELFORD.**

(Supreme Court of Georgia. May 15, 1912.)

*(Syllabus by the Court.)***1. APPEAL AND ERROR (§ 477\*)—SUPERSEDEAS—REFUSAL OF INJUNCTION.**

When a judgment refusing an interlocutory injunction is brought to the Supreme Court for review, the trial judge is authorized to grant a supersedeas upon such terms as may by him be deemed necessary to preserve the rights of the parties until the judgment of the Supreme Court can be had. Civil Code 1910, § 5502; Stokes v. Stokes, 126 Ga. 804 (2), 55 S. E. 1023. It is left, however, in the sound legal discretion of the judge to grant or refuse it. See Savannah, Florida & Western Ry. Co. v. Postal Telegraph Cable Co., 113 Ga. 916, 39 S. E. 399.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2247-2249; Dec. Dig. § 477.\*]

**2. DISCRETION OF COURT—SUPERSEDEAS.**

The judge did not abuse his discretion in refusing to grant a supersedeas in this case.

Error from Superior Court, Clarke County; C. H. Brand, Judge.

Action by H. S. West against T. J. Shackelford. Judgment for defendant, and plaintiff brings error. Affirmed.

John J. & Roy M. Strickland, of Athens, for plaintiff in error. J. A. B. Mahaffey, of Jefferson, and Cobb & Erwin, of Athens, for defendant in error.

ATKINSON, J. Judgment affirmed. All the Justices concur.

(138 Ga. 159)

**SHACKELFORD v. WEST.**

(Supreme Court of Georgia. May 15, 1912.)

*(Syllabus by the Court.)***1. OFFICERS (§ 54\*)—APPOINTMENT—TERM OF OFFICE.**

Where the General Assembly creates an office, and provides that the officer shall be

appointed by the Governor, by and with the advice of the Senate, who shall hold his office for the term of four years, under the provisions of Civil Code, § 281, the office does not expire at the expiration of such term, but the appointee holds over until his successor is commissioned and qualified.

[Ed. Note.—For other cases, see Officers, Cent. Dig. §§ 74, 75; Dec. Dig. § 54.\*]

**2. JUDGES (§ 8\*)—EXPIRATION OF TERM—APPOINTMENT BY GOVERNOR.**

Where, in creating an office, the General Assembly provides that the officer shall be appointed by the Governor, by and with the advice and consent of the Senate, a person does not become the successor of another in office by mere executive appointment. If the term of the incumbent in office has expired, but he still continues to discharge his duties, there is no such vacancy in the office as will authorize the Governor to fill it by the appointment of a successor without the consent of the Senate.

[Ed. Note.—For other cases, see Judges, Cent. Dig. §§ 30-39; Dec. Dig. § 8.\*]

Error from Superior Court, Clarke County; C. H. Brand, Judge.

Quo warranto by T. J. Shackelford against H. S. West. Judgment for defendant, and plaintiff brings error. Affirmed.

J. A. B. Mahaffey, of Jefferson, and Cobb & Erwin, of Athens, for plaintiff in error. Jno. J. & Roy M. Strickland, of Athens, for defendant in error.

EVANS, P. J. The judgment under review involves the title to the office of judge of the city court of Athens. The city court of Clarke county was created in 1879 (Acts 1878-79, p. 291), and its name changed to the city court of Athens by the act of 1894 (Acts 1894, p. 212). In the act creating the city court (Acts 1879, p. 291) it is provided that "there shall be a judge of said city court, who shall be appointed by the Governor, by and with the advice of the Senate, who shall hold his office for the term of four years, and all vacancies in the office of judge shall be filled by appointment by the Governor for the balance of the unexpired term; but should a vacancy occur when the Senate shall not be in session, the Governor shall appoint to fill said vacancy and submit said appointment to the Senate when it shall next thereafter convene." Hon. Henry S. West was appointed by the Governor, and his appointment confirmed by the Senate, for the term expiring September 12, 1911. Upon the confirmation of the Governor's appointment by the Senate, Judge West took the oath of office, was duly commissioned, and entered upon the discharge of his duties. On August 16, 1911, his excellency, Governor Smith, nominated, and in his order asked the Senate's confirmation of the appointment of. Hon. Thomas J. Shackelford as judge of the city court of Athens. On August 19, 1911, Governor Smith passed an executive order reciting that the Senate had failed to act on this appointment, and again appointed Mr.

Shackelford as judge of the city court of Athens for a term of four years from September 12, 1911; the appointment being made subject to confirmation by the Senate at the next session of the General Assembly. The Senate failed to act upon the nomination of Mr. Shackelford, and upon its adjournment the communication from the Governor to the Senate, advising that body of this nomination, as well as others, was returned to the Governor's secretary by the secretary of the Senate. On September 18, 1911, the Governor passed an order reciting that "a vacancy exists in the office of judge of the city court of Athens, occasioned by the expiration of the term of H. S. West, whose term of office expired on September 12, 1911; and whereas, on August 16, 1911, the Governor sent to the Senate the nomination of Hon. Thos. J. Shackelford as judge of the city court of Athens, and the Senate failed to act upon said nomination," and appointing Mr. Shackelford as judge of the city court of Athens "for a term of four years from September 12, 1911, subject to confirmation by the Senate, this appointment being made to fill the vacancy now existing." At the date of this order the Senate had adjourned. Mr. Shackelford took the prescribed oath of office, and a commission was issued to him. Judge West disputed the legality of Mr. Shackelford's appointment, and declined to relinquish the office to him. Whereupon Mr. Shackelford asked leave to file a petition in the nature of quo warranto. Leave was granted, and upon considering the pleadings and the admitted facts the court rendered judgment refusing the prayers of the applicant, holding that he was not entitled to hold the office of judge of the city court of Athens, and that the incumbent, Judge West, is entitled to discharge the duties of the office until a successor is legally appointed and qualified.

[1] 1. The act creating the city court of Athens fixes the tenure of office of the judge at four years; but this does not mean that an incumbent, for whom no successor has been appointed or qualified, cannot perform the duties of the office after the expiration of the four years. The general law provides that "all officers of this state must discharge the duties of their office until their successors are commissioned and qualified." Civil Code 1910, § 261. The policy of provisions of this nature is that it is the wiser and better course to permit the incumbent to hold over until a successor is appointed or elected and commissioned in the prescribed legal manner, rather than to have no one authorized to discharge the functions of the office. Where the Legislature creates an office, and provides for the appointment of an officer to fill it for a given number of years, the incumbent will hold over beyond the fixed term, until his successor is commissioned and qualified. *Walker v. Ferrill*, 58 Ga. 512. The term of the city court judge is

fixed at four years certain, with a contingent extension. When this contingency happens, this extension is just as much a part of the term as the antecedent fixed term. *People v. Whitman*, 10 Cal. 38. Judge West, therefore, is entitled to discharge the duties of the office of judge of the city court of Athens until a successor has been appointed and commissioned according to law.

[2] 2. We now approach a discussion of the power of the Governor to make the appointment of Mr. Shackelford under the circumstances appearing in the record. It is clear that the Governor had no power to appoint a judge of the city court of Athens, without the advice and consent of the Senate, except in the case of a vacancy in the office. The Constitution declares that, "when any office shall become vacant by death, resignation or otherwise, the Governor shall have power to fill such vacancy, unless otherwise provided by law." Civil Code, § 6483. The statute declares that all offices are vacated (1) by death of the incumbent; (2) resignation when accepted; (3) judgment declaring the office vacant; (4) incapacity to serve; (5) removal from the jurisdiction of the office; (6) failure to apply for commission or to give bond within the prescribed time; and (7) abandonment of the office. Civil Code, § 264. These instances may not be exhaustive of conditions which create a vacancy, but their enumeration is strongly suggestive of the legislative conception of the nature of the circumstances which would have the effect of creating a vacancy in the office. It is characteristic of each of the specified instances that there is no incumbent of the office capable of exercising its functions and discharging its duties. "The office is not vacant so long as it is supplied, in the manner provided by the Constitution or law, with an incumbent who is legally qualified to exercise the powers and perform the duties which pertain to it; and, conversely, it is vacant in the eye of the law whenever it is unoccupied by a legally qualified incumbent who has a lawful right to continue therein until the happening of some future event." *State v. Harrison*, 113 Ind. 234, 16 N. E. 384, 3 Am. St. Rep. 663. When there is no one to fill the office, a vacancy exists. *Gormley v. Taylor*, 44 Ga. 76. There is a patent difference between a vacancy in an office and the expiration of the term of the incumbent, whose tenure is for a definite term and until his successor shall qualify. In the latter case it is the duty of the incumbent to continue in the discharge of his office until a successor is qualified; the superadded period being a part of the rightful term of office. He has the right to continue in office until the qualification of his successor, who has been appointed or elected in the manner designated by the law. From the very nature of things there cannot be a vacancy in an office so long as there is an



officer authorized by law to perform its functions; and as Judge West's successor can only be appointed by the Governor, with the advice and consent of the Senate, it follows that his term of office will continue, so long as he is capable of performing and actually performs his duties, until the qualification of a successor appointed by the Governor with the advice of the Senate.

The question is not a new one. It has been before the courts of last resort in most of the states; and the holdings have been almost uniform to the effect that, if an office filled by appointment of the Governor requires the confirmation of the Senate, a vacancy therein such as will authorize the Governor to fill it without the concurrence of the Senate can be caused only by the death or resignation of the incumbent, or some other event by reason of which the duties of the office are no longer discharged, and that the mere expiration of the term of the incumbent does not create a vacancy. *Mechem on Public Officers*, § 128, and authorities cited; *Ash v. McVey*, 85 Md. 119, 36 Atl. 440; *State v. Shaw*, 32 La. Ann. 934; *People v. Bissell*, 49 Cal. 407; *Kimberlin v. State*, 130 Ind. 120, 29 N. E. 773, 14 L. R. A. 858, 30 Am. St. Rep. 208; *Brady v. Howe*, 50 Miss. 607; *People v. Henderson*, 4 Wyo. 535, 35 Pac. 517, 22 L. R. A. 751; *State v. Howe*, 25 Ohio St. 588, 18 Am. Rep. 321; *State v. Compson*, 34 Or. 25, 54 Pac. 849; *Chaddock v. Burke*, 103 Va. 694, 49 S. E. 976; *Holtan v. Beck*, 20 N. D. 5, 125 N. W. 1048.

Judgment affirmed. All the Justices concur.

(133 Ga. 150)

RUIS v. BRANCH, Sheriff, et al.  
(Supreme Court of Georgia. May 15, 1912.)

(Syllabus by the Court.)

CONTRACTS (§ 130\*)—EXECUTION (§ 317\*)—  
SALE — CHILLING BIDDING — CANCELING  
DEED.

A combination between a defendant in execution and a prospective bidder to suppress the usual competition at a sheriff's sale is illegal from considerations of public policy; but equity will not cancel the sheriff's deed made in pursuance of the sale, at the instance of the defendant, on the ground that bidders were deterred from bidding as a result of the agreement between him and the purchaser.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 654-658; Dec. Dig. § 130;\* *Execution*, Cent. Dig. § 934; Dec. Dig. § 317.\*]

Error from Superior Court, Appling County; C. B. Conyers, Judge.

Action by Jack Ruis against W. J. Branch, Sheriff, and others. From a judgment dismissing the petition on demurrer, plaintiff brings error. Affirmed.

Wade H. Watson and V. E. Padgett, both of Baxley, for plaintiff in error. Levi O'Steen and Lankford & Dickerson, all of Douglas, for defendants in error.

EVANS, P. J. The action is by Jack Ruis against W. J. Branch, sheriff, Lott & Peterson, and Wash and E. D. Douglas, to cancel a sheriff's deed, and for other relief. The petition, after amendment, was dismissed on demurrer. In the original petition it was alleged as follows: Martha J. Taylor obtained against the plaintiff a judgment for \$500. She held, as security for the note which was the basis of the judgment, a deed to his land. He also owed Lott & Peterson \$375, which was secured by a second mortgage on the land and a mortgage on a mule. Execution issued on the Taylor judgment, and it was duly levied on the land described in the security deed, and the land was advertised for sale. On the day of sale the attorney of Martha J. Taylor informed the plaintiff that he had seen Lott & Peterson, and that they had instructed him to bid off the property, and they would execute to plaintiff their bond to reconvey to him the land upon the payment of their mortgage and the Taylor judgment within 12 months. Thereupon the plaintiff and the attorney informed the sheriff of this arrangement, and also informed other bidders, who were deterred from bidding on the land, for the reason that they did not care to interfere with the plaintiff in redeeming his property. The sheriff was requested not to run the property any more than was absolutely necessary. In accordance with their agreement the land was bid off by the attorney, and a deed was executed by the sheriff to Lott & Peterson. After the sale the plaintiff applied to Lott & Peterson to perform their agreement by executing to him their bond to reconvey, when they denied that they authorized the attorney to make any agreement, and refused to negotiate with him, and conveyed the land to E. D. and Wash Douglas. It was alleged that the property was worth \$1,250, and would have brought approximately this sum, but for the announcement of the above-mentioned agreement respecting its sale. About two years after the filing of the petition it was amended by alleging that on the day of the sale the plaintiff informed the attorney that he had arranged with the judgment creditor, Taylor, that if he could raise \$150 or \$200 the sale would be postponed; and that he had about perfected a sale of the timber, which would yield this sum, whereupon the attorney said that he had seen Lott & Peterson, and they had agreed to buy the land on the terms stated in his original petition; that when the sheriff offered the land for sale the attorney publicly announced that whoever might bid off the property would have to pay, in addition to his bid, the amount of the Lott & Peterson mortgage; that the sheriff did not sell the land in the usual manner, did not read the advertisement or cry aloud the land, but sep-

ped to the front of the courthouse door and announced that he would sell the Ruis property, addressing his remarks to the attorney and to the plaintiff; that the attorney bid on the property \$610, the judgment creditor bid \$615, and the attorney bid \$620, when the property was knocked off to him without requesting other bids; that E. D. and Wash Douglas had notice of all these facts when they purchased the land from Lott & Peterson; that since the filing of the petition all the defendants, except the sheriff, have been in possession of the land, and they have removed timber therefrom of the value of \$300, have received rents of the value of \$600, and appropriated to their use fertilizers in the stables belonging to the plaintiff, of the value of \$30, and that these sums aggregate \$930, which is \$310 in excess of the purchase price of the land at sheriff's sale. He prayed for cancellation of the sheriff's deed and the deed from Lott & Peterson to E. D. and Wash Douglas, for an accounting, for judgment for the excess over what the land brought at sheriff's sale, and for general relief. He offered, should the amount of the rents, issues, and profits be insufficient to repay the purchasers the amount of their bid, to account for the difference.

The petition is projected on the theory that the sheriff's sale was void, and it is prayed that the sheriff's deed to the purchasers and the deed to their vendees with notice be canceled. The plaintiff is not seeking specific performance of any agreement between himself and the purchasers. What he demands is the cancellation of the deeds, on the ground that the effect of his arrangement with the attorney who bid for the purchasers, and the attorney's statement (while the sale was in progress) that prospective buyers would take title subject to a second mortgage on the property, was to chill the bidding and allow the purchasers to obtain the land at an undervalue. The plaintiff's proposition, stated differently, is that he and the purchasers conspired to deter bidding at the sale in order that the land might bring less than its value, and when this was accomplished the purchasers refused to consummate the arrangement which induced him to enter into the conspiracy to depress the sale, and that this refusal on the part of the purchasers justifies a rescission of the sale.

It may be declared to be the settled policy of the law that sheriffs' sales shall be fairly conducted, and in such manner that the property to be sold shall not be needlessly sacrificed. Whenever it is made to appear that a sale under process is infected with fraud, irregularity, or error to the injury of either party the sale will be set aside. Civil Code, § 6032. A combination to suppress the usual competition at a sheriff's sale is illegal from considerations of

public policy. *Jones v. Caswell*, 3 Johns. Cas. (N. Y.) 29, 2 Am. Dec. 134. This is unquestionably the general rule. But the principle that a party to a fraudulent agreement cannot maintain a suit founded upon the refusal of the other party to the fraud to carry such agreement into effect is applicable alike to sales under execution as to privately executed sales. In conducting a sale under execution the sheriff acts as the agent of the defendant in execution appointed by the law. *Dozier v. McWhorter*, 113 Ga. 587, 39 S. E. 106. The sale of the defendant's property at less than its market value was caused by his own act. He participated in the acts of the agent of the purchaser which depressed the sale of his land. It was his own conduct which depreciated the price of his property. Prospective purchasers yielded to the appeal made in his behalf, and in his presence, that they refrain from bidding on his land. "Deterring bidders at a sheriff's sale for the benefit of the defendant and with his consent would not vitiate the sale as between him and the purchaser." *O'Kelley v. Gholston*, 89 Ga. 1, 15 S. E. 123. In that case the purchaser made certain statements at the sale, and begged those present not to bid, saying if they did they would deprive the defendant in execution, who was an old man, of his home and property; whereas, if they would not bid and let him buy it, he would allow the defendant to remain in possession during life. The court stated the general rule in the quoted language, but said it would not control if the defendant was of weak mind, and the purchaser by deceitful means and artful practices took a fraudulent advantage of his mental condition. In the case at bar the plaintiff was laboring under no disabilities, and deliberately entered into a scheme to deter bidders upon the oral promise of the purchaser's agent that he would buy it in for him. The sale resulted just as he planned it, and he should not be permitted to vacate it because the purchaser broke faith with him in keeping his promise.

This is not a case of a purchaser who, without any agreement or connivance with the defendant in execution, deters bidders by falsely representing that he is buying the property for the benefit of the defendant. In such a case the defendant does not participate in the purchaser's conduct, and comes into court with clean hands, and is entitled to reparation for the injury accruing from the purchaser's false representation. According to his own pleadings the plaintiff in the case at bar conspired with the purchaser to depreciate the sale of his own property, conspired with him to taint the purity of the sheriff's sale; and equity will not relieve him from a condition resultant from his own conduct. Both he and the purchaser were involved in the effort to prostitute a judicial sale, and in such cases

the maxim "potior est conditio defendentis" applies.

Judgment affirmed. All the Justices concur.

(138 Ga. 168)

WILLIAMS v. STATE.

(Supreme Court of Georgia. May 15, 1912.)

(Syllabus by the Court.)

CRIMINAL LAW (§ 84\*)—STATUTES (§ 76\*)—JURISDICTION — GENERAL AND SPECIAL LAWS.

The clause in the act amendatory of the act creating the city court of Blakely, which provides, "If the grand jury return a true bill for a misdemeanor in the matter [in a case which the city court binds over to the grand jury], the judge of the superior court shall transfer the same to the city court for trial" (Acts 1911, p. 230), is mandatory in its nature, and violative of the Constitution, in that it is an attempt to oust the superior court of its constitutional jurisdiction over the trial of misdemeanor cases, and also because there is a general law (Penal Code 1895, § 752, as amended by Acts 1902, p. 59), leaving it discretionary with the judges of the superior courts in the transfer of indictments for misdemeanors to the city courts for trial, which cannot be changed by special law applicable only to the city court of Blakely.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 115-124; Dec. Dig. § 84;\* Statutes, Cent. Dig. §§ 77½-78½; Dec. Dig. § 76.\*]

Certified Questions from Court of Appeals.

Peter Williams was convicted of a misdemeanor, and brings error. Heard on questions certified by the Court of Appeals. Questions answered.

The Court of Appeals desires the instruction of the Supreme Court on the following questions, to wit: "Is so much of the act approved August 18, 1911 (Acts 1911, p. 229), amending the act creating the city court of Blakely, as provides that where a defendant in the city court of Blakely demands an indictment by the grand jury, and the judge of the city court thereupon allows the demand and binds the defendant over to the grand jury for action, and which provides that upon indictment by the grand jury for a misdemeanor the judge of the superior court shall return such indictment to the city court for trial, violative of the constitutional provision contained in article 1, § 4, of the Constitution of Georgia, codified in section 6391 of the Civil Code of 1910, which provides that laws of a general nature shall have uniform operation throughout the state, and no special law shall be enacted in any case for which provision has been made by an existing general law; there being a general law of the state which leaves it discretionary with the judge of the superior court whether he shall transfer any case to the city court? Is the amendment of the law creating the city court of Blakely above noted, which requires the judge of the superior

court to transfer such indictment back to the city court for trial, mandatory or discretionary in character? Can the superior court, by the local or special act in question, be ousted of its constitutional jurisdiction in such criminal cases?"

W. W. Wright, of Blakely, for plaintiff in error. J. A. Laing, Sol. Gen., of Dawson, and R. R. Arnold, of Atlanta, for the State.

EVANS, P. J. In the act of 1911, amendatory of the act establishing the city court of Blakely, it was provided that, if any defendant upon the original call of his case shall demand indictment by the grand jury, the court shall bind him over in a reasonable bond to answer to any true bill of indictment that may be required by the grand jury against him, and that, "if the grand jury return a true bill for a misdemeanor in the matter, the judge of the superior court shall transfer the same to the city court for trial." Acts 1911, page 229. There can be no doubt that the clause was intended to be mandatory in its nature. Its express language, as well as its context, evince the legislative intent that all indictments against defendants bound over by the city court shall be transferred by the superior court to the city court for trial. Is it competent for the Legislature to oust the superior court of its jurisdiction over misdemeanor cases pending in that court? The superior courts of this state are courts of general jurisdiction. The constitutional specification that in certain matters they shall have exclusive jurisdiction emphasizes the constitutional conception that the superior courts are to have general jurisdiction over all matters except such as may be expressly denied. "The superior courts have ever in our history been the great reservoir of judicial powers, the *aula regis* as it were, in which the judicial powers of the state were vested; and however other courts might be erected as a relief to it, to take cognizance of minor matters, the practice has been uniform to retain in this tribunal concurrent and general, even supervisory, power over them." Porter v. State, 53 Ga. 239. The Constitution declares that "the judicial powers of this state shall be vested in a Supreme Court, a Court of Appeals, superior courts, courts of ordinary, justices of the peace, commissioned notaries public, and such other courts as have been or may be established by law" (Civil Code, § 6497), and that "all courts not specially mentioned by name in the first section of this article (Civil Code, § 6497) may be abolished in any county, at the discretion of the General Assembly" (Civil Code, § 6549). Substantially the same provisions were in the Constitution of 1868, and McCay, J., in the case just cited, said of them: "It follows from these two provisions that these several courts mentioned by name are

the constitutional courts of the state. These courts are beyond legislative discretion. The Legislature may create and abolish at its pleasure, but these tribunals have amongst them all judicial power by the very terms of the Constitution itself. As to the superior court, certain powers are subsequently, in section 3, par. 2, declared to be exclusive in that tribunal. But it is plain that in the four tribunals mentioned in section 1 the Constitution vests, either exclusively or concurrently with such other courts as have been or may be established by law, jurisdiction over every matter of a judicial nature that can arise." The Legislature, in establishing a city court, may confer on such court jurisdiction of causes cognizable in the superior court, where that jurisdiction is not declared by the Constitution to be exclusive in the superior court, but it cannot entirely divest the superior court of its constitutional jurisdiction. Any such legislative act violates the Constitution and is of no avail.

So much of the act of 1911, amendatory of the act establishing the city court of Blakely, as requires the judge of the superior court to transfer to the city court for trial indictments for misdemeanors in cases where the city court has bound over the defendant to the grand jury, is also violative of article 1, § 4, par. 1, of the Constitution, viz.: "Laws of a general nature shall have uniform operation throughout the state, and no special law shall be enacted in any case for which provision has been made by an existing general law." Civil Code, § 6391. It is provided in section 752 of the Penal Code of 1895, as amended by the act of 1902 (Acts 1902, p. 59), that "if an indictment is found by the grand jury, the judge of the superior court may in his discretion, either in term time or vacation, order it to be transferred, with all the papers in the case, to the county judge or city court." There is also another section (778) in the Penal Code of 1895 relating to the transfer of misdemeanor cases from the superior court to the city court for trial, viz.: "The judge of the superior court may send down from the superior court of that county all presentments and bills of indictment for trial, the order transmitting to be entered on the minutes of both courts." It may be plausibly argued that section 778 refers only to city courts which may be established on the recommendation of the grand jury, and is not applicable to city courts like unto the city courts of Atlanta and Savannah, referred to in the Constitution (Civil Code, § 6506), from which a writ of error lies to the Court of Appeals. Even concede this to be true, still we have section 752, as amended by the act of 1902, making express provision for the transfer of indictments for misdemeanors from the superior to the city court. This statute is

territorially coextensive with the limits of the state, and general in its nature. While the Constitution provides for the establishment of city courts without uniformity as to practice and jurisdiction, yet, as the subject-matter of section 752 relates to the general jurisdiction of the superior court over misdemeanor matters, the provision in the Blakely city court act is to be regarded as special legislation upon a matter already provided for by the general law.

Neither of these sections of the Penal Code of 1895 is brought forward in the Code of 1910; but, as the latter Code contains nothing at variance with them, their omission is not to be regarded as an implied repeal of them. All the Justices concur.

(133 Ga. 147)

AMERICAN COTTON COLLEGE et al. v.  
ATLANTA NEWSPAPER UNION.

(Supreme Court of Georgia. May 15, 1912.)

(Syllabus by the Court.)

1. PARTNERSHIP (§ 49\*)—EXISTENCE OF RELATION—ADMISSIBILITY OF EVIDENCE.

Where suit was brought against a firm and against two persons alleged to be members thereof, one of whom pleaded no partnership, there was no error in refusing to admit in evidence on his behalf a letter to him from the other alleged partner, dated 11 months after the date of the contract on which the suit was based, and several months after the cause of action accrued, in which the writer stated that he had that day discontinued "the American Cotton College" (the name of the alleged firm), that the addressee was at liberty to operate it for his own use and benefit, and that, in so doing, it was expressly agreed and understood that the writer would in no way hold the addressee for any of the outstanding liabilities.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 67-73, 74; Dec. Dig. § 49.\*]

2. PARTNERSHIP (§ 50\*)—TRIAL (§§ 48, 56\*)—APPEAL AND ERROR (§ 206\*)—EXISTENCE OF PARTNERSHIP—EVIDENCE—TIME FOR RAISING OBJECTIONS.

Where, to a suit against an alleged partnership, one of the defendants filed a plea of no partnership, it was competent for the plaintiff to introduce in evidence printed letter heads containing the alleged partnership name, "The American Cotton College," and the names of the alleged partners as "associate presidents," together with evidence that such letter heads, and others of the same character, were used by the defendant.

(a) The plaintiff was not obliged to rest on the introduction of a single specimen of the letter heads and upon the statement of the defendant pleading no partnership that stationery of this character was used. He could introduce several letter heads of like character which had been used in correspondence. Nor was the court compelled, on suggestion of counsel for the defendant who denied being a partner that he would consent to select one of the letter heads to go to the jury, with the statement that the remainder were identical in form with it, and that stationery of that character was used, to accede to such proposition and direct that such course be taken.

(b) The admission in evidence of such letter heads was not erroneous, although upon the paper on which they were printed were writ-

ten certain letters which were not offered or introduced in evidence.

(c) While, if the letters which thus went into the physical custody of the jury were of a character calculated to affect injuriously the defendant who pleaded no partnership, it would have been better practice to guard against any such possible injurious consequences by requiring the letters to be severed from the letter heads, or by having the writing covered, so as not to be read by the jury, and while, after the jury had seen them, it would have been well to give an instruction that the letters were not in evidence and should not be considered in arriving at a verdict, it not appearing that any such point was raised by a request to have the letters covered from sight, or to give instructions to the jury, or otherwise, under the facts of the case the omission of the court to charge on the subject was not error requiring a new trial.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. § 73; Dec. Dig. § 50;\* Trial, Cent. Dig. §§ 120, 131, 132; Dec. Dig. §§ 48, 56;\* Appeal and Error, Cent. Dig. §§ 1283-1289; Dec. Dig. § 206.\*]

### 3. PARTNERSHIP (§ 218\*)—ACTIONS AGAINST PARTNERS—ISSUES AND PROOF.

Where suit was brought on an open account for advertising done under a contract made by an alleged partnership, and one of the members answered that he could not admit or deny the allegations of the petition for want of sufficient information, and the other denied the allegations of indebtedness and pleaded no partnership, this placed on the plaintiff the burden of proving both the debt and the partnership in order to bind the latter defendant, and it was incorrect to charge that the only issue was one of partnership.

(a) If this were the only error, whether, under the evidence, it would require a new trial, query.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 49, 426-428; Dec. Dig. § 218.\*]

### 4. PARTNERSHIP (§§ 38, 56\*)—TRIAL (§ 252\*)—LIABILITIES—OSTENSIBLE PARTNERS—INSTRUCTIONS.

If a person holds himself out, or permits himself to be held out, to the world as a partner in a business, he will be bound to one who contracts with the purported partnership on the faith of such representations, whether in fact he has any interest therein or not.

(a) While the principle just stated is correct as an abstract proposition of law, there was no evidence that the plaintiff knew of any such representations of the existence of a partnership until after the contract was made with it, or that it acted on the faith thereof, and a charge submitting that question to the jury was error.

(b) Letter heads, used with the knowledge of one sought to be held bound as a partner, may have a value as evidence tending to prove the existence of a partnership; but unless they held out such person as a partner, and the plaintiff acted on the faith of them, they would not create an estoppel.

(c) The charges of the court on the subject were incorrect.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 53, 80; Dec. Dig. §§ 38, 56;\* Trial, Cent. Dig. §§ 505, 596-612; Dec. Dig. § 252.\*]

Error from Superior Court, Baldwin County; J. B. Park, Judge.

Action by the Atlanta Newspaper Union against the American Cotton College and others. Judgment for plaintiff, and defendants bring error. Reversed.

Hines & Vinson, of Milledgeville, for plaintiffs in error. Allen & Pottle, of Milledgeville, for defendant in error.

LUMPKIN, J. The Atlanta Newspaper Union brought suit against the American Cotton College, alleged to be a firm composed of J. H. Dickinson and R. L. Wall, on an open account for advertising during the months of July, August, September, and October, 1908. Dickinson answered that he could not admit or deny the allegations of the petition, for want of sufficient information. Wall denied the indebtedness, and pleaded that he was not a partner in the alleged firm. The jury found for the plaintiff for the amount of the account. A motion was made for a new trial, which was overruled, and exception was taken.

[4] The headnotes require no elaboration, except in one particular. In the ninth and tenth grounds of the motion for a new trial complaint is made of charges on the subject of the liability of an ostensible partner, or one who holds himself out to the world as a partner, or permits himself to be so held out. Section 3157 of the Civil Code of 1910 declares that "an ostensible partner is one whose name appears to the world as such, and he is bound, though he have no interest in the firm." This section was not a new rule, but was a codification of the pre-existing law. It recognizes the fact that, while a joint interest in partnership property or in the profits and losses of the business constitutes a partnership as to third persons (section 3158), one may be bound as a partner though he has no interest. As to liability as a partner by one who holds himself out as a member of a firm, though he is actually not such, it has been declared that he is liable as a partner only to those persons who have acted on the faith of the truth of the appearance. *Bowie v. Maddox & Goldsmith*, 29 Ga. 285, 74 Am. Dec. 61; *Carlton v. Grissom & Co.*, 98 Ga. 118, 26 S. E. 77; *Stewart & Son v. Brown & Co.*, 102 Ga. 836, 30 S. E. 264.

In the case now under consideration the evidence was conflicting as to the existence of the partnership. The plaintiff introduced evidence tending to show that Dickinson and Wall were partners. Wall denied this, and claimed that he was a mere employé of Dickinson. Certain letter heads were introduced in evidence, and were shown to have been used with the knowledge and consent of Wall. They contained the names of Dickinson and Wall, with the words "associate presidents" between them, and were followed by the words "American Cotton College," and certain statements descriptive of its character. These were admissible as evidence tending to prove the existence of a partnership. It was further contended that if through them Wall held himself out to the world as a

partner of Dickinson, or permitted it to be done, and the plaintiff acted on the faith thereof, he (Wall) was bound as a partner, whether in fact he had any interest in the firm or not. The judge gave certain instructions on the subject. While the principle of law involved is sound as an abstract statement, the evidence did not authorize it as applicable to the case. The plaintiff introduced in evidence three letter heads of the character indicated, attached to letters written to it; but none of them appear to have been received by it prior to the making of the contract for the advertising, nor did it appear that the plaintiff acted in reliance on any statement appearing in such letter heads. It was accordingly erroneous to charge as to liability which might arise from facts as to which there was no sufficient evidence.

Judgment reversed. All the Justices concur.

(138 Ga. 190)

#### DOZIER v. DAVISON & FARGO.

(Supreme Court of Georgia. May 16, 1912.)

(*Syllabus by the Court.*)

#### 1. PRINCIPAL AND AGENT (§ 77\*)—CONTRACT OF AGENT—BREACH BY PRINCIPAL—RIGHTS OF AGENT—DAMAGES.

Where, under a written contract, an agent, in consideration of \$1 per bale, the work done, and the obligations assumed, sold for his principal 100 bales cotton at 12.53 cents per pound to a third party, and the agent guaranteed the delivery of the cotton to the purchaser, and the principal agreed to hold his agent harmless "for any loss by reason of such agreement," and the principal delivered only 37 of the 100 bales to the agent on his contract, by reason of which the agent had to purchase 63 bales cotton at 14 $\frac{3}{4}$  cents per pound to place on his contract with the purchaser, and thereby sustained loss, and the agent brought suit against his principal for the loss thus sustained, *held*: (a) The contract between the principal and the agent was not lacking in mutuality, and was therefore enforceable. (b) The agent could recover of the principal any loss he had sustained by reason of the latter's failure to deliver the cotton in accordance with the terms of the contract, and this regardless as to how the contract stood between the principal and the purchaser of the cotton, or as between the agent and the purchaser. (c) The principal was not entitled, as a matter of law, to payment for part of the cotton delivered at the time of delivery, but only on the delivery of all of the cotton sold.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. § 77; Dec. Dig. § 77.\*]

#### 2. PLEADING (§ 354\*) — MODIFICATION BY PAROL.

A plea which sought to substitute a parol contract for the written was properly stricken on motion.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1092-1095; Dec. Dig. § 354.\*]

#### 3. EVIDENCE (§ 448\*)—PAROL EVIDENCE—ADMISSIBILITY.

Parol evidence, the purpose of which was to change or vary the plain and unambiguous terms of a written contract, is not admissible.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2066-2082, 2084; Dec. Dig. § 448.\*]

#### 4. DIRECTION OF VERDICT.

The court did not err, under the facts of this case, in directing a verdict for the plaintiff.

Error from Superior Court, Columbia County; H. C. Hammond, Judge.

Action by Davison & Fargo against William P. Dozier. Judgment for plaintiffs, and defendant brings error. Affirmed.

Davison & Fargo brought suit against W. P. Dozier for the alleged breach of the following contract entered into between them (formal parts omitted):

"(1) That the said party of the second part [plaintiffs], acting under the instructions of the party of the first part [defendant], has made a contract in behalf of said party of the first part for the sale of fifty thousand pounds of lint cotton, in merchantable bales, upon the terms and conditions hereinafter set out, and that said party of the first part hereby confirms and ratifies such sale.

"(2) The said cotton to be delivered at the warehouse of said party of the second part, in Augusta, Georgia, between Oct. 1st and November 27th, 1909, such delivery to be made during the time above specified, at the option of the party of the first part, bales to average 495 to 505 pounds per bale, to be in good merchantable order, and to be of grade between Augusta low middling and Augusta good middling, inclusive, at the price of twelve and  $\frac{53}{100}$  cents per pound (12.53) for Augusta middling with deductions and additions for the other grades according to differences in effect at the Augusta Cotton Exchange at the date of delivery, the classification and weight to be settled on at Augusta, Georgia, under the rules of the Augusta Cotton Exchange.

"(3) It is distinctly understood and agreed between both parties hereto that this contract is for sale and delivery of actual cotton, and is not to be settled by difference in prices.

"(4) It is further agreed that the said party of the second part has, in order to effect such sale, guaranteed to the purchaser the delivery of such cotton, and that the said party of the first part hereby agrees to protect and hold harmless the said party of the second part for any loss by reason of such agreement, or by reason of any other obligations assumed hereunder.

"(5) The said party of the first part further agrees to pay to the said party of the second part, in consideration of the work done and the obligations assumed by the said party of the second part one dollar per bale, which amount is to cover all charges for handling of such cotton in Augusta, Georgia, except freight and 5 cents per bale truckage. The party of the first part further agrees that, at any time the said party of the second part may be called upon to put

margins with purchaser of such cotton in order to secure or protect the same, the said party of the first part will promptly place with said party of the second part an equivalent amount of money."

It was alleged that the defendant, on the 17th day of July, 1909, authorized the plaintiffs to sell for him 100 bales cotton; that on the 4th day of September, 1909, the plaintiffs entered into a contract with Heineken & Vogelsang to sell them 728 bales cotton, in which was included the 100 bales authorized by the defendant to be sold for him; that the defendant delivered 37 bales of the cotton in accordance with his contract, but failed to deliver 63 bales, and thus breached the contract; and that the plaintiffs were compelled, by reason of their guaranty given to Heineken & Vogelsang, to purchase and make delivery of the 63 bales of cotton which Dozier failed to deliver, and were thereby damaged in the sum of \$729.09. The defendant filed general and special demurrers to the petition, which were overruled by the court. He also filed an answer, denying the material allegations of the petition, and averring that the plaintiffs never made any contract with Heineken & Vogelsang for the defendant, based on any contract between plaintiffs and defendant. He also averred that, "by agreement with plaintiffs when he signed said contract, having received no advances whatever from plaintiffs in the way of money, his cotton was to be sold on delivery, and sales and remittances made as promptly and rapidly as sold," etc. On motion, the court struck paragraph 4 of the original plea of the defendant, which was as follows: "That defendant, while not legally bound to do so, intended to ship to plaintiffs 100 bales of cotton on said contract, and did ship, as stated in the petition, 19,876 pounds of cotton. That by agreement with plaintiffs when he signed said contract, having received no advances whatever from plaintiffs in the way of money, his cotton was to be sold on delivery, and sales and remittances made promptly as rapidly as sold. That plaintiffs failed to do this; they failed to grade the cotton properly, and failed to send him a statement showing the weight of the cotton, the grade, and remittance to cover same, and, though he notified them by mail and went in person to see them and made repeated requests, they failed to handle his cotton in a prompt and expeditious manner, as they should have done, and as they had agreed to do. That their manner of handling his cotton made it both unpleasant and unsatisfactory and harmful to defendant in getting the use of his money, which he was entitled to, promptly as the cotton was delivered. As the cotton was delivered on the contract with a fixed price, the only thing to be done by plaintiffs was to weigh the cotton, grade it, and make remittances, and yet they failed to do this, giving unsatisfactory reason for so

doing, and thereby broke their agreement and contract with defendant, and thereby released defendant from further obligation, if he was in fact bound at all under said contract, and from further delivery of said cotton." Thereupon the defendant offered to amend his plea, which amendment the court disallowed. The case proceeded to trial, after the court had overruled the demurrers and had stricken the fourth paragraph of the defendant's plea, and had refused to allow the amendment tendered; and, after evidence had been submitted and argument heard, the court directed a verdict for the plaintiffs for the full amount sued for. His motion for a new trial having been overruled, the defendant excepted.

J. B. Burnside and Jno. T. West, both of Thomson, for plaintiff in error. Wm. H. Barrett, of Augusta, for defendants in error.

HILL, J. (after stating the facts as above). [1] 1. The petition in this case sets forth a cause of action, and the demurrer filed thereto was properly overruled. We do not think the contract sued upon is open to the objection urged, that it is unilateral and not binding on Davison & Fargo. As between Davison & Fargo and Dozier, the latter could waive the fact that his agents did not sell his cotton alone. Davison & Fargo had sold to Heineken & Vogelsang 728 bales cotton, and through his agents, Davison & Fargo, upon a consideration of \$1 per bale, the work done, and the obligations assumed by the agents, Dozier had sold to Heineken & Vogelsang 100 bales cotton, which the agents were to deliver on the contract. Dozier, the principal, agreed with his agents, Davison & Fargo, that he would stand back of them and make good their losses by reason of any failure on his part to deliver the 100 bales cotton. That makes a contract between Dozier, the principal, and Davison & Fargo, his agents, for that purpose. If the agents perform their part of the contract and suffer loss, the principal, under the terms of his contract, is bound by it. Such a contract is not unilateral, but is a valid, binding contract; and the agents are entitled to reimbursement if they suffer loss, and this regardless of the contract with Heineken & Vogelsang. Between the principal and the agent, the former cannot repudiate his contract with the latter. It is a question between Dozier and his agents, Davison & Fargo, as to what he did with his cotton. He ratified his agents' action, and said, in effect: "You go ahead and incur certain liabilities, and I will protect and hold you harmless for any loss by reason of such agreement." The plaintiff in error insists that he did not authorize his agents to put his cotton in with the 728 bales to be delivered to Heineken & Vogelsang; but after his agents had done that Dozier signed another contract and delivered part of the cotton, and thus ratified the contract of Sep-

tember 4th. The defendant did not deliver all of his cotton according to contract, and his agents, Davison & Fargo, had to go into the open market and buy 63 bales cotton at the advanced market price of 14½ cents per pound; and under the terms of his agreement Dozler is bound by it to make good any loss sustained by his agents, Davison & Fargo. This is not a sale of cotton by the defendant, Dozler, to his agents, Davison & Fargo. It is a case of agency, and a guaranty by the principal to his agents that he will make good any loss they may sustain on his account by reason of his failure to deliver the 100 bales of cotton according to contract. And Dozler is responsible to his agents, Davison & Fargo, if they sustained loss, regardless of how the contract stood between Dozler and Heineken & Vogelsang. The evidence shows that the defendant's agents did sell for him 100 bales cotton at 12.53 cents per pound, and that he delivered to them only 37 bales, and that they had to go into the market and buy 63 bales; and the plaintiffs testified that "by having to supply that cotton we lost the amount set out in the petition."

Again, the defendant insists that the plaintiffs cannot recover, because the 37 bales cotton were not paid for when delivered by the defendant. The reply is that the evidence shows that the defendant was to get pay for the cotton when he delivered all the cotton due on the contract, namely, 100 bales. In point of fact, a portion of the money was paid the defendant soon after the cotton was delivered, but the contract was for the delivery of 100 bales of cotton, and the defendant cannot complain that payment was deferred until the entire 100 bales were delivered; and any verbal agreement as to payment which varies the plain, unambiguous written contract, under the facts of this case, is not admissible to change or modify the written contract. *Forsyth Mfg. Co. v. Castlen*, 112 Ga. 199, 37 S. E. 485, 81 Am. St. Rep. 28; *Hawkins v. Studdard*, 132 Ga. 265, 63 S. E. 852, 131 Am. St. Rep. 190.

[2] 2. The fourth paragraph of the defendant's plea was properly stricken on motion. This answer was clearly an effort to set up a parol contract which varied the terms of the written contract executed by the parties, and which was plain and unambiguous within itself. This plea seeks to vary the plain terms of the written contract, and undertakes to substitute an entirely different one, which cannot be done. The stricken plea avers, among other things, "that the cotton was not to be delivered under the sale already made, but was to be 'sold on delivery and sales and remittances made promptly and rapidly as sold.'" Even if it was error to strike the above-stated plea, it did not cause injury to the defendant, as the cotton delivered was paid for by the plaintiffs, except the small sum of \$3.43, before the entire 100 bales were delivered;

and there is no evidence in the record to show that Davison & Fargo failed to properly grade, weigh, and pay for the cotton actually delivered, other than as to the payment of the small amount above referred to, and certainly the defendant could not be entitled to variations on that not delivered.

[3] 3. It follows from what has been said in the foregoing division of this opinion that, if the fourth paragraph of the defendant's answer was properly stricken, the evidence sought to be introduced under it was properly excluded by the court. *Civil Code* 1910, § 4268 (1); *Hawkins v. Studdard*, 132 Ga. 265 (4b), 63 S. E. 852, 131 Am. St. Rep. 190; *Burton v. Meiner*, 136 Ga. 420 (2, 6), 71 S. E. 870.

[4] 4. There is no error in any of the other grounds of the motion requiring a new trial. The evidence authorized the direction of the verdict rendered in favor of the plaintiffs.

Judgment affirmed. All the Justices concur.

(128 Ga. 128)

**McINTOSH et al. v. THOMASVILLE REAL ESTATE & IMPROVEMENT CO.**

**THOMASVILLE REAL ESTATE & IMPROVEMENT CO. v. McINTOSH et al.**

(Supreme Court of Georgia, April 12, 1912.  
Motion for Rehearing Denied  
May 14, 1912.)

(Syllabus by the Court.)

**1. BUILDING AND LOAN ASSOCIATIONS (§ 33\*)  
—NATURE AND STATUS.**

In order for an incorporated company to come within the classification of like character to a building and loan association, so that it may conduct business on the plan of a building and loan association and escape the penalty of taking an excess of legal interest, its charter must indicate that its method of business with relation to mutual participation in profits and losses in loans made by it has some distinctive feature of the plan of a building and loan association.

(a) A company, with a fixed capital stock, divided into shares of \$100, payable in installments of \$2 per month, chartered for the purpose of buying and selling real and personal property, building houses, and improving real estate, of borrowing money and giving security therefor, and lending money on real estate or upon such other security as the directors of the corporation may approve, with power to impose such reasonable penalties for failure to make prompt payment of subscriptions to stock or installments on property sold as it may fix by its by-laws, is not a building and loan association or an association of like character, so as to permit it to contract to lend money by aggregating the principal and interest for the entire period into one sum, divided into equal monthly payments, where the result is the taking or reserving of interest in excess of the maximum legal rate.

[Ed. Note.—For other cases, see *Building and Loan Associations*, Cent. Dig. §§ 43-47, 49-59; Dec. Dig. § 33.\*]

**2. BUILDING AND LOAN ASSOCIATIONS (§ 41\*)  
—ACTIONS—PLEADING.**

In so far as the plea set up a payment subsequent to the filing of the suit, and alleged



that the plaintiff was not a building and loan association or an association of like character, and was not entitled to recover interest in excess of the legal rate, it was meritorious.

[Ed. Note.—For other cases, see *Building and Loan Associations*, Cent. Dig. §§ 81-85; Dec. Dig. § 41.\*]

Error from Superior Court, Thomas County; W. E. Thomas, Judge.

Action by the Thomasville Real Estate & Improvement Company against T. M. McIntosh and others. From the judgment, both parties bring error. Reversed on main bill of exceptions and affirmed on cross-bill.

Louis Moore and Roscoe Luke, both of Thomasville, and E. K. Wilcox, of Valdosta, for plaintiff in error. W. H. Hammond and J. H. Merrill, both of Thomasville, for defendants in error.

EVANS, P. J. The Thomasville Real Estate & Improvement Company brought suit against T. M. McIntosh and Mrs. Clifford Williams to recover the balance of principal, interest, fines, and attorney's fees alleged to be due on a certain contract attached to the petition, the nature of which will be hereafter set forth. The defendant McIntosh pleaded that the plaintiff was not a building and loan association, and as such entitled by law to aggregate the principal and interest of the loan for the entire period and divide it into monthly installments, whereby greater interest than allowed by law was charged; and that he had paid the principal and legal interest; and that he is the sole owner of his codefendant's rights in the property and liable in her stead. The court directed a verdict for the plaintiff.

[1] 1. In *Cook v. Equitable Building & Loan Association*, 104 Ga. 814, 30 S. E. 911, it was held that a building and loan association "as such organizations usually exist today, is a private corporation designed for the purpose of accumulating into its treasury, by means of the gradual payment by its members of their stock subscriptions in periodical installments, a fund to be invested from time to time in advances made to such shareholders on their stock as may apply for this privilege on approved security; the borrowing members paying interest and a premium for this preference in securing an advancement over other members, and continuing to pay the regular installments on their stock in addition—all of which funds, together with payments made by the nonborrowing members, including fines, forfeitures, and other like revenues, go into the common fund until it, with the profits thereon, aggregate the face value of all the shares in the association, the legal effect of which is to extinguish the liability incurred for the loans and advancements, and to distribute to each nonborrowing member the par value of his stock." As defined by the Code, § 2890: "The name 'building and loan association,' as used

in this article shall include all corporations, societies, or organizations, or associations doing a savings and loan or investment business on the building society plan, viz., loaning its funds to its members, whether issuing certificates of stock which mature at a time fixed in advance or not, except those which restrict their business to the county of their domicile and not more than two other adjacent counties." It is the mutual participation in profits and losses by borrowers and nonborrowers which is the basic principle on which contracts between this class of associations and its members have been saved from the consequences attached to other usurious loans. *Rooney v. Southern Building & Loan Association*, 119 Ga. 941, 47 S. E. 345. The original conception of building and loan associations confined the loan to its members, but in the course of evolution such associations have been allowed to make loans to nonmembers. At the same time, however, the departure from the original scheme of a community of interest among its members has never been so radical that a corporation which gathers its capital from its members by installment payments on stock subscription of a fixed amount may loan the money accumulated in its treasury indiscriminately to any person at greater than the maximum legal rate of interest and escape the consequences of usury. The scheme of a true building and loan association holds fast to the basic plan that members are to be given a preference in obtaining loans, and that the excess of interest is to be adjusted to the stock in the way of premiums and fines and not to the loan, and there must be some nexus between at least some of the loans and the stockholder's interest in the association. *Hawkins v. Americus Building & Loan Association*, 96 Ga. 206, 22 S. E. 711. In an ordinary business corporation the stock is paid for in a lump sum or in aliquot parts; but the nature of the stock in a building and loan association is best illustrated in the case where the stockholder becomes a borrower to the extent of the stock subscribed for. "The stockholder receives the par value of his stock as it would be when it matured or all payments completed thereon, in advance of that period, less the amount of any premium or bonus he may be willing to pay for the preference. But he continues to pay the amounts periodically falling due on such stock, just as if no loan had been made to him, and when his stock has matured it is equal in value to the amount of his loan, and it is applied to the cancellation of such indebtedness." *Thornton & Blackledge Building & Loan Associations*, § 146. Where a number of persons incorporate themselves into an association, with a fixed capital, represented by shares, payable in aliquot installments, and the money thus derived is used in purchasing real estate, or in making loans generally.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes 74 S.E.—69

such a company, with no added features, would not partake of the character of a building and loan association. Where the scheme of the corporation simply comprehends the loan of its money indifferently to members and the general public upon the same terms, the corporation amounts to a mere loan company, and it makes no difference whether the stock subscriptions are to be paid in advance of the organization of the company for business or in installments at stated intervals.

The Thomasville Real Estate & Improvement Company by its charter was authorized to buy and sell real and personal property and choses in action; to build houses and otherwise improve real estate; to loan money upon real estate or upon such other security as the board of directors may approve; to borrow money and execute security therefor; to sell land on the installment plan for cash or otherwise, to its stockholders or others, upon such terms as may be agreed upon by the company and the other party or parties; to purchase real estate, and to subdivide it, and to sell the same as a whole or in such lots as the company may see fit; to hold real estate and other property in fee or as security for loans; to declare dividends; to collect subscriptions to its capital stock by ordinary process of law or by forfeiture of stock for failure to pay installments, and the sale of the stock so forfeited at public outcry after notice; that the company may impose such reasonable penalties for failure to make prompt payment of subscriptions to stock, or installments on property sold, as it may fix in its by-laws, and to make any and all contracts necessary to carry into effect the purposes and objects of the corporation, and to enact necessary by-laws for the prosecution of its business. Its capital stock was declared to be \$35,000, divided into shares of \$100 each, payable in monthly installments of \$2 per share until \$100 shall have been paid on each share. The company was allowed to increase its capital stock to \$100,000. The stock of the company was declared to be transferable only on the books of the company, and no share to be transferred until all arrears thereon had been fully paid; that at the meeting of the stockholders each share of stock entitled the holder to one vote, to be cast by himself or by written proxy. Provision was made for an annual meeting of the stockholders, and for the election of a board of directors, authorized to name their officers from their own number. The charter was granted September 21, 1888, and on May 22, 1891, the stockholders adopted as an amendment to their charter the provisions of the act of the General Assembly approved December 26, 1888 (Acts 1888, p. 47), and now incorporated in Civil Code, § 2878, which authorized all building and loan associations and other like associa-

tions doing business in this state to lend money to persons not members thereof nor shareholders therein at 8 per cent. or less, and to aggregate the principal and interest at the date of the loan for the entire period of the loan, and to divide the sum of the principal and interest for the entire period of the loan into monthly or other installments, and to take security by mortgage or waiver, or exemption, or title, or both, upon and to real estate situated in the county in which said building and loan association may be located.

The defendant McIntosh subscribed to 20 shares of stock of the par value of \$100, and was the owner of this stock at the time he applied for and received from the company a loan of \$6,000, and entered into a contract with the company whereby he agreed to pay them the sum of \$9,600, according to the constitution of the company, as rent for the land and premises thereafter described. He agreed to pay 120 monthly installments of \$80 per month, on the 8th day of each and every month until the whole was paid. Each monthly installment unpaid was to bear interest at the rate of 8 per cent., and any default of payment was to be subject to such fine or penalty as the constitution and by-laws may prescribe. He agreed to pay all taxes, repairs, and premiums of insurance, and all monthly or other dues in the shape of installments, interest, premiums, fines, and arrearages that may be due to the company, or that may be paid out by the company for him, and perform every duty imposed upon him by the company, and to pay every charge therein required, and all costs and expenses, including attorney's fees, incurred in the enforcement of any claim or duty against him. He further agreed that default for three consecutive months in the payment of monthly installments would mature the entire balance, and that after the sale of the property held by the company the proceeds shall be applied first to the payment of expenses and the balance to the debt, and agreed to pay any deficiency remaining unpaid, and, in case of default, to surrender possession to the company, and, upon his failure to do so, the company had the right to proceed against him as tenant in arrears or holding over, or in any other legal way to sell or dispose of the premises as provided by its constitution, and that no alteration or amendment to the constitution should affect the validity of his obligation, and that he would pay any sum or sums of money to discharge any obligation that may be demanded or required by the amended constitution, and his obligation shall be held and construed to be binding under the same and in conformity therewith. In order to secure the payment of his obligation, he conveyed to the Thomasville Real Estate & Improvement Company, pursuant to sections 1969, 1970 of the Code of 1882, cer-

tain described real estate, acknowledging that he received from the company its bond for title conditioned for the company's reconveyance of the premises to him upon performance of his obligations and covenants therein.

It appeared that the borrower was a stockholder at the time the loan was made to him, and acted as a director of the company from September 13, 1898, to May 3, 1909, when he sold his stock. He paid for his stock by monthly installments just as other stock was paid for. No loans were made by the company except loans payable in installments. Very few of the stockholders borrowed money, and when they did borrow, it was upon real estate security. The company made no loans except upon real estate security. Prior to the adoption by the company of the act of 1888 (Civil Code, § 2878), no loans were made to any persons not stockholders.

These are the essential features of the character of the plaintiff company and of the contract which it is seeking to enforce as a building and loan association obligation. The defendant, by motion to dismiss and by plea, raised the point that the plaintiff was not a building and loan association, and was not entitled to aggregate the principal and interest of the loan into one sum and divide it into monthly installments, if, by so doing, the amount contracted to be paid is in excess of the maximum legal rate of interest. Stress is laid on the fact that the charter and the constitution provide for the collection of fines in case of certain defaults in payments. The provision of the charter is that the company may impose reasonable penalties for a failure to make prompt payment of subscriptions to stock or of installments on property, such as it may fix by its by-laws; but it is not provided that the company may impose fines on its borrowers for default in the payment of loans. The imposition of a penalty for breach of contract in paying stock subscriptions and installment payments on purchases of property seems to be more in the nature of liquidated damages. It has not the remotest reference to premiums to be paid by stockholders for an advance of money, or fines incurred because of the nonpayment of a loan installment. The charter permits the company to deal indiscriminately with stockholders and the public in the matter of loans, as well as in sales of property contracted to be paid for in installments. In fine, the charter of the company is that of a loan and investment company. It was not a corporation contemplated by the act of 1888 (Civil Code, § 2878) as coming within its provisions. Not being incorporated as a building and loan association, it could not voluntarily convert itself into such a corporation, and the adoption of the act of 1888 by its stockholders was without avail.

It has been held that a company whose

name imports that it is a building and loan association will be presumed to be such until the contrary is made to appear. *Rooney v. Sou. Building & Loan Association*, supra. The name of the Thomasville Real Estate & Improvement Company does not import a building and loan association, and the burden was upon the plaintiff to make it appear that it was either a building and loan association, or an association of like character. The charter of the company contains no essential feature of a building and loan association. It has no provision looking to the division of the aggregate principal and interest into monthly installments, no provision in the way of premiums for the privilege of an advance on a member's stock, nor any reference that it proposes to do a building and loan association business. We have compared the character of this company, and the contract which it is seeking to enforce, with that of other associations which have been held to escape the infection of usury because of their building and loan feature, and we find no such essential points of agreement upon the cardinal principle as will bring this company and its contract within their provisions, so as to allow it to charge more than the legal rate of interest.

Having reached the conclusion that the plaintiff corporation is not a building and loan association, nor of like character to such, and that the contract which it is seeking to enforce stipulates for interest in excess of the maximum legal rate, it becomes unnecessary to deal with the other assignments of error in the main bill.

[2] 2. Error is assigned in the cross-bill on the refusal of the court to strike, on oral motion, the defendant's answer as insufficient to raise the issue of usury or to state any defense. It averred that the plaintiff was not a building and loan association entitled to make the contract sued on, which reserved more than the maximum legal rate of interest. It also averred payment, since the filing of the suit, as sufficient to discharge the principal and lawful interest. There was no error in refusing to strike the plea.

Judgment reversed on main bill of exceptions, and affirmed on cross-bill. All the Justices concur.

(128 Ga. 233)

TOWN OF COMER v. ETNA INDEMNITY CO.

(Supreme Court of Georgia. May 18, 1912.)

(Syllabus by the Court.)

REVIEW ON APPEAL.

This case was tried before the judge without a jury. The evidence, though conflicting on the substantial issues, was sufficient to authorize the verdict.

Error from Superior Court, Fulton County; Geo. L. Bell, Judge.

Action between the Town of Comer and the Aetna Indemnity Company. From the judgment, the Town brings error. Affirmed. See, also, 70 S. E. 676.

Jno. J. Strickland, of Athens, for plaintiff in error. Dodd & Dodd, of Atlanta, for defendant in error.

EVANS, P. J. Judgment affirmed. All the Justices concur.

(138 Ga. 202)

**JARRETT v. HUDSON.**

(Supreme Court of Georgia. May 16, 1912.)

*(Syllabus by the Court.)*

**TROVER AND CONVERSION (§ 23\*)—DEFENSES—TITLE FRAUDULENTLY ACQUIRED.**

It is no defense to a trover suit that the plaintiff acquired title from a former owner of the chattel in fraud of the rights of the wife of such former owner, where the defendant is not a privy of the person alleged to have been defrauded.

[Ed. Note.—For other cases, see Trover and Conversion, Cent. Dig. §§ 163-166; Dec. Dig. § 23.\*]

Error from Superior Court, Warren County; B. F. Walker, Judge.

Action by W. R. Hudson against E. W. Jarrett. Judgment for plaintiff, and defendant brings error. Affirmed.

L. D. McGregor, of Warrenton, for plaintiff in error. E. P. Davis, of Warrenton, for defendant in error.

EVANS, P. J. The plaintiff, W. R. Hudson, brought an action of trover against E. W. Jarrett to recover certain personal property. The defendant offered to amend his plea by alleging: "That the consideration of the note, bill of sale, or mortgage which the said Robert Harrison executed to the said W. R. Hudson on the ——— day of ———, 1908, was fraudulent and illegal, and made for the purpose of hindering, delaying, and defrauding the wife of said Robert Harrison in collecting her judgment against the said Harrison for alimony. That the said Hudson by his own consent and agreement entered into the said fraudulent and illegal contract with the said Harrison, and that the said note, bill of sale, or mortgage, which is the basis of this trover proceeding, is the culmination of such fraudulent and illegal agreement and contract. That by reason of such fraud the title to said property never passed into the said Hudson; and for that reason defendant says that the said Hudson has no title or right to recover the property sued for." The amendment was disallowed, and the case proceeded to trial, resulting in a verdict for the plaintiff.

There was no error in rejecting the amendment. The defendant does not allege himself to be a privy in estate with Mrs. Harri-

son. It is of no concern to him whether Mrs. Harrison's husband executed the bill of sale to the plaintiff to defeat the judgment which he obtained against her husband. A conveyance made in fraud of the rights of creditors is not absolutely void, but is voidable at the instance of the creditors affected by it. *Moore v. Mobley*, 123 Ga. 424, 51 South. 351. In a proceeding by Mrs. Harrison to subject the property to the payment of her judgment, if Hudson relied on title from her husband, she could attack the bill of sale as fraudulent. In this case, however, the transaction set up in the stricken amendment is *res inter alios acta*.

Judgment affirmed. All the Justices concur.

(11 Ga. App. 199)

**BRAY v. STATE. (No. 4,155.)**

(Court of Appeals of Georgia. May 22, 1912.)

*(Syllabus by the Court.)*

**1. ANIMALS (§ 108\*)—BREAKING POUND—RELEASING ANIMAL—EVIDENCE—INTENT.**

The accused being on trial for unlawfully breaking a pound and releasing an animal, in violation of section 584 of the Penal Code of 1910, and the evidence demanding a finding that he and a person who had been deputized as a bailiff by a justice of the peace took the animal from the pound, under a possessory warrant apparently valid and regularly issued by the justice, the conviction was without evidence to support it. This is so, even though the person designated as bailiff may not have been qualified to act; it appearing that both he and the magistrate in good faith believed he had been regularly and lawfully appointed. The act of taking the animal under the warrant being apparently lawful, and there being no evidence to show knowledge on the part of the accused that the person acting as bailiff had not been lawfully appointed, the element of criminal intent was wanting.

[Ed. Note.—For other cases, see Animals, Cent. Dig. §§ 439, 440; Dec. Dig. § 108.\*]

**2. ANIMALS (§ 110\*)—IMPOUNDING—BREAKING POUND—EVIDENCE.**

Evidence was irrelevant that, after the accused acquired possession of the animal under the possessory warrant, it was again taken from his possession under another warrant, and turned over to a person other than the one who impounded it, and that the accused attempted to use the original possessory warrant for the purpose of taking the animal from the possession of the latter person.

[Ed. Note.—For other cases, see Animals, Cent. Dig. §§ 439, 440; Dec. Dig. § 110.\*]

Error from City Court of Lexington; Joel Cloud, Judge.

W. P. Bray was convicted of unlawfully breaking a pound and releasing an animal therefrom, and he brings error. Reversed.

E. P. Shull, of Lexington, for plaintiff in error. Hamilton McWhorter, Jr., Sol., and W. W. Armistead, both of Lexington, for the State.

POTTLE, J. Judgment reversed.

(11 Ga. App. 197)

**SMITH v. STATE. (No. 4,144.)**

(Court of Appeals of Georgia. May 22, 1912.)

*(Syllabus by the Court.)***LARCENY (§ 17\*)—ASPORTATION—WRONGFUL SALE.**

Where a person fraudulently claims another's property as his own and sells it, and the purchaser thereupon takes possession of it and takes it away, after having paid the seller for it, this constitutes an asportation of the property by the seller, through the innocent agency of the purchaser.

[Ed. Note.—For other cases, see Larceny, Cent. Dig. § 30; Dec. Dig. § 17.\*]

Error from Superior Court, Worth County; Frank Park, Judge.

William Smith was convicted of stealing a cow, and he brings error. Affirmed.

J. J. Forehand & Son, of Sylvester, for plaintiff in error. W. E. Wooten, Sol. Gen., of Albany, and F. A. Hooper, of Atlanta, for the State.

HILL, C. J. The plaintiff in error was convicted of simple larceny in stealing a cow, the property of the prosecutor, and his motion for a new trial was overruled.

The only question raised for our decision is whether, under the evidence, the asportation of the cow was proved. It was shown that the cow in question was the property of the prosecutor; that it was at large near the house of the accused, in company with several other cows. She was claimed by the accused as his cow, and he requested a proposed purchaser to drive her up in front of his house, which was done by the purchaser. The accused then told the purchaser that it was his cow, the same one about which he had been talking, and that he (the purchaser) could take her. The purchaser thereupon paid the accused for the cow and drove her away. It was claimed that this evidence was insufficient to show an asportation.

Unquestionably asportation, or the taking possession and carrying away of personal property, alleged to have been stolen, is an essential element of the offense of simple larceny; and it has been held that, where one has neither actual nor constructive possession of the property of another, but points it out and purports to sell it, receiving payment therefor, he does not commit larceny, in the absence of some act constituting asportation. *Long v. State*, 44 Fla. 134, 32 South. 870, as, for instance, where a wrongdoer, without himself taking actual possession of it, sells a steer, at large upon a range, to one who never takes possession of it; he is not guilty of larceny. *Hardeman v. State*, 12 Tex. App. 207. But where, in such cases, the purchaser does take the property so sold into his own possession, in good faith, believing that it is the property of the seller, the seller is guilty of

larceny, since the purchaser takes as his innocent agent, and the act of the purchaser amounts to a taking by the seller. 25 Cyc. 21, and decisions cited in the note; *Clark's Criminal Law*, 296. In the present case, the accused pointed out this cow as his property, and directed the purchaser to drive her up in front of his house, which the purchaser did, and the accused then sold the cow, receiving the price from the purchaser, and the purchaser took possession of her, by direction of the seller, and drove her away.

There was some doubt as to the identity of the cow alleged to have been stolen; the accused alleging that the cow which he sold was his own cow, and not that of the prosecutor. The jury, however, were warranted in accepting the testimony of the prosecutor as to this. The evidence otherwise supports the verdict.

Judgment affirmed.

(11 Ga. App. 167)

**ATKINSON v. SWORDS. (No. 4,008.)**

(Court of Appeals of Georgia. May 22, 1912.)

*(Syllabus by the Court.)***1. NEW TRIAL (§ 41\*)—INSTRUCTIONS—REQUISITES AND SUFFICIENCY.**

In stating to the jury the contentions of the parties as contained in the pleadings, it is not good practice to refer to those contentions which do not in law constitute issues in the case; but so doing is not cause for a new trial, when in a subsequent portion of the charge the judge correctly gives the rules of law applicable to the real issues in the case and confines the jury to a consideration of such questions.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 67-71; Dec. Dig. § 41.\*]

**2. STATUTES (§ 146\*)—MASTER AND SERVANT (§ 180\*)—CONSTRUCTION OF STATUTE—INJURIES TO SERVANT—LIABILITY—"NOW FIXED BY LAW."**

The effect of the act adopting the Code of 1910 was to re-enact into one statute all of the provisions of that Code; and hence the phrase "now fixed by law," as used in section 2788 of that Code, comprehends all the law in the Code applicable to the provisions of that section. The Employer's Liability Act, found in section 2782 et seq., is applicable to a suit brought under authority of section 2788, by an employé against a federal receiver of a railroad operated partially within this state.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 215; Dec. Dig. § 146;\* Master and Servant, Cent. Dig. §§ 359-361, 363-368; Dec. Dig. § 180.\*]

**3. MASTER AND SERVANT (§ 265\*)—TRIAL (§ 296\*)—ACTIONS FOR INJURIES—INSTRUCTIONS—CURE BY OTHER INSTRUCTIONS.**

In a suit by an employé against a railroad company for a personal injury caused by the running of a locomotive, it is error to charge the provisions of section 2780 of the Civil Code of 1910, to the effect that, when the injury is shown, a presumption of negligence arises against the company, and such an error is not cured by subsequently giving the correct rule.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 877-908, 955; Dec. Dig. § 265;\* Trial, Cent. Dig. §§ 705-713, 715, 716, 718; Dec. Dig. § 296.\*]

Error from City Court of Fitzgerald; E. Wall, Judge.

Action by H. B. Swords, by next friend, against H. M. Atkinson, receiver of the Atlanta, Birmingham & Atlantic Railroad Company. Judgment for plaintiff; and defendant brings error. Reversed.

See, also, 9 Ga. App. 669, 72 S. E. 42.

Bolling Whitfield, of Brunswick, Elkins & Wall, of Fitzgerald, and Rosser & Brandon, of Atlanta, for plaintiff in error. L. Kennedy and McDonald & Grantham, all of Fitzgerald, for defendant in error.

POTTLE, J. This was an action for personal injuries, brought against the receiver appointed by a United States Circuit Court for the Atlanta, Birmingham & Atlantic Railroad Company. The plaintiff alleged that he was employed as a switchman by the defendant, and that, while attempting to open the knuckle of the automatic coupler on an engine, he fell from the pilot, on which he was standing, under the front of the engine; that he clung to the pilot and was dragged 12 or 15 feet, when he attempted to throw himself from the track to avoid catching his clothing on a protruding switch point which the engine was approaching, but that his right leg was caught under the wheels and so crushed that amputation a few inches below the knee became necessary. The allegations of negligence were: (1) In furnishing an ordinary passenger engine for switching purposes, instead of a regular switch engine having a footboard in front, upon which it was customary and necessary for switchmen to stand while the engine was moving to and fro in the yards handling cars; (2) in failing to warn plaintiff of the danger of using the engine furnished, he being a youth only 19 years of age and inexperienced; (3) in the failure of the engineer to keep a lookout, as the engine, moving only two miles an hour, could have been stopped in time to have prevented the injury if the engineer had been on the lookout; (4) in allowing the switch point, which plaintiff sought to avoid, to be out of repair and extend above the main rail. A general demurrer to the petition was overruled, and this judgment was affirmed by this court. *Atkinson v. Swords*, 9 Ga. App. 669, 72 S. E. 42.

When the case came on for trial after this decision, an amendment to the petition was allowed, in which it was alleged that the defendant was negligent, in that, even if the engineer was on the lookout, he could have stopped the engine in time to have prevented the injury after he saw or should have seen the plaintiff in his perilous position. The defendant's theory of the case, as developed by the testimony of the engineer and the fireman, was that the plaintiff fell while attempting to mount the pilot of the moving engine, and was injured be-

fore the engine could be stopped. The engineer testified that he was looking directly at the plaintiff, and saw him when he attempted to get upon the engine and when he fell. The plaintiff, however, in his testimony supported the material averments of his petition. He testified that he had gotten upon the engine, and was in the act of turning the knuckle on the automatic coupler, when he slipped and fell in front of the engine; that he grabbed hold of the pilot and was dragged several feet, when he attempted to throw himself from the engine because he saw a protruding switch point, which he thought would probably catch his clothing and drag him under the engine; that the engine was moving very slowly, about two miles an hour, and could have been stopped within six inches; that the engineer could easily have seen him and stopped the engine before he was hurt. The plaintiff recovered a verdict, and the case is here upon exception to a judgment overruling the defendant's motion for a new trial.

[1] 1. Under the former decision of this court, all of the grounds of negligence were eliminated, except the claim that the engineer failed to keep a lookout, "and because of this omission failed to promptly stop the engine when he saw, or by the exercise of due diligence should have seen, the plaintiff when he slipped from the pilot in attempting to make a coupling therefrom." It was held that as to this allegation of negligence the petition stated a cause of action. Complaint is made that in charging the jury the court stated all of the contentions of the plaintiff, as set forth in his petition, in reference to the negligence of the engineer, and also as to the other matters which this court had held could not be the basis of recovery. This court held that, while the use by the plaintiff of the engine with a pilot, instead of a footboard, was an assumed risk, yet proof that an improper and unsafe engine was furnished would be pertinent, as illustrating the allegation of negligence charged against the engineer, and as showing an increased necessity for keeping a lookout and taking precautions for the plaintiff's protection. It was, therefore, not error to refer in the charge to the contention that an improper engine was furnished. It was improper to charge at length the contentions of the plaintiff which had in effect been eliminated from the case by the decision of this court. In charging the jury, the court should confine his instructions to real issues. They should not be confused by a lengthy statement in reference to matters not pertinent to the real issues in the case. But this error of the court was completely cured. It is true he instructed the jury that they would have the pleadings, and from them could ascertain more in detail what the contentions were; but they were later distinctly instructed in exact accord with

this court's previous ruling, and it is apparent that no substantial injury could have resulted to the defendant from the recital of the plaintiff's contentions as set forth in his petition.

[2] 2. The trial judge held that the Employer's Liability Act of 1909, codified in section 2782 et seq. of the Civil Code of 1910, was applicable to the case. Section 2788 of the Code provides that the liability of receivers operating railroads in this state, "or partially in this state," for injuries to persons or property caused by the negligence of coemployees, "shall be the same as the liability now fixed by the law governing the operation of railroad corporations in this state for like injuries and damages." The provisions of this section in reference to injuries to the person were codified from the act of 1895 (Acts 1895, p. 103), and in 1896 an amendment was passed, adding the words "damages to personal property" (Acts 1896, p. 63). Prior to the passage of these acts it was held that special statutory enactments fixing liability of railroads did not apply to receivers operating a railroad under orders of court, but that as to them the common law applied. *Robinson v. Huidekoper*, 98 Ga. 306, 25 S. E. 440. The act of Congress of March 3, 1887 (24 Stat. 554, c. 373 [U. S. Comp. St. 1901, p. 582]), provides that a receiver of a railroad appointed by a United States court shall operate the railroad according to the requirements of the valid laws of the state in which the property is situated, and that such receiver "may be sued in respect of any act or transaction of his in carrying on the business" without the previous leave of the court. In view of this act of Congress and of the language of Code, § 2788, no reason occurs to us why the provisions of that section should not apply as well to a receiver of a railroad company appointed by a federal court as to a receiver appointed by a court of this state. The manifest purpose of the act of 1895 was to give to a cause of action for personal injury to an employé of a receiver of a railroad exactly the same status it would have had if the railroad were being operated by its own officers. But the ordinary and usual meaning of the words in the act, "shall be the same as the liability now fixed by law," would require that a cause of action arising for a personal injury against a receiver of a railroad should be governed by the law as it existed at the date of the passage of the act of 1895. See *State v. Bossa*, 69 Conn. 835, 37 Atl. 977; *Macon & Atlanta Ry. Co. v. Macon & Dublin R. Co.*, 86 Ga. 83, 13 S. E. 157. But, however this may be, the effect of the act adopting the Code of 1910 was to enact into one statute all of the sections of that Code. *Barnes v. Carter*, 120 Ga. 897, 48 S. E. 387. When, therefore, that Code was adopted, and section 2799 therein incorporated, the phrase "now fixed by law," as used in the section, comprehended at

least all the law in the Code applicable to the causes of action referred to in the section, even though future enactments might not apply. It follows that the provisions of the liability act of 1909 were applicable to the case, and that the trial judge rightly so held.

[3] 3. The act of 1909 creates a cause of action in all cases where an employé is killed or injured as the result of negligence on the part of the agents or servants of a railroad company, or negligent defects in its equipment or roadbed. If death results from an injury to an employé, the company is presumed to have been negligent, and carries the burden of proving diligence. "If death does not result from the injury, the presumption of negligence shall be and remain as now provided by law in case of injury received by an employé in the service of a railroad company." Civil Code 1910, § 2782. In *Wrightsville & Tennille R. Co. v. Tompkins*, 9 Ga. App. 154, 70 S. E. 955, this court had occasion to discuss the act of 1909 at some length, and especially that part of the statute quoted above. It was held that the act "did not affect existing presumption, so far as an employé injured, but not killed, is concerned. It only varied the degree of blame by which the plaintiff's right of action would be defeated." The rule applicable under the statute to an employé suing for an injury to himself was announced to be as follows: "If the plaintiff shows that he has been injured in the running of the cars or other machinery, or by the act of a fellow servant, he may, even as to a transaction in which he was a participant, make a prima facie case by further showing either of two things: (1) That he himself did not bring about his injury by his own carelessness, amounting to a failure to exercise ordinary care; or (2) by showing that the defendant or its servants were negligent in one or more respects charged in the petition. The company, taking at this stage the burden of reply, can defend successfully by disproving either of these propositions, or by showing that, notwithstanding it or its servants may have been negligent, the plaintiff, by the exercise of ordinary care, could have avoided the consequences."

Since the act of 1909 did not change the rule as to presumptions where death did not result, the instructions of the trial judge on this subject must be tested by the law as it stood prior to the passage of the act. The judge charged broadly the provisions of section 2780 of the Code of 1910 in reference to the general presumption of negligence against railroad companies where an injury results from the running of locomotives. That this was error requiring a new trial is settled by the decision of the Supreme Court in *Port Royal & Augusta Ry. Co. v. Davis*, 103 Ga. 579, 30 S. E. 262, where it was held: "In a suit by an employé against a railroad com-

pany for an injury alleged to have resulted from the negligence of a coemployé, it was error for the court to give in charge to the jury section 2321 of the Civil Code [of 1895]; and the error was not cured by the judge subsequently stating in his charge the correct rule on the subject, without calling attention of the jury to his mistake in quoting said section to them as the law of the case. *Georgia Railroad Co. v. Hicks*, 95 Ga. 301-305 [22 S. E. 613]. In this case, as in that, the plaintiff's counsel contended that the error was cured because the court subsequently gave the correct rule. The decision in the *Davis Case* is, however, authoritative and binding. The requirement of the constitutional amendment creating this court is that "the decisions of the Supreme Court shall bind the Court of Appeals as precedents." In obedience to this constitutional mandate, we direct a new trial. See, also, *Atlanta, etc., Ry. v. McManus*, 1 Ga. App. 302 (5), 306, 58 S. E. 258. On another trial the jury should be instructed in accordance with the rule announced by this court in the case of *Wrightsville & Tennille Railroad Co. v. Tompkins*, supra, and the judge should likewise charge the law of contributory negligence, as contained in section 2783 of the Code.

Other than as above indicated, no material error was committed. If the plaintiff's testimony was to be accepted as the truth of the case, a recovery was authorized under the decision of this court when the case was here before. Under that decision, it was the duty of the engineer to keep a lookout. It is admitted that the plaintiff could have been seen. The plaintiff testifies that he was dragged 15 feet, and that the engine could have been stopped in six inches. Under this evidence the plaintiff was entitled to recover, if himself not guilty of a failure to exercise ordinary care, whether the engineer saw him in his perilous position or not. If the engineer saw him, and failed to stop, his conduct was wanton; if he could have seen him, and did not, he was negligent in not doing so. In either event the plaintiff would be entitled to recover, if he himself was not guilty of such negligence as amounted to a failure to exercise ordinary care.

Judgment reversed.

(11 Ga. App. 181)

JONES v. ROUNTREE et al. (No. 4,067.)  
(Court of Appeals of Georgia. May 22, 1912.)

(Syllabus by the Court.)

1. INJUNCTION (§ 252\*)—ACTION ON BOND—DAMAGES—ATTORNEY'S FEES.

In an action on an injunction bond conditioned to pay to the plaintiff "all costs and damages" which he may sustain by reason of the suing out of a bill of exceptions complaining of a judgment refusing an injunction, and thereby obtaining a supersedeas of such judg-

ment, fees paid by the plaintiff to his counsel for services in the Supreme Court cannot be recovered.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 586-598; Dec. Dig. § 252.\*]

2. INJUNCTION (§ 250\*)—BOND—ACTION—ISSUES—AMENDMENT—CURING ERROR.

In a suit upon such an injunction bond, the only issue involved is whether or not the plaintiff has incurred any costs and sustained any damages, within the meaning of the bond. Questions relating to the title to the land involved in the injunction suit are irrelevant. In the present case the court erred in allowing the amendment to the answer; but this error was completely cured by disregarding the amendment, in the rulings on evidence and in the instructions to the jury.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 574-581; Dec. Dig. § 250.\*]

3. INJUNCTION (§ 251\*)—BOND—ACTION—EVIDENCE.

The evidence was sufficient to authorize the verdict in the defendant's favor, and there was no abuse of discretion in overruling the plaintiff's motion for a new trial.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 582-585; Dec. Dig. § 251.\*]

(Additional Syllabus by Editorial Staff.)

4. COSTS (§ 2\*)—WHAT CONSTITUTES.

The word "costs" has a fixed legal significance, to wit, sum allowed by statute to be taxed in the action against the losing party. As used in an injunction bond securing costs, it did not bind the bondsman to pay counsel fees of the adversary.

[Ed. Note.—For other cases, see Costs, Cent. Dig. §§ 4, 26; Dec. Dig. § 2.\*]

For other definitions, see Words and Phrases, vol. 2, pp. 1633-1640; vol. 8, p. 7620.]

5. INJUNCTION (§ 252\*)—"DAMAGES"—WHAT CONSTITUTES.

"Damages," as used in an injunction bond, binding the signers to pay costs and damages, did not include attorneys' fees for the opposite party.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 586-598; Dec. Dig. § 252.\*]

For other definitions, see Words and Phrases, vol. 2, pp. 1812-1820; vol. 8, pp. 7625, 7626.]

Error from Superior Court, Brooks County; W. E. Thomas, Judge.

Action by M. F. Jones against S. S. Rountree and others. A verdict was returned in favor of the defendants, and plaintiff brings error. Affirmed.

Rountree, as surviving partner, claiming to be an execution creditor, brought an action to restrain Jones from committing waste on land which had been set apart as a homestead to the execution debtor. A temporary restraining order was granted, but was dissolved upon the hearing. The plaintiff desiring to supersede the judgment, for the purpose of having it reviewed in the Supreme Court, an order was passed that the judgment be superseded upon the giving by the plaintiff of a bond payable to the defendant, "conditioned to pay all damage he may sustain by reason of the carrying said case to Supreme Court." Thereupon the plaintiff filed and had approved a bond conditioned to



pay the defendant "all costs and damages" which he might sustain "by reason of the filing of [a] bill of exceptions" in the case. The judgment refusing an injunction was affirmed by the Supreme Court. *Rountree v. Jones*, 124 Ga. 395, 52 S. E. 325. The defendant sued the plaintiff and his surety upon the injunction bond, claiming \$568 damages, including which is an item of \$100 expended for the services of an attorney in the Supreme Court. Upon demurrer the judge struck this item of damage, and exception is taken to this judgment. The judge, over objection, allowed Rountree and the surety to amend their answer and plead the existence of the homestead which had been set apart to the execution debtor of Rountree; and error is assigned upon this ruling. A verdict was returned in their favor. Jones' motion for a new trial was overruled, and this judgment is likewise assigned as error.

Branch & Snow, of Quitman, for plaintiff in error. M. Baum and J. D. Wade, both of Quitman, for defendants in error.

POTTLE, J. (after stating the facts as above). 1. By section 5502 of the Civil Code of 1910, it is provided that where an injunction is granted or denied, and the losing party desires to supersede the judgment in order to have the same reviewed in the Supreme Court, the presiding judge shall "make such order and require such bond as may be necessary to preserve and protect the rights of the parties until the judgment of the Supreme Court can be had thereon." The bond given in the present case was in strict accordance with the terms of the statute; but, even if it had not been, the party who gave the bond, and by reason thereof obtained a supersedeas of the judgment, and thus delayed his adversary, would not be heard to complain. Having obtained the benefit from the giving of the bond, he must stand by his contract as made, whether it be good as a strict statutory bond or not. *Waycross R. Co. v. Offerman & W. R. Co.*, 114 Ga. 727, 732, 40 S. E. 738. The case therefore turns upon the construction of the bond given by the defendants in error. The bond was conditioned to pay "all costs and damages" which the defendant in the injunction suit might sustain by reason of the suing out of a writ of error complaining of the refusal to grant the injunction, and the granting by the judge of a supersedeas of that judgment, pending the case in the Supreme Court.

[4] In this state counsel fees are not taxable as a part of the costs. The word "costs" has a fixed legal significance. It signifies the sums allowed by the statute to be taxed in the case against the losing party. *Apperson v. Life Insurance Co.*, 38 N. J. Law, 388. It is clear, however, that the use of the word "costs" in the injunction bond did not bind the defendants to pay counsel fees of

the adversary. It is insisted that counsel fees are recoverable under the obligation to pay all damages which the defendant might sustain by reason of the filing of the bill of exceptions. The purpose of the petition for injunction was to restrain the defendant from boxing and working pine timber for turpentine purposes. Evidently the damages which were in contemplation of the parties consisted of the possible or probable loss which the defendant might sustain by reason of the delay in the operation of his turpentine boxes. It is well known that turpentine can be taken from the trees only during a certain season of the year, and that, should one who has already boxed his trees for turpentine purposes be deprived of his right to dip turpentine and streak the boxes from time to time, he would in all probability sustain loss thereby. Evidently this was the loss and the damage which the parties had in contemplation when the bond was given.

[5] Attorney's fees are generally not included in the term "damages." Of course, in a broad sense, the defendant was damaged to the extent of \$100 because he employed counsel to represent him in the Supreme Court in the injunction case; but, in order for attorney's fees to be recovered by way of damages, it would be necessary for the parties to use language clearly indicating that they had the payment of such fees in contemplation when the contract was made. In *Wisecarver v. Wisecarver*, 97 Va. 452, 34 S. E. 56, it was held that where an injunction bond was conditioned "to pay all such costs as may be awarded against the plaintiff and all such damages as may be incurred in case such injunction is dissolved," counsel fees could not be recovered. To the same effect, see *Barrett v. Bowers*, 87 Me. 185, 32 Atl. 871; *Midgett v. Vann* (N. C.) 73 S. E. 801; *Ball v. Vason*, 56 Ga. 264 (2).

[1] There was no error in striking from the petition the paragraph claiming the right to recover attorney's fees.

[2] 2. The question of title to the land embraced in the injunction suit was not involved in the suit on the bond. By the judgment of the Supreme Court it was definitely adjudicated that the plaintiff was not entitled to an injunction against the defendant, and this question could not be reopened in any form in the trial of the suit upon the injunction bond. It was therefore error to allow the defendants to amend their answer by undertaking to set up outstanding title, so as to defeat the plaintiff's suit, inasmuch as the sole question involved in the suit on the injunction bond was whether the plaintiff had expended any costs and sustained any damages within the meaning of the injunction bond. This error was, however, entirely harmless in the present case, for the reason that the judge disregarded the amendment, in his rulings on evidence and instructions to the jury, and per-

mitted the plaintiff to offer proof and try the case without reference to the defendant's claim of outstanding title in a third person. The error in allowing the amendment was therefore cured by subsequent rulings, and constitutes no reason for reversing the judgment.

[3] 3. It is doubtful whether the plaintiff in error furnished sufficient data to enable the jury to calculate his damages with legal certainty, but, even if he did, there was sufficient evidence offered by the defendants to show that the plaintiff had not sustained any damages, and for this reason the discretion of the trial judge, in overruling the motion for a new trial which was based on the general grounds only, will not be controlled. Judgment affirmed.

(11 Ga. App. 239)

**GAINESVILLE MIDLAND RY. v. CROMIC.**  
(No. 4,009.)

(Court of Appeals of Georgia. June 5, 1912.)

(Syllabus by the Court.)

**RAILROADS (§ 443\*)—KILLING STOCK—EVIDENCE.**

It is conceded that the only question raised by the record is one of fact. The plaintiff sought to recover the value of his hog, killed by the running of a motor car of the defendant railroad company. The value of the hog was admitted to have been \$50, and it was admitted that it was killed by the running of the defendant's car. The presumption of negligence thus raised was not fully rebutted, and there were circumstances of negligence proved in support of the presumption. The judgment of the lower court is affirmed, and 10 per cent. damages awarded for delay in suing out and prosecuting the writ of error.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1608-1620; Dec. Dig. § 443.\*]

Error from Superior Court, Hall County; J. B. Jones, Judge.

Action by J. H. Cronic against the Gainesville Midland Railway. Judgment for plaintiff, and defendant brings error. Affirmed.

H. H. Dean, of Gainesville, for plaintiff in error. Howard Thompson, of Gainesville, for defendant in error.

HILL, C. J. Judgment affirmed.

(11 Ga. App. 236)

**DAVIS v. WILLIAMS.**  
(No. 3,986.)

(Court of Appeals of Georgia. June 5, 1912.)

(Syllabus by the Court.)

**SUFFICIENCY OF EVIDENCE—NO ERROR.**

This was a suit on an open account for \$35.55. The evidence strongly supports the verdict for the plaintiff, and no error of law appears.

Error from City Court of Statesboro; H. B. Strange, Judge.

Action by A. T. Williams against Jim Davis. Judgment for plaintiff, and defendant brings error. Affirmed.

Fred T. Lanier, of Statesboro, for plaintiff in error. Brannen & Booth, of Statesboro, for defendant in error.

HILL, C. J. Judgment affirmed.

(11 Ga. App. 233)

**GEORGIA SOUTHERN & F. RY. CO. v. TYSON.** (No. 3,889.)

(Court of Appeals of Georgia. June 5, 1912.)

(Syllabus by the Court.)

**STOCK ON TRACK—FRIVOLOUS APPEAL.**

The statutory presumption arising on proof that the cow of the plaintiff was killed by the running of the defendant's locomotive and train was not fully rebutted. Besides there were circumstances supporting the presumption. The judgment is affirmed, and 10 per cent. damages on the judgment is awarded, for frivolous appeal.

Error from Superior Court, Tift County; W. E. Thomas, Judge.

Action by W. E. Tyson against the Georgia Southern & Florida Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Jno. I. & J. E. Hall, of Macon, and Fulwood & Murray, of Tifton, for plaintiff in error. J. S. Ridgill, of Tifton, for defendant in error.

HILL, C. J. Judgment affirmed.

(11 Ga. App. 235)

**OWENS v. COCROFT.** (No. 3,929.)

(Court of Appeals of Georgia. June 5, 1912.)

(Syllabus by the Court.)

**APPEAL AND ERROR (§ 977\*)—REVIEW—DISCRETION OF TRIAL COURT—GRANT OF NEW TRIAL.**

The first grant of a new trial will not be disturbed by the Court of Appeals, unless the plaintiff in error shows that the law and the facts require the verdict notwithstanding the judgment of the presiding judge. Civil Code 1910, § 6204; Hughes v. Atlanta Steel Co., 9 Ga. App. 510, 71 S. E. 934, and cases cited. This rule applies, though two new trials have been granted, one to the plaintiff and the other to the defendant. Jordan v. Dooly, 129 Ga. 392, 58 S. E. 379. In this case the bill of exceptions and the record fail to show that the verdict rendered was demanded by the law and the evidence, and the judgment granting a new trial must be affirmed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3860-3865; Dec. Dig. § 977.\*]

Error from Superior Court, Putnam County.

Action by Rance Owens against L. G. Cocroft. From the judgment, Owens brings error. Affirmed.

M. C. Few, of Madison, and M. F. Adams, of Eatonton, for plaintiff in error. W. T. Davidson, of Eatonton, for defendant in error.

HILL, C. J. Judgment affirmed.

(11 Ga. App. 239)

**BLOUNT v. STATE.** (No. 4,020.)

(Court of Appeals of Georgia. June 5, 1912.)

*(Syllabus by the Court.)***1. INDICTMENT AND INFORMATION (§ 125\*)—JOINDER OF OFFENSES—FORGERY AND UTTERING FORGED PAPER.**

The ruling on the demurrer to the indictment is fully controlled by the ruling of this court in *Nalley v. State*, 11 Ga. App. —, 74 S. E. 567, and decisions therein cited.

(a) The charges of forgery and of uttering and publishing a forged paper may be joined in the same count.

[Ed. Note.—For other cases, see *Indictment and Information*, Cent. Dig. §§ 334-400; Dec. Dig. § 125.\*]

**2. CRIMINAL LAW (§ 922\*)—NEW TRIAL—FAILURE TO INSTRUCT.**

An intent to defraud is an essential ingredient of the offense of uttering and publishing a forgery; and the court in this case having omitted to properly instruct the jury that, in order to constitute the offense, the intent to defraud must be shown, a new trial will be granted. The jury should be instructed that they must be satisfied that the writing mentioned in the indictment was forged or uttered (as the case may be) with an intent to defraud, or they should acquit the defendant. A new trial is more readily granted because of the fact that the evidence of fraudulent intent is very weak and unsatisfactory.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 2210-2218; Dec. Dig. § 922.\*]

Error from Superior Court, Liberty County; W. W. Sheppard, Judge.

J. M. Blount was convicted of uttering and publishing a forgery, and brings error. Reversed.

Way & Burkhalter, of Reidsville, for plaintiff in error. N. J. Norman, Sol. Gen., and Edwin A. Cohen, both of Savannah, for the State.

RUSSELL, J. Judgment reversed.

(11 Ga. App. 258)

**HULSEY v. STATE.** (No. 4,146.)

(Court of Appeals of Georgia. June 5, 1912.)

*(Syllabus by the Court.)***1. STATUTE OF LIMITATIONS—SUFFICIENCY OF EVIDENCE.**

There was sufficient evidence to authorize the jury to find that the accused was absent from the state after the commission of the offense, so as to prevent the statute of limitations from running against the state.

**2. CRIMINAL LAW (§ 565\*)—EVIDENCE—WEIGHT AND SUFFICIENCY—LIMITATIONS.**

As to the charge of the court on the statute of limitations, this case is controlled by the decision of this court in the case of *Cohen v. State*, 2 Ga. App. 689, 59 S. E. 4.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 1270; Dec. Dig. § 565.\*]

Error from Superior Court, Haralson County; Price Edwards, Judge.

Mitch Hulsey was convicted of crime, and brings error. Affirmed.

Griffith & Matthews, of Buchanan, for plaintiff in error. J. R. Hutcheson, Sol. Gen., of Douglasville, for the State.

RUSSELL, J. Judgment affirmed.

POTTLE, J. (concurring specially). I concur in the ruling set forth in the second headnote, because I am bound by the decision of this court in *Cohen v. State*, supra. Under the decision of the Supreme Court in *McLane v. State*, 4 Ga. 335, where the indictment alleges a time beyond the period of the statute of limitations, it is also necessary to allege that the defendant has brought himself within one of the exceptions necessary to prevent the bar of the statute from attaching. Sometimes averments in an indictment may be treated as surplusage, and sometimes an unnecessary allegation must be proved. When it does become necessary for the state to prove an allegation, whether originally material or not, the evidence must be sufficient to establish the averment beyond a reasonable doubt. I know of no authority for holding that the state can prove any material allegation in an indictment with a less degree of certainty than "beyond a reasonable doubt." The moment the conclusion is reached that a particular averment is material, and must therefore be set forth in the indictment, it becomes necessary for the state to prove this averment beyond a reasonable doubt. An offense committed at a time anterior to the period fixed in the limitation statute may be alleged to have been committed within the statutory period, and, if the statute of limitations is relied upon as a defense, the state may reply by proving that the accused has placed himself within one of the exceptions which has prevented the bar of the statute from attaching. But if it were an open question I would hold that whenever the state alleges an exception, for the purpose of showing that the offense is not barred, it is necessary to prove that exception with the same degree of certainty that any other allegation in the indictment must be proved.

Judgment affirmed.

(11 Ga. App. 246)

**PORTER v. STATE.** (No. 4,115.)

(Court of Appeals of Georgia. June 5, 1912.)

*(Syllabus by the Court.)***CRIMINAL LAW (§ 781\*)—INCRIMINATORY ADMISSIONS—INSTRUCTIONS.**

There being no proof of a plenary confession by the accused, but, at most, evidence only of incriminatory admissions, it was such an error to charge the law relating to confessions as to require the grant of a new trial. These incriminatory admissions are not conclusive; and proof of inculpatory admissions will not authorize a charge upon the subject of confession. *Owens v. State*, 120 Ga. 296, 48

S. E. 21; *Riley v. State*, 1 Ga. App. 651, 57 S. E. 1031, and decisions cited.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1864-1871, 1898; Dec. Dig. § 781.\*]

Error from Superior Court, Wilkes County; B. F. Walker, Judge.

Robert Porter was convicted of crime, and brings error. Reversed.

Wm. Wynne and F. H. Colley, both of Washington, for plaintiff in error. Thos. J. Brown, Sol. Gen., of Elberton, and J. M. Pitner, of Washington, for the State.

RUSSELL, J. Judgment reversed.

(11 Ga. App. 265)

STRANGE v. STATE. (No. 4,166.)  
(Court of Appeals of Georgia. June 5, 1912.)

(Syllabus by the Court.)

GAMING (§ 98\*)—PROSECUTION—SUFFICIENCY OF EVIDENCE.

Where there was evidence that several men were seen on their knees around a coat, playing cards, at night, by the light of a lantern, and that there were "several little piles of money on the coat," the jury were authorized to infer that these men were playing and betting with cards for money, and the conviction of one of the players, of the offense of gaming was not wholly unauthorized.

[Ed. Note.—For other cases, see Gaming, Cent. Dig. §§ 291-298; Dec. Dig. § 98.\*]

Error from City Court of Elberton; Geo. C. Grogan, Judge.

J. H. Strange was convicted of gaming, and brings error. Affirmed.

T. Donnelly Bennett, of Elberton, and Percy Middlebrooks, of Madison, for plaintiff in error. Boozer Payne, Sol. Gen., of Elberton, for the State.

HILL, C. J. Judgment affirmed.

(11 Ga. App. 261)

WALKER v. STATE. (No. 4,129.)  
(Court of Appeals of Georgia. June 5, 1912.)

(Syllabus by the Court.)

1. CRIMINAL LAW (§ 590\*)—TIME FOR TRIAL—CONTINUANCE.

While ample time to prepare for trial should be allowed to one accused of crime, it is the duty of a defendant, who has given bond for his appearance at a specified term of the city court, to employ counsel and take any other necessary steps essential to his defense in advance of the term of court at which he is bound to appear; and a motion for continuance by one who has waited until the case has sounded for trial to employ his counsel, although he was previously under bond to appear at the court, was properly overruled.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1316, 1317; Dec. Dig. § 590.\*]

2. CRIMINAL LAW (§ 400\*)—EVIDENCE—BEST AND SECONDARY EVIDENCE.

The testimony of a witness who saw certain packages in the hands of a common carrier, and their reception and delivery, is as

competent and valuable to show the number of them, and the dates upon which they were received and delivered, as are the records of the common carrier.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 879-886, 1208-1210; Dec. Dig. § 400.\*]

3. SUFFICIENCY OF EVIDENCE—No ERROR.

The evidence authorized conviction. It was not error to overrule the motion for a new trial.

Error from City Court of Springfield; J. H. Smith, Judge.

D. L. Walker was convicted of crime, and brings error. Affirmed.

C. T. Guyton, of Guyton, and R. F. C. Smith, of Eden, for plaintiff in error. R. W. Sheppard, of Guyton, for the State.

RUSSELL, J. Judgment affirmed.

(11 Ga. App. 257)

WHITTLE v. CENTRAL OF GEORGIA RY. CO. (No. 4,140.)

(Court of Appeals of Georgia. June 5, 1912.)

(Syllabus by the Court.)

1. TRIAL (§ 259\*)—INSTRUCTIONS—REQUESTS—NECESSITY.

It is not error, requiring a new trial, to fail to charge upon the subject of the burden of proof, when there is no written request for such an instruction.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 648-650; Dec. Dig. § 259.\*]

2. CHARGES NOT ERRONEOUS—EVIDENCE SUFFICIENT.

The charges complained of were not erroneous, and the evidence fully warranted the verdict.

Error from City Court of Macon; Robt. Hodges, Judge.

Action between L. O. Whittle and the Central of Georgia Railway Company. From the judgment, Whittle brings error. Affirmed.

Guerry, Hall & Roberts, of Macon, for plaintiff in error. Ellis & Jordan, of Macon, for defendant in error.

POTTLE, J. Judgment affirmed.

(11 Ga. App. 242)

WOOD v. STATE. (No. 4,040.)  
(Court of Appeals of Georgia. June 5, 1912.)

(Syllabus by the Court.)

1. CRIMINAL LAW (§ 568\*)—EVIDENCE—WEIGHT AND SUFFICIENCY—INTENT.

While, in criminal cases, the question of intent is one entirely for the jury, yet where, from all of the facts and circumstances in the case, an intent to defraud is not reasonably deducible, there can be no conviction of an offense of which an intent to defraud is necessarily an essential element.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1271; Dec. Dig. § 568.\*]

2. SUFFICIENCY OF EVIDENCE.

Applying to the facts of the present case the principle above stated, the conviction of the accused was not authorized, and a new trial should have been granted.

Error from Superior Court, Haralson County; Price Edwards, Judge.

Dwinnell Wood was convicted of larceny after trust, and brings error. Reversed.

Robinson & Edwards, of Buchanan, and W. W. Mundy, of Cedartown, for plaintiff in error. J. R. Hutcheson, Sol. Gen., of Douglasville, and Griffith & Matthews, for the State.

RUSSELL, J. Judgment reversed.

(11 Ga. App. 267)

McGOVERN v. STATE. (No. 4,185.)  
(Court of Appeals of Georgia. June 5, 1912.)

(Syllabus by the Court.)

1. CRIMINAL LAW (§ 413\*)—EVIDENCE—SELF-SERVING DECLARATIONS.

On the trial of one for the illegal sale of intoxicating liquors, it is not error to refuse to permit a witness, to whom the sale is alleged to have been made, to testify that when he applied to the accused for the purchase of the whisky, and gave him the money for it, the latter stated that he did not have whisky himself, but hoped he could obtain it from another person. Such a statement is a mere self-serving declaration, and cannot be used to rebut the inference of guilt arising from proof of reception of the purchase price and delivery of the whisky.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 928-935; Dec. Dig. § 413.\*]

2. CRIMINAL LAW (§ 400\*)—EVIDENCE—BEST AND SECONDARY EVIDENCE—CHARACTER OF SHIPMENT.

On such a trial, it was not error to admit testimony of the agent of a common carrier that a certain barrel shipped to the accused "was billed whisky in flasks, it appeared so on the barrel," over the objection that there was higher and better evidence of the fact.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 879-886, 1208-1210; Dec. Dig. § 400.\*]

3. INTOXICATING LIQUORS (§ 224\*)—CRIMINAL LAW (§ 822\*)—EVIDENCE—INSTRUCTIONS—CONSTRUCTION AS A WHOLE.

Proof of reception, by the accused, of the purchase price, and delivery of intoxicating liquor, makes a prima facie case of guilt, and casts upon him the burden of showing that he was not interested in the sale, received no benefit therefrom, and acted solely as agent for the buyer. While it is inaccurate to charge that, when one delivers whisky and receives the money, "he becomes the seller," such an instruction will not require a new trial, when, from the whole charge, it is manifest that the correct rule was given, and that the jury were not misled.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. §§ 275-281; Dec. Dig. § 224.\* Criminal Law, Cent. Dig. §§ 1990, 1991, 1994, 1995, 3158; Dec. Dig. § 822.\*]

4. CRIMINAL LAW (§ 823\*)—TRIAL—INSTRUCTIONS—CONSTRUCTION AS A WHOLE.

A charge that one who receives money and in consideration thereof delivers whisky must, in order to exculpate himself, show that "he had no interest in the transaction in any way," is not technically accurate; but when, in the same connection, the jury are instructed that, if the accused acted solely as agent for the buyer, he would not be guilty, the language

above quoted is not misleading, nor does the instruction constitute any reason for granting a new trial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1992-1995, 3158; Dec. Dig. § 823.\*]

5. CRIMINAL LAW (§ 822\*)—TRIAL—INSTRUCTIONS—CONSTRUCTION AS A WHOLE.

In view of the charge as a whole, the following instruction is not cause for a new trial: "You are to look to the facts and circumstances, and to the transactions surrounding this case, as brought out by the testimony, and say whether or not you believe the defendant was in any way connected with the sale of liquor, either for himself, or for others, directly or indirectly."

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1990, 1991, 1994, 1995, 3158; Dec. Dig. § 822.\*]

6. SUFFICIENCY OF EVIDENCE.

The evidence fully supports the conviction.

Error from Superior Court, Coffee County; T. A. Parker, Judge.

T. I. McGovern was convicted of violation of the liquor law, and brings error. Affirmed.

J. W. Quincey, Lankford & Moore, McDonald & Willingham, and W. A. Wood, all of Douglas, for plaintiff in error. Lawson Kelley, Sol. Gen., pro tem., and Rogers & Heath, all of Douglas, for the State.

POTTLE, J. Judgment affirmed.

(11 Ga. App. 267)

GREENE v. STATE. (No. 4,184.)  
(Court of Appeals of Georgia. June 5, 1912.)

(Syllabus by the Court.)

1. CRIMINAL LAW (§ 1064½\*)—BILL OF EXCEPTIONS.

The recitals of fact in the grounds of the amended motion for a new trial not being approved as true by the trial judge, nothing is presented for the consideration of this court by the special assignments of error.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2676, 2887, 2948; Dec. Dig. § 1064½.\*]

2. CRIMINAL LAW (§ 828\*)—TRIAL—INSTRUCTIONS—NECESSITY FOR WRITTEN REQUESTS.

Requests to charge must be presented in writing.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2007; Dec. Dig. § 828.\*]

3. SUFFICIENCY OF EVIDENCE.

The verdict was authorized by the evidence.

Error from City Court of Tifton; R. Eve, Judge.

Ed Greene was convicted of crime, and brings error. Affirmed.

J. B. Murrow and J. S. Ridgill, both of Tifton, for plaintiff in error. Jas. H. Price, Sol., of Tifton, for the State.

RUSSELL, J. Judgment affirmed.

(11 Ga. App. 233)

**MARTIN v. THAXTON.** (No. 3,900.)

(Court of Appeals of Georgia. June 5, 1912.)

*(Syllabus by the Court.)***APPEAL AND ERROR (§ 1092\*)—REVIEW—DISCRETION OF COURT—GRANT OF NEW TRIAL.**

The evidence did not demand the verdict rendered by the jury in the justice court, and the first grant of a new trial by the judge of the superior court upon certiorari will not be disturbed. *Bailey v. Hooks*, 1 Ga. App. 276, 57 S. E. 924; *Brantley v. Taylor*, 121 Ga. 475, 49 S. E. 262.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4312-4321; Dec. Dig. § 1092.\*]

Error from Superior Court, Butts County; R. T. Daniel, Judge.

Action between H. S. Martin and C. A. Thaxton. From the judgment, Martin brings error. Affirmed.

W. B. Watkins, of Jackson, for plaintiff in error. J. T. Moore, of Jackson, for defendant in error.

HILL, C. J. Judgment affirmed.

(11 Ga. App. 233)

**STEWART v. RISH.** (No. 3,894.)

(Court of Appeals of Georgia. June 5, 1912.)

*(Syllabus by the Court.)***JUSTICES OF THE PEACE (§ 92\*)—APPEARANCE.**

This case is fully controlled by the decision of this court in *Smith v. Chivers*, 6 Ga. App. 154, 64 S. E. 493. See, also, Civil Code 1910, § 4734; *Heyward v. Field*, 95 Ga. 714, 22 S. E. 653; *Morgan v. Prior*, 110 Ga. 791, 36 S. E. 75.

[Ed. Note.—For other cases, see *Justices of the Peace*, Cent. Dig. §§ 324, 325; Dec. Dig. § 92.\*]

Error from Superior Court, Clay County; W. C. Worrill, Judge.

Action between J. K. Stewart and W. H. Rish. From the judgment, Stewart brings error. Affirmed.

Ben M. Turnipseed, of Ft. Gaines, for plaintiff in error. King & Castellow, of Ft. Gaines, for defendant in error.

HILL, C. J. Judgment affirmed.

(11 Ga. App. 259)

**MOORE v. STATE.** (No. 4,157.)

(Court of Appeals of Georgia. June 5, 1912.)

*(Syllabus by the Court.)***1. CRIMINAL LAW (§ 1064½\*)—WRIT OF ERROR—RECORD—QUESTIONS PRESENTED FOR REVIEW.**

The first ground of the amendment to the motion for a new trial is not verified by the presiding judge, and therefore, under repeated rulings of the Supreme Court and of this court, it cannot be considered.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 2676, 2887, 2948; Dec. Dig. § 1064½.\*]

**2. HOMICIDE (§§ 145, 146\*)—EVIDENCE—PRESUMPTIONS AND BURDEN OF PROOF.**

The instruction excepted to in the second ground of the amendment of the motion for a new trial is not an accurate statement of the law. On the trial of an indictment for assault to murder, the use of a deadly weapon does not of itself raise a presumption of the existence of malice and of the specific intent to kill. *Gaskin v. State*, 11 Ga. App. —, 74 S. E. 554.

[Ed. Note.—For other cases, see *Homicide*, Cent. Dig. §§ 262-271; Dec. Dig. §§ 145, 146.\*]

**3. CRIMINAL LAW (§ 938\*)—NEW TRIAL—NEWLY DISCOVERED EVIDENCE.**

The alleged newly discovered evidence is not merely cumulative or impeaching in character, and, if believed by the jury, would probably produce a different verdict. Therefore the trial court should have granted another trial on this ground.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 2306-2317; Dec. Dig. § 938.\*]

Error from Superior Court, Chatham County; W. G. Charlton, Judge.

Willie Moore was convicted of assault with intent to murder, and brings error. Reversed.

Twiggs & Gazan, of Savannah, for plaintiff in error. Walter C. Hartridge, Sol. Gen., of Savannah, for the State.

HILL, C. J. Judgment reversed.

## MEMORANDUM DECISIONS

**FLEMING v. FLEMING.** (Supreme Court of North Carolina. April 10, 1912.) Appeal from Superior Court, Wake County; Peebles, Judge. Action by Nelle Claire Fleming against Percy B. Fleming. From judgment on motion in cause for alimony pendente lite, for the custody of two children, and for counsel fees, defendant appeals. Affirmed in part and remanded. Douglass, Lyon & Douglass, for appellant. John W. Hinsdale, Herbert E. Norris, and W. M. Person, for appellee.

**PER CURIAM.** Upon a review of the entire record in this case, we are of opinion that some of the assignments of error are well taken and must be sustained. Inasmuch as this application is for alimony pendente lite and the custody of children, we do not deem it advisable to review the case at length immediately preceding its trial upon the issues raised by the pleadings, which is soon to take place before a jury in the superior court. It is possible that a discussion of it by us might be prejudicial to one party or the other upon such trial. We will content ourselves by setting aside the order and remanding the cause to the superior court of Wake county, to be heard by the judge upon the motion of the plaintiff when the issues of fact raised by the pleadings have been determined by the jury. If there is any delay in the trial of the cause, the plaintiff shall have a right to renew her motion for alimony pendente lite and counsel fees at any time at chambers, or at a regular term of the court. In the meantime we affirm so much of the order as awards the custody of

the two children to the plaintiff pending the trial of the cause before a jury upon the issues raised by the pleadings. The cost of the appeal will be paid by the appellant and the appellee in equal parts. The cause is remanded to the superior court of Wake county. Remanded.

**FLEMING v. FLEMING.** (Supreme Court of North Carolina. April 10, 1912.) Appeal from Superior Court, Wake County; Peebles, Judge. Action by Nelle Claire Fleming against Percy B. Fleming. From a judgment in the cause brought to restrain defendant from disposing of certain property, defendant appeals. Remanded for rehearing. Douglass, Lyon & Douglass, for appellant. John W. Hinsdale, Herbert E. Norris, and W. M. Person, for appellee.

**PER CURIAM.** This cause is brought to restrain the defendant from disposing of certain property in aid of the proceeding between the same parties (No. 229, at this term, 74 S. E. 1102), for alimony. This last-named case has been remanded to the superior court of Wake county for another hearing, and this case is so intimately connected with it that it will take the same course. The cause is remanded to the superior court of Wake county for a rehearing. Remanded.

**JOHNSON v. ATLANTIC COAST LINE R. CO.** (Supreme Court of North Carolina. April 10, 1912.) Appeal from Superior Court, Chatham County; Cooke, Judge. Action by W. M. Johnson, administrator of J. T. Johnson, deceased, against the Atlantic Coast Line Railroad Company. Judgment for plaintiff, and defendant appeals. Affirmed. These issues were submitted to the jury: "(1) Was the plaintiff's intestate killed by the negligence of the defendant company? (2) Did plaintiff's intestate, by his own negligence, contribute to his injury? (3) What amount, if any, is plaintiff entitled to recover from the defendant?" The jury answered the first issue "Yes," the second issue "No," and the third issue "\$5,000." Rose & Rose and H. A. London & Son, for appellant. N. Y. Gulley & Son, R. H. Dixon, and Hayes & Bynum, for appellee.

**PER CURIAM.** We have examined carefully the several assignments of error set out in the record, and we are of opinion that his honor properly denied the motion for nonsuit. We think that there was sufficient evidence to be submitted to the jury that the intestate fell from the car by reason of negligence in giving the signal by the conductor at the moment he did. We do not deem it necessary to discuss the facts, as these cases differ so materially from each other that a discussion of the evi-

dence is of no material value. We have examined the charge of his honor, and think that he presented the case to the jury fairly and fully, and in accordance with the well-settled precedents of this court. The judgment of the superior court is affirmed.

**WINSTEAD v. NORFOLK SOUTHERN RY. CO. et al.** (Supreme Court of North Carolina. March 13, 1912.) Appeal from Superior Court, Lenoir County; Peebles, Judge. Action by L. J. Winstead against the Norfolk Southern Railway Company and others. From a judgment for plaintiff, defendant named appeals. Affirmed. These issues were submitted: "(1) Was the plaintiff the owner of the tobacco in controversy, as alleged in the complaint? Answer: Yes. (2) If so, was the said tobacco damaged by the negligence of the defendant the Goldsboro Lumber Company? Answer: No. (3) If so, was the said tobacco damaged by the negligence of the defendant Atlantic Coast Line Railroad Company? Answer: No. (4) If so, was the said tobacco damaged by the negligence of the defendant Norfolk Southern Railway Company? Answer: Yes. (5) If so, what damages, if any, is the plaintiff entitled to recover? Answer: One hundred and twenty dollars, with interest from September 9, 1908, to June 12, 1911." From the judgment rendered, the defendant the Norfolk Southern Railway Company appealed. Rouse & Land, for appellant. Loftin & Dawson, for appellee.

**PER CURIAM.** We have examined the 14 assignments of error in the record of this case, and are of the opinion that his honor committed no substantial error in submitting the case involved to the jury. We think his honor followed the well-settled decisions of this court. We are of opinion that no reversible error has been committed which would warrant us in directing a new trial. No error.

**D. W. ALDERMAN & SONS CO. v. McKNIGHT.** (Supreme Court of South Carolina. April 17, 1912.) Action by D. W. Alderman & Sons Company against Sarah A. McKnight. On motion to suspend an appeal, after decree in the court of common pleas. Motion overruled. Charlton Du Rant of Manning, for plaintiff. W. C. Davis, of Manning, for defendant.

**PER CURIAM.** Upon hearing the argument upon the motion to suspend the appeal herein, it has not been made to appear to the court that it is necessary to pass such an order to enable the party making the motion to take such steps as he may be advised on circuit to protect his rights. The motion is therefore refused.







